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## Settlement of Commercial Disputes

### **International Commercial Mediation: Draft UNCITRAL Notes on Mediation**

**Note by the Secretariat**

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## I. Introduction

1. At its fifty-first session, in 2018, the Commission heard the proposal that the Secretariat could undertake work on (a) updating the UNCITRAL Conciliation Rules (1980) to both reflect current practice and ensure consistency with the contents of the instruments finalized by the Commission at that session,<sup>1</sup> and (b) preparing notes on organizing mediation.<sup>2</sup> After discussion, the Commission decided that the Secretariat would prepare mediation rules and notes on mediation taking account of the newly adopted instruments on international commercial mediation.<sup>3</sup>
2. At its fifty-second session, in 2019, the Commission had before it the draft UNCITRAL notes on mediation (A/CN.9/987) prepared by the Secretariat in broad consultation with experts. The Commission deferred consideration of the draft notes to its fifty-third session. In addition, States and other interested stakeholders were invited to submit comments on these draft UNCITRAL notes on mediation and the Secretariat was requested to prepare a revised text.<sup>4</sup>
3. 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>5</sup> so as to facilitate speedy adoption of those texts at the fifty-fourth session of the Commission in 2021.<sup>6</sup>
4. Accordingly, this note contains the draft UNCITRAL notes on mediation for consideration by the Commission, taking account of comments received<sup>7</sup> including comments made during the seventy-third session of Working Group II (A/CN.9/1049, paras. 69–71).

## II. Draft UNCITRAL notes on mediation

5. The Commission may wish to note that the references in the draft below to Rules are in respect to the UNCITRAL Mediation Rules presented for adoption to the Commission at its current session (see document A/CN.9/1074). Such references will be adjusted to reflect the final version of the Rules.
6. The text of the draft notes on mediation reads as follows:

### UNCITRAL Notes on Mediation ([2021])

#### Purpose of the Notes

1. The Notes list and briefly describe matters relevant to mediation. Prepared with a focus on international mediation, they are intended to be used in a general and universal manner by mediation practitioners and parties to a dispute.

<sup>1</sup> The instruments are the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation and the United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the “Singapore Convention on Mediation”).

<sup>2</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 246.

<sup>3</sup> *Ibid.*, para. 254.

<sup>4</sup> *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 118 and 123.

<sup>5</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>6</sup> *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17 (A/75/17)*, part two, paras. 15(d) and 30.

<sup>7</sup> See A/CN.9/1031 and addenda as well as informal comments received in advance of the 73rd session of Working Group II, available at [https://uncitral.un.org/en/working\\_groups/2/arbitration](https://uncitral.un.org/en/working_groups/2/arbitration).

2. Given the flexibility that characterizes mediation, procedural styles, practices and methods to foster a settlement between parties vary. Each approach has its own merit. Therefore, the Notes do not seek to promote any particular practice as best practice.

3. The Notes seek to assist parties in better understanding mediation including the wide and flexible range of possible outcomes. The parties and the mediator may use or refer to the Notes at their discretion and to the extent they see fit and need not adopt or provide reasons for not adopting any particular element of the Notes. The Notes do not impose any legal requirements binding upon the parties or the mediator and are not suitable to be used as mediation rules.

### **Main features of mediation**

4. Mediation is an efficient and cost-effective dispute settlement mechanism. It allows parties to prevent or settle a dispute taking their interests into account and avoiding a win/lose outcome.

5. Mediation can be used for solving a wide range of disputes. Its use results in significant benefits, such as facilitating the administration of international transactions by parties and reducing the instances where a dispute leads to the termination of a commercial relationship.

#### *Non-adjudicatory process*

6. Mediation is not formal and in contrast to any adjudicative proceedings, it does not rely on complex rules of form and procedure. Indeed, the manner in which a mediation process unfolds is not legally predetermined.

7. In successful mediation, the parties frequently shift from an adversarial (“one party against the other”) to a solution-oriented (“both parties against the problem”) mindset. Even if the parties do not reach a settlement agreement, the process can still allow them to gain a better understanding of the issues at stake and overcome unrealistic expectations.

#### *Flexible process*

8. Mediation is a flexible process, which allows parties to tailor it as they wish, taking also into account their needs as well as the circumstances of the case. As a result, mediation is usually less time and resources consuming than adjudication.

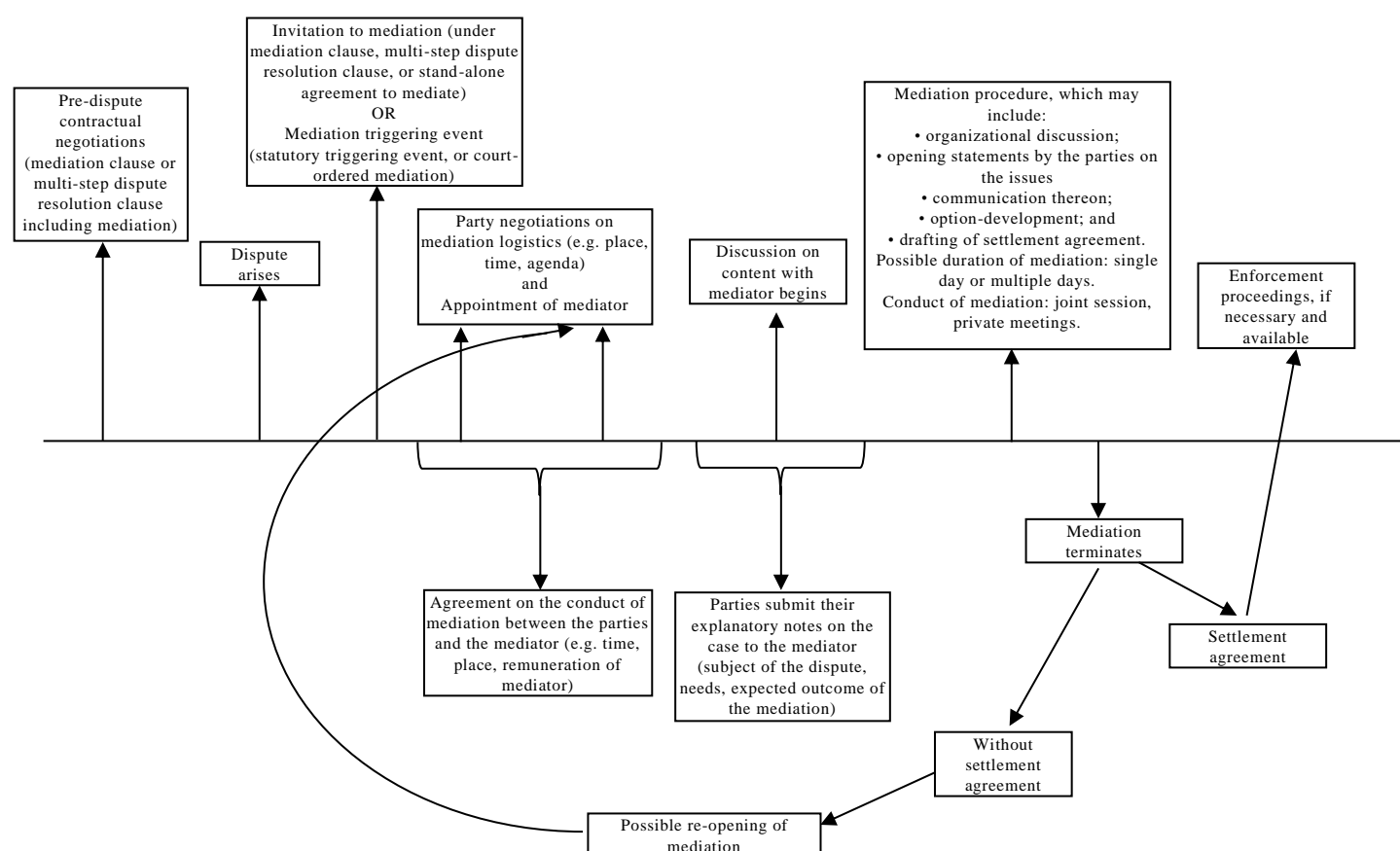
9. The parties focus on their underlying concerns and interests. They can resolve potential misunderstandings and develop the basis for a longer term business relationship.

#### *Voluntary process based on party autonomy*

10. Mediation relies on party autonomy. Indeed, the parties retain full control of their participation in a mediation. Unless mandatory requirements apply under a relevant source of law, the parties are usually free to:

- Agree on the mediator;
- Agree on the conduct of the mediation procedure;
- Determine the scope of issues to be submitted to mediation;
- Develop their own solutions;
- Solve their dispute holistically or agree on a partial solution; and/or
- Terminate the mediation at any time.

11. The following chart provides an overview of the mediation steps.



## Legal framework

### *Singapore Convention on Mediation*

12. The United Nations Convention on International Settlement Agreements resulting from Mediation (“Singapore Convention on Mediation” or “Convention”), adopted by the United Nations General Assembly on 20 December 2018,<sup>8</sup> applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute, as defined in the Convention.<sup>9</sup> It provides a uniform and efficient framework for the enforcement of international settlement agreements resulting from mediation and for allowing parties to invoke such agreements. It ensures that a settlement reached by parties becomes binding and enforceable in accordance with a simplified and streamlined procedure.

### *Mediation laws*

13. Mediation laws, such as those modelled on the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (the “Model Law on Mediation”) usually

<sup>8</sup> General Assembly resolution 73/198 of 20 December 2018.

<sup>9</sup> Article 1(1) of the Convention reads as follows: “This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute (“settlement agreement”) which, at the time of its conclusion, is international in that: (a) At least two parties to the settlement agreement have their places of business in different States; or (b) The State in which the parties to the settlement agreement have their places of business is different from either: (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) The State with which the subject matter of the settlement agreement is most closely connected.”

define mediation as a process where parties are assisted by a third person or persons in their attempt to negotiate and reach an amicable settlement of their dispute. The mediator is to assist the parties in their communication so that they can find a solution, and has no authority to impose a solution on the parties.

14. Essentially, mediation laws seek to strike a balance between protecting the integrity of the mediation process, for example, by ensuring that the mediator would make the necessary disclosures, while also providing maximum flexibility by preserving party autonomy. The laws are designed to accommodate procedural differences. Therefore, they usually include default provisions on the mediation procedure. They often focus on domestic mediation, and include provisions on access to mediation, the establishment of mediation institutions or organizations, the appointment and accreditation of mediators and the protection of confidentiality.

#### *Mediation rules*

15. The parties may agree to use a set of mediation rules. Such rules usually determine the procedural framework of the mediation. They also contain model mediation clauses that can be easily adopted by the parties in their commercial contracts. For example, the UNCITRAL Mediation Rules are a set of procedural rules, that can be used without an institution administering the mediation, and that parties are free to modify and adapt as they wish. Parties can also decide to have the proceedings administered by an institution. Most institutional rules also give parties a high degree of flexibility.

### **List of matters for possible consideration in organizing a mediation**

- 1. Commencement of the mediation**
  - a. Various basis
  - b. Agreement of the parties
  - c. Invitation to mediate
  - d. Date of commencement of the mediation
  - e. Institutional support
- 2. Selection and appointment of a mediator**
  - a. How to select and appoint a mediator
  - b. Availability, skills and background
  - c. Ethical requirements
- 3. Preparatory steps**
  - a. Terms of reference, fees and other costs
  - b. Administrative assistance
  - c. Parties' attendance and representation
  - d. Addressing confidentiality
  - e. Determining the location and the timing of the mediation
  - f. Agreeing on the language of the mediation
- 4. Conduct of the mediation**
  - a. Role of the mediator

- b. Initial consultations
- c. Submissions and supporting documents
- d. Mediation sessions and active negotiations

**5. Settlement agreement**

- a. Settlement proposals
- b. Drawing up the settlement agreement
- c. Enforceability

**6. Termination of the mediation**

**7. Mediation in the investor-State dispute settlement context**

- a. Selection and appointment of a mediator
- b. Confidentiality and transparency
- c. Third parties
- d. Authority to settle

**Annotations**

**1. Commencement of the mediation**

**(a) Various basis**

16. Mediation can be used successfully at different stages of a dispute, either before or during any arbitral, judicial or other dispute resolution proceedings.

17. Mediation can be carried out based on an agreement between the parties whether reached before or after a dispute has arisen (see below, paras. 19–22). Mediation often represents the last possible attempt to find a solution to settle a dispute before formal proceedings are initiated, or after they are concluded (for example, for the purposes of enforcement of an arbitral award or a judgment).

18. Mediation can also be carried out based on an obligation established by an international instrument or by law, or by a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

**(b) Agreement of the parties**

*Pre-dispute agreement*

19. It is advisable for the parties to include in their contract a mediation clause. Such a clause usually provides that the parties will seek to solve any dispute under the contract through mediation. Parties usually tailor the mediation clause to their needs. They may choose to refer to a set of mediation rules (see above, para. 15). Further, they may indicate the language of mediation and the place of any mediation (see below, paras. 52–54).

20. A pre-dispute mediation clause can be included in a contract either as a simple clause, as part of a multi-tiered dispute resolution clause where mediation is one of the initial tiers, or in a clause which provides that mediation shall proceed concurrently with arbitral, judicial or other dispute resolution proceedings. In case of a multi-tiered clause, it is advisable for the parties to determine periods during which they must comply with certain actions as part of the multi-tiered process, indicating steps regarding both timing and the process.

*Agreement to mediate an existing dispute*

21. If there is no pre-existing agreement to mediate, a party can request mediation at any stage, even if arbitral, judicial or other dispute resolution proceedings are ongoing.

22. Where a mediation takes place during arbitral or court proceedings, the arbitration or litigation may be stayed to allow time for conducting the mediation, unless prohibited by the applicable law. In certain cases, the parties may agree to proceed concurrently with mediation and arbitration or litigation.

**(c) Invitation to mediate**

23. The party that wishes to commence a mediation usually sends an invitation to mediate to the other party or parties.

24. At this preliminary stage, subject to any agreed or mandatory procedure, it is useful to indicate the following in the invitation to mediate:

(i) A brief outline of the subject matter of the dispute;

(ii) Any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;

(iii) The identification of the basis for the mediation such as whether the invitation is made under a mediation agreement or on a different basis;

(iv) The applicable mediation rules, if any, or mediation procedure; and

(v) A period after which if no acceptance of the invitation is received, the party may elect to treat this as a rejection of the invitation to mediate.

**(d) Date of commencement of the mediation**

25. It is advisable for the parties to determine the date of commencement of the mediation for several reasons, including that this date marks the starting point of the obligation of confidentiality.

26. The commencement date is often the day on which the parties to the dispute agree to engage in the mediation.

**(e) Institutional support**

27. The parties may consider referring their disputes to a mediation institution. Mediation institutions may handle mediation generally or be specialized in certain types of disputes, such as construction, infrastructure, intellectual property disputes, or certain mode of settlement, such as online dispute resolution.

28. The availability, nature and cost of institutional support vary depending on the institution. Support may include:

(i) Providing guidance on the organization of the mediation (for example on procedural steps and costs);

(ii) Helping select and appoint a mediator;

(iii) Assisting with logistical matters (for example, reserving conference facilities and translation services);

(iv) Providing data protection or cybersecurity measures (in particular for online mediation); and

(v) Certifying that a mediation took place.

## **2. Selection and appointment of a mediator**

### **(a) How to select and appoint a mediator**

29. After the parties have agreed to engage in a mediation, they usually proceed with the selection and appointment of the mediator. The parties may agree on a mediator or on a procedure for appointing the mediator. The advantage of the parties first seeking to mutually agree on a mediator is that this approach respects the consensual nature of mediation and provides the parties with greater control and autonomy, and therefore confidence in the mediation process.

30. Generally, the practice is to appoint a single mediator in order to allow for a speedy and inexpensive process. Sometimes, the parties appoint two or more mediators, for example, in cases where:

(i) Special expertise is needed in more than one area if the dispute is complex (in which case the parties may also choose to appoint an expert instead);

(ii) A single mediator may not be sufficiently familiar with the law and trade usages, languages or cultures with which an international transaction is connected; or

(iii) Multiple parties are involved.

31. Certain sets of mediation rules provide for the involvement of an appointing authority when the parties cannot agree on a mediator. In these cases, the parties may request an institution or a person to recommend a suitable mediator or to directly appoint the mediator.<sup>10</sup> In recommending or appointing an individual to act as mediator in international mediation, the appointing institution or person may consider whether it is necessary to choose a mediator of a nationality other than the nationalities of the parties and should strive to respect gender and geographical diversity.

### **(b) Availability, skills and background**

32. When selecting a prospective mediator, the parties may consider the following elements:

(i) Availability;

(ii) Training and experience in the field of mediation and ability to conduct the mediation;

(iii) Background such as nationality and legal tradition;

(iv) Any relevant accreditation and/or certification awarded by a recognized professional mediation standards body; and

(v) Professional expertise and qualifications, including expertise in the subject matter in controversy, languages and technical skills.

### **(c) Ethical requirements**

33. A mediator usually shall be independent and impartial, and shall not have any professional, financial or other interest in the dispute and its outcome.

34. From the time of appointment and throughout the mediation, a mediator is usually required to disclose any circumstances likely to give rise to justifiable doubts as to her/his impartiality. If the parties have been informed of potential

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<sup>10</sup> For example, the UNCITRAL Mediation Rules foresee in article 3 that the parties can refer to an institution or a person for the selection of a mediator, which the parties may subsequently appoint.



conflicts of interests and have given their informed consent to appoint the mediator, the mediator can proceed with the mediation.

35. Many jurisdictions do not allow the mediator to act as an arbitrator or judge in a dispute that was or is the subject of the mediation or for another dispute that has arisen from the same or any related contract or legal relationship, unless otherwise agreed by the parties. Laws and mediation rules also often foresee that the mediator shall not act as a representative or counsel of a party in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that is the subject of the mediation.

### **3. Preparatory steps**

#### **(a) Terms of reference, fees and other costs**

36. Once a mediator is selected by the parties, the appointment of the mediator should be confirmed. The parties may send an appointment letter to the mediator. It is also common for the parties and the mediator to sign terms of reference which cover various elements of the mediation and mediators' involvement in the process. The terms of reference may contain an outline of the dispute, relevant rules determining the conduct of the mediation, such as the ethical standards applicable to the mediator and relevant disclosure obligations as well as the parties' agreement regarding confidentiality (see below, paras. 45–51).

37. The parties and the mediator should agree at the outset on the determination and allocation of the fees of the mediator and the mediation costs. The costs of mediation usually include:

- (i) The fees of the mediator;
- (ii) The fees of the institution administering the mediation, if any;
- (iii) The expenses incurred by the mediator, such as for travel, accommodation and administrative support, if not directly covered by the parties;
- (iv) The expenses occurred by experts, if any; and
- (v) Other expenses including translation and interpretation costs.

38. The mediator may require the parties to deposit an amount as an advance for costs and may suspend the mediation until such a deposit is paid. Mediation rules often have provisions regarding these matters, including whether the deposit should be made in equal amounts by the parties and the consequences of the failure of a party to make the required payment.<sup>11</sup> Where the mediation is administered by a mediation institution, the institution's services may include fixing the amount of the deposit as well as holding, managing and accounting for deposits. If the mediation institution does not offer such services, the parties or the mediator will have to make necessary arrangements, for example, with a bank or other external provider. In any case, it is useful to clarify matters, such as the type and the location of the account in which the deposit will be kept, how the deposit will be managed and whether interest on the deposit will accrue.

39. Regulatory restrictions may have an impact on the handling of deposits of costs, such as restrictions in professional and ethical codes, financial regulations relating to the identity of beneficiaries and restrictions on trade or payment.

40. Allocation of costs is usually agreed by the parties or provided for in the applicable mediation rules. Generally, if no allocation method is agreed upon, costs in respect of the mediation are borne by the parties in equal shares.<sup>12</sup> In

<sup>11</sup> See, for example, article 11, paragraphs 3 to 5 of the UNCITRAL Mediation Rules.

<sup>12</sup> See, for example, article 11, paragraph 2 of the UNCITRAL Mediation Rules.

multiparty proceedings, an agreement on “equally sharing costs” would need to be further specified.

**(b) Administrative assistance**

41. The mediator may need administrative support to facilitate the conduct of the mediation. The parties, or the mediator with the consent of the parties, may arrange for administrative assistance by a suitable person or institution.

**(c) Parties’ attendance and representation**

42. If a party has a limitation on the authority to settle (for example, where any settlement will need to be approved by a board of directors, a ministerial committee or an insurer), the party should, at the outset, inform the mediator and the other parties of this limitation. This allows the mediator to discuss these issues with the parties in advance of the mediation. Producing a power of attorney may be required.

43. Participants in the mediation may include persons who can assist in the resolution of the dispute. They should be agreed by the parties.

44. It is common, particularly in international disputes, for a counsel to assist parties in some or all parts of the mediation process. Legal representation is not required in all cases as negotiation between the parties is generally interest based and not limited to legal considerations. Participation by counsel is recommended where there is a need to ascertain the party’s legal rights and obligations, analyse the legal implications of offers and options for settlement and draft the settlement agreement.

**(d) Addressing confidentiality**

45. It is advisable for the parties to consider at the outset of the mediation the extent to which they wish the mediation to remain confidential, and to check the applicable law and rules to ensure that the confidentiality obligations are clearly spelled out and sufficiently safeguarded. The parties should consider agreeing on how confidentiality should be dealt with, covering the following aspects.

*The mediator and those involved in the mediation*

46. The mediator is generally expected to keep the mediation, including any information related to, or obtained during, the mediation, confidential. The duty of confidentiality usually not only applies to the mediator but also to others involved in the mediation (such as those representing or assisting the parties as well as those providing administrative support). It is advisable that all those involved in the mediation should be covered by a confidentiality agreement.

*Between the parties*

47. The parties may agree on the desired confidentiality regime to the extent not precluded by the applicable law. They may determine the extent to which the mediation itself and any information exchanged or disclosed during the mediation should remain confidential.

48. An agreement on confidentiality may cover one or more of the following matters: (a) the material or information that is to be kept confidential (for example, the fact that the mediation is taking place, the identity of the parties and the mediator, written and oral communications, the content of the settlement); (b) measures for maintaining the confidentiality of such information and the duration of the obligation on confidentiality; (c) circumstances in which confidential information may be disclosed in whole or in part to the extent necessary to protect a legal right; and (d) other circumstances in which such disclosure might be permissible (for example,

information in the public domain, or disclosures required by law or a regulatory body).

*Between the parties and the mediator during the mediation*

49. The parties should agree on how the mediator will deal with the information received from a party during the mediation. For example, the understanding could be that the mediator may disclose the substance of that information to any other party to the mediation where such disclosure is likely to assist the parties in resolving their dispute. However, when a party gives information to the mediator, subject to a request that it remains confidential, such information shall not be disclosed to any other party to the mediation.<sup>13</sup>

*Admissibility of evidence in other proceedings*

50. Any documents prepared primarily for the mediation, any suggestions made regarding the settlement, or any admissions made by a party in the mediation should not be admissible as evidence in arbitral, judicial or other dispute resolution proceedings.

51. The inadmissibility of evidence in other proceedings is to ensure that no party has a disadvantage resulting from her/his openness regarding substantive information or views expressed to bring the parties closer to settlement. The inadmissibility of communications and information exchanged in the mediation as evidence and the inability to call a mediator as a witness in any post-mediation procedure should cover all subsequent proceedings that relate to the dispute that is or was the subject matter of the mediation. Nevertheless, such information usually may be disclosed or admitted as evidence if required under the law or for the purposes of implementation or enforcement of a settlement agreement.

**(e) Determining the location and the timing of the mediation**

52. The parties should determine, at the outset, where the mediation will take place. When deciding on meeting locations, the following may be considered:

- (i) The convenience and neutrality of the location for the parties and the mediator, including travel to the location;
- (ii) The availability and cost of support services; and
- (iii) Whether the venue includes separate rooms for each party and a large room for holding joint meetings with all parties.

53. Mediation can also be conducted fully or partially online, limiting the contact between the parties and the mediator to virtual meetings. In these cases, the determination of the applicable law may be affected, and thus predetermination of the law applicable to the mediation process and the settlement agreement might be of particular importance.

54. The parties can determine the timing, including agreeing on a time-table and time frame for the mediation, so as to be able to be properly prepared.

**(f) Agreeing on the language of the mediation**

55. The parties normally also agree on the language or languages in which the mediation will be conducted. When multiple languages are to be used during the mediation, the parties and the mediator need to decide whether the languages are to be used interchangeably without any translation or interpretation, or whether some documents and communications (or some relevant sections thereof) need to be translated into all languages.

<sup>13</sup> See, for example, article 9 of the Model Law on Mediation.

#### **4. Conduct of the mediation**

##### **(a) Role of the mediator**

56. In general, the role of mediators is to build trust between the parties and in the process so as to reach a settlement of the dispute. Mediators aim, at the outset, to create a safe, neutral and supportive atmosphere for effective negotiation. Mediators apply varying degrees of influence in accordance with the parties' expectations, the circumstances of the case and different practices. The neutral status of mediators makes them uniquely qualified to react to parties' allegations and arguments and aids the parties in assessing the credibility of their positions. Mediators also assist the parties in identifying and prioritizing their needs and interests, leading to informed negotiations and tailor-made solutions to the dispute.

57. Mediators have a variety of methodological techniques and tools at their disposal to overcome deadlocks and move the process forward. Throughout the mediation, mediators assist the parties and provide guidance on the discussions, often helping the parties to think innovatively, thereby empowering them to consider a range of possible outcomes and find solutions, including creative or otherwise suitable solutions, which might not be available in court or arbitration.

##### **(b) Initial consultations**

58. Once a mediator is appointed, the parties and the mediator typically hold a preparatory meeting (which can take place in person or remotely, for example, through a conference call), during which the parties and the mediator work out the best arrangements for the case, including the procedural conduct (the parties may choose from the variety of rules available and adapt them to their needs)<sup>14</sup> and logistical matters. Such initial consultations are intrinsic to the consensual nature of mediation and are normally undertaken with respect to most organizational decisions addressed in the Notes, in particular those covered under Note 3 (Preparatory steps). If the parties have agreed on these matters before the mediation starts, or even in a pre-dispute mediation agreement, the parties may then confirm their decisions.

59. Further, the initial consultations help clarifying the parties' expectations on the conduct of the mediation and allow the parties to assess whether the mediator's approach, methods and style fit to the dispute at stake, and to assess the reasonableness of the fees and costs involved. Therefore, initial consultations are crucial, even in an institutional mediation where logistical issues might have already been taken care of.

60. If the parties have not agreed on a procedure to be followed by the mediator or on a set of mediation rules to govern the mediation, the mediator and the parties can design the procedure together. The parties may leave it to the discretion of the mediator to determine how the mediation should be conducted, subject to mandatory provisions of any applicable law. In particular, at an early stage, the parties occasionally may have difficulties agreeing on procedural matters, and may request the mediator to decide on those matters. Some mediators consider that engaging the parties on routine procedural matters is a first and necessary step to establish confidence in the process.

61. The parties should seek to clarify various questions at an early stage of the mediation, including whether the mediation constitutes a bar to initiate arbitral, judicial or other dispute resolution proceedings. They may also consider questions regarding the legal framework for the conclusion, implementation and enforcement of a settlement agreement.

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<sup>14</sup> See, for example, article 7, paragraph 1 of the Model Law on Mediation. Examples of the "set of rules" that may be agreed upon by the parties to organize the conduct of the mediation include the UNCITRAL Mediation Rules and rules of mediation institutions.

**(c) Submissions and supporting documents**

62. The parties are free to agree on how the information on their case should be provided to the mediator and in what form. As part of the mediation process, the parties usually exchange short papers (sometimes called position papers, mediation statements, briefs or case summaries).

63. If any such written summary is prepared, it is usually meant to be used only in mediation with a view to finding a settlement and it is not meant to be used in any further litigation. The summary may be submitted by each party or jointly, and it would usually contain:

- (i) The dispute history;
- (ii) An explanation of the issues; and
- (iii) What the party seeks to obtain in mediation.

64. The parties may agree on documents to be provided that will support their arguments or clarify the dispute. Such documentation may include contracts and correspondence, as well as any other relevant information.

65. The parties and the mediator may consider whether it would be helpful to agree on practical details such as the form in which the information will be conveyed (for example, in hard copy, electronic form or through a shared platform), including their format (for example, specific electronic format, with search features).

66. The use of electronic means of communication can make the mediation more expeditious and efficient. However, it is advisable to consider whether all parties have access to, or are familiar with, such means. The parties and the mediator may need to consider issues of compatibility, storage, access, data security as well as related costs when deciding on electronic means of communication. The parties and the mediator also need to ensure that electronic communications are adequately protected.

**(d) Mediation sessions and active negotiations**

67. A solid understanding of key facts and possible outcomes should emerge from the mediation process. To that end, the mediator usually organizes one or several meetings, in person or remotely by using, for example, an appropriate platform that allows for joint and private meetings (referred to as “mediation sessions”). It may be advisable for the mediator, in consultation with the parties, to determine the time to be allocated to the mediation sessions.

68. Such mediation sessions may be held with all parties present or may be held separately with each party alone (often referred to as caucus) or a combination of both joint and private meetings. For example, a mediator may start with a joint meeting where the parties discuss their views on the dispute and then caucus with the parties separately. Ex parte communications are not prohibited and, on the contrary, are considered useful in mediation. However, the mediator is expected to maintain a fair treatment of the parties and to disclose to any other party that an ex parte communication is taking place. Fair treatment does not mean equal treatment, as a mediator may need to spend more time with one party than the other. It is recommended that the parties participate in mediation sessions.

69. The number of mediation sessions and their duration depend on the complexity of the issues and can be adjusted to the case and the approach favoured by the mediator and the parties. For exploring the issues and identifying a lasting and sustainable solution, taking the necessary time is critical.

70. In complex mediations, more attention is required regarding the organization of mediation sessions. Following the prior and express consent by

the parties, interested stakeholders and/or experts may be invited to attend and participate as necessary. The issue of maintaining confidentiality in such cases needs to be addressed, e.g. by confidentiality agreements.

## **5. Settlement agreement**

### **(a) Settlement proposals**

71. The mediator cannot impose a settlement on the parties, but she/he will assist the parties in reaching an amicable settlement of their dispute. Settlement proposals can be made directly between the parties or through the mediator.

72. The mediator may, if requested by the parties, recommend terms of settlement.

### **(b) Drawing up the settlement agreement**

73. If the parties agree to settle their dispute, they will prepare a settlement agreement. Depending on the applicable law, the mediator may, if so requested, assist the parties in preparing the settlement agreement, for example by providing a summary of the agreed terms. Usually, settlement agreements are made in writing; it is advisable for the parties to check how this requirement can be satisfied.<sup>15</sup>

74. The settlement agreement should be clearly worded, for example, the conditions of performance should be unambiguously identifiable.

75. When agreeing on the law applicable to the settlement agreement, and when considering the place where the obligations in the settlement agreement are connected to, the parties may keep in mind the legal consequences attached thereto, as well as more generally the legal framework, including the Singapore Convention on Mediation.

### **(c) Enforceability**

76. Generally, the parties comply voluntarily with the obligations set forth in the settlement agreement. Nevertheless, the parties should consider any requirement as to the form (including language requirements), content, filing, registering or delivering of the settlement agreement set forth by the applicable mediation law, the relevant law at the place(s) of enforcement and the applicable mediation rules.

77. If necessary, the settlement agreement may be enforced in accordance with the procedure of the State in which enforcement is sought. Such procedure varies in different jurisdictions.

78. States that are party to the Singapore Convention on Mediation and States that have enacted legislation based on the Model Law on Mediation presumably follow the enforcement procedure defined therein. While drafting the settlement agreement, the parties may take note of the relevant provisions and requirements under the Singapore Convention on Mediation and the Model Law on Mediation.<sup>16</sup> A list of reservations made by State parties under article 8 of the Convention can be found on the UNCITRAL website.<sup>17</sup>

<sup>15</sup> For example, article 16, paragraph 6 of the Model Law on Mediation provides as follows:

“A settlement agreement is ‘in writing’ if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.”

<sup>16</sup> See, in particular, articles 4 and 5 of the Convention and articles 18 and 19 of the Model Law.

<sup>17</sup> Under article 8(1)(a) of the Singapore Convention on Mediation, a State Party may declare that it shall not apply the Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration; under article 8(1)(b) of the Singapore Convention on Mediation, a State Party may declare that it shall apply this Convention only to the extent that

79. It is advisable that the parties state their understanding that the settlement agreement can be used as evidence that resulted from mediation, and that it can be relied upon for seeking relief under the applicable legal framework.

## **6. Termination of the mediation**

80. After the parties have engaged in mediation, the mediation is usually terminated by:

(i) The conclusion of a settlement agreement by the parties, on the date of the agreement;

(ii) By a declaration of the mediator, after consultation with the parties, if the required deposits are not paid in full by all parties within a reasonable period set by the mediator, on the date of the declaration;

(iii) A declaration of the mediator, after consultation with the parties to the effect that further mediation efforts are no longer justified on the date of the declaration;

(iv) A declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration;

(v) A declaration of a party to the other party or parties and the mediator, if appointed, to the effect that the mediation proceedings are terminated as to that party, on the date of the declaration; or

(vi) At the expiration of a defined period in the applicable international instrument, court order or mandatory statutory provision, or as agreed upon at the outset by the parties.

81. It is advisable that any termination be clearly and unambiguously recorded as it may constitute the starting point of subsequent procedures or it may have an impact on the running of limitation periods applicable to the claim that is the subject matter of the mediation.

## **[7. Mediation in the investor-State dispute settlement context<sup>18</sup>**

82. Mediation is an efficient and cost-effective dispute resolution mechanism for disputes that arise between an investor and a State. Mediation is increasingly provided for in investment treaties as a step or condition precedent to the filing of a court action or arbitration in investor-State dispute settlement. Mediation can be efficiently used during the “cooling-off period”,<sup>19</sup> as well as in parallel track during or even after arbitral, judicial or other dispute resolution proceedings have been commenced or concluded. The following specific issues arise in the investor-State dispute settlement context and should be envisioned at the start of the mediation.

### **(a) Selection and appointment of a mediator**

83. Unless the investment treaty provides otherwise, the parties are generally free to select and appoint one or several mediators. This choice may take into account different factors, such as nationality, previous experience in governmental affairs or investment dispute resolution, relevant accreditation, gender and geographic diversity, as well as cross-cultural dimension of the

the parties to the settlement agreement have agreed to the application of the Convention.

<sup>18</sup> When reviewing the draft notes, the Working Group did not decide whether the section on mediation in the investor-State dispute settlement context should be kept or deleted. The issue will need to be further considered by the Commission, see A/CN.9/1049, para. 69.

<sup>19</sup> A “cooling-off period” in investment treaties is a period between the notification of the claim to the opposing party and the initiation of the dispute resolution proceedings. Negotiations usually take place during this period with a view to reaching an amicable settlement.

dispute. Since investment disputes tend to be complex, the parties sometimes consider whether to appoint two co-mediators rather than a sole mediator.

84. Either because it is provided for by the investment treaty or by agreement of the parties, the dispute may be referred to a mediation institution specialized in investor-State dispute settlement. Such institutions offer pools of qualified and well-respected mediators along with providing administrative support to the proceedings.

**(b) Confidentiality and transparency**

85. In determining their confidentiality obligations, the parties should be aware of any transparency obligations that may apply in the context of investor-State dispute settlement.

**(c) Third parties**

86. A dispute may affect and concern the civil society and/or other interested stakeholders. Third parties may be allowed by the parties to participate in the mediation and make submissions, if they meet certain criteria as agreed by the parties. If the parties have agreed that third parties may attend mediation sessions, the mediator and the parties should be mindful of the interests that are represented and the authority of each representative. In allowing third parties participation, confidentiality obligations need to be addressed.

**(d) Authority to settle**

87. In the investor-State dispute settlement context, as mediation invariably involves public bodies, the necessary approval process needs to be identified and considered throughout the mediation.]

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