

# **Rules of Mediation Procedure for Financial Services Disputes**

**January 2020**

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English version

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## **Introduction**

### **TO BETTER SERVE THE ECONOMY**

For the purpose of providing improved dispute resolution services, the Chambers of Commerce and Industry of Basel, Bern, Geneva, Ticino, Vaud, and Zurich (the “Chambers”) harmonised their arbitration rules in 2004 and their Mediation Rules in 2007. In 2007, they also founded the Swiss Chambers' Arbitration Institution (“SCAI”). They were later joined by the Chambers of Commerce and Industry of Neuchatel and of Central Switzerland. SCAI is a not-for-profit independent private association registered in Switzerland.

SCAI provides domestic as well as international mediation and arbitration services, under any applicable law, in Switzerland or in any other country. SCAI has established a Court of Arbitration (the Arbitration Court”) and an Advisory Council for Mediation (the “Advisory Council”) comprised of experienced arbitration and mediation practitioners in order to provide independent and impartial guidance and assistance on arbitration and mediation cases conducted by independent and impartial arbitrators and mediators under the various SCAI rules of arbitration and mediation.

In 2020, the Federal Department of Finance (the “FDF”) granted SCAI the authorization to be a Mediation Organ providing ombudsperson services to the investors and financial service providers (the “Financial Service Provider”) as per the requirement of the Swiss Financial Services Act (the “FinSA”) and Swiss Financial Services Ordinance (the “FinSO”). SCAI provides the ombudsperson and mediation services according to the Rules of Mediation Procedure for Financial Services Disputes (the “Financial Mediation Rules” or the “Rules”).

The administration of cases under the Financial Mediation Rules is exclusively carried out by the SCAI secretariat (the “Secretariat”) and by the Ombudspersons designated by the Secretariat.

### **COMING INTO FORCE**

This version of the Rules shall come into force on 1 January 2020.

## A VOLUNTARY PROCESS

Mediation is a method of dispute resolution whereby the parties attempt to reach an amicable settlement of their dispute or avoid future conflicts with the assistance of a neutral third party, the mediator. When acting as a mediator, the ombudsperson facilitates the exchange of information and perspectives between the parties and encourages them to explore solutions that meet their needs and interests. In addition, the Ombudsperson, when asked specifically to do so by a party, can give his or her own views and make evaluations and proposals. While the Financial Service Provider may have been obliged by law to enter the process and might hence not be participating voluntarily, he/she remains free, at any time, to enter or not in a full or partial settlement agreement. The process usually helps the participating parties at the minimum to unveil and resolve misunderstandings and misconceptions, hear and understand the other party's feelings, interests and positions, as well as improve their assessment of their own opportunities, risks and interests.

For further information: [www.swissarbitration.org/Ombuds-Fin](http://www.swissarbitration.org/Ombuds-Fin)

## I. Introductory Rules

### SCOPE OF APPLICATION

#### Article 1

1. These Rules shall govern all mediations where an agreement to mediate refers to the Rules, or where the parties agree to mediate under the Rules after a dispute has arisen, or where the FinSA applies and the Financial Service Provider is affiliated at SCAI ombudsperson services, either directly or through an association of financial services providers or of a surveillance organ.
2. Unless the parties have agreed otherwise, this version of the Rules shall apply to all mediations in which the request for mediation pursuant to Article 2 of the Rules is submitted to the Secretariat on or after the date of coming into force.

### REQUEST FOR MEDIATION

#### Article 2

1. The party(ies) requesting a mediation (the "Requesting Party(ies)") shall submit a request for mediation (the "Request") in English, German, French or Italian to one of the offices of the Secretariat listed in Appendix A of the Rules. For mediations subject to the FinSA, unless otherwise agreed between the parties and with the Secretariat, the language of the Request and of the mediation shall be the Swiss national language

chosen by the investor customer of the Financial Service Provider (the "Customer")<sup>1</sup>.

2. The Request shall include:
  - (a) the names, addresses, telephone numbers, fax numbers (if any), e-mail addresses and other contact details (if any) for appropriate electronic communication with the parties and their counsel (if any, as well as a copy of the counsel's Power-of-Attorney);
  - (b) the name of the Financial Service Provider Association through which the Financial Service Provider is affiliated to SCAI (if any);
  - (c) a copy of the agreement under which the dispute has arisen, including the agreement to mediate or relevant mediation clause in an existing agreement (if any), and all further information and documents that are relevant for the initial case assessment by the Ombudsperson;
  - (d) a short description of the dispute, and an estimate of the amount in dispute (if any);
  - (e) a description of any desired qualifications of the Ombudsperson (if any);
  - (f) a confirmation that the Requesting Party (provided that it is the Customer) has already put all his/her questions and complaints to the Financial Service Provider and attempted to find a solution;
  - (g) a proposal as to the language of the mediation if the parties have not previously agreed thereon;
  - (h) a confirmation of the payment of the registration fee, pursuant to Appendix B of the Rules in force at the date on which the Request is submitted to the Secretariat.
3. The Request may be submitted to the Secretariat by e-mail. Upon request of the Secretariat, the Requesting Party shall provide hard copies of the Request. The parties and the Secretariat may agree to submit all further documents by e-mail or other appropriate electronic means.
4. If the registration fee is not paid, or if the Request is incomplete, or if the Request or any existing agreement to mediate are submitted in any language other than English, German, French or Italian, the Secretariat may request the Requesting Party(ies) to remedy the defect within an appropriate time limit. If the Requesting Party(ies) comply within the time limit set by the

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<sup>1</sup> Art. 75(5) FinSA.

Secretariat, the Request is deemed to have been validly submitted on the date when the initial version was received by the Secretariat.

5. Upon receipt of a validly submitted Request, the Secretariat shall provide the other party(ies) with a copy of the Request and other documents submitted pursuant to Article 2(2), if the Request was not submitted jointly by all parties. Where the Request was submitted by one or several parties with a prior agreement to mediate without referring to the Rules, or where the Request was submitted by one or several parties in the absence of a prior agreement to mediate, the Secretariat shall also invite the other party(ies) (the “Responding Party(ies)”) to explicitly agree on the application of the Rules within a 15-day time limit. Swiss Financial Service Providers are required to participate in the mediation in accordance with article 78 FinSA.
6. If no answer is received from a Responding Party by the Secretariat within the time limit set by the Secretariat pursuant to Article 2(5) above, the mediation shall not proceed with that party. The Secretariat shall promptly inform the parties in writing. Swiss Financial Service Providers who do not participate to a mediation despite being legally required to do so under the FinSA may be excluded from the SCAI’s affiliation registers and will be reported to the surveillance organs as per articles 82 and 83 FinSA.
7. If the Requesting Party(ies) and any Responding Party wish to proceed to mediation without one or more party(ies) that have refused to do so, the mediation shall start between the parties in agreement. Swiss Financial Service Providers are required to participate in the mediation in accordance with article 78 FinSA.

## **II. Selection and Competence of the Ombudsperson**

### **SELECTION AND REPLACEMENT OF OMBUDSPERSON**

#### **Article 3**

1. Unless otherwise agreed by all the parties, the Secretariat shall direct the parties to an ombudsperson having sufficient knowledge of the relevant financial industry and speaking the relevant language(s) fluently (the “Ombudsperson”).
2. The function of the Ombudsperson is entrusted to him/her personally. If the Ombudsperson is no longer in a position to fulfil his/her duties or is no longer accepted by the parties, the Secretariat shall direct the parties to another Ombudsperson, provided one is available.

### **III. The Ombudsperson**

#### **INDEPENDENCE, IMPARTIALITY AND AVAILABILITY OF THE OMBUDSPERSON**

##### **Article 4**

1. The Ombudsperson shall be and remain at all times impartial and independent from the parties and available to conduct the mediation.
2. Prior to his/her confirmation of appointment by the Secretariat, the prospective Ombudsperson shall:
  - (a) return to the Secretariat, duly dated and signed: (i) the agreement to serve as an Ombudsperson; and (ii) the declaration of independence, impartiality, and availability;
  - (b) state in writing that he/she complies with the present Rules and with the European Code of Conduct for Mediators in force on the date on which the Ombudsperson is appointed; in the event of a discrepancy between the Rules and the Code, the Rules shall take precedence; and,
  - (c) disclose any circumstances, including any circumstances listed in the European Code of Conduct for Mediators, known to him/her that are likely to give rise to justifiable doubts as to his/her independence or impartiality towards the parties, or regarding his/her availability.
3. If, in the course of the mediation, the Ombudsperson discovers the existence of any circumstances likely to affect his/her impartiality or independence towards the parties, or his/her availability, he/she shall promptly inform the parties. Upon their mutual consent, the Ombudsperson may continue to serve. If the parties disagree, the Ombudsperson shall stay the mediation and inform the Secretariat, which shall proceed to replace the Ombudsperson in accordance with Article 3 of the Rules.

#### **TRANSMISSION OF THE FILE TO THE OMBUDSPERSON**

##### **Article 5**

1. After receipt of the Request for Mediation and payment of the registration fees by all the parties, as well as of the Consent of Appointment and Statement of Independence, Impartiality and Availability of the Ombudsperson, the Secretariat will decide on whether it confirms the Ombudsperson, in which case it shall transmit the complete file for the mediation to the appointed Ombudsperson.

2. If administrative costs apply, the file for the mediation will be transmitted to the Ombudsperson only upon receipt of the payment of the administrative costs, pursuant to Appendix B of the Rules in force on the date of the Request.

## **SCOPE OF COMPETENCE OF THE OMBUDSPERSON**

### **Article 6**

1. The Ombudsperson shall consult the documents provided by the Requesting Party(ies) and collect from them and the other parties any further relevant information and document for an initial case assessment. The Ombudsperson may convene the parties, and in particular the Financial Service Providers subject to FinSA, to separate or joint meetings, require them to provide information and documents, as well as ask them to provide their opinion on the issue at stake.
2. The Ombudsperson is also authorized by all the parties to obtain from the relevant bank(s) all necessary information relating to the case submitted to him and to inspect the bank file. The parties must specifically release the bank(s) of their confidentiality obligations with respect to the subject matter in dispute and require them to provide the Ombudsperson with the information and documents requested.
3. The Ombudsperson shall address in particular disputes concerning purchase and sale of securities, execution of orders, discretionary and collective asset management, investment advice and margin accounts (crédit Lombard), as well as the rendering of accounts.
4. The Ombudsperson may decline his/her competence or the admissibility of the Request in:
  - (a) Questions of general business and fee policy;
  - (b) Abstract business and legal questions;
  - (c) Cases where the Customer has not yet informed the Financial Service Provider of its point of view and attempted to reach a settlement, unless the Financial Service Provider accepts to proceed nonetheless;
  - (d) Manifestly abusive cases;
  - (e) If a mediation was already conducted with the same subject matter between the same parties, unless the parties accept to proceed nonetheless;
  - (f) If another mediation/conciliation/ombudsperson or –entity, a judicial or arbitral court or an administrative entity has been seized with the same subject matter between the same parties, unless the parties agree to proceed nonetheless.

## **ROLE OF THE OMBUDSPERSON**

### **Article 7**

1. The Ombudsperson shall assist the parties in their negotiations, with a view to reaching a mutually acceptable and satisfactory resolution of their dispute. The Ombudsperson has no authority or power to impose a settlement on the parties.
2. The Ombudsperson and the parties shall be guided by the principles of fairness, party autonomy and mutual respect. The Ombudsperson shall ensure that the procedure remains pragmatic as well as cost and time efficient.
3. The Ombudsperson shall neither provide legal advice to the parties, nor act as their representative. Since applying for mediation under the Rules does not, in principle, suspend or limit legal deadlines such as those relating to limitation, forfeiture or court or administrative proceedings, parties are responsible for ensuring such deadlines are met.
4. If, any time after having collected the relevant information and documents from the parties and made an initial assessment of the situation, the Ombudsperson considers that the case is of such complexity that it cannot be solved by an ombudsperson and should be submitted to a more formal and longer but entirely voluntary mediation process, or to an arbitration or judicial procedure, the Ombudsperson shall inform the parties of such assessment and require the closure of the current proceeding to the SCAI Secretariat.

## **IV. Procedural Rules**

### **CONDUCT OF THE MEDIATION**

#### **Article 8**

1. The mediation shall be conducted as agreed upon with the parties. Failing such agreement, the Ombudsperson shall proceed as he/she considers appropriate, taking into account the circumstances of the case, the wishes of the parties, their budgets and timelines, and the need for a prompt settlement of the dispute.
2. The Ombudsperson deals with simple enquiries orally. He/she provides information to Requesting Parties and advises them on how to proceed.
3. For FinSA cases, if the Requesting Party(ies) is a Customer, the Ombudsperson will check that the Requesting Party(ies) have first put their questions or complaints to the Financial Service Provider and/or bank directly and demanded a written response.



4. Where investigations are necessary, the Ombudsperson may encourage Financial Service Provider Customers to submit their enquiries in writing and provide him/her with copies of the relevant documentation. The Ombudsperson's response in such cases is also normally in writing.
5. Immediately after receipt of the file from the Secretariat, the Ombudsperson shall contact the parties to schedule an initial conference to discuss the manner in which the mediation will proceed. A short note summarising the agreement of the parties with respect to the conduct and the organisation of the mediation (language, time and place of meetings, submissions, participants, etc.) shall then be drafted by the Ombudsperson and provided to the parties, with a copy to the Secretariat.
6. In FinSA cases, Financial Service Providers are obliged to participate in the procedure and must comply with the deadlines, invitations to attend meetings, as well as provide the information, documentation and positions requested by the Secretariat and the Ombudsperson.<sup>2</sup> Financial Service Providers who do not comply on more than one occasion with the requests of the Secretariat and Ombudsperson may be excluded from the SCAI Mediation Organ.<sup>3</sup>
7. The Ombudsperson hears all sides.
8. The Ombudsperson may hold separate meetings with the parties. The Ombudsperson shall maintain strict confidentiality regarding any information exchanged during those separate meetings vis-à-vis each party, unless the Ombudsperson is expressly authorised to disclose such information by all participants in the separate meetings.
9. The Ombudsperson may decline or suspend the handling of Requests for mediation where he/she considers the Ombudsperson procedure is not a suitable way of providing a solution, for instance on grounds of complexity, or where there appears to be no prospect of the Ombudsperson procedure providing a solution.
10. For complex cases, the Ombudsperson may invite the parties to consider the opportunity of holding a co-mediation and deciding on the allocation of costs for such a procedure.
11. The Ombudsperson may assist the parties orally with all questions and complaints he or she is comfortable answering, on the basis of the information provided to him/her, without specific legal or technical research and without any responsibility for such prima facie assessment.

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<sup>2</sup> Article 78 FinSA.

<sup>3</sup> Article 82 FinSA.

12. The Ombudsperson acts as a facilitator and submits proposed solutions to the parties. The parties are not bound by these. They are free to make decisions at their own discretion.
13. If no settlement is reached after 90 days since the filing of the Request, or after the Ombudsperson spent a reasonable number of hours assisting the parties without success in their attempt to reach an agreement, or if the Ombudsperson considers that no settlement will be reached, the Ombudsperson may put an end to the proceedings and, if so specifically requested by a party, provide the parties with a written assessment in summary form, based on the information available to him/her, together with a notice of closure.
14. The Ombudsperson has the final word in making and drafting any assessment of the case and proposal to the parties. The Secretariat, SCAI organs and management do not get involved in reviewing the Ombudsperson's proposed solutions.
15. The Ombudsperson may revisit assessments where there are grounds for so doing, notably when new facts emerge.
16. The Ombudsperson shall always provide to the Secretariat copies of all his written communication to the parties. At the end of the mediation, the Ombudsperson shall provide the Secretariat with the complete file for archiving purposes.

## **MASS DISPUTES**

### **Article 9**

1. In addition to/deviation from the general procedural provisions of these Rules, the following provisions apply to mass disputes:
2. Mass disputes are complaints where:
  - (a) a large number of disputes have occurred or are expected to occur in a short period of time, and
  - (b) they involve the same or similar products, services, parties or circumstances, or
  - (c) Requesting Parties are using the same or similar (legal) arguments.
3. Treating some complaints as mass disputes is intended to help ensure that identical or similar cases are dealt with uniformly, efficiently and promptly, resulting in a fair and consistent solution. When it comes to establishing which cases fall within a particular group and to determining how to proceed and what decision-making criteria should be used, greater importance may be attached to dealing with cases that have elements in common than to treating each individual case in depth.
4. Financial Service Providers must inform the Ombudsperson at an early stage if they are aware of any situations that may result in

complaints which might meet the criteria for being treated as mass disputes.

5. Where the Secretariat or an Ombudsperson becomes aware of possible mass disputes as a result of complaints received or information provided by third parties such as regulators, consumer protection organisations or the media, the Secretariat may request the Ombudsperson to carry out further investigations where necessary and request a response from the Financial Service Provider(s) and bank(s) concerned.
6. Should the Secretariat conclude, based on the response from the Financial Service Providers and bank(s), and having considered the broader circumstances, that the criteria for a mass dispute are met and it seems appropriate to treat the complaints in question as a mass dispute, the Financial Service Provider(s) and bank(s) are informed to this effect in order to open a dialogue aimed at reaching agreement on the following points:
  - (a) acknowledgement that there is a mass dispute;
  - (b) the criteria for including individual complaints in the mass dispute;
  - (c) the criteria for setting up dispute groups (if applicable);
  - (d) how complaints might be dealt with collectively, if applicable;
  - (e) the criteria for deciding on complaints in individual disputes/dispute groups;
  - (f) communication with the Customers concerned, interest groups and the general public.
7. If agreement cannot be reached on whether or not there is a mass dispute, the criteria for including complaints in it and the formal treatment and material consideration of the complaints, the Secretariat submits the unresolved or disputed points to the SCAI Management which will make the final decision.
8. The procedure for establishing that there is a mass dispute, determining the criteria for including complaints in it and the formal treatment and material consideration of the complaints is confidential.

## **REPRESENTATION**

### **Article 10**

The parties shall appear at all mediation sessions in person or, for legal entities, through duly authorized and empowered representatives of the entity, whose complete contact details shall be communicated in writing to the Ombudsperson, to the other party(ies) and to the Secretariat. The parties may be assisted and accompanied by the legal counsel or advisors of their choice.

## CONFIDENTIALITY

### Article 11

1. The mediation is confidential. No observation, statement or proposition made during the mediation or documents prepared for the purposes of the mediation can be disclosed outside of the mediation or subsequently used without the written consent of all persons involved in the mediation, even in the event of litigation or arbitration, except to the extent necessary to enforce a written settlement agreement that concludes the mediation or if otherwise required by law.
2. The mediation sessions are private. With the consent of the Ombudsperson, the parties may agree that persons other than the parties themselves, their representatives or advisors may attend the sessions.
3. Unless the parties expressly agree otherwise, an Ombudsperson cannot act as an arbitrator, judge, expert, or as a representative or advisor of one party in any subsequent proceedings relating to the same dispute or involving any of the parties to the mediation after the Request has been validly submitted to the Secretariat.
4. The Secretariat shall retain securely the main documents of the file for a period of at least 10 years after the confirmed end of the mediation. After this period, SCAI may destroy all documents, both physically and electronically.
5. During and after the settlement of the dispute or the end of the mediation, neither SCAI, nor the Chambers, nor their staff, executives and board members, nor the Ombudspersons, mediators, arbitrators, members of the Advisory Council, court members, nor any experts appointed by them shall be under any obligation to make statements to any person or tribunal about any matter concerning the mediation, nor shall a party seek to make any of these persons a witness, or otherwise provide testimony or any evidence, in any legal or other proceedings arising out of or in relation to the mediation, except to the extent necessary to enforce a written settlement agreement that concludes the mediation.
6. The Ombudsperson and the SCAI personnel are subject to the duty of confidentiality that applies to agents. The Ombudsperson is entitled to decline to take part in civil proceedings in accordance with Article 166 (1) (d) of the Swiss Code of Civil Procedure (ZPO/CPC)<sup>4</sup>.
7. The parties' right to inspect files is restricted to their own correspondence with the Secretariat and Ombudsperson.<sup>5</sup>

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<sup>4</sup> RS 272.

<sup>5</sup> Article 75 (3) FinSA.

8. The Secretariat informs the relevant supervisory authorities and the relevant registration body for Financial Service Providers about the names of Financial Services Providers who are subject to FinSA and affiliated with SCAI, those who have been refused and those who have been excluded<sup>6</sup>.
9. SCAI informs the Swiss Federal Department of Finance of its activities at least once a year via an annual report and a press release. SCAI issues statistics broken down by enquiries, mediations and issues. SCAI does not comment publicly on individual cases or disclose any names.
10. SCAI may provide the Financial Service Providers organizations, banks, mediators, counsel and arbitrators with general information about its activities and the activities of the Ombudspersons.
11. SCAI may exchange non-public information about FinSA cases and FinSA Financial Service Providers with the Swiss Federal Department of Finance, the FINMA, the relevant Surveillance Organ, the relevant Adviser Register and the relevant Control Organ in order to allow each Organ to execute its duties<sup>7</sup>.

## **SEAT OF THE MEDIATION**

### **Article 12**

Unless otherwise agreed by the parties, the seat of the mediation shall be deemed to be at the place of the Secretariat's office where the Request was submitted, although meetings may be held elsewhere.

## **APPLICABLE LAW**

### **Article 13**

1. Unless otherwise agreed by the parties, the conduct of the mediation is subject to Swiss law.
2. The relationship between SCAI and any person participating in the mediation (parties, parties' representatives and advisors, Ombudsperson(s), expert(s), etc.) is subject to Swiss law.

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<sup>6</sup> Article 83 FinSA.

<sup>7</sup> Article 88 FinSA.

## V. End of the Mediation and Certification thereof

### END OF THE MEDIATION AND CERTIFICATION THEREOF

#### Article 14

1. A mediation under the Rules shall be deemed to have ended:
  - (a) upon the signing by all parties of a settlement agreement putting an end to the dispute;
  - (b) after 90 days, if a defective or incomplete Request has been submitted to the Secretariat, and the Requesting Party(ies) have not timely remedied the defect as requested by the Secretariat;
  - (c) at any time after the Ombudsperson has provided the parties with a written note, pursuant to Article 8(5) of the Rules, if a party notifies the Ombudsperson and the Secretariat in writing of its decision to terminate the mediation and the remaining parties do not wish to continue without that party. Financial Service Providers subject to FinSA are not allowed to terminate the mediation with their Customer;
  - (d) at any time after the Ombudsperson has provided the parties with a written note, pursuant to Article 8(5) of the Rules, if, in the opinion of the Ombudsperson, further efforts would not contribute to a resolution of the dispute and he/she notifies the parties and the Secretariat in writing of his/her decision to terminate the mediation;
  - (e) upon expiration of any time limit set by the parties or the Ombudsperson for the resolution of the dispute, if not extended by agreement of all parties and the Ombudsperson;
  - (f) in the event of non-payment, by the relevant parties, of the deposits according to Article 24 of the Rules, or of the SCAI administrative costs according to Section 2 of Appendix B of the Rules, within the time limit set respectively by the Ombudsperson or by the Secretariat;
  - (g) as soon as a conciliation authority, a court, an arbitral tribunal or an administrative authority has been seized, unless the parties agree otherwise.
2. The Ombudsperson shall promptly inform the Secretariat of the end of the mediation in a written note indicating the date of termination and whether the mediation resulted in full, partial, or no settlement.

3. In multi-party mediations, if one party or some of the parties decide to withdraw from the mediation:
  - (a) the remaining parties shall promptly inform the Secretariat in writing whether they wish to pursue the mediation, and if so, if they wish to continue the mediation with the appointed Ombudsperson;
  - (b) the Ombudsperson shall promptly inform the Secretariat in writing of the withdrawal of the party(ies) from the mediation, and indicate whether he/she agrees to continue the mediation with the remaining party(ies).
4. The Secretariat shall confirm in writing to the parties and the Ombudsperson the end of the mediation.
5. Upon request of the parties or the Ombudsperson, the Secretariat shall provide the parties and the Ombudsperson with a mediation certificate confirming that the mediation took place and stating whether it led to a settlement. The Secretariat may request the parties or the Ombudsperson to submit any document deemed relevant for the certification of the mediation. Such documents shall be provided in English, German, French or Italian, or officially translated into one of these languages.

## **SETTLEMENT AGREEMENT AND CERTIFICATION THEREOF**

### **Article 15**

1. Unless otherwise agreed by the parties in writing, no settlement is reached until it has been made in writing and signed by the relevant parties.
2. Upon request by the parties, and if provided by the Ombudsperson with a signed original hard copy of the settlement agreement, the Secretariat may issue certified copies of the settlement agreement to the parties.
3. Upon request by the parties and if the Ombudsperson confirms in writing that he/she witnessed the parties signing the settlement agreement, or if the parties sign the settlement agreement at the Secretariat, the Secretariat may provide the parties with a certificate of authenticity of the settlement agreement.
4. The Secretariat may request the parties or the Ombudsperson to submit any document deemed relevant for the certification of the settlement agreement. Such documents shall be provided in English, German, French or Italian, or officially translated into one of these languages.

## **VI. Mediation, Litigation and Arbitration**

### **RECOURSE TO LITIGATION**

#### **Article 16**

1. The parties may jointly agree in writing at any time to submit their dispute or any part of it to litigation. For FinSA cases, either party may then initiate proceedings by submitting a Request to the competent Court and, in application of article 76(2) FinSA, may waive unilaterally the conciliation procedure of art. 197ff of the Swiss Code of Civil Procedure<sup>8</sup>.
2. FinSA mediation procedures will be closed as soon as a conciliation authority, a court, or an administrative authority has been seized (in application of article 76 (3) FinSA), unless the parties agree otherwise.

### **RECOURSE TO ARBITRATION**

#### **Article 17**

1. The parties may jointly agree in writing at any time to submit their dispute or any part of it to SCAI for arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution. Either party may then initiate arbitral proceedings under those Rules by submitting a Notice of Arbitration pursuant to Article 3 of the Swiss Rules of International Arbitration. If the parties settle the dispute during the arbitral proceedings, Article 34 of the Swiss Rules of International Arbitration shall apply to any award on agreed terms.
2. The parties may jointly agree in writing at any time to refer their dispute or any part of it to arbitration in accordance with other arbitration rules.
3. FinSA mediation procedures will be closed as soon as an arbitral tribunal has been seized (in application of article 76 (3) FinSA), unless the parties agree otherwise.

### **MEDIATION DURING THE COURSE OF ARBITRAL PROCEEDINGS**

#### **Article 18**

1. In all arbitral proceedings pending before SCAI, a party or the arbitrator(s) may suggest that the parties seek to amicably resolve the dispute, or any part of it, by recourse to mediation.
2. If the parties to an arbitration agree to mediation under the Rules, the Secretariat, upon receipt of the Request and the registration fee, shall proceed with the selection of the Ombudsperson pursuant to Section II of the Rules.

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<sup>8</sup> RS 272.



## **VII. Exclusion of Liability**

### **EXCLUSION OF LIABILITY**

#### **Article 19**

Neither the Ombudsperson, nor SCAI, its Secretariat, nor the Chambers, nor their staff, executives and board members, nor the mediators, arbitrators, members of the Advisory Council for Mediation, Arbitration Court members, nor any experts appointed by them shall be liable for any act or omission in connection with any mediation conducted under the Rules, except if the act or omission is shown to constitute their own intentional wrongdoing or gross negligence.

## **VIII. Costs**

### **MEDIATION COSTS**

#### **Article 20**

The fees, costs and expenses of SCAI and the Ombudsperson (the “Mediation Costs”) are determined pursuant to the Schedule of Costs (Appendix B to the Rules) in force on the date the Request is submitted to the Secretariat.

### **APPORTIONMENT OF THE MEDIATION COSTS**

#### **Article 21**

1. Unless otherwise agreed by the parties, all Mediation Costs shall be borne as prescribed in Appendix B to the Rules.
2. In the event a case involves several Requesting Parties or several Respondents, the Requesting Parties, or as the case may be the Respondents, are jointly and severally liable with the other parties of their group for the payment of all the Mediation Costs attributed to them as prescribed in Appendix B to the Rules.
3. Unless otherwise agreed by the parties, all personal expenses incurred by a party in relation to the mediation (for example its legal fees, hotel, travel, etc.) are borne by that party and are not included in the Mediation Costs.

### **SCAI FEES AND COSTS**

#### **Article 22**

1. SCAI fees and costs according to Appendix B of the Rules include:
  - (a) non-refundable registration fee(s);
  - (b) administrative costs;

- (c) certification and authentication fees and expenses pursuant to Articles 14(5) and 15(2) and (3) of the Rules, respectively.
2. All SCAI fees, costs and expenses shall be paid to, or deposited with, SCAI as indicated by the Secretariat.
  3. If the registration fee(s) or the requested administrative costs are not paid in full and within the specified time limit (if applicable), the mediation shall not proceed. The Secretariat shall instruct the Ombudsperson in writing to stay or terminate the mediation.

## **THE OMBUDSPERSON'S FEES AND EXPENSES**

### **Article 23**

1. The parties are responsible for paying the fees and expenses of the Ombudsperson as per the Schedule of Costs (Appendix B). Unless otherwise agreed by the parties and the Ombudsperson, the Ombudsperson's fees are calculated on the basis of the time spent by the Ombudsperson in the mediation including his/her preparation time and the drafting of his/her written assessment of the case, if any.
2. The Ombudsperson shall request the parties to pay a deposit in order to cover, at a minimum, the Ombudsperson's initial fees and expenses.
3. At any later time during the mediation, the Ombudsperson may request each party to deposit an equal amount (unless otherwise agreed, or, for mediations subject to the FinSA, the Financial Service Provider) as advance payment towards the fees and expenses of the Ombudsperson for the mediation. The Ombudsperson shall inform the Secretariat in writing accordingly.
4. Any disagreement regarding the Ombudsperson's fees and/or expenses shall be submitted to the SCAI Secretariat.

## **DEPOSITS FOR FEES AND COSTS**

### **Article 24**

1. SCAI shall hold the deposits to be paid by the parties in its bank account.
2. If the required deposits are not received in full by the Secretariat within the specified time limit, SCAI may stay or terminate the mediation and shall promptly inform the Ombudsperson and parties in writing accordingly.

## **STATEMENT OF COSTS**

### **Article 25**

1. At the end of the mediation, the Ombudsperson shall provide an invoice for his/her fees and expenses to the parties, with a copy to the Secretariat.
2. The invoice shall include the details of the expenses incurred in the course of the mediation, the time spent by the Ombudsperson, any applicable tax, and all payments received from the parties.
3. Any payment in excess will be reimbursed to the parties in proportion to their respective payments.

## **Appendix A:**

### **ADDRESSES OF THE SECRETARIAT AND BANK ACCOUNT**

For updated information on the SCAI Secretariat addresses and bank account details please visit our website:

<https://www.swissarbitration.org/Mediation/Initiating-mediation>

All payments must be made in Swiss Francs (CHF) and received net of any banking fees.

#### **Addresses of the Secretariat**

Swiss Chambers' Arbitration Institution  
Secretariat  
c/o Geneva Chamber of Commerce, Industry and Services  
4, boulevard du Théâtre - P.O. Box 5039  
CH-1211 **Geneva 11**  
Phone: +41 22 819 91 57  
Fax: +41 22 819 91 36  
E-mail: [geneva@swissarbitration.org](mailto:geneva@swissarbitration.org)

Swiss Chambers' Arbitration Institution  
Secretariat  
c/o Chamber of Commerce and Industry of Ticino  
16, corso Elvezia - P.O. Box 5399  
CH-6901 **Lugano**  
Phone: +41 91 911 51 11  
Fax: +41 91 911 51 12  
E-mail: [lugano@swissarbitration.org](mailto:lugano@swissarbitration.org)

Swiss Chambers' Arbitration Institution  
Secretariat  
c/o Zurich Chamber of Commerce  
Loewenstrasse 11 - P.O. Box  
CH-8021 **Zurich**  
Phone: +41 44 217 40 50  
Fax: +41 44 217 40 51  
E-mail: [zurich@swissarbitration.org](mailto:zurich@swissarbitration.org)

## **Appendix B:**

### **SCHEDULE FOR THE COSTS OF MEDIATION**

For an updated version of this Appendix B, please visit our website:  
[www.swissarbitration.org/Mediation](http://www.swissarbitration.org/Mediation).

#### **1. SCAI registration and fixed fees**

- 1.1 A registration fee of CHF 1'000 is due to SCAI for each party to the mediation.
- 1.2 For mediations subject to FinSA, the registration fee due by the Customer(s) of the Financial Service Provider shall be of CHF 100.-, and the registration fee to be paid by the Financial Service Provider shall be of CHF 1'900.-.
- 1.3 If the mediation involves more than two parties, for instance for mass claims, the registration fee to be paid by each additional Customer is CHF 100.-, and the additional registration fee to be paid by the Financial Service Provider is CHF 900.- per additional Customer. If the joinder of other parties is agreed, for instance banks or other Financial Service Providers, an additional registration fee of CHF 1'000.- by additional party shall be paid.
- 1.4 The Secretariat shall not proceed with the appointment or confirmation of the Ombudsperson unless and until the registration fee is fully paid.
- 1.5 The registration fee is non-refundable.
- 1.6 If the subject matter described in the Request is already the subject of a Notice of Arbitration filed by the parties with SCAI, the registration fee for the mediation shall be divided by two.
- 1.7 If the number of parties increases during the mediation, the Secretariat will adjust and charge additional registration fees accordingly.
- 1.8 If the parties request that the Secretariat appoints or confirms more than one Ombudsperson, or replaces Ombudspersons, SCAI will charge an additional fee of CHF 1'000 for each additional appointment or confirmation of an Ombudsperson. The additional fee shall be borne by the party(ies) requesting this additional service.
- 1.9 SCAI charges an annual abeyance fee of CHF 2'000, to be borne equally by the parties, for mediations that are stayed for more than three months. This fee will be charged by SCAI as a requisite to maintain the case open.

## **2. SCAI administrative costs**

2.1 SCAI charges the following administrative costs to the parties for cases that are not subject to the FinSA, respectively charges half of the below administrative costs for the FinSA cases and this only to the Financial Service Provider:

- CHF 2'500, if the amount in dispute is between CHF 50'000 and CHF 2'000'000;
- CHF 8'000, if the amount in dispute is between CHF 2'000'001 and CHF 5'000'000;
- CHF 13'000, if the amount in dispute is between CHF 5'000'001 and CHF 10'000'000;
- CHF 17'000, if the amount in dispute is between CHF 10'000'001 and CHF 20'000'000;
- CHF 20'000, if the amount in dispute is between CHF 20'000'001 and 50'000'000;
- CHF 23'000, if the amount in dispute is above CHF 50'000'000.

2.2 SCAI does not charge administrative costs if the amount in dispute is below CHF 50'000.

2.3 The parties shall pay the SCAI administrative costs when so requested by the Secretariat.

2.4 If the amount in dispute increases during the mediation, the Secretariat may adjust and charge the administrative costs accordingly.

## **3. SCAI Certification and authentication fees**

3.1 The party requesting the issuance of a mediation certificate shall pay a certification fee of CHF 500 per certificate and will be invoiced for any costs incurred by SCAI.

3.2 A party requesting a certified copy of the settlement agreement shall pay a certification fee of CHF 300 per certified copy and will be invoiced for any costs incurred by SCAI.

3.3 The party requesting a certificate of authenticity of the settlement agreement shall pay an authentication fee of CHF 1'000 per certificate and will be invoiced for any costs incurred by SCAI.

#### **4. Ombudsperson fees and expenses**

- 4.1 For FinSA cases, the Ombudsperson will charge an hourly fee of CHF 250.- to CHF 500.- per hour, depending on the complexity of the case and the amount in dispute, to be borne exclusively by the Financial Service Provider. The Ombudsperson will inform the Financial Service Provider in advance of the fee he/she intends to charge.
- 4.2 If the Financial Service Provider and the Ombudsperson cannot agree on the hourly fee to be charged, the SCAI Advisory Council for Mediation will decide on the hourly fee.
- 4.3 For FinSA cases, unless otherwise agreed by the parties, a maximum of 40 hours can be charged.
- 4.4 For other cases, the Ombudsperson may charge the hourly fees and number of hours as agreed upon between him/her and the parties at the outset of the procedure or as revised during the procedure.
- 4.5 Unless otherwise agreed by the parties and when travels are agreed, the Ombudsperson will be entitled to the reimbursement of 1<sup>st</sup> class train tickets. When a taxi can reasonably be deemed more practicable than public transports, the Ombudsperson will be entitled to reimbursement of taxi courses of maximum CHF 50.- each way. Air travel and meeting room rentals may be agreed upon when necessary, upon prior approval of the Secretariat. For FinSA cases, the Ombudsperson's expenses will be borne exclusively by the Financial Service Provider.

## Model Mediation Clauses and Agreements

Various types of model mediation clauses for inclusion in contracts and model agreements to submit a dispute to mediation are available on our website: [www.swissarbitration.org](http://www.swissarbitration.org).

### MODEL FINANCIAL MEDIATION CLAUSES

For cases subject to FinSA, the Customer does not need to have signed a contract including such a clause to benefit of the SCAI Rules of Mediation Procedure for Financial Services Disputes. It is sufficient that the Financial Service Provider is affiliated with the Mediation Organ of the Swiss Chambers' Arbitration Institution.

#### MODEL FINANCIAL MEDIATION CLAUSE FOR CONTRACTS

*Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be submitted to mediation in accordance with the Rules of Mediation for Financial Services Disputes of the Swiss Chambers' Arbitration Institution in force on the date when the request for mediation was submitted in accordance with these Rules.*

*The seat of the mediation shall be... [city] in... [country], although the meetings may be held in... [city] in... [country].*

*The mediation shall be conducted in ... [specify desired language].*

#### MODEL FINANCIAL MEDIATION AGREEMENT WHEN PARTIES ARE ALREADY INVOLVED IN A DISPUTE

*The parties hereby agree to submit the following dispute to mediation in accordance with the Rules of Mediation for Financial Services Disputes of the Swiss Chambers' Arbitration Institution:*

*[brief description of the dispute]*

*The seat of the mediation shall be ... [city] in ... [country], although the meetings may be held in ... [city] in ... [country].*

*The mediation shall be conducted in ... [specify desired language].*



## FINANCIAL MEDIATION AND ARBITRATION

Parties who wish to have mediation combined with arbitration should refer as well to the dedicated pages of the SCAI website:  
[www.swissarbitration.org](http://www.swissarbitration.org)

### MODEL FINANCIAL MEDIATION AND ARBITRATION CLAUSE FOR CONTRACTS

*Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be submitted to mediation in accordance with the Rules of Mediation for Financial Services Disputes of the Swiss Chambers' Arbitration Institution (SCAI) in force on the date when the request for mediation was submitted in accordance with these Rules.*

*The seat of the mediation shall be... [city] in... [country], although the meetings may be held in... [city] in... [country].*

*The mediation shall be conducted in ... [specify desired language].*

*If such dispute, controversy or claim has not been fully resolved by mediation within 60 days from the date when the Ombudsperson(s) has (have) been appointed by the SCAI Secretariat, it shall be settled by arbitration in accordance with the Swiss Rules of International Arbitration of SCAI in force on the date when the Notice of Arbitration was submitted in accordance with those Rules.*

*The number of arbitrators shall be ... ["one", "three", "one or three"].*

*The seat of the arbitration shall be... [city] in... [country], although the hearings may be held in... [city] in... [country].*

*The arbitration shall be conducted in ... [specify desired language].*

*The arbitration shall be conducted in accordance with the provisions for Expedited Procedure [if so wished by the parties].*

### MODEL FINANCIAL MEDIATION AND ARBITRATION AGREEMENT WHEN PARTIES ARE ALREADY INVOLVED IN A DISPUTE

*The parties hereby agree to submit the following dispute to mediation in accordance with the Rules of Mediation for Financial Services Disputes of the Swiss Chambers' Arbitration Institution (SCAI):*

*[brief description of the dispute]*

*The seat of the mediation shall be ... [city] in ... [country], although the meetings may be held in ... [city] in ... [country].*

*The mediation shall be conducted in ... [specify desired language].*

*If such dispute, controversy or claim has not been fully resolved by mediation within 60 days from the date when the Ombudsperson(s) has (have) been appointed by the SCAI Secretariat, it shall be settled by arbitration in accordance with the Swiss Rules of International Arbitration of SCAI in force on the date when the Notice of Arbitration was submitted in accordance with those Rules.*

*The number of arbitrators shall be ... [“one”, “three”, “one or three”];*

*The seat of the arbitration shall be... [city] in... [country], although the hearings may be held in... [city] in... [country].*

*The arbitration shall be conducted in ... [specify desired language].*

*The arbitration shall be conducted in accordance with the provisions for Expedited Procedure [if so wished by the parties].*

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