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## Settlement of commercial disputes

### **International commercial mediation: draft UNCITRAL Mediation Rules**

**Note by the Secretariat**

#### Contents

	<i>Page</i>
I. Introduction. . . . .	2
II. Draft UNCITRAL Mediation Rules . . . . .	2
A. Text of the draft Rules . . . . .	2
B. Annotations. . . . .	8



## I. Introduction

1. At its fifty-first session, in 2018, the Commission noted that the Secretariat would undertake work on updating the UNCITRAL Conciliation Rules (1980) to both reflect current practice and ensure consistency with the contents of the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) and the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (the “Model Law”) finalized by the Commission at that session.<sup>1</sup>
2. At its fifty-second session, in 2019, the Commission had before it the draft UNCITRAL Mediation Rules (A/CN.9/986) prepared by the Secretariat in broad consultation with experts. In order to ensure that comments from States and other interested organizations would be further reflected, States were requested to submit comments on the draft text and the Secretariat was requested to prepare a revised draft based on the comments received.<sup>2</sup> At its fifty-third session, which was held under exceptional circumstances and with a significantly reduced agenda, the Commission requested Working Group II to briefly review the draft texts on international mediation,<sup>3</sup> so as to facilitate speedy adoption of those texts at the fifty-fourth session of the Commission in 2021.<sup>4</sup>
3. Accordingly, this note contains the revised draft UNCITRAL Mediation Rules with annotations, taking account of comments received<sup>5</sup> including comments made during the seventy-third session of Working Group II (A/CN.9/1049, paras. 69–71).

## II. Draft UNCITRAL Mediation Rules

### A. Text of the draft rules

4. The text of the draft rules reads as follows.

### UNCITRAL Mediation Rules ([2021])

#### Article 1 – Application of the Rules

1. Where parties have agreed that disputes between them shall be submitted to mediation under the UNCITRAL Mediation Rules, then these Rules shall apply. The Rules may apply irrespective of the basis, whether contractual or not, upon which the mediation is carried out.
2. Mediation under the Rules is a process, whether referred to by the term mediation, conciliation or an expression of similar import, whereby parties request a third person or persons (“the mediator”) to assist them in their attempt to reach an amicable settlement of their dispute. The mediator shall not have the authority to impose upon the parties a solution to the dispute.

<sup>1</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 246 and 254.

<sup>2</sup> *Ibid.*, *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 118 and 123.

<sup>3</sup> Draft UNCITRAL Mediation Rules (A/CN.9/1026); draft UNCITRAL Notes on Mediation (A/CN.9/1027); and draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (A/CN.9/1025).

<sup>4</sup> *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17 (A/75/17)*, part two, paras. 15(d) and 30.

<sup>5</sup> See A/CN.9/1031 and addenda as well as informal comments received in advance of the session of the 73rd Working Group II, available at [https://uncitral.un.org/en/working\\_groups/2/arbitration](https://uncitral.un.org/en/working_groups/2/arbitration).

3. The parties to a mediation shall be presumed to have referred to the Rules in effect on the date of commencement of the mediation, unless the parties have agreed to apply a particular version of the Rules.
4. The parties may agree to exclude or vary any provision of the Rules at any time.
5. Where any provision of these Rules is in conflict with a provision of the law applicable to the mediation from which the parties cannot derogate, including any applicable instrument or court order, that provision of law shall prevail.

## **Article 2 – Commencement of mediation**

1. Mediation in respect of a dispute that has arisen shall be deemed to have commenced on the day on which the parties to that dispute agree to engage in mediation, unless otherwise agreed.
2. If a party that invited another party to mediate does not receive an acceptance of the invitation within 30 days from the day on which the invitation was sent by any means that provides for a record of its transmission, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediate.

## **Article 3 – Number and appointment of mediators**

1. There should be one mediator, unless otherwise agreed. Where there is more than one mediator, the mediators shall act jointly.
2. The parties should endeavour to appoint a mediator by agreement, unless a different appointment procedure applies. They may agree to replace a mediator at any time.
3. The parties may seek the assistance of an institution or person for appointing a mediator.
4. In recommending or selecting individuals to act as mediator, the institution or person shall have regard to:
  - (a) The professional expertise and qualifications of the prospective mediator, experience as a mediator and ability to conduct the mediation;
  - (b) Any relevant accreditation and/or certification awarded to the prospective mediator by a recognised professional mediation standards body;
  - (c) The availability of the mediator; and
  - (d) Such considerations as are likely to secure the appointment of an independent and impartial mediator.
5. If the parties have different nationalities, the institution or person may also take into account the advisability of appointing a mediator of a nationality other than the nationalities of the parties. In addition, the institution or person, in selecting, shall take into consideration gender and geographical diversity of candidates.
6. When a person is approached in connection with a possible appointment as mediator, that person shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence, including the disclosure of details of any personal, professional, financial or other interest that may influence the outcome of the dispute. A mediator, from the time of appointment and throughout the mediation, shall, without delay, disclose to the parties any such circumstances as they arise.
7. Prior to accepting the appointment, the prospective mediator shall ensure his or her availability to conduct the mediation diligently and efficiently.

8. In the event the mediator cannot perform her of his functions, the parties shall appoint a substitute mediator pursuant to the procedure mentioned in paragraphs 2, 3, and 4. Paragraphs 6 and 7 shall apply to the newly appointed mediator.

#### **Article 4 – Conduct of mediation**

1. The parties may agree on the manner in which the mediation is to be conducted. Otherwise the mediator may determine the conduct of the mediation in consultation with the parties, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.
2. The mediator shall maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.
3. In order to facilitate the conduct of the mediation:
  - (a) The parties and the mediator may convene a meeting at an early stage to agree on the organization of the mediation;
  - (b) The parties, or the mediator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person; and
  - (c) The parties, or the mediator with the consent of the parties, may appoint experts.
4. In conducting the mediation, the mediator may, in consultation with the parties and taking into account the circumstances of the dispute, utilize any technological means as he or she considers appropriate, including to communicate with the parties and to hold meetings remotely.
5. A party may be represented or assisted by a person of its choice. The name, address and function of such person shall be communicated to all parties and to the mediator in advance of the mediation or without delay. This communication shall also indicate the scope of authority and whether the purpose of the appointment is for representation or assistance.

#### **Article 5 – Communication between the parties and the mediator**

1. The mediator may meet or communicate with the parties together or with each of them separately.
2. At any stage of the mediation, the parties may submit information concerning the dispute, such as statements describing the general nature of the dispute, the points at issue, and any supporting document or additional information deemed appropriate. The information may also include a description of the goals, interests, needs and motivations of the parties as well as any relevant documents.
3. When the mediator receives information concerning the dispute from a party, the mediator shall keep such information confidential, unless that party indicates that the information is not subject to the condition that it should be kept confidential, or expresses its consent to the disclosure of such information to another party to the mediation.

#### **Article 6 – Confidentiality**

Unless otherwise agreed by the parties, all information relating to the mediation, including, if relevant, the settlement agreement, shall be kept confidential by those involved in the mediation, except where disclosure is required by the law or as referred to under article 8, paragraph 4.

### **Article 7 – Introduction of evidence in other proceedings**

1. Unless otherwise agreed by the parties, a party to the mediation, the mediator and any third person, including those involved in the administration of the mediation shall not, in arbitral, judicial or other dispute resolution proceedings, rely on, introduce as evidence or give evidence regarding any of the following:

- (a) An invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation;
- (b) Views expressed, or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;
- (c) Statements or admissions made by a party in the course of the mediation;
- (d) Proposals made by the mediator or the parties;
- (e) The fact that a party had indicated its willingness to accept a proposal (or parts thereof) for settlement made by the mediator or the parties;
- (f) A document prepared primarily for purposes of the mediation.

2. Paragraph 1 applies irrespective of the form of the information or evidence referred to therein.

3. Paragraphs 1 and 2 apply whether or not the arbitral, judicial or other dispute resolution proceedings relate to the dispute that is or was the subject matter of the mediation.

4. Subject to the limitations of paragraph 1, evidence that is otherwise admissible in arbitral, judicial or other dispute resolution proceedings does not become inadmissible as a consequence of having been used or disclosed in the mediation.

### **Article 8 – Settlement agreement**

1. Once the parties agree on the terms of a settlement to resolve all or part of the dispute through mediation, they should prepare and sign a settlement agreement. If requested by the parties and if the mediator deems it appropriate, the mediator may provide support to the parties in preparing the settlement agreement.

2. Unless otherwise agreed by the parties, the mediator or the mediation institution may sign or stamp the settlement agreement or provide other evidence that the agreement resulted from mediation.

3. The requirement that a settlement agreement shall be signed by the parties is met in relation to an electronic communication if:

- (a) A method is used to identify the parties and to indicate the parties' intention in respect of the information contained in the electronic communication;
- (b) The method is used either:
  - (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
  - (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence;

4. By signing the settlement agreement, the parties agree that the settlement agreement can be used as evidence that it results from mediation, and that it can be relied upon for seeking relief under the applicable law.

**Article 9 – Termination of mediation**

The mediation shall terminate:

- (a) By the signing of the settlement agreement by the parties, on the date of the agreement;
- (b) By a declaration of the parties to the mediator to the effect that the mediation is terminated, on the date of the declaration;
- (c) By a declaration of a party to the other party and the mediator, if appointed, to the effect that it no longer wishes to pursue mediation, on the date of the declaration;
- (d) By a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration;
- (e) By a declaration of the mediator, after consultation with the parties, in the situation referred to in article 11(5), on the date of the declaration; or
- (f) At the expiration of any mandatory period in the applicable international instrument, court order or mandatory statutory provision, or as agreed upon by the parties.

**Article 10 – Arbitral, judicial or other dispute resolution proceedings**

1. Mediation may take place under the Rules at any time regardless of whether arbitral, judicial or other dispute resolution proceedings have been already initiated.
2. Where the parties have agreed to mediate and have also expressly undertaken not to initiate during a specified period of time or until a specified event has occurred, arbitral, judicial or other dispute resolution proceedings with respect to an existing or future dispute, such an undertaking shall be complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as waiver of the agreement to mediate or as a termination of the mediation.

**Article 11 – Costs and deposit of costs**

1. The method for fixing the costs of mediation should be agreed upon by the parties and the mediator as early as possible in the mediation. Upon termination of the mediation, the mediator shall fix the costs of the mediation, which shall be reasonable in amount and gives written notice thereof to the parties. The term “costs” includes only:
  - (a) The fees of the mediator;
  - (b) The travel and other expenses of the mediator;
  - (c) The cost of any expert advice requested by the mediator with the agreement of the parties;
  - (d) The cost of any assistance provided pursuant to article 4, paragraph 3, of the Rules; and
  - (e) Any other expenses that may have been accrued out of the mediation, including in relation to translation and interpretation services.
2. Unless otherwise agreed by the parties, the costs, referred to in paragraph 1, are borne equally by the parties and, in case of multiparty mediation, they are shared pro rata. All other expenses incurred by a party are borne by that party.
3. The mediator, upon appointment, may request each party to deposit an equal amount as an advance for the costs referred to in paragraph 1, unless otherwise agreed by the parties and the mediator.

4. During the course of the mediation, the mediator may request supplementary deposits in an equal amount from each party, unless otherwise agreed by the parties and the mediator.

5. If the required deposits under paragraphs 3 and 4 are not paid in full by all parties within a reasonable period set by the mediator, the mediator may suspend the mediation or may declare the termination of the mediation, in accordance with article 9(d).

6. Upon termination of the mediation and if deposits were received, the mediator shall render an accounting to the parties of the deposits received and return any unexpended funds to the parties.

#### **Article 12 – Role of the mediator in other proceedings**

Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that was or is the subject of the mediation and of a dispute that has arisen from the same or a related contract or legal relationship. The parties shall not present the mediator as a witness in any such proceedings.

#### **Article 13 – Exclusion of liability**

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the mediator based on any act or omission in connection with the mediation.

### **Annex**

#### **Model mediation clauses**

##### *Mediation only*

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules.

*Note: The parties should consider adding:*

- (a) The year of adoption of the version of the Rules;
- (b) The parties agree that there will be one mediator, appointed by agreement of the parties [within thirty days of the mediation agreement], and if the parties cannot agree, then the mediator shall be selected by [relevant selecting authority];
- (c) The language of the mediation shall be ...;
- (d) The place of mediation shall be ... .

##### *Multi-tiered clause*

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules.

*Note: Parties should consider adding:*

- (a) The selecting authority shall be (name of institution or person);
- (b) The language of the mediation shall be ...;
- (c) The place of mediation shall be... .

If the dispute, or any part thereof, is not settled within [(60) days] of the request to mediate under these Rules then the parties agree to resolve any remaining matters by arbitration in accordance with the UNCITRAL Arbitration Rules.

*Note: Parties should consider adding:*

- (a) The selecting authority shall be (name of institution or person);
- (b) The number of arbitrators shall be (one or three);
- (c) The place of arbitration shall be (town and country);
- (d) The language of the arbitration shall be... .

## **B. Annotations**

### **1. General remarks**

5. The Commission may wish to note that the draft Rules have been prepared with a view to align them with the mediation procedure as defined in the instruments referred to in paragraph 1 above, and to take account of developments in the field since the initial version of the Conciliation Rules, in 1980, (the “1980 Conciliation Rules”) including the development of court-ordered mediation.

6. The Commission may wish to note that the draft Rules emphasize that mediation is an interest-based process, and therefore terms that are normally used in connection with adversarial proceedings have been avoided. Further, the text includes gender neutral language. For the sake of simplicity, provisions of the 1980 Conciliation Rules have been grouped differently, and sometimes merged, as indicated below.

### **2. Article-by-article comments**

#### *Article 1 (Application of the Rules)*

7. Paragraph 1 clarifies that the Rules can apply to mediation regardless of the origin of the process. In other words, mediation under the Rules can be based on an agreement between the parties, or it may find its origin in an international instrument such as an investment treaty, a court order, or mandatory statutory provision, provided that the parties agree to the UNCITRAL Mediation Rules.

8. A definition of mediation has been included in paragraph 2, which mirrors the definition contained in the Model Law. The definition is meant to cover the range of possible outcomes of mediation.

9. Paragraph 3 is a new provision addressing the temporal application of the Rules. It provides, as a default rule, for the application of the Rules in effect at the date of the commencement of the mediation.

10. Paragraphs 4 and 5 mirror article 1, paragraphs 2 and 3, of the 1980 Conciliation Rules. Paragraph 5 clarifies that any mandatory provision contained in the applicable international instrument, a court order or a law prevails in case of a conflict.

#### *Article 2 (Commencement of mediation)*

11. Article 2 of the draft Rules mirrors article 5 of the Model Law, with the necessary adjustments.

12. Paragraph 1 provides that a mediation commences when the parties to a dispute “agree to engage” in the mediation. The effect of this paragraph is that, even if there exists a provision in a contract requiring parties to engage in mediation or a court or arbitral tribunal directs parties to engage in mediation, such mediation will not commence until the parties agree to actually engage in such proceeding. Also, for the sake of simplicity, article 2(1) applies to agreement to mediate, regardless whether the mediation agreement is entered before or after the dispute arises.



13. Paragraph 2 addresses the invitation to mediate. It does not contain details about the content of such invitation or response thereof in order to leave flexibility to the parties on how they wish to approach their mediation.

*Article 3 (Number and appointment of mediators)*

14. Article 3 of the draft Rules merges articles 3 (number of conciliators) and 4 (appointment of conciliators) of the 1980 Conciliation Rules. It is modelled on article 6 of the Model Law.

15. Paragraph 1 reflects the default rule that one mediator is usually appointed by the parties. Paragraph 2 indicates that the process of appointing a mediator must remain consensual.

16. Paragraphs 3 to 5 refer to the possible involvement of an institution or a person in the selection process.

17. With respect to paragraphs 6 (disclosure of circumstances regarding impartiality or independence) and 7 (availability), the Commission may wish to note that the draft Rules do not refer to any declaration by mediators as to their independence, impartiality and availability. The Commission may wish to note that the disclosure obligations take account of the provisions under article 5 (1) (f) of the Singapore Convention on Mediation. It may wish to consider whether standard declarations of independence, impartiality and availability should be provided for in the annex to the draft Rules, along the same lines as those provided for in the Annex to the UNCITRAL Arbitration Rules (2010).

*Article 4 (Conduct of mediation)*

18. Article 4 of the draft Rules addresses the conduct of the mediation in a manner consistent with article 7 of the Model Law. It also reflects provisions that were formerly contained in articles 6 (representation and assistance), 7 (role of conciliator) and 8 (administrative assistance) of the 1980 Conciliation Rules.

19. The Commission may wish to note that the 1980 Conciliation Rules include the parties' duty to act in "good faith" without spelling out legal consequences in case parties do not act accordingly. Such a duty is therefore not reflected in the draft Rules as it appeared redundant.

20. The Commission may wish to also note that early organizational meetings, envisioned paragraph 3, are mentioned as a practice that is increasingly common.

21. Paragraph 4 reflects the possibility to utilise different means of communication during the mediation and to make use of remote consultations.

*Article 5 (Communication between the parties and the mediator)*

22. The Commission may wish to note that article 5 of the draft Rules merges the provisions of article 5 (submission of statements to conciliator), article 9(1) (communication between conciliator and parties) and article 10 (disclosure of information) of the 1980 Conciliation Rules. Article 5 (3) provides for an alternative solution to the default rule on confidentiality under article 9 of the Model Law on Mediation.

*Article 6 (Confidentiality)*

23. Article 6 reflects the provisions of article 10 of the Model Law. The matter of confidentiality was addressed in article 14 of the 1980 Conciliation Rules.

*Article 7 (Introduction of evidence in other proceedings)*

24. Article 7 of the draft Rules is modelled after article 11 of the Model Law. The matter covered under article 7 was dealt with under article 20 of the 1980 Conciliation

Rules. As the matter is closely connected with confidentiality, the provision has been relocated after article 6.

*Article 8 (Settlement agreement)*

25. Article 8 of the draft Rules updates the provisions on settlement agreements contained in article 13 of the 1980 Conciliation Rules. It also takes account of the new legal framework adopted by the Commission on settlement agreements.

26. Paragraph 1 provides insight on the settlement agreement and the assistance that the mediator can provide to the parties at that stage.

27. Paragraphs 2 and 3 mirror the provision of the Singapore Convention on Mediation on formal requirements. Paragraph 4 signals the existence of a legal framework for relying on settlement agreements for the purpose of seeking relief, using terms similar to that of the Model Law and the Singapore Convention on Mediation.

*Article 9 (Termination of mediation)*

28. Article 9 of the draft Rules is modelled after the corresponding provisions of article 15 of the 1980 Conciliation Rules and article 12 of the Model Law.

*Article 10 (Arbitral, judicial or other dispute settlement proceedings)*

29. Article 10 of the draft Rules addresses the possible link between mediation and other proceedings. It contains two distinct paragraphs.

30. Paragraph 1 refers to the possibility to hold mediation under the Rules as part of other proceedings.

31. Paragraph 2 mirrors, with necessary adjustments, article 14 of the Model Law and article 16 of the 1980 Conciliation Rules. It covers the situation where parties agreed not to initiate proceedings in parallel to their mediation.

*Article 11 (Costs and deposit of costs)*

32. Article 11 of the draft Rules merges articles 17 and 18 of the 1980 Conciliation Rules. It provides that the parties and the mediator should agree upfront on the methods for fixing the cost of mediation. As the mediator provides services to all parties equally and the mediation is an interest-based negotiation, it is suggested that the costs in multi-party mediation should be shared on a pro rata basis.

*Article 12 (Role of the mediator in other proceedings)*

33. Article 12 of the draft Rules is modelled after article 19 of the Conciliation Rules (1980).

*Article 13 (Exclusion of liability)*

34. Article 13 of the draft Rules provides for exclusion of liability of mediators. It is modelled after article 16 of the UNCITRAL Arbitration Rules (2010).

*Model mediation clauses (annex)*

35. Model mediation clauses include variants, from a simple clause to a multi-tiered provision.

### **3. Other matters**

36. The Commission may wish to consider whether it would be useful to prepare recommendations on how to adjust the draft Rules for their use by mediation institutions, so that the draft Rules may serve as a model for institutional rules.