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Dispute settlement: Draft UNCITRAL mediation rules and notes on mediation

Compilation of comments from Governments

Note by the Secretariat

Contents

	<i>Page</i>
I. Introduction	2
II. Compilation of comments from Governments	2
1. Italy	2
2. Poland	4
3. Thailand	5
4. Iraq	6



I. Introduction

1. At its fifty-first session, in 2018, the Commission noted that, in the area of dispute settlement, the Secretariat would prepare notes on organizing mediation proceedings and update the UNCITRAL Conciliation Rules¹ in the light of the two texts finalized by the Commission at that session (the United Nations Convention on International Settlement Agreements Resulting from Mediation, adopted by the General Assembly in December 2018², and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation).³

2. At its fifty-second session, in 2019, the Commission had before it the draft UNCITRAL mediation rules (A/CN.9/986) and the draft UNCITRAL notes on mediation (A/CN.9/987) prepared by the Secretariat in broad consultation with experts. Acknowledging that the Commission would not be in a position to adopt the draft mediation texts at that session, it was agreed that the Commission would consider both texts, as revised by the Secretariat to take account of further comments, at its next session, in 2020.

3. The present note reproduces comments received from Governments on the revised draft UNCITRAL mediation rules (A/CN.9/1026) and the revised draft UNCITRAL notes on mediation (A/CN.9/1027), with formatting changes.

II. Compilation of comments from Governments

1. Italy

[Original: English]
[Date: 14 April 2020]

Revised draft UNCITRAL mediation rules

Article 1 – Application of the Rules

[1] Parties could refer to mediation to avoid disputes: this should be reflected in the text of article 1. In fact, it could be useful to introduce at this point the idea that mediation is a good tool for resolving disputes, but it is also great to prevent disputes, at an earlier stage.

Article 2 – Commencement of mediation

[2] In relation to the provision “If a party that invited another party to mediate does not receive ...”, the date of dispatch of the reply is important. The term “invitation was sent” should be replaced by “by registered post with acknowledgement of receipt”, to give more certainty at the end of the thirty-day period.

Article 3 – Number and appointment of mediators

[1] The meaning of the word “jointly” would need to be clarified. Does it mean that the mediators have plenary power or have to hold caucuses? Does it mean that each mediator cannot speak separately with parties, or that both mediators have to follow plenaries and caucuses together?

[3 (b)] In regard to the phrase “The parties may agree that the selection shall be made directly by the selected authority, in which case the parties shall subsequently appoint the selected mediator”, it should be provided for the possibility that the appointment

¹ *Official Records of the General Assembly, Thirteenth Session, Supplement No. 17 (A/35/17)*, chap. V, sect. A, para. 106. See also UNCITRAL Yearbook, vol. XI: 1980, part three, annex II.

² General Assembly resolution 73/198. See also *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 49 and annex I.

³ *Ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 254.

of the selected mediator is also “by tacit consent”. The expression “within the deadline established by the institution” should be added at the end of the sentence.

[4 (a)] In regard to the phrase “including expertise in the subject matter in controversy”, the requirement of expertise in the disputed matter is not shared by all the mediation experts. It would entail that the mediator “knows” the solution because s/he has expertise. Perhaps it should be stressed that the mediator is an expert in conflict management first of all and should also have expertise in conflict management on the specific subject matter of the dispute.

Article 4 – Conduct of mediation

[4] It should be clarified that the mediation can take place through the use of electronic means of communication and remotely too, unless otherwise agreed between the parties or based on consent of the participants.

Article 8 – Settlement agreement

[2] This provision should ensure more consistency with article 4 (2) of the Singapore Convention on Mediation, which provides for some conditions under which the settlement can be concluded by electronic communication and the signatures are not necessary (see also paras. 54 and 65 of document [A/CN.9/1027](#)).

Article 11 – Costs and deposit of costs

[2] It might be useful to insert an example list of “all other expenses” (i.e. translation of documents, interpreting services, travel and accommodation costs for the parties and for the translators or interpreters or even technical advice when needed).

Revised draft UNCITRAL notes on mediation

Main features of mediation

[4] It could be appropriate to add a dispute avoidance mechanism.

Selection and appointment of a mediator

(a) How to select and appoint a mediator

[30 (i)] Where expertise is needed in more than one area of the dispute, the parties may appoint a neutral technical expert, the mediator being an expert in conflict management first of all. It could be inappropriate to mix the two roles.

Conduct of Mediation

(d) Mediation sessions and active negotiations

[69] In relation to the “interested stakeholders” that may be invited to attend and participate in the mediation, they should have the same duty of confidentiality as the other participants.

Settlement agreement

(b) Drawing up the settlement agreement

This section is not relevant for the purpose of this document and should be deleted.

Mediation in the investor-State dispute settlement context

(a) Selection and appointment of a mediator

[83] It is not clear why investment disputes need to be referred to specialized institutions.

2. Poland

[Original: English]
[Date: 14 April 2020]

Revised draft UNCITRAL mediation rules

Article 1 – Application of the Rules

[1] We suggest changing the provision as follows: “The Rules may apply during the whole process of mediation.”

[4] We suggest changing the provision as follows: “If this does not interfere with the mediation process.”

Article 3 – Number and appointment of mediators

[4 (d)] We suggest changing the provision as follows: Such considerations (...) and “neutral” mediator.

Article 4 – Conduct of mediation

[1] We suggest changing the provision as follows: The parties may agree on the manner “and the place” in which the mediation is to be conducted.

Article 5 – Communication between the parties and the mediator

We suggest adding paragraph 4: “If the parties speak other languages, a sworn translator or sworn translators who know the languages of the parties should participate in the mediation.”

Article 8 – Settlement agreement

[1] We suggest adding: “or prepare a draft settlement” at the end of the second sentence.

Article 11 – Costs and deposit of costs

[1] We suggest changing the provision as follows: “The method for fixing the costs of mediation should be agreed upon by the parties and the mediator before first mediation proceedings.”

Article 12 – Role of the mediator in other proceedings

We suggest splitting the article into 2 paragraphs, as below: “1. 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 is related to the mediation. 2. The parties shall not present the mediator as a witness in any such proceedings.”

Article 13 – Exclusion of liability

We suggest changing the provision as follows: “Unless otherwise agreed by the parties and mediator”.

Revised draft UNCITRAL notes on mediation

Voluntary process based on party autonomy

[10] We suggest the following modification: “(...) the parties are usually free to (...) – Terminate their own needs and expectations.”

Mediation laws

[13] We suggest the following modification: “The mediator is to assist the parties in communication and finding a solution by them.”

List of matters for possible consideration in organizing a mediation**Selection and appointment of a mediator**

[c 33] We suggest the following modification: “The mediator should not be a family member of either party.”

Preparatory steps**Addressing confidentiality – Between the parties**

[47] We suggest the following modification: “Unless otherwise agreed by the parties, the entire process is confidential.”

Determining the location of mediation

[e 52] We suggest the following modification: “The parties should choose neutral place for each of them.”

Settlement agreement – Drawing up the settlement agreement

[72] We suggest to add “or prepare a draft settlement” at the end of the second sentence.

Mediation in the investor-State dispute settlement context – Third parties

[85] We suggest the following modification: “Third parties have to keep confidentiality.”.

3. Thailand

[Original: English]

[Dates: 15 and 24 April 2020]

Revised draft UNCITRAL mediation rules

The term “neutral” in article 1, paragraph 2, should be replaced by “independent and impartial” in order to make it consistent with article 3, paragraph 4 (c) which uses the term “... appointment of an independent and impartial mediator”.

The term “declaration” in articles 9(b)–(d) should be changed to “written declaration”. This would create clarity and certainty when determining the exact termination date of the mediation process, which might affect the initiation of other dispute settlement mechanisms, especially in a multi-tier alternative dispute resolution, or statute of limitations of relevant case.

Thailand would like to suggest an amendment of article 11, paragraph 1 (d) to include the cost of administrative assistance, since the cost of mediation may also include the cost of administrative assistance by a suitable institution or person as mentioned in draft article 4, paragraph 3 (b) of the Rules. The subparagraph may be amended as “(d) The cost of any assistance provided pursuant to article 3, paragraph 3, and article 4, paragraph 3 (b) of the Rules.” This amendment will bring the provisions involving the cost of mediation of the draft Rules to be in line with article 17 and article 18 of the 1980 UNCITRAL Conciliation Rules, as clarified by the Secretariat in its annotations of the draft Rules.

In order to maintain the consistency of the guidelines and the standards of the UNCITRAL alternative dispute resolution mechanism, Thailand supports that standard declarations of independence, impartiality and availability of the mediator

should be provided in the annex to the draft Rules, along the same line as those provided in the annex to the UNCITRAL Arbitration Rules.

The term “reasonable in amount” should remain in article 11, paragraph 1 (a) because it is in line with article 17 of the 1980 UNCITRAL Conciliation Rules and could also serve as a guideline for mediators that their compensation should be reasonable and not be an undue expense on disputing parties.

Thailand is of the view that the use of the draft Rules would increase the harmonization of the international mediation mechanism. We, therefore, encourage the preparation of recommendations on how to adjust the draft Rules for use by mediation institutions.

Thailand would like to seek clarification regarding its previous suggestion on the consequences of the replacement of mediations pursuant to article 3, paragraph 2. We would like to suggest that any reason for excluding the consequences should reflect in the annotations for future reference

Revised draft UNCITRAL notes on mediation

Thailand suggests that paragraph 79 of the draft Notes concerning the termination of mediation should also include the failure to make a required deposit as one of the causes of termination of mediation proceedings, since article 9 (d) of the draft Rules provides that the mediator may unilaterally declare the termination of mediation proceedings in the event where the required deposits are not made in full by the parties. We would like to seek clarification whether there is any reason for the exclusion. However, if the failure to make a required deposit is not a common cause for the termination of mediation proceedings, we would then have no objection to such exclusion.

4. Iraq

[Original: Arabic]
[Date: 14 May 2020]

Revised draft UNCITRAL notes on mediation

1. In article 1, paragraph 1, the words “whether contractual or not” should be suppressed as they are superfluous and can be rephrased in the draft annotations.
2. Article 3, paragraph 7, should be amended to read as follows: “The prospective mediator shall make a written application expressing his or her availability to accept the mediation. Therein the mediator shall declare that he or she has no personal interest that might affect the outcome of the dispute nor any interest of the State whose nationality he or she holds, if the two parties in the dispute are of different nationalities.” In our view, the reference in the original text to the availability of the mediator to conduct the mediation is unclear.
3. Article 4, paragraph 4, should be amended to read as follows: “Each party in the dispute shall identify a person to represent them in the mediation process. The name of such person and a precise description of their functions shall be communicated in writing to all parties and to the mediator in advance of the mediation.” The original text was not clear-cut in that regard.
4. Article 5, paragraph 3, should be amended to read as follows: “When the mediator receives any information from a party concerning the dispute, the mediator shall keep such information confidential, unless the relevant party expressly indicates that the information is not subject to the condition that it should be kept confidential.” The reason for this is that the original wording of “is expected to” is not clearly binding and should, therefore, be replaced.

5. In article 10, paragraph 2, the words "... to the extent necessary for a party, in its opinion, to preserve its rights" should be suppressed because they conflict with the undertaking not to initiate judicial proceedings.

6. Article 11, paragraph 1, should be reworded to read as follows: "The method for fixing the costs of mediation shall be agreed upon by the parties and the mediator before the mediation process begins. Upon termination of the mediation, the mediator shall fix the costs of the mediation and give written notice thereof to the parties ...". The purpose of this proposed amendment is to protect the economic rights of the mediator, as the original wording did not oblige the parties to satisfy the mediator's rights within a set time.
