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## **Dispute settlement: Draft UNCITRAL mediation rules and notes on mediation**

### **Compilation of comments from Governments**

#### **Note by the Secretariat**

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## II. Compilation of comments from Governments

### 6. Singapore

[Original: English]

[Date: 29 April 2020]

#### I. Comments on the Draft UNCITRAL Mediation Rules 2020 (“the Draft Rules”), with reference to:

- Note by the Secretariat on International Commercial Mediation: Draft UNCITRAL Mediation Rules (“Note by Secretariat”);
- UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (“Model Law”); and
- United Nations Convention on International Settlement Agreements Resulting from Mediation (“the Convention”).

#### Article 1(2)

Paragraph 8 of the Note by Secretariat states that the definition of mediation is meant to mirror the definition contained in the Model Law.

However, we note that the definition of the process of mediation under Article 1(2) of the Draft Rules which defines the process of mediation, differs slightly from the definition provided for in the Model Law. Article 1(2) of the Draft Rules uses the word “neutral”, which the Model Law does not. In contemporary definitions of the word “mediation” and “mediator”, the word “neutral” is less common. The word “neutral” also does not appear elsewhere in the Draft Rules. Focus should rather be given to the principle of empowering party autonomy and terms such as “impartial” and “independent”.

#### Article 1(4)

The ability for parties to agree to exclude or vary any provision of the Draft Rules at any time is useful as it provides flexibility for the multitude of scenarios that can arise during the mediation process.

However, issues may arise in relation to some of the provisions, e.g. those that grant the mediator the power to make his or her own decisions. In theory, the parties may decide to vary those provisions, even those which can be seen as provisions that are protective of the mediator. For example, would parties be able to vary Article 9(d) of the Draft Rules so as to oust the mediator’s right to declare a mediation as terminated? See also Articles 11(3)-(5) of the Draft Rules, for example. We query whether there would be recourse for the mediator in such cases.

#### Article 2(2)

Article 2(2) of the Draft Rules requires the invitation to mediate be “written”, while Article 5(2) of the Model Law does not specify that the invitation has to be in this form.

We note that paragraph 13 of the Note by Secretariat states that this rule addresses the invitation to mediate, and 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. If flexibility is an objective of the rule, we query whether it would be necessary to specify that the invitation has to be written, given that there may be other modes through which the invitation is communicated, e.g. verbal or through an electronic communication etc.

**Article 3(4)**

We note that the word “controversy” is used in Article 3(4)(a) of the Draft Rules whereas the word “dispute” is used in the Convention. For the purposes of consistency, we suggest using the word “dispute” instead of “controversy”.

**Article 3(6)**

There is a linkage between Article 3(6) of the Draft Rules and Article 5(1)(f) of the Convention. We suggest that it would be useful for the Note by Secretariat to reflect this linkage, for instance, at paragraph 17 of the Note by Secretariat.

**Article 4(2)**

We suggest deleting the phrase “seek to” in Article 4(2) of the Draft Rules as the mediator shall maintain fair treatment of the parties at all times.

**Article 4(4)**

The use of the word “represented” in the first sentence of Article 4(4) could be interpreted to mean that the presence of a party is not required at the mediation.

Hence, for clarity, we suggest an additional sentence: “**To avoid doubt, parties are required to be present at mediation, even where representatives or others also attend.**” It would also be useful to include this clarification in the Note by Secretariat.

**Article 5(3)**

The approach in Article 5(3) of the Draft Rules differs from the approach taken in Article 9 of the Model Law.

Under Article 5(3) of the Draft Rules, the default position is for the mediator to keep information received by him from a party to the dispute confidential, unless that party indicates that the information is not subject to the condition that it should be kept confidential, or the party expresses its consent to the disclosure of the information. In comparison, Article 9 of the Model Law states this in the reverse, i.e. the default position is that the mediator may disclose the information to any other party to the mediation, unless that party subjects the information disclosed to a specific condition that it be kept confidential.

Article 5(3) of the Draft Rules is preferred as it makes the information shared by a party to the mediator confidential by default. We suggest that it would be helpful to point out this difference in the Annex to the Draft Rules and in the Note by Secretariat, for instance, at paragraph 21 of the Note by Secretariat.

**Article 6**

We suggest clarifying that this provision on confidentiality would also apply to the administrators of an online dispute resolution platform.

Further, we agree that confidentiality attaches to the mediation process. We query whether the default position should be that confidentiality automatically attaches to the settlement agreements within the parameters of Article 6 of the Draft Rules, or whether the default position should be that confidentiality is not attached to the settlement agreement unless the parties choose to include a confidentiality clause. Similar to our previous comment on Article 5(3), we prefer a default position of confidentiality.

**Article 7(5)**

We query whether Article 7(5) of the Draft Rules can apply or take effect if the law applicable to parties does not provide for this.

This Article 7(5) also appears to contradict Article 12 of the Draft Rules, which states, “...The parties shall not present the mediator as a witness in any such proceedings”.

In our view, Article 7(5) should be deleted. The mediator should not be in a position to be a judge of parties' behaviour. This fundamentally changes the dynamic between the parties and the mediator.

#### **Article 8(2)**

Article 8(2) of the Draft Rules makes reference indirectly to the Convention. Also, Article 4(2) of the Convention refers to further evidence which can show that the settlement agreement resulted from mediation, for example, signature of the mediator or an attestation by the institution that administered the mediation.

We suggest that it would be useful to reflect this in Article 8 of the Draft Rules, perhaps in a new paragraph.

#### **Article 9**

Article 9(a) of the Draft Rules refers to the "signing" of a settlement agreement in line with language used in the Convention. However, Article 12(a) of the Model Law refers to the "conclusion" of a settlement agreement. We suggest amending the word "signing" to "conclusion". The word "conclusion" is broader and covers all the situations, whereas the word "signing" is narrower. We note that in some jurisdictions, settlement agreements may be valid without signature in certain circumstances.

We suggest Article 9(c) of the Draft Rules should read: "By a declaration of a party to the other party **or parties** and the mediator" (addition in bold and underlined) to accommodate a multi-party mediation, which is in line with Article 12(d) of the Model Law.

Article 9(b), (c), (d): We suggest specifying the requirement for the declarations in Articles 9(b), (c), and (d) to be in writing.

#### **Article 10(2)**

We suggest the inclusion of the words, "**Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings**" at the end of Article 10(2) of the Draft Rules for clarity, if the intention is for this to reflect Article 14 of the Model Law.

#### **Article 11**

There is a typographical error in Article 11(1) of the Draft Rules –; "gives" should be amended to "give".

Article 11(1)(a) of the Draft Rules states that the fees of the mediator shall be "reasonable" in amount. We note that paragraph 32 of the Note by Secretariat poses the question whether the reference to the "reasonable amount" of the mediator's fees in Article 11(1)(a) is useful. We suggest that in order to avoid disagreement as to what would be seen as "reasonable", it may be useful to give guidance on this, for example, making reference to factors such as the mediator's charge-out rates as previously agreed upon with the parties, the duration of the mediation, etc.

Article 11 of the Draft Rules appears to focus on mediator fees. Article 11(1)(d) of the Draft Rules refers to the cost of any assistance provided pursuant to Article 3(3) of the Draft Rules, which refers to the parties' use of a selecting authority to appoint a mediator. It is not clear how the latter relates to costs that should be fixed by or paid to the mediator.

#### **Article 12**

The current wording in Article 12 of the Draft Rules "in respect of the dispute that is related to the mediation", is not clear. We suggest substituting the current wording with the phrase: "**in respect of a dispute that was or is the subject of the mediation proceedings or in respect of another dispute that has arisen from the same**"

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**contract or legal relationship or any related contract or legal relationship**” to clarify the restrictions on a mediator’s role in other proceedings.

We also highlight our comment on Article 7(5) above, which allows the mediator to give evidence on whether a party had participated in the mediation in good faith, provided that leave is obtained from the judicial, arbitral or other dispute resolution tribunal. As mentioned, Article 7(5) appears to contradict Article 12, and should be deleted. In the alternative, if Article 7(5) is to be retained, we suggest that Article 12 of the Draft Rules could be amended to include the words in bold and underlined: “Unless otherwise agreed by the parties **and/or without prejudice to article 7(5),....**”.

### **Article 13**

Given that the Draft Rules make reference to the roles of third parties, for example, the selecting authority, it is arguable that the exclusion of liability should also extend to those other parties who are involved in the mediation, apart from the mediator, such as translators.

Additionally, we suggest noting in the Annex to the Draft Rules the link with Article 5(1)(e) and Article 5(1)(f) of the Convention in terms of how they relate to mediator behaviour. While we note that the focus of the provisions differs (i.e. civil liability of mediators in the Rules and setting aside of settlement agreements in the Convention), they both deal with mediator conduct.

## **II. Comments on the Draft UNCITRAL Notes on Mediation (“the Draft Notes”)**

### *Paragraph 10*

The use of word “voluntary” is not necessary as its use might set up for the debate between mandatory-voluntary debate. Party autonomy is the important term to use.

The following change is suggested (in bold and underlined): “Mediation **remains voluntary, entirely** ~~relying~~ on party autonomy.”

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