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Settlement of commercial disputes

Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018)

Note by the Secretariat

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I. Introduction

1. At its fifty-first session, in 2018, the Commission adopted the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (referred to as the "Model Law on Mediation" or the "Model Law"), amending the Model Law on International Commercial Conciliation (2002) (referred to as the "2002 Model Law").[1]

2. The Commission may wish to recall that a Guide to Enactment and Use of the 2002 Model Law had been prepared by the Secretariat and adopted by the Commission at its thirty-fifth session, in 2002 (referred to as the "2002 Guide").[2] At its fifty-first session, in 2018, the Commission agreed that the Secretariat should be tasked with the preparation of a text (the "Guide") to accompany the Model Law on Mediation and replace the 2002 Guide. The Commission also agreed that the Guide should provide guidance on how section 2 (on the mediation procedure) and section 3 (on international settlement agreements) of the Model Law could each be enacted as a stand-alone legislative text.[3]

3. At its fifty-third session, the Commission requested Working Group II to review the draft mediation texts, including the draft Guide so as to facilitate a speedy adoption of those texts at the fifty-fourth session of the Commission in 2021.[4]

4. Accordingly, this note contains the draft Guide for consideration by the Commission, including informal comments received from States and as reviewed by the Working Group. References in the Guide to the UNCITRAL Mediation Rules and Notes on Mediation will be adjusted upon finalisation and adoption of those texts by the Commission.

II. Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018)

Background information

1. The UNCITRAL Model Law on International Commercial Conciliation (the "2002 Model Law") was prepared by the United Nations Commission on International Trade Law (UNCITRAL or the Commission) and adopted by consensus on 24 June 2002.[5] Subsequently, the General Assembly adopted resolution 57/18 of 19 November 2002 recommending that all States give due consideration to the enactment of the Model Law, in view of the desirability of uniformity in the law of dispute settlement procedures and the specific needs of international commercial conciliation practice.[6]

2. The 2002 Model Law provided a sound legislative basis on the procedural aspects of conciliation/mediation, but it did not contain uniform rules on the enforcement of settlement agreements resulting from conciliation/mediation (see para. 8 below regarding terminology). In 2014, a proposal was made to work on that question as one obstacle to greater use of mediation was that the enforcement of

[1] *Official Records of the General Assembly, Seventy-third session, Supplement No. 17* (A/73/17), para. 68 and Annex II.

[2] Ibid., *Fifty-seventh session, Supplement No. 17* (A/57/17), paras. 142–177.

[3] Ibid., *Seventy-third session, Supplement No. 17* (A/73/17), para. 67.

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

[5] For the deliberations of the Commission on that topic, see the report of UNCITRAL on the work of its thirty-fifth session, *Official Records of the General Assembly, Fifty-seventh session, Supplement No. 17* (A/57/17), paras. 13–177.

[6] General Assembly resolution 57/18 of 19 November 2002 (A/RES/57/18).

settlement agreements was burdensome and time-consuming.[7] In that light, UNCITRAL undertook work on settlement agreements resulting from mediation. It adopted amendments to the Model Law by consensus on 25 June 2018.[8] The General Assembly, in its resolution 73/199 of 20 December 2018 expressed its conviction that "the amendments to the Model Law on International Commercial Conciliation will significantly assist States in enhancing their legislation governing the use of modern mediation techniques and in formulating such legislation where none currently exists".[9] In parallel, UNCITRAL prepared and finalized the United Nations Convention on International Settlement Agreements Resulting from Mediation ("the Singapore Convention on Mediation" or the "Convention"). The General Assembly noted in its resolution 73/199 "that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation[10] and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument".[11]

Objective of the Model Law

3. The Model Law aims at encouraging the use of mediation by providing greater predictability and certainty regarding the process and its outcome. International trade and commerce is growing rapidly, with cross-border transactions being entered into by a growing number of entities, including small and medium-sized enterprises. With business being frequently conducted across national boundaries, including through the increasing use of electronic commerce, the need for effective and efficient dispute resolution systems has become paramount. By adopting the Model Law, and by educating parties engaged in international commerce about its purposes, States will encourage parties to seek non-adjudicative dispute settlement methods. Indeed, UNCITRAL has drafted the Model Law to assist States in designing dispute resolution processes that are intended to:

- Reduce cost and time of dispute settlement;
- Foster and maintain a cooperative atmosphere between trading parties;
- Find flexible and tailor-made solutions to conflicts;
- Prevent further disputes; and
- Inject certainty into international trade.

Objective and content of the Guide

4. In preparing and adopting model legislative provisions on mediation and settlement agreements, UNCITRAL was mindful that such provisions should be accompanied by background and explanatory information as an effective tool to assist States in modernizing their legislation and in considering which provisions of the Model Law, if any, might have to be varied to accommodate particular national

[7] For the deliberations of the Commission on that topic, see the report of UNCITRAL on the work of its forty-seventh session, *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 17* (A/69/17), paras. 123–125; see also document A/CN.9/822.

[8] For the deliberations of the Commission on that topic, see the report of UNCITRAL on the work of its fifty-first session, *Official Records of the General Assembly, Seventy-third session, Supplement No. 17* (A/73/17), para.68 and Annex II.

[9] General Assembly resolution 73/199 of 20 December 2018 (A/RES/73/199).

[10] The UN Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention on Mediation, adopted by the UN General Assembly on 20 December 2018 (A/RES/73/198).

[11] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52; General Assembly resolution on 73/199 of 20 December 2018 (A/RES/73/199), Preamble.

circumstances. Primarily directed to executive branches of Governments and legislators preparing the necessary legislative revisions, this Guide should also provide useful insight to other users of the text, including commercial parties, practitioners, academics and judges.

5. Much of this Guide is drawn from the *travaux préparatoires* of the Model Law, as adopted in 2002 and as amended in 2018. The Guide reflects the deliberations and decisions of the Commission during the sessions at which the Model Law was adopted, and the considerations of UNCITRAL's Working Group II (Arbitration and Conciliation/Dispute Settlement) that conducted the preparatory work. The Guide explains why the provisions in the Model Law have been included as essential basic features of a statutory device designed to constitute a solid basis for international mediation.

6. The *travaux préparatoires* for the Model Law, including the reports of the relevant sessions of Working Group II and of the Commission as well as the preparatory notes by the Secretariat, have been published in the six official languages of the United Nations (Arabic, Chinese, English, French, Russian and Spanish). These documents are available on the UNCITRAL website (https://uncitral.un.org). They are also compiled in the UNCITRAL Yearbook.

I. Introduction to the Model Law, 2018

A. Notion of mediation and purpose of the Model Law

Increasing use of mediation

7. Mediation is being increasingly used in dispute settlement practice in various parts of the world. In addition, the use of mediation is becoming a dispute resolution option preferred and promoted by courts and government agencies, as well as in community and commercial spheres. This trend is reflected, for example, in the establishment of a number of private and public bodies offering services to interested parties designed to foster the amicable settlement of disputes. Alongside this trend, various regions of the world have actively promoted mediation as a method of dispute settlement. The development of national legislation on mediation has given rise to discussions calling for internationally harmonized legal solutions designed to facilitate mediation (see A/CN.9/WG.II/WP.108, para. 15).

Mediation and similar procedures

8. The term "mediation" is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship. In its previously adopted texts, including the 2002 Model Law and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In preparing the amendment to the Model Law, the Commission decided to use the term "mediation" instead in an effort to adapt its terminology to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications (A/73/17, para. 19; A/CN.9/934, para. 16).

9. In practice, proceedings in which the parties are assisted by a third person to settle a dispute are referred to by expressions such as mediation, conciliation, neutral evaluation, mini-trial or similar terms. The Model Law uses the term "mediation" to encompass all such procedures. Practitioners draw distinctions between these expressions in terms of the methods used by the third person (also referred to as third-party neutral) or the degree to which the third person is involved in the process. However, from the viewpoint of the legislator, no differentiation needs to be made between the various procedural methods used by the third person. All these processes

share the common characteristic that the role of the third person is limited to assisting the parties to settle the dispute and does not include the power to impose a binding decision on the parties. To the extent that "alternative dispute resolution" (ADR) procedures are characterized by these features, they are covered by the Model Law (see A/CN.9/WG.II/WP.108, para. 14). However, the Model Law does not refer to the notion of ADR since that notion is unclear and may be understood as a broad category that includes other types of alternatives to judicial dispute resolution (for example, arbitration), which typically results in a binding decision.

Differentiating the processes of negotiation, mediation and arbitration

10. There are critical differences among the dispute resolution processes of negotiation, mediation and arbitration. With negotiation, once a dispute arises, the parties typically seek to resolve their dispute by negotiating without involving anyone outside the dispute. Alternative mechanisms to resolve the dispute are available to the parties including mediation and arbitration. An essential feature of mediation is that it is based on a request addressed by the parties in dispute to a third person. In arbitration, the parties entrust the dispute resolution process and the outcome of the dispute to the arbitral tribunal that imposes a binding decision on the parties. Mediation differs from party negotiations in that mediation involves third-person assistance in an independent and impartial manner to settle the dispute. It differs from arbitration because in mediation the parties retain full control over the process and the outcome; the process is non-adjudicatory. The mediation process is an entirely consensual one in which parties that are in dispute determine how to resolve the dispute, with the assistance of a neutral third party, so that the needs and interests of the parties in dispute are met. The neutral third party has no authority to impose on the parties a solution to the dispute (see the UNCITRAL Notes on Mediation).

Non-mandatory legislative provisions and preservation of the flexibility of the mediation

11. Since the role of the mediator is only to facilitate a dialogue between the parties and not to make a decision, there is not the same need for procedural guarantees of the type that exist in arbitration, such as the prohibition of meetings by the mediator with one party only or an unconditional duty on the mediator to disclose to a party all information received from the other party. Rather, the flexibility of mediation procedures and the ability to adapt the process to the circumstances of each case and to the wishes of the parties are considered to be of crucial importance.

12. This flexibility has led to a widespread view that it is not necessary to deal legislatively with a process that is so dependent upon the will of the parties. Indeed, it was believed that legislative rules would unduly restrict and harm the mediation process. Rules adopted by or agreed to by the disputing parties were widely considered to be the suitable way to provide certainty and predictability.

13. Nevertheless, States have been adopting laws on mediation. They have done so in order to respond to concerns by practitioners that contractual solutions alone do not completely meet the needs of the parties, while remaining conscious of the importance to preserve the flexibility of mediation. For instance, a key concern of parties in mediation is to ensure that certain statements or admissions made by a party during the mediation will not be used as evidence against that party in other proceedings. Contractual solution only might be inadequate to accomplish this goal. Moreover, in countries where agreements as to the admissibility of certain kinds of evidence are of uncertain effect, uniform legislation might provide useful clarification. In order to address this and other matters (such as the role of the mediator in subsequent court or arbitral proceedings, the process for the appointment of mediators, the broad principles applicable to the mediation), UNCITRAL decided in 2002 to prepare a model law to support the increased use of mediation. Legislation is also needed to determine the rules applicable to the enforcement of settlement agreements resulting from mediation or to determine how such settlement agreements can be invoked in court proceedings by a party. This is why in 2018, UNCITRAL

amended the 2002 Model Law and adopted legislative provisions on international settlement agreements.[12]

14. Mediation proceedings may differ in procedural details depending on what is considered the best method to foster a settlement between the parties. The provisions in the Model Law governing such proceedings are designed to accommodate those differences and leave the parties and mediators free to carry out the mediation as they consider appropriate. Essentially, the provisions seek to strike a balance between protecting the integrity of the mediation process, for example, by ensuring that the parties' expectations regarding the confidentiality of the mediation are met, while also providing maximum flexibility by preserving party autonomy.

B. The Model Law as a tool for harmonizing legislation

Uniform rules on mediation and settlement agreements

15. The Model Law was developed to provide uniform rules in respect of the mediation process. In many countries, the legal rules addressing mediation are set out in various pieces of legislation and take differing approaches on issues such as confidentiality, evidentiary privilege and exceptions thereto and the regime applicable to settlement agreements. Uniformity on such topics helps to provide greater integrity and certainty in the mediation process and its outcome. The benefits of uniformity are even more obvious in cases involving online (or remote) mediation where the applicable law may not be self-evident.

Enactment of legislation based on the Model Law

16. A model law is a legislative text that is recommended to States for incorporation into their national legislation. Unlike an international convention, model legislation does not require the State enacting it to notify the United Nations or other States that may have also enacted it. States are strongly encouraged, however, to inform the UNCITRAL secretariat of any enactment of the new Model Law (like for any other model law resulting from the work of UNCITRAL) and enable the secretariat to update its status pages.

17. The Model Law should be regarded as a balanced and discrete set of provisions and could be enacted as a single statute or as a part of a law on dispute settlement.

18. In incorporating the text of the model legislation into its legal system, a State may modify or leave out some of its provisions. The flexibility inherent in model legislation is particularly desirable in those cases where it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as national law. Some modifications may be expected in particular when the uniform text is closely related to the national court and procedural system. In order to achieve a satisfactory degree of harmonization and certainty, States should consider making as few changes as possible in incorporating the Model Law into their legal systems; however, if changes are made, they should remain within the basic principles of the Model Law. A significant reason for adhering as much as possible to the uniform text is to make the national law as transparent and familiar as possible for foreign parties, advisers and mediators who participate in mediations in the enacting State.

19. States that have adopted the Singapore Convention on Mediation should consider not departing from section 3 of the Model Law, as the provisions of that section mirror the text of the Convention. Section 3 of the Model Law, which can be enacted as a stand-alone text on settlement agreements, ensures that such consistency would be preserved, although States retain the flexibility to provide more generous

[12] In addition, UNCITRAL prepared the United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Convention on Mediation), adopted by the United Nations General Assembly by resolution 73/198 on 20 December 2018 (see para. 2 of the Guide).

treatment of settlement agreements when implementing this section of the Model Law.

C. Scope and structure of the Model Law

20. In preparing the Model Law and addressing the subject matter before it, the Commission's intent was for law to apply to the broadest range of commercial disputes. The Commission agreed that the title of the law should refer to international commercial mediation and international settlement agreements resulting from mediation. While the Model Law is restricted to international and commercial disputes, States enacting the Model Law may consider extending it to domestic, commercial disputes and some non-commercial ones (see footnote 3 to art. 3).

21. The Model Law contains definitions, procedures and guidelines on related issues based upon the importance of party control over the process and outcome.

22. Section 1 contains the general provisions of the Model Law. Article 1 delineates the scope of the Model Law and defines mediation in general terms. These are the types of provisions that would generally be found in legislation to determine the range of matters that a law is intended to cover. Article 2 provides guidance on the interpretation of the Model Law, with reference to its international origin.

23. Section 2 addresses international commercial mediation. Article 3 defines the notion of internationality of mediation. Article 4 expressly provides that all the provisions of the Model Law, except for article 7, paragraph 3, may be varied by party agreement. Articles 5 to 12 cover procedural aspects of the mediation. These provisions are designed to function as default provisions, in particular when parties have not adopted specific rules governing mediation. They are also intended to assist the parties in dispute that may have defined dispute resolution processes in their agreement, in this context serving as a supplement to the parties' agreement. An important focus of the provisions is to avoid situations where information from mediation proceedings spill over into arbitral or court proceedings. The remaining provisions of section 2 (arts. 13 to 15) address issues relating to the mediator acting as arbitrator, the initiation of other proceedings and the binding nature of settlement agreements to avoid uncertainty which might result from an absence of statutory provisions governing those issues.

24. Section 3 addresses international settlement agreements resulting from mediation. Article 16 determines the scope of application of section 3 and the definitions relevant to that section. Articles 17 and 18 outline general principles and requirements that apply to parties that seek to rely on a settlement agreement and seek relief. Article 19 defines the grounds for refusing to grant relief. Article 20 deals with parallel applications or claims.

25. States that wish to adopt legislation on the mediation procedure only, without providing uniform rules on settlement agreements resulting from mediation, may enact legislation based on sections 1 and 2 of the Model Law. States that are currently listed on the status page of the UNCITRAL Model law on International Commercial Conciliation are States with legislation in compliance with sections 1 and 2. States that wish to adopt legislation on settlement agreements only, without providing uniform rules on the mediation procedure, may enact legislation based on sections 1 and 3 of the Model Law.

D. Assistance from the UNCITRAL secretariat

26. In line with its training and assistance activities, the UNCITRAL Secretariat may provide technical consultations for Governments preparing legislation based on the Model Law. More generally, the Secretariat may provide technical consultation for Governments considering legislation based on other UNCITRAL model laws or

considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

27. Further information concerning the Model Law, as well as the Guide and other model texts, laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below. The Secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.

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II. Article-by-article remarks

Section 1 – General principles

Comments on Section 1

28. Section 1 of the Model Law contains general principles that apply to sections 2 and 3. This is reflected in article 1, paragraph 1, which provides that the Law applies to both international commercial mediation and international settlement agreements.

Article 1. Scope of application of the Law and definitions

Text of article 1

1. This Law applies to international commercial[1] mediation[2] and to international settlement agreements.

2. For the purposes of this Law, “mediator” means a sole mediator or two or more mediators, as the case may be.

3. For the purposes of this Law, “mediation” means a process, whether referred to by the expression 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 arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.

———————

Footnotes

[1] The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.

[2] In its previously adopted texts and relevant documents, UNCITRAL used the term “conciliation” with the understanding that the terms “conciliation” and “mediation” were interchangeable. In preparing this Model Law, the Commission decided to use the term “mediation” instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

Comments on article 1

Purpose of article 1

29. The purpose of article 1 is to delineate the scope of application of the Model Law by expressly referring to international commercial mediation and to international settlement agreements.

Notion of "commercial" mediation

30. In preparing the Model Law, it was agreed that the application of the uniform rules should be restricted to commercial matters (A/CN.9/468, para. 21; A/CN.9/485, paras. 113–116; A/CN.9/487, para. 89). Footnote 1 to paragraph 1 of article 1 provides an illustrative and open-ended list of relationships that might be described as "commercial" in nature. The purpose of the footnote is to be inclusive and broad and to overcome any difficulties that may arise in national law as to which transactions are commercial. It is inspired by the definition set out in footnote 2 to article 1 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law on Arbitration"). No strict definition of "commercial" is provided in the Model Law, the intention being that the term be interpreted broadly so as to cover matters arising from all legal relationships of a commercial nature, whether contractual or not. Footnote 1 emphasizes the width of the suggested interpretation and makes it clear that the test is not based on what the national law may regard as "commercial". This may be particularly useful for those countries where a discrete body of commercial law does not exist; and between countries in which such a discrete law exists, the footnote may play a harmonizing role. In certain countries, the use of footnotes in a statutory text might not be regarded as acceptable legislative practice. National authorities enacting the Model Law might thus consider the possible inclusion of the text of the footnote in the body of the enacting legislation itself.

31. The restriction to commercial matters is not only a reflection of the mandate of UNCITRAL to prepare texts for commercial matters but also a result of the realization that mediation of non-commercial matters touches upon policy issues that do not readily lend themselves to universal harmonization. Nevertheless, if a country would wish to enact legislation relating to non-commercial disputes, the Model Law could serve as a useful model. Despite the fact that the Model Law is expressly limited to commercial mediation, nothing in the Model Law prevents an enacting State from extending the scope of the Model Law to cover mediation outside the commercial sphere. It should be noted that in some jurisdictions, particularly in federal States, considerable difficulties might arise in distinguishing international trade from domestic trade (A/CN.9/506, para. 16).

Definition of mediation

32. In the Model Law, the definition of "mediation" expresses a broad notion of a voluntary process controlled by the parties and conducted with the assistance of a neutral third person or persons who does not have any authority to impose a solution to the dispute on the parties. Different procedural styles and techniques might be used in practice to achieve the settlement of a dispute, and different expressions might be used to refer to those styles and techniques. In drafting the Model Law, the Commission intended to encompass all those styles and techniques that might fall within the scope of article 1. The legislative policy reflected in the Model Law should apply equally to all such dispute settlement methods. For example, the Model Law could apply to "ad hoc" as well as "institutional" mediations, where the process would normally be governed by the rules of a specific institution.

33. Paragraph 3 of article 1 sets out the elements for the definition of mediation (see A/CN.9/487, para. 102; and A/CN.9/506, para. 29), including:

- The existence of a dispute;

- The intention of the parties to reach an amicable settlement; and

- The participation of an impartial and independent third person or persons that assists the parties in an attempt to reach an amicable settlement, without any authority to impose a solution.

34. The intent is to distinguish mediation, on the one hand, from binding arbitration and, on the other hand, from mere negotiations between the parties or their representatives. The last sentence of paragraph 3 ("*The mediator does not have the authority to impose upon the parties a solution to the dispute*") is intended to further clarify and emphasize the main distinction between mediation and a process such as arbitration (see A/CN.9/861, para. 22).

35. In verifying whether, in a given factual situation, the elements set forth in paragraph 3 for the definition of mediation are met, courts are invited to consider any evidence of conduct of the parties showing that they were conscious (and had an understanding) of being involved in a process of mediation.[13] Such evidence would be based on the circumstances of the case and the understanding and expectations of the parties of the process in which they engaged.

References to UNCITRAL documents in respect of article 1

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 22;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 15–27, 135–140, and 151;

A/CN.9/943, paras. 7 and 8;
A/CN.9/934, paras. 16, 30–32 and 120;
A/CN.9/WG.II/WP.205, para. 39;
A/CN.9/929, paras. 43, 102–104 and 106;
A/CN.9/896, paras. 39–47;
A/CN.9/867, paras. 102–121;
A/CN.9/WG.II/WP.195, paras. 13–25;
A/CN.9/861, paras. 21–22, 40–43;
A/CN.9/WG.II/WP.190, paras. 25–29;
A/CN.9/506, paras. 28–31;
A/CN.9/WG.II/WP.115, paras. 8–11;
A/CN.9/487, paras. 100–104;
A/CN.9/WG.II/WP.113/Add.1, footnotes 7–8;
A/CN.9/485, paras. 108–109, 111–116 and paras. 123–124;
A/CN.9/WG.II/WP.110, paras. 83–85, and 88;
A/CN.9/468, para. 19;
A/CN.9/WG.II/WP.108, para. 11;
A/CN.9/460, paras. 8–10.

Article 2. Interpretation

Text of article 2

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

[13] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 151.

Comments on article 2

Interpretation of the Model Law

36. Article 2 provides guidance for the interpretation of the Model Law by courts and other national or local authorities with due regard being given to its international origin. It is inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods (1980),[14] article 3 of the UNCITRAL Model Law on Electronic Commerce (1996),[15] article 8 of the UNCITRAL Model Law on Cross-Border Insolvency (1997)[16] and article 4 of the UNCITRAL Model Law on Electronic Signatures (2001)[17] (A/CN.9/506, para. 49). The expected effect of article 2 is to limit the extent to which a uniform text, once incorporated in local legislation, would be interpreted only by reference to concepts of local law. The purpose of paragraph 1 is to draw the attention of courts and other national authorities to the fact that the provisions of the Model Law (or the provisions of the instrument implementing the Model Law), while enacted as part of domestic legislation and therefore domestic in character, should be interpreted with reference to its international origin in order to ensure uniform interpretation in various countries. Case-law, available through the UNCITRAL CLOUT database which consolidates reported case law on UNCITRAL texts, may assist both national authorities and courts in their interpretation of the Model Law. States and other stakeholders are therefore encouraged to contribute to CLOUT, to assist in the uniform interpretation of the Model Law.[18]

General principles upon which the Model Law is based

37. Paragraph 2 provides that, where a question is not settled by the Model Law, reference may be made to the general principles upon which it is based. As to the general principles on which the Model Law is based, the following non-exhaustive list may be considered:

- To promote mediation as a method of dispute settlement that reduces the instances where a dispute leads to the termination of a commercial relationship, and that facilitates the administration of international transactions by commercial parties;
- To offer access to a dispute resolution tool that is flexible, allows for savings of time and cost, and mitigates undue risks;
- To facilitate access to justice, especially for micro, small and medium sized enterprises (“MSMEs”);
- To provide international harmonized legal solutions that facilitate mediation, respect the integrity of the process and party autonomy and promote active involvement by the parties, hereby developing a rule of law culture among citizens;
- To promote frank and open discussions between parties by ensuring confidentiality of the process, limiting disclosure of certain information and facts raised in the mediation in other subsequent proceedings, subject only to the need for disclosure required by law or for the purposes of implementation or enforcement;
- To support developments and changes in the mediation process arising from technological developments, such as online procedures; and
- To provide a sound legal framework for facilitating the cross-border enforcement of settlement agreements resulting from mediation.

[14] United Nations publication, Sales No. E.10.V.14.
[15] United Nations publication, Sales No. E.99.V.4.
[16] United Nations publication, Sales No. E.14.V.2.
[17] United Nations publication, Sales No. E.02.V.8.
[18] https://uncitral.un.org/en/case_law.

References to UNCITRAL documents in respect of article 2

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para.53;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 28–29 and 154;

A/CN.9/506, para. 49.

Section 2 – International commercial mediation

Comments on Section 2

38. Section 2 addresses the mediation process and is based on the 2002 Model law and its articles 1 paragraph 1 and 4 and articles 3 to 14.

Article 3. Scope of application of the section and definitions

Text of article 3

1. This section applies to international[3] commercial mediation.

2. A mediation is "international" if:

(a) The parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

3. For the purposes of paragraph 2:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to mediate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

4. This section also applies to commercial mediation when the parties agree that the mediation is international or agree to the applicability of this section.

5. The parties are free to agree to exclude the applicability of this section.

6. Subject to the provisions of paragraph 7 of this article, this section applies irrespective of the basis upon which the mediation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

7. This section does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) […].

———————

Footnote

(3) States wishing to enact this section to apply to domestic as well as international mediation may wish to consider the following changes to the text:
- Delete the word "international" in paragraph 1 of articles 1 and 3; and
- Delete paragraphs 2, 3 and 4 of article 3, and modify references to paragraphs accordingly.

Comments on article 3

39. Article 3 delineates the scope of application of section 2 on the process of international commercial mediation.

International mediation

40. Section 2 only applies to international mediation as defined in paragraph 2 of article 3. Paragraph 2 establishes a test for distinguishing international cases from domestic ones. The requirement of internationality will be met if the parties to the mediation agreement have their places of business in different States at the time that the agreement was concluded, or where the State in which either a substantial part of the obligations of the commercial relationship is to be performed, or with which the subject matter of the dispute is most closely connected, differs from the State in which the parties have their places of business. Paragraph 3 provides a test for determining a party's place of business where the party either has more than one place of business or has no place of business. In the first case, the place of business is the one bearing the closest relationship with the agreement to mediate. Factors which may indicate that one place of business bears a close relationship with the agreement to mediate may include that a substantial part of the obligations of the commercial relationship that is the subject of the dispute is to be performed at that place of business, or that the subject matter of the dispute is most closely connected to that place of business. Where a party has no place of business, reference is made to the party's habitual residence. Article 3 is not intended to interfere with the operation of the rules of private international law.

Possible coverage of domestic mediation

41. Section 2 should not be interpreted as encouraging enacting States to limit its applicability to international cases. An enacting State may, in the implementing legislation, extend its applicability to cover both domestic and international mediation with minor adaptations of the text as provided in footnote 3 to paragraph 1 (A/CN.9/506, para. 17). If any further additions or changes are deemed necessary to reflect domestic policies in this area, the enacting State should be careful to evaluate whether the additions are suitable for international cases and, if they are not, should make them applicable to domestic cases only. Also, paragraph 4 allows the parties to agree to the application of the Model Law (i.e. to opt into the Model Law) to a commercial mediation even if the mediation is not international as defined in section 2. Parties may "opt in" to the Model Law by agreeing that their mediation is international (even if the circumstances of the case would not indicate its international character or if it is unclear whether the case is international) or by straightforward agreement on the applicability of the Model Law.

Opting out of Section 2

42. Paragraph 5 allows parties to exclude the application of section 2. Paragraph 5 may come into play, for example, where the parties to an otherwise domestic mediation agree for convenience on a place of mediation abroad without intending to make the mediation "international".

Internationality of the mediation and of the settlement agreement

43. It should be noted that separate definitions of "international" are contained in section 2 (para. 2 of art. 3) and section 3 (para. 4 of art. 16), as a consequence of the conceptual difference between the internationality criteria of mediation and that of settlement agreements (A/CN.9/943, para. 10). The reason for the two definitions is that the outcome of an international mediation might not necessarily be an "international" settlement agreement. The internationality of a settlement agreement is to be assessed at the time of the conclusion of the settlement agreement itself (as opposed to the time of the conclusion of the agreement to mediate, for instance). As section 3 focuses on "international" settlement agreements only, it was considered

necessary to also define the internationality of settlement agreements and to differentiate between an international mediation and an international settlement agreement.

44. Despite the different scopes of the notion of "internationality", States enacting the Model Law may consider adopting a unified definition of the term "international" (see footnote 7 to art. 16) (A/CN.9/934, paras. 121–127).

Situation where parties are obliged to mediate

45. The Model Law takes into account the fact that, while mediation is often set in motion by agreement of the parties after the dispute has arisen, there may exist various grounds pursuant to which the parties may be under a duty to make a good-faith attempt at mediating their differences. One basis may be their own contractual commitment entered into before the dispute has arisen, while another basis may be legislation that some countries have adopted requiring the parties in certain situations to mediate, or allowing a judge or a court official to suggest, or even order, that parties mediate before they continue with litigation. The Model Law does not deal with such obligations or with the sanctions that may be entailed by failure to comply with them. Provisions on these matters depend on national policies that do not easily lend themselves to worldwide harmonization. The Model Law is based on the principle that the procedural characteristics of mediation proceedings and the need for the protections established by the Law (for example, with respect to the inadmissibility of certain evidence, as provided for in art. 11) do not depend on whether the parties mediate in compliance with a prior agreement, a legal obligation or a court order. In order to remove any doubt about the application of the Model Law in these situations, paragraph 6 provides that section 2 applies irrespective of whether a mediation is carried out by agreement between the parties or pursuant to a legal obligation or request by a court, arbitral tribunal or competent governmental entity.

46. It is suggested that, even if in the enacting State mediation is left fully to the agreement of the parties, article 3, paragraph 6 should not be omitted from the piece of legislation enacting the Model Law. In such situations, this provision clarifies that the Model Law applies when parties commence a mediation that is governed by the law of that State but pursuant to a legal obligation arising from a foreign law or from a request by a foreign court or institution.

Possible exclusions from the scope of enacting legislation

47. Paragraph 7 allows enacting States to exclude certain situations from the sphere of application of section 2. However, in interpreting paragraph 7, it should be noted that section 2 does not exclude its application in any situation listed under paragraph 7 if the parties agreed under paragraph 4 that the provisions of section 2 should apply. Subparagraph (a) excludes from the application of section 2 of the Model Law any case where either a judge or an arbitrator, in the course of adjudicating a dispute, undertakes a mediation process. That process may be undertaken either at the request of the parties that are in dispute or in the exercise of the judge's prerogatives or discretion. The exclusion expressed in subparagraph (a) was considered necessary to avoid undue interference with existing procedural law. It should be noted, however, that the Model Law is not intended to indicate whether or not a judge or an arbitrator may conduct mediation in the course of court or arbitration proceedings. In some legal systems an arbitrator could, pursuant to an agreement of the parties, become a mediator and conduct a mediation proceeding, although this is not accepted practice in other legal systems. [19] In some cases of so-called court-annexed mediation, it might not be clear whether such mediation is being carried out "in the course of a court … proceedings". To avoid uncertainty in this respect, an enacting State may wish to clarify in the piece of legislation enacting the Model Law whether such mediations are to be governed by section 2 or not.

[19] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 26 and 152.

Subparagraph (b) suggests that other areas of exclusion may be considered by the enacting State. For example, the enacting State may consider excluding the application of section 2 of the Model Law for mediations relating to collective bargaining relationships between employers and employees, given that a number of countries may have established mediation systems in the collective bargaining system which may be subject to particular policy considerations that might differ from those underlying the Model Law. Another example of exclusion could relate to a mediation that is conducted by a judicial officer (A/CN.9/WG.II/WP.113/Add.1, footnote 5, and A/CN.9/WG.II/WP.115, para. 7). Given that such judicially conducted mediation mechanisms are governed by court rules and that the Model Law is not intended to deal with the jurisdiction of courts of any State, it may be appropriate to also exclude these from the scope of section 2.

Use of mediation in multiparty situations

48. Experience in some jurisdictions suggests that the Model Law would also be useful to foster the non-judicial settlement of disputes in multiparty situations, especially those where interests and issues are complex and multilateral rather than bilateral. The Commission noted that mediation was being used with success in the case of complex, multiparty disputes. Notable examples of these include disputes arising during insolvency proceedings or disputes whose resolution is essential to avoid the commencement of insolvency proceedings. Such disputes involve issues among creditors or classes of creditors and the debtor or among creditors themselves, a situation often compounded by disputes with debtors or contracting parties of the insolvent debtor. These issues may arise, for example, in connection with the content of a reorganization plan for the insolvent company; claims for avoidance of transactions that result from allegations that a creditor or creditors were treated preferentially; and issues between the insolvency administrator and a debtor's contracting party regarding the implementation or termination of a contract and the issue of compensation in such situations.[20]

References to UNCITRAL documents in respect of article 3

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para.54;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 15, 18, 22–27, 135–140, 152 and 173–177;

A/CN.9/934, paras. 121–130;
A/CN.9/861, paras. 36–50;
A/CN.9/867, paras. 93–101;
A/CN.9/WG.II/WP.195, paras. 7–12
A/CN.9/WG.II/WP.205, para. 40;
A/CN.9/506, paras. 15–17;
A/CN.9/WG.II/WP.115, remarks 1–7 and 12–13;
A/CN.9/487, paras. 88, 90–99, 105–109;
A/CN.9/WG.II/WP.113/Add.1, footnotes 3–6 and 9–10;
A/CN.9/485, paras. 117–120;
A/CN.9/WG.II/WP.110, paras. 89–90.

Article 4. Variation by agreement

Text of article 4

Except for the provisions of article 7, paragraph 3, the parties may agree to exclude or vary any of the provisions of this section.

[20] Ibid., paras. 173–177.

Comments on article 4

49. With a view to emphasizing the prominent role given to the principle of party autonomy, this provision has been isolated in a separate article applicable to section 2. Inclusion of this provision is a reflection of the principle that the whole concept of mediation is dependent on the will of the parties. This type of drafting is also intended to bring the Model Law more closely in line with other UNCITRAL instruments (for example, art. 6 of the United Nations Convention on Contracts for the International Sale of Goods, art. 4 of the UNCITRAL Model Law on Electronic Commerce and art. 5 of the UNCITRAL Model Law on Electronic Signatures). Expressing the principle of party autonomy in a separate article may further reduce the desirability of repeating that principle in the context of a number of specific provisions of section 2 (A/CN.9/WG.II/WP.115, remark 14). Article 4 promotes the autonomy of the parties by leaving to them almost all matters that can be set by agreement. However, paragraph 3 of article 7, concerning the fair treatment of the parties by the mediator, is not subject to the principle of party autonomy. Similarly, as article 4 only applies to the provisions of section 2, the wide scope of possible variation by agreement is only applicable to the provisions of section 2. Section 3, which addresses the enforceability of settlement agreements resulting from mediation, does not lend itself to party autonomy.

References to UNCITRAL documents in respect of article 4

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para.53;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 30–31, 127–134 and 155;

A/CN.9/934, para. 131;
A/CN.9/WG.II/WP.205, para. 44.
A/CN.9/506, paras. 51 and 140–144;
A/CN.9/WG.II/WP.115, remark 14;
A/CN.9/WG.II/WP.110, para. 87.

Article 5. Commencement of mediation proceedings[4]

Text of article 5

1. Mediation proceedings in respect of a dispute that has arisen commence on the day on which the parties to the dispute agree to engage in mediation proceedings.

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, 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.

Footnote

[4] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:
Article X. Suspension of limitation period
1. When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended.
2. Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement.

Comments on article 5

Effect of article 5

50. Article 5 addresses the question of the commencement of mediation proceedings. The Commission, in adopting the Model Law, agreed that paragraph 1 of this article should be harmonized with paragraph 3 of article 1. This was done to accommodate the fact that mediation might be carried out as a consequence of a suggestion, an order or request by a dispute settlement body such as a court, an arbitral tribunal or a competent governmental authority. Article 5 provides that mediation commences when the parties to a dispute agree to engage in such a proceeding. The effect of this provision 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 proceedings, such proceedings will not commence until the parties agree to engage in such proceedings. The Model Law does not deal with any such requirement or with the consequences of the parties' or a party's failure to act as required (see para. 45).

Methods by which parties may agree to engage in mediation

51. The general reference to the "day on which the parties to the dispute agree to engage in mediation proceedings" is designed to cover the different methods by which parties may agree to engage in mediation proceedings. Such methods may include, for example, the acceptance by one party of an invitation to mediate made by the other party, or the acceptance by both parties of suggestion or order or request to mediate made by a court, arbitral tribunal or a competent government entity.

52. By referring in paragraph 1 of article 5 to an agreement "to engage in mediation proceedings", the Model Law leaves the determination of when exactly this agreement is concluded to laws outside the Model Law. Ultimately, the question of when the parties reach an agreement will be a question of evidence (A/CN.9/506, para. 97).

Time period for accepting an invitation to mediate

53. Paragraph 2 provides that a party that has invited another party to engage in mediation, may treat this invitation as having been rejected if the other party fails to accept that invitation within 30 days from when the invitation was sent, or any other time as specified in the invitation. The time period for replying to an invitation to mediate has been set at 30 days as also provided for in the UNCITRAL Mediation Rules. The time period is, however, subject to contrary agreement so as to provide maximum flexibility and respect the principle of party autonomy over the procedure to be followed in commencing mediation.

54. Paragraph 2 may give rise to a question regarding its effect in a situation where parties have agreed to mediate future disputes but, after a dispute has arisen, a party no longer wishes to mediate. The question is whether paragraph 2 offers that party an opportunity to disregard its contractual obligation simply by not responding to the invitation to mediate within 30 days. In the preparation of the Model Law, it was agreed that the text should not deal with the consequences of failure by a party to comply with an agreement to mediate, that matter being left to the general law of obligations that is not covered by the Model Law. Thus, the purpose of paragraph 2 is to provide certainty in a situation where it is unclear whether a party is willing to mediate (by determining the time when an attempt at mediation is deemed to have failed), irrespective of whether that failure is or is not a violation of an agreement to mediate under the general law of obligations.[21]

[21] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 36.

Withdrawal of an invitation to mediate

55. Article 5 does not address the situation where an invitation to mediate is withdrawn after it has been made. Although a proposal was made during the preparation of the Model Law to include a provision specifying that the party initiating the mediation is free to withdraw the invitation to mediate until that invitation has been accepted, it was decided that such a provision would probably be superfluous in view of the possibility offered to both parties to terminate mediation proceedings at any time under subparagraph (d) of article 12. Also, inclusion of a provision regarding the withdrawal of an invitation to mediate could unduly interfere with the law of contract formation by introducing new rules as to the conditions under which an offer or an acceptance to mediate might be withdrawn (A/CN.9/WG.II/WP.115, para.17).

Possible provision on the suspension of a limitation period

56. The footnote to the title of article 5 (footnote 4) includes text for optional use by States that wish to enact it. In the preparation of the Model Law, a discussion took place as to whether it would be desirable to include in the Model Law a uniform rule providing that the initiation of mediation proceedings would interrupt the running of limitation and prescription periods concerning the claims involved in the mediation. Ultimately, it was agreed to include the provision as a footnote to article 5 for optional use by States that wished to enact it (A/CN.9/506, paras. 93–94).[22] If an enacting State adopts draft article X, that State may wish to require that termination be in writing and, if so, may also wish to require that the commencement of mediation be declared in writing (see para. 86 below).[23] Further, States that adopt a provision on the suspension of the limitation period in the form of draft article X, may wish to consider including provisions to define more precisely what constitutes “mediation”. This may be needed in view of the fact that in the Model Law it was agreed to define the term “mediation” broadly so as to reflect the concept that it is a flexible process that, in practice, takes many forms, some of which may be quite informal, and that it can be conducted without a written agreement to mediate. Such provisions could be helpful in the context of applying provisions on the suspension of limitation periods, which by their nature must be very specific due to the serious legal consequences that may flow from determining whether a mediation occurred and, if so, when it began. In determining whether or not to enact a provision in the form of draft article X, note should be taken of article 14 of the Model Law, which provides that any party is free by its own unilateral action to initiate arbitral or judicial proceedings to the extent that that is necessary to preserve its right. Given that such action is not, of itself, to be taken as a waiver of the agreement to mediate, a party can thus, by unilateral action, extend the limitation period.

References to UNCITRAL documents in respect of article 5

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 53;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 32–37, 96 and 156;

A/CN.9/506, paras. 53–56 and 93–100;
A/CN.9/WG.II/WP.115, remarks 15–17, 28;
A/CN.9/487, paras. 110–115;
A/CN.9/WG.II/WP.113/Add.1, footnotes 11, 12 and 24;
A/CN.9/485, paras. 127–132;
A/CN.9/WG.II/WP.110, paras. 95–96;
UNCITRAL Conciliation Rules, article 2;
UNCITRAL Mediation Rules, articles [-]; and
UNCITRAL Mediation Notes, paras. [-].

[22] Ibid.
[23] Ibid., para. 96.

Article 6. Number and appointment of mediators

Text of article 6

1. There shall be one mediator, unless the parties agree that there shall be two or more mediators.

2. The parties shall endeavour to reach agreement on a mediator or mediators, unless a different procedure for their appointment has been agreed upon.

3. Parties may seek the assistance of an institution or person in connection with the appointment of mediators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as mediator; or

(b) The parties may agree that the appointment of one or more mediators be made directly by such an institution or person.

4. In recommending or appointing individuals to act as mediator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial mediator and, where appropriate, shall take into account the advisability of appointing a mediator of a nationality other than the nationalities of the parties.

5. When a person is approached in connection with his or her possible appointment as a mediator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A mediator, from the time of his or her appointment and throughout the mediation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Comments on article 6

Default rule

57. Unlike in international commercial arbitration where the default rule is often three arbitrators (see art. 10 of the Model Law on Arbitration and art. 7 of the UNCITRAL Arbitration Rules), mediation practice shows that parties usually wish to have the dispute handled by one mediator. For that reason, the default rule in article 6 is one mediator.

Agreement by the parties on the selection of a mediator

58. The intent of article 6 is to encourage the parties to agree on the selection of a mediator. The advantage of the parties first endeavouring to mutually agree on a mediator is that this approach respects the consensual nature of mediation proceedings and also provides parties with greater control and therefore confidence in the mediation process. Although a suggestion was made, while preparing the Model Law, that, where there is more than one mediator, the appointment of each mediator should be agreed to by the various parties involved in the mediation, which would thereby avoid the perception of partisanship, the prevailing view was that the solution allowing each party to appoint a mediator was the more practical approach. That approach allows for speedy commencement of the mediation process and might foster settlement in the sense that the party-appointed mediators, while acting independently and impartially, would be in a better position to clarify the positions of the parties and thereby enhance the likelihood of settlement. When three or more mediators are to be appointed, the mediator, other than the party-appointed mediators, should in principle be appointed by agreement of the parties. That should foster greater confidence in the mediation process. The provisions of article 6 in respect of two-party mediation also apply, *mutatis mutandis*, to multiparty mediation.

Absence of an agreement by the parties on the selection of a mediator

59. When no agreement may be reached on a mediator, reference may be made to an institution or a third person. Subparagraphs (a) and (b) of paragraph 3 provide that that institution or person may simply provide names of recommended mediators or, by agreement of the parties, directly appoint mediators. Paragraph 4 sets out some guidelines for that person or institution to follow in making recommendations or appointments. The guidelines seek to foster the independence and impartiality of the mediator.

Disclosure of circumstances likely to create doubts as to the impartiality of a mediator

60. Paragraph 5 obliges a person who is approached to act as a mediator to disclose any circumstance likely to raise justifiable doubts as to his or her impartiality or independence. That obligation is stated to apply not only from the time that the person is approached, but also throughout the mediation. In the preparation of the Model Law, a suggestion was made that the provision address the consequences that might result from failure to make such a disclosure, for example by expressly stating that failure to make such disclosure should not result in the nullification of the mediation process. Having been amended in 2018, the Model Law now deems a failure to disclose facts that might give rise to justifiable doubts as a possible ground for refusing to grant relief based on a settlement agreement (see paragraph 1(f) of art. 19), but "material impact or undue influence" of the non-disclosure is required as well as that the party would not have entered into the settlement agreement otherwise.

References to UNCITRAL documents in respect of article 6

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 53;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 38–53 and 157;

A/CN.9/506, paras. 57–66;
A/CN.9/WG.II/WP.115, remarks 18–19;
A/CN.9/487, paras. 116–119;
A/CN.9/WG.II/WP.113/Add.1, footnotes 13 and 14;
UNCITRAL Conciliation Rules, articles 3 and 4;
UNCITRAL Mediation Rules, articles [-]; and
UNCITRAL Mediation Notes, paras. [-].

Article 7. Conduct of mediation

Text of article 7

1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

2. Failing agreement on the manner in which the mediation is to be conducted, the mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, 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.

3. In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

4. The mediator may, at any stage of the mediation proceedings, make proposals for a settlement of the dispute.

Comments on article 7

Agreement by the parties

61. Paragraph 1, derived from article 19 of the Model Law on Arbitration, stresses that the parties are free to agree on the manner in which the mediation is to be conducted. Examples of the "set of rules" that may be agreed upon by the parties to organize the conduct of mediation include the UNCITRAL Mediation Rules (*date*) or the rules of a mediation centre that offer to administer these types of dispute settlement processes.

Role of the mediator

62. Paragraph 2, derived from article 7, paragraph 3, of the UNCITRAL Conciliation Rules (1980, also included in article [–] of the UNCITRAL Mediation Rules (*date*)), recognizes the role of the mediator who, while observing the will of the parties, may shape the process as he or she considers appropriate.

Fair and equal treatment of the parties

63. By way of guidance regarding the standard of conduct to be applied by a mediator,[24] paragraph 3 provides that the mediator or mediators should seek to maintain fair treatment of the parties by reference to the particular circumstances of the case. Paragraph 3 should be regarded as a basic obligation and a minimum standard to be observed mandatorily by a mediator.[25] The reference in paragraph 3 to maintaining fair treatment of the parties is intended to govern the conduct of the mediation process and not the contents of the settlement agreement.[26] The reference to "fair treatment" is to be understood as covering also the notion that mediators should seek to maintain equality of treatment when dealing with the various parties. However, such equality of treatment does not mean that equal time should necessarily be devoted to separate meetings with each party. The mediator may explain to the parties in advance that there may be time discrepancies, both real and imagined, which should not be construed as other than the fact that the mediator is taking time to explore all issues, interests and possibilities for settlement.[27]

Proposal for settlement

64. Paragraph 4 clarifies that a mediator may, at any stage, make a proposal for settlement. Whether, to what extent and at which stage the mediator may make any such proposal will depend on many factors, including the wishes of the parties and the techniques that the mediator considers most conducive to a settlement.

References to UNCITRAL documents in respect of article 7

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para.53;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 54–60 and 158–160;

A/CN.9/506, paras. 67–74;
A/CN.9/WG.II/WP.115, remarks 20–23;
A/CN.9/487, paras. 120–127;
A/CN.9/WG.II/WP.113/Add.1, footnotes 15–18;
A/CN.9/485, paras. 121–125;
A/CN.9/WG.II/WP.110, paras. 91 and 92;
A/CN.9/468, paras. 56–59;
A/CN.9/WG.II/WP.108, paras. 61 and 62;

[24] Ibid., para. 158.
[25] Ibid., para. 57.
[26] Ibid., para. 58.
[27] Ibid., para. 160.

UNCITRAL Conciliation Rules, article 7;
UNCITRAL Mediation Rules, articles [-]; and
UNCITRAL Mediation Notes, paras. [-].

Article 8. Communication between mediator and parties

Text of article 8

The mediator may meet or communicate with the parties together or with each of them separately.

Comment on article 8

Freedom of communication

65. Separate meetings between the mediator and the parties are, in practice, so usual that a mediator is presumed to be free to use this technique, save for any express restriction agreed to by the parties. The purpose of this provision is to put this issue beyond doubt.

References to UNCITRAL documents in respect of article 8

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para.53;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 61–63 and 160;

A/CN.9/506, paras. 75 and 76;
A/CN.9/WG.II/WP.115, remark 24;
A/CN.9/487, paras. 128–129;
A/CN.9/WG.II/WP.110, para. 93;
A/CN.9/WG.II/WP.113/Add.1, footnote 19;
A/CN.9/468, paras. 54 and 55;
A/CN.9/WG.II/WP.108, paras. 56–60;
UNCITRAL Conciliation Rules, article 9;
UNCITRAL Mediation Rules, articles [-]; and
UNCITRAL Mediation Notes, paras. [-].

Article 9. Disclosure of information

Text of article 9

When the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to any other party to the mediation. However, when a party gives any information to the mediator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the mediation.

Comments on article 9

Need for open communications between parties and the mediator

66. For mediation to succeed, the parties and the mediator must be able to explore and understand, as much as possible, the issues between the parties, the background and circumstances that culminated into the dispute (including the reasons for which the parties were unable settle their dispute by agreement), and the possibilities for the parties to overcome the existing issues, to settle the dispute and clear possible misunderstandings. In the course of the mediation, the scope of the discussion could thus cover matters beyond those that were legally disputed at the outset of the mediation and may include, for example, possibilities for restructuring the future relationship between the parties or proposals for mutual concessions. For such discussions to have a chance of success, the parties should be ready to be open and delve into matters that would normally not be considered in arbitral or court

proceedings, including those that the parties deem sensitive or confidential. If there were a risk that some of that information could be disclosed to a third person or made public or that, if the mediation failed, one of the parties could use disclosures or statements of the other party as evidence in arbitral or court proceedings, the parties would be reticent during the mediation and less likely to arrive at a settlement. It is therefore critical that the legal framework governing mediation proceedings lay down safeguards providing the desired degree of legal protection against unwanted disclosure of certain facts and information. These safeguards are the centrepiece of the mediation regime and a particularly important reason why legislation on mediation is needed.

Disclosure of information

67. Article 9 expresses the principle that, whatever information a party gives to a mediator, that information may be disclosed to the other party, unless the party giving the information specifically requests otherwise. The intent is to foster open and frank communication of information between each party and the mediator and, at the same time, to preserve the parties' rights to maintain confidentiality. The role of the mediator is to cultivate a candid exchange of information regarding the dispute. Such disclosure fosters the confidence of all parties in the mediation. However, the principle of disclosure is not absolute, as the mediator has the freedom, but not the duty, to disclose such information to the other party. Indeed, the mediator has a duty not to disclose a particular piece of information when the party that gave the information to the mediator made it subject to a specific condition that it be kept confidential. This approach is justified because the mediator imposes no binding decision on the parties. In the preparation of this article in 2002, the suggestion was made that the party giving the information to the mediator should be required to give consent before any communication of that information may be given to the other party. That suggestion was ultimately not adopted. However, in 2021, when revising the draft UNCITRAL Mediation Rules, it was decided to go for that approach, as such a practice was widely followed with good results in a number of countries and that, in certain countries, such practice was enshrined in mediation rules. Therefore, to take into account what might be regarded as a natural and legitimate expectation by the parties that information communicated to mediators would be treated as confidential, it is recommended that, if the solution of the Model Law is followed, mediators inform the parties that information communicated to the mediator may be revealed unless the mediator is instructed otherwise.[28]

Notion of "information"

68. A broad notion of "information" is preferred in the context of the statutory rule established by article 9. It is intended to cover all relevant information communicated by a party to the mediator. The notion of "information", as used in this article, should be understood as covering not only communications that occurred during the mediation, but also communications that took place before the actual commencement of the mediation. The "substance of that information" were used in preference to the words "that information" to reflect the fact that mediators do not need to communicate the literal content of any information received from the parties.[29]

References to UNCITRAL documents in respect of article 9

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 54;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 64–73 and 161–163;

A/CN.9/506, paras. 77–82;

[28] Ibid., para. 161.
[29] Ibid., para. 162.

A/CN.9/WG.II/WP.115, remark 25;
A/CN.9/487, paras. 130–134;
A/CN.9/WG.II/WP.110, para. 94;
A/CN.9/468, paras. 54–55;
A/CN.9/WG.II/WP.108, paras. 56–60;
A/CN.9/WG.II/WP.113/Add.1, footnotes 20 and 21;
UNCITRAL Conciliation Rules, article 10;
UNCITRAL Mediation Rules, articles [-]; and
UNCITRAL Mediation Notes, paras. [-].

Article 10. Confidentiality

Text of article 10

Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Comments on article 10

General rule regarding confidentiality

69. A provision on confidentiality is important, as the mediation will be more appealing if parties can have confidence, supported by a statutory duty, that mediation-related information will be kept confidential (A/CN.9/506, para. 86). The provision is drafted broadly referring to "all information relating to the mediation proceedings" to cover not only information disclosed during the mediation proceedings, but also the substance and the result of those proceedings, as well as matters relating to a mediation that occurred before the agreement to mediate was reached, including, for example, discussions concerning the desirability of mediation, the terms of an agreement to mediate, the choice of mediators, an invitation to mediate and the acceptance or rejection of such an invitation. The phrase "all information relating to the mediation proceedings" was used because it reflects a tried and tested formula set out in article 14 of the UNCITRAL Conciliation Rules (also found in article – of the Mediation Rules (*date*).

Party autonomy

70. Article 10 is expressly subject to party autonomy to meet concerns expressed that it might be inappropriate to impose upon the parties a rule that would not be subject to party autonomy and could be difficult to enforce. This reinforces one of the main objectives of the Model Law, which is to respect party autonomy and also to provide a clear rule to guide parties in the absence of a contrary agreement.

Exceptions to the rule

71. The rule is also subject to express exceptions, namely where disclosure is required by law, such as an obligation to disclose evidence of a criminal offence, or where disclosure is required for the purposes of implementation or enforcement of a settlement agreement. Although the Working Group that prepared the Model Law initially considered including a list of specific exceptions, it was strongly felt that listing exceptions in the text of the Model Law might raise difficult questions of interpretation, in particular as to whether the list should be regarded as exhaustive. The Working Group agreed that an illustrative and non-exhaustive list of possible exceptions to the general rule on confidentiality would more appropriately be provided in this Guide. Examples of such exceptions may include laws requiring the mediator or parties to reveal information if there is a threat that a person will suffer death or substantial bodily harm if the information is not disclosed, and laws requiring disclosure if it is in the public interest, for example, to alert the public about a health, an environmental or a safety risk. It is the intent of the drafters that, in the event that a court is considering an allegation that a person did not comply with article 10, it

should include in its consideration any evidence of conduct of the parties that shows whether they had, or did not have, an understanding that a mediation existed and consequently an expectation of confidentiality. When enacting the Model Law, certain States may wish to clarify article 10 to reflect that interpretation.[30]

References to UNCITRAL documents in respect of article 10

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 54;

*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (*A/57/17), paras. 74–81 and 164;

A/CN.9/506, paras. 83–86;
A/CN.9/487, paras. 130–134;
UNCITRAL Conciliation Rules, article 14;
UNCITRAL Mediation Rules, articles [-]; and
UNCITRAL Mediation Notes, paras. [-].

Article 11. Admissibility of evidence in other proceedings

Text of article 11

1. A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;

(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 proceedings;

(d) Proposals made by the mediator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(f) A document prepared solely for purposes of the mediation proceedings.

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

3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation proceedings.

5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a mediation.

[30] Ibid., para. 76.

Comments on article 11

General prohibition on the use of information obtained in mediation for the purposes of other proceedings

72. In mediation proceedings, the parties may typically express suggestions and views regarding proposals for a possible settlement, make admissions or indicate their willingness to settle. If, despite such efforts, the mediation does not result in a settlement and a party initiates judicial or arbitral proceedings, those views, suggestions, admissions or indications of willingness to settle might be used to the detriment of the party who made them. The possibility of such a "spill over" of information may discourage parties from actively trying to reach a settlement during mediation proceedings, which would reduce the usefulness of mediation (A/CN.9/WG.II/WP.108, para. 18). Thus, article 11 is designed to encourage frank and candid discussions in mediation by prohibiting the use of information listed in paragraph 1 in any later proceedings. The words "and any third person" are used to clarify that persons other than the party (for example, witnesses or experts) who participated in the mediation proceedings are also bound by paragraph 1.[31] The term "similar proceedings" is intended to cover not only administrative proceedings but also such procedures as "discovery" and "depositions" in countries where such methods of obtaining evidence are used[32] and are not covered by the notion of "judicial proceedings".

Relationship with article 20 of the UNCITRAL Conciliation Rules and article [--] of the Mediation Rules

73. The provision is needed in particular if the parties have not agreed on a provision such as that contained in article 20 of the UNCITRAL Conciliation Rules and article [--] of the UNCITRAL Mediation Rules, which provides that the parties must not rely on or introduce as evidence in arbitral or judicial proceedings:[33]

[(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) Admissions made by the other party in the course of the mediation proceedings;

(c) Proposals made by the mediator;

(d) The fact that the other party had indicated its willingness to accept a proposal for settlement made by the mediator.]

74. However even if the parties have agreed on a rule of that type, the legislative provision is useful because, at least under some legal systems, the court may not give full effect to agreements concerning the admissibility of evidence in court proceedings.

Effect of article 11

75. Article 11 provides for two results with respect to the admissibility of evidence in other proceedings: an obligation incumbent upon the parties not to rely on the types of evidence specified in article 11 and an obligation for courts to treat such evidence as inadmissible.[34] The Model Law aims at preventing the use of certain information in subsequent judicial or arbitral proceedings, regardless of whether the parties have agreed to a rule such as that contained in article [-] of the UNCITRAL Mediation Rules. Where the parties have not agreed otherwise, the Model Law provides that the parties shall in any subsequent arbitral or judicial proceedings not rely on evidence

[31] Ibid., para. 83.
[32] Ibid., para. 166.
[33] United Nations publication, Sales No. E.81.V.6.
[34] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 166.

of the types specified in the model provisions. The specified evidence would then be inadmissible and the arbitral tribunal or the court could not order disclosure.

Form of the information or evidence

76. Paragraph 2 provides that the prohibition in article 11 is intended to apply broadly to the range of information or evidence listed in paragraph 1, regardless of whether or not such information or evidence appears in the form of a written document, an oral statement or an electronic message. Documents prepared solely for purposes of the mediation proceedings may include not only statements of the parties but also, for example, witness statements and expert opinions.

Prohibition of disclosure of mediation-related evidence or information

77. In order to promote candour between the parties engaged in a mediation, they must be able to enter into the mediation knowing the scope of the rule and that it will be applied. Paragraph 1 achieves that by prohibiting any of the parties involved in the mediation process, including the mediator and any third party, from using mediation-related material in the context of other proceedings. With a view to clarifying and strengthening the rule expressed in paragraph 1, paragraph 3 restricts the rights of courts, arbitral tribunal or government entities from ordering disclosure of information referred to in paragraph 1, unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings, and requires such bodies to treat any such information offered as evidence as being inadmissible.

Situation where disclosure of information is permitted or required by law

78. In the preparation of the Model Law, it was recognized that, in certain systems, the term “law” includes not only the texts of statutes, but also court decisions. In finalizing the text of the Model Law, the Commission agreed that the term “law” should be given a narrow interpretation so as to be interpreted to refer to legislation rather than orders by arbitral or judicial tribunals ordering a party to mediate. Thus, if disclosure of evidence is requested by a party to support its position in litigation or similar proceedings (without existing overriding public policy interests such as those referred to below), the court would be barred from issuing a disclosure order. However, such orders by a court (potentially combined with a threat of sanctions, including criminal sanctions, directed to a party or another person who could give evidence referred to in paragraph 1), are normally based on legislation, and certain types of such orders (in particular, if based on the law of criminal procedure or laws protecting public safety or professional integrity) may be regarded as exceptions to the rule of paragraph 1.[35]

79. There may be situations where evidence of certain facts would be inadmissible under article 11, but the inadmissibility would have to be overridden by an overwhelming need to accommodate compelling reasons of public policy, for example:

- The need to disclose threats made by a participant to inflict bodily harm or unlawful loss or damage;
- Where a participant attempts to use the mediation to plan or commit a crime;
- Where evidence is needed to establish or disprove an allegation of professional misconduct based on the conduct occurring during a mediation;
- Where evidence is needed in a proceeding in which fraud or duress is in issue regarding the validity or enforceability of an agreement reached by the parties or where statements made during a mediation show a significant threat to public health or safety.

[35] Ibid., para. 167.

80. The final sentence in paragraph 3 expresses such exceptions in a general manner and is expressed in terms similar to the exception of the duty to confidentiality in article 10.

Relationship between mediation and subsequent proceedings

81. Paragraph 4 extends the scope of application of paragraphs 1–3 to apply not only to subsequent proceedings related to the mediation, but also to unrelated subsequent proceedings. This provision eliminates the possibility of avoiding the application of article 10 by introducing evidence in proceedings where the main issue is a different one from the issue considered in the mediation.

82. In making sure that certain information is not used in subsequent proceedings, it must however be born in mind that parties in practice often present in mediation proceedings information or evidence that has existed or has been created for purposes other than the mediation and that, by presenting it in the mediation proceedings, the party has not forfeited its use in subsequent proceedings or otherwise made it inadmissible. In order to put this beyond doubt, paragraph 5 makes it clear that all information that otherwise would be admissible as evidence in a subsequent court or arbitral proceeding does not become inadmissible solely by reason of it having been raised in an earlier mediation proceeding (for example, in a dispute concerning a contract of carriage of goods by sea, a bill of lading would be admissible to prove the name of the shipper, notwithstanding its prior use in a mediation). Only statements (or views, proposals etc.) made in mediation proceedings, as listed in paragraph 1, are inadmissible, but the inadmissibility does not extend to any underlying evidence that may have given rise to those statements.

83. In many legal systems, a party may not be compelled to produce in court proceedings a document that enjoys a "privilege" – for example, a written communication between a client and its attorney. However, in some legal systems, the privilege may be lost if a party has relied on the privileged document in a proceeding. Privileged documents may be presented in mediation proceedings with a view to facilitating settlement. In order not to discourage the use of privileged documents in mediation, the enacting State may wish to consider including a provision stating that the use of a privileged document in mediation proceedings does not constitute a waiver of the privilege.

References to UNCITRAL documents in respect of article 11

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 54;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 82–91 and 165–167;

A/CN.9/506, paras. 101–115;
A/CN.9/WG.II/WP.115, remarks 29–35;
A/CN.9/487, paras. 139–141;
A/CN.9/WG.II/WP.113/Add.1, footnotes 25–32;
A/CN.9/485, paras. 139–146;
A/CN.9/WG.II/WP.110, paras. 98–100;
A/CN.9/468, paras. 22–30;
A/CN.9/WG.II/WP.108, paras. 16 and 18–28;
A/CN.9/460, paras.11–13;
UNCITRAL Conciliation Rules article 20;
UNCITRAL Mediation Rules, articles [-]; and
UNCITRAL Mediation Notes, paras. [-].

Article 12. Termination of mediation proceedings

Text of article 12

The mediation proceedings are terminated:

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

(b) 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;

(c) By a declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration; or

(d) By 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, on the date of the declaration.

Comments on article 12

Circumstances in which mediation may be terminated

84. The provision enumerates various circumstances in which mediation proceedings may be terminated. In subparagraph (a) the provision uses the expression "conclusion" instead of "signing" in order to better reflect the possibility of settling in any form, such as by an exchange of electronic communications or even orally (see A/CN.9/506, para. 88). The first circumstance listed in subparagraph (a) is where the mediation ends successfully, namely where a settlement agreement is reached. The second circumstance set out in subparagraph (b) allows the mediator or panel of mediators to bring the mediation proceedings to an end, after consulting with the parties. In the preparation of the Model Law, it was agreed that subparagraph (b) should also cover cases of abandonment of the mediation procedure after it had commenced where such abandonment is implied by the conduct of the parties, for example conduct such as an expression of a negative opinion by a party about the prospects of the mediation, or refusal of a party to consult or to meet with the mediator when invited.[36] The phrase "after consultation with the parties" should be interpreted to include those cases where the mediator has contacted the parties in an attempt to consult and has received no response. Subparagraph (c) provides that both parties may declare the mediation proceedings to be terminated, and subparagraph (d) allows one party to give such notice of termination to the other party and the mediator or panel of mediators.

85. As noted above in the context of article 5, the parties may be under an obligation to commence and participate in good faith in mediation proceedings. Such an obligation may arise, for example, from an agreement of the parties entered into before or after the dispute arose, from a statutory provision or from a direction or request by a court. The sources of such an obligation differ from country to country and the Model Law does not deal with them. The Model Law also does not deal with the consequences of failure by a party to comply with such an obligation (see para. 45 above).

Forms of termination

86. While article 12 does not require that the termination be in writing, an enacting State that adopts draft article X as contained in the footnote to article 5 may wish to consider whether termination in writing should be required, since precision may be needed in determining when a mediation ended so that courts can properly determine the moment when the limitation period stops running (see para. 56 above).[37]

[36] Ibid., para. 169.
[37] Ibid., paras. 96 and 168.

References to UNCITRAL documents in respect of article 12

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 54;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 92–98 and 168–169;

A/CN.9/506, paras. 87–91;
A/CN.9/WG.II/WP.115, remarks 26 and 27;
A/CN.9/487, paras. 135–136;
A/CN.9/WG.II/WP.113/Add.1, footnotes 22 and 23;
A/CN.9/468, paras. 50–53;
UNCITRAL Conciliation Rules, article 15;
UNCITRAL Mediation Rules, articles [-]; and
UNCITRAL Mediation Notes, paras. [-].

Article 13. Mediator acting as arbitrator

Text of article 13

Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator 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 contract or legal relationship or any related contract or legal relationship.

Comments on article 13

Default rule, subject to party autonomy

87. In some legal systems, mediators are permitted to act as arbitrators if parties so agree and, in other legal systems, that is subject to rules embedded in professional codes of conduct. The Model Law provides a default rule subject to party autonomy: The agreement of the parties and the mediator may be able to override any limitation on that point, even where the matter is subject to rules embedded in codes of conduct.[38] Article 13 reinforces the effect of article 11 by limiting the possibility of the mediator acting as arbitrator 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 contract or any related contract. The purpose of article 13 is to provide greater confidence in the mediator and in mediation as a method of dispute settlement. A party may be reluctant to strive actively for a settlement in mediation proceedings if it has to take into account the possibility that, if the mediation is not successful, the mediator might be appointed by the other party as an arbitrator in subsequent arbitration proceedings.

88. In some cases, the parties might regard prior knowledge of the arbitrator as advantageous, particularly if the parties think that this knowledge would allow the arbitrator to assist settle the case more efficiently. In such cases, the parties may actually prefer that the mediator and not somebody else be appointed as an arbitrator in the subsequent arbitral proceedings. The provision poses no obstacle to the appointment of the former mediator provided the parties depart from the rule by agreement – for example, by a joint appointment of the mediator to serve as an arbitrator. The same considerations governing the situation of a mediator acting as an arbitrator may also apply in situations where a mediator acts as a judge. That situation is not addressed in the Model Law, given that it is rarer and that its regulation might interfere with national rules governing the judiciary. Enacting States may wish to consider whether any special rule is needed in that respect in the context of their national rules governing the judiciary.[39]

[38] Ibid., para. 170.
[39] Ibid.

Scope of article 13

89. The provision applies not only with respect to "a dispute that was or is the subject of the mediation proceedings" but also "in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship". The first limb extends the application of the provision to both past and ongoing mediations. The second limb extends the scope of the article to cover disputes arising under contracts that are distinct but commercially and factually closely related to the subject matter of the mediation. While the formulation is very broad, determining whether a dispute raises issues relating to the main contract or legal relationship would require an examination of the facts of each case. In the preparation of the Model Law, it was agreed that the reference to "another dispute" in article 13 could involve parties other than the parties in the mediation proceedings.[40]

Arbitrator acting as mediator

90. An early draft of the Model Law contained a provision dealing with the situation where an arbitrator acts as a mediator, a practice that is permitted in some legal systems. It was noted that such a provision would relate to the functions and competence of an arbitrator and to arbitration practices that differ from country to country and are influenced by legal and social traditions. There is no settled practice on the question of an arbitrator acting as mediator, and some practice notes suggest that the arbitrator should exercise caution before suggesting or taking part in mediation proceedings relating to the dispute.[41] It was considered inappropriate to attempt unifying these practices through uniform legislation. Although the provision was deleted in the preparation of the Model Law, the Commission agreed that the Model Law was not intended to indicate whether or not an arbitrator could act or participate in mediation proceedings relating to the dispute and that this was a matter left to the discretion of the parties and arbitrators acting within the context of applicable law and rules (A/CN.9/506, para. 132).[42]

Mediator acting as representative or counsel of a party

91. An early draft of the Model Law also restricted a mediator from acting as representative or counsel of either party subject to contrary party agreement. It was suggested, however, that, in some jurisdictions, even if the parties agreed to the mediator acting as a representative or counsel of any party, such an agreement would contravene ethical guidance to be followed by mediators and could also be perceived as undermining the integrity of mediation as a method for dispute settlement. A proposal to amend the provision so as not to leave this question to party autonomy was rejected on the basis that it undermined the principle of party autonomy and failed to recognize that, in some jurisdictions where ethical rules required a mediator not to act as representative or counsel, the mediator would always be free to refuse to act in that capacity. On that basis, it was agreed that the provision should be silent on the question whether a mediator could act as representative or counsel of any of the parties (A/CN.9/506, paras. 117–118).

References to UNCITRAL documents in respect of article 13

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 54;

Official Records of the General Assembly, Fifty seventh Session, Supplement No. 17 (A/57/17), paras. 99–105 and 170;

A/CN.9/WG.II/WP.110, footnote 30;
A/CN.9/WG.II/WP.108, paras. 29–33;

[40] Ibid., para. 102.
[41] See, for example, *UNCITRAL Notes on Organizing Arbitral Proceedings*.
[42] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 170.

A/CN.9/506, paras. 117–123;
A/CN.9/WG.II/WP.115, remarks 36–41;
A/CN.9/487, paras. 142–145;
A/CN.9/485, paras. 148–153;
A/CN.9/468, paras. 31–37;
UNCITRAL Conciliation Rules, article 19;
UNCITRAL Mediation Rules, articles [-]; and
UNCITRAL Mediation Notes, paras. [-].

Article 14. Resort to arbitral or judicial proceedings

Text of article 14

Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been 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 a waiver of the agreement to mediate or as a termination of the mediation proceedings.

Comments on article 14

Limitation of the freedom to initiate arbitral or judicial proceedings

92. In the preparation of the Model Law, it was noted that the initiation of arbitral or judicial proceedings by the parties while mediation was pending was likely to have a negative impact on the chances of reaching a settlement. However, no consensus was found on the formulation of a general rule that would prohibit the parties from initiating such arbitral or judicial proceedings or restrict such an action to taking the steps necessary to prevent expiry of a limitation period. It was found that limiting the parties' right to initiate arbitral or court proceedings might, in certain situations, discourage parties from entering into mediation agreements. Moreover, preventing access to courts might raise constitutional law issues in that access to courts is in some jurisdictions regarded as an inalienable right.[43]

93. In article 14, the Model Law limits itself to dealing with the hypothesis where the parties would have specifically agreed to waive their right to initiate arbitral or judicial proceedings while mediation is pending. The consequence of that provision is that the court or arbitral tribunal will be obliged to bar litigation or an arbitration from proceeding if that would be in violation of the agreement of the parties.

"Except to the extent necessary for a party, in its opinion, to preserve its rights"

94. Even in the case where the parties would have agreed to waive their right to initiate arbitral or judicial proceedings while mediation is pending, article 14 creates the possibility for a party to disregard that agreement where, in the opinion of that party, the initiation of arbitral or court proceedings is necessary to preserve its rights. That provision is based on the assumption that parties will effectively limit themselves in good faith to initiating arbitral or court proceedings in circumstances where such proceedings are truly necessary to preserve their rights. Possible circumstances that may require such proceedings may include the necessity to seek interim measures of protection or to avoid the expiration of a limitation period.[44] A party might initiate court or arbitral proceedings also where one of the parties remained passive and thus hindered implementation of the mediation agreement. However, in such a case, a party could initiate judicial or arbitral proceedings after the mediation proceedings were terminated pursuant to article 12.[45]

[43] Ibid., para. 112.
[44] Ibid., para. 117.
[45] Ibid.

95. Article 14 makes it clear that the parties' right to resort to arbitral or judicial proceedings is an exception to the duty of arbitral or judicial tribunals to stay any proceeding in the case of a waiver by the parties of the right to initiate arbitral or judicial proceedings.[46]

References to UNCITRAL documents in respect of article 14

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 54;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 106–110, 111–118 and 171;

A/CN.9/506, paras. 124–129 and 130–132;
A/CN.9/WG.II/WP.115, remarks 42 and 43;
A/CN.9/487, paras. 146–150;
A/CN.9/WG.II/WP.113/Add.1, footnotes 36 and 37;
A/CN.9/485, paras. 154–158;
A/CN.9/468, paras. 45–49;
A/CN.9/WG.II/WP.108, paras. 49–52;
UNCITRAL Conciliation Rules, article 16;
UNCITRAL Mediation Rules, articles [-]; and
UNCITRAL Mediation Notes, paras. [-].

Article 15. Binding and enforceable nature of settlement agreements

Text of article 15

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable.

Comments on article 15

96. Article 15 stresses the binding and enforceable nature of settlement agreements. It addresses the outcome of the mediation process and therefore naturally concludes section 2 dealing with the procedure of mediation. (A/CN.9/934, para. 132). The word "binding" reflects a contractual obligation between the parties and is meant to accommodate the diverse pre-enforcement procedures varying between jurisdictions. Furthermore, the word "enforceable" reflected the nature of that obligation as susceptible to enforcement by courts, without specifying the nature of such enforcement (A/CN.9/896, para. 79).

97. Regarding the link between article 15 and section 3, it should be noted that article 15 refers to the enforceability of settlement agreements, without requiring such agreements to be international. Article 15 governs enforcement of settlement agreements resulting from international mediation, whereas section 3 is strictly applicable to settlement agreements that are international at the time of their conclusion.

References to UNCITRAL documents in respect of article 15

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 54;

Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 119–126 and 172;

A/CN.9/934, paras. 119, 125, and 132;
A/CN.9/WG.II/WP.205, paras. 45–46;
A/CN.9/896, paras. 76–83.

[46] Ibid., para. 116.

Section 3 – International Settlement Agreements[5]

Comments on Section 3

98. Section 3 of the Model Law focusses on the outcome of the mediation procedure, i.e., the settlement agreement. It addresses situations where a party seeks to either enforce a settlement agreement or invoke a settlement agreement as a defence or for other procedural purposes. The lack of a uniform enforcement mechanism for settlement agreements was considered as the main barrier to the wider use of mediation (A/CN.9/832, paras. 17–19).

99. Section 3 does not address the agreement to submit a dispute to mediation, as the basis upon which mediation might be carried out are diverse including not only the agreement between the parties, but also mandatory provisions of the law or an order by a competent authority.

100. Articles 16 to 20 were drafted in parallel to the preparation of the Singapore Convention on Mediation in order to accommodate the different levels of experience with mediation in different jurisdictions (A/CN.9/901, paras. 13 and 93). The double-track approach of drafting both the Convention and Model Law provisions should permit as many States as possible to use at least one of the two UNCITRAL instruments on international settlement agreements resulting from mediation. States that adopt the Convention can use section 3 as a piece of legislation implementing the Convention.

101. Indeed, both the Convention and section 3 of the Model Law have been drafted with the highest possible level of consistency, with differences only where the different nature of the instrument required a different wording (A/CN.9/943, para. 11). The deliberations on both instruments took place simultaneously.

Options for the enacting State

- *Applicability of section 3 to settlement agreements not resulting from mediation*

102. While section 3 aims at harmonizing the rules governing the enforcement of international settlement agreements resulting from mediation, flexibility is provided to States should they wish to broaden the application of the section to agreements that did not result from mediation. The purpose is to allow application of section 3 to settlement agreements, regardless of the procedure that led to their conclusion, as long as their purpose is to settle a dispute (A/CN.9/861, paras. 17–19; A/CN.9/934, paras. 133–137).

103. To make section 3 applicable to international settlement agreements generally, irrespective of whether they resulted from mediation, enacting States need to amend the following articles:

- Paragraph (1) of article 16, with the deletion of the words “resulting from mediation and”;
- Deletion of paragraph (1)(b) of article 18 and of references to “the mediator” in paragraph (2) of article 18;
- Paragraphs (1)(e) and (f) as well as (2)(b) of article 19.

Applicability of Section 3 based on parties’ agreement

104. Footnote 6 to article 16(1) provides States with the possibility of using an opt-in mechanism, i.e. applying section 3 only where the parties to the settlement agreement agreed to its application. Footnote 6 reflects the reservation provided for in article 8(1)(b) of the Singapore Convention on Mediation which allows a State to make a reservation that it shall apply the Convention to the extent that the parties have agreed to the application of the Convention (A.CN.9/934, para. 137).

Article 16. Scope of application of the section and definitions

Text of article 16

1. This section applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreements").[6]

2. This section does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This section does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

4. A settlement agreement is "international" if, at the time of the conclusion of the settlement agreement:[7]

(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 to be performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

5. For the purposes of paragraph 4:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

6. 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.

Footnotes

[5] A State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation. Adjustments would then have to be made to relevant articles.

[6] A State may consider enacting this section to apply only where the parties to the settlement agreement agreed to its application.

[7] A State may consider broadening the definition of "international" settlement agreements by adding the following subparagraph to paragraph 4: "A settlement is also 'international' if it results from international mediation as defined in article 3, paragraphs 2, 3 and 4."

Comments on article 16

Scope

105. Article 16 delineates the scope of application of section 3 on international settlement agreements, and reflects article 2 of the Singapore Convention. Paragraph 1 introduces the generic term "settlement agreement", which refers to an international agreement, resulting from mediation, and concluded in writing by parties to resolve a commercial dispute. Article 16 further defines the notions of "international" and "in writing". It should be noted that no limitation as to the nature of the remedies or contractual obligations are provided for (A/CN.9/861, paras. 47–50).

106. Settlement agreements might address matters not contemplated when the mediation started. Paragraph 1 therefore defines settlement agreements as those "resulting from" mediation, to avoid complications at the enforcement stage (A/CN.9/861, para. 69).

107. As to the obligations covered, as settlement agreements may contain both pecuniary and non-pecuniary obligations, section 3 applies to both types of obligations. The reasons are that providing for the enforcement of pecuniary obligations only would have been overly restrictive and would have created an imbalance between the parties. Section 3 has been drafted so that any issues that might arise in the enforcement of non-pecuniary obligations can be handled by the competent authority in accordance with the applicable law.

Exclusions from the scope

108. Paragraphs (2) and (3) provide an exhaustive list of exclusions where section 3 does not apply.

- *Settlement agreements to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes or relating to family, inheritance or employment law*

109. Paragraph 2 excludes the application of section 3 to settlement agreements dealing with consumer, family, inheritance and employment law matters. Given that the term "consumer" could be understood differently in various jurisdictions, the current descriptive language "for personal, family or household purposes" is used, alongside an explicit reference to "consumer" (A/CN.9/896, paras. 58–9). Such approach is consistent with provisions found in other UNCITRAL instruments, such as article 4(a) of the Convention on the Limitation Period in the International Sale of Goods and article 2(a) of the United Nations Convention on Contracts for the International Sale of Goods.

110. Paragraph (2)(b) refers to settlement agreements arising from family, inheritance, or employment disputes "laws", as opposed to "matters". This formulation aims at ensuring that family "matters", which may comprise commercial disputes involving family members resolved by mediation, would fall under the scope of section 3.

- *Settlement agreements concluded in the course of judicial or arbitral proceedings*

111. Paragraph 3 provides for two exclusions: settlement agreements which have been (i) approved by a court or concluded before a court and take the form of a court judgment, or (ii) concluded during an arbitration and take the form of an award. Since such settlement agreements may be governed by other specific legislation (including international instruments such as the Convention on Choice of Court Agreements and the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters as well as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention"), the purpose of these exclusions is to avoid possible overlap or gap with

such existing legal framework (A/CN.9/901, para. 26). Nevertheless, States have the flexibility to enact legislation to cover settlement agreements concluded in the course of judicial or arbitral proceedings, thereby enlarging the scope of section 3 (A/CN.9/929, para. 19).

112. The first exclusion in paragraph (3)(a) is intended to cover a wide range of different circumstances (A/CN.9/901, para. 61). When court proceedings are commenced, but the parties are able to settle through mediation, settlement agreements resulting therefrom fall outside the scope of the Model Law, only as long as the settlement agreement is approved by a court or concluded in the course of proceedings before a court and enforceable as a judgment in that State where court proceedings began (A/CN.9/929, para. 20). Settlement agreements reached during court proceedings, but not recorded as judicial decisions also fall outside the scope of the Model Law, only as long as the settlement agreement is approved by a court or concluded in the course of proceedings before a court and enforceable as a judgment in the State where court proceedings took place (A/CN.9/929, para. 21). The phrase "enforceable as a judgment" is intended to address the gap that might arise from the non-enforceability of settlement agreements approved by a court or concluded in the course of proceedings before a court (reference required). In that respect, if a judgment falls outside the scope of the relevant enforcement regime, the settlement agreement might still be considered for enforcement under the Model Law. To determine the enforceability of a settlement agreement approved by a court or concluded before a court, reference should be made to whether it is enforceable "in the State of that court." A suggestion that the enforceability should be determined according to the law of the State where enforcement is sought did not received support during the preparation of the Model Law. The reason expressed was that such an approach would create confusion (A/CN.9/929, para. 24; see also paras. 15–16 A/CN.9/WG.II/WP.202).

113. Regarding the second exclusion in paragraph (3)(b), the phrase "enforceable as an arbitral award" is intended to address the gap that might arise from the non-enforceability of settlement agreements recorded in the form of awards in certain jurisdictions (A/CN.9/929, para. 25). In that respect, if an arbitral award recording a settlement agreement cannot benefit from the enforcement regime for arbitral awards, the settlement agreement might still be considered for enforcement under the Model Law. During the preparation of the Model Law, there were discussions on whether the enforceability of a settlement agreement as an arbitral award should be decided according to the law of the contracting State, of the State where enforcement is sought, or of the place of arbitration. It was finally agreed that the question of enforceability of the settlement agreement as an arbitral award would be left to the competent State authority (A/CN.9/929, paras. 25–27).

114. Noteworthy is the fact that the mere involvement of a judge or an arbitrator in the mediation process should not result in the settlement agreement being excluded from the scope of the instrument (A/CN.9/901, para. 25; see para. 47 above).

Definition of "international"

115. The scope of section 3 is limited to "international" settlement agreements. The definition of "international" settlement agreements in paragraphs (4) and (5) of article 16 provides clear and simple criteria to determine whether or not a settlement agreement falls under the scope of section 3. The definition clarifies that the "international" nature of settlement agreements does not result from the "international" nature of mediation, but from the settlement agreement itself (A/CN.9/934, paras. 121–127).

116. During the preparation of the Model Law, it was considered whether the internationality of a settlement agreement should be assessed at the time of the conclusion of the agreement to mediate or at the time of the conclusion of the settlement agreement. Section 3 clarifies that the relevant point in time for the determination of internationality is the time of conclusion of the settlement

agreement, regardless of whether the relevant criteria have been met at any point during the proceedings (A/CN.9/934, paras. 28 and 121–127). Consequently, a settlement agreement might be international although the mediation procedure was not international (e.g. one of the parties moved its place of business to a different State from the other party after the start of the proceedings and before the conclusion of the settlement agreement). Further, the adopted formulation, "at the time of the conclusion of the settlement agreement" is used to ensure that section 3 also applies to situations where mediation did not commence on the basis of an agreement to mediate between the parties (A/CN.9/934, para. 123).

117. It was also acknowledged that parties to international mediation under the definition of paragraph (2) of article 3 would expect the settlement agreement resulting from that process to be subject to enforcement under section 3, whereas the settlement agreement might not be international under paragraph (4) of article 16. In that light, an option is also provided in the Model Law, under footnote 7, regarding the possible application of section 3 to settlement agreements that are not international under paragraph (4), but resulted from international mediation (A/CN.9/934, paras. 124–127).

118. Paragraph 5 of article 16 provides for a test to determine a party's place of business, where the party has either more than one place of business, or no place of business. As the term "place of business" is well-known and frequently used in the commercial law context, this term is not defined in section 3 (A/CN.9/896, paras. 27–28).

Writing requirement

119. The reference to the phrase "concluded in writing" in paragraph (1) of article 16, further defined in paragraph (6) of article 16 reflects the need for the competent authority to be presented with a settlement agreement fulfilling certain minimal form requirements in order to proceed with the application (A/CN.9/896, paras. 32–36). Modern means of communication and trade usages are considered in paragraph (6), which foresees the principle of functional equivalence as embodied in the UNCITRAL texts on electronic commerce. (A/CN.9/867, para. 133). The functional equivalence rules for the writing requirements under section 3 are derived from article 9 (2) and (3) of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (A/CN.9/896, para. 66).

Notion of "commercial"

120. Section 3 applies to "commercial" settlement agreements. It does not contain an illustrative list or a definition of the term "commercial" (see above, paras. 30–31).

Notion of "party" to the settlement agreement

121. Section 3 does not provide a detailed explanation of what is meant by a "party", in light of the current global business practices as well as complex corporate structures.

122. Section 3 applies to settlement agreements involving government entities as such government entities may also engage in commercial activities and use mediation to resolve disputes in the context of those activities. Excluding settlement agreements involving government entities would deprive those entities of the opportunity to enforce or invoke such agreements vis-a-vis their commercial partners (A/CN.9/861, paras. 44–46).

References to UNCITRAL documents in respect of article 16

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), paras. 56–57 and 66;

A/CN.9/943, paras. 12 and 13;

A/CN.9/934, paras. 18–19, 21, 23–24, 26, 28–29, 120–127, and 133–137;
A/CN.9/WG.II/WP.205, paras. 7–10 and 12–16;
A/CN.9/929, paras. 14–15, 17–35, 43, and 68–72;
A/CN.9/WG.II/WP.202, paras. 24–28;
A/CN.9/901, paras. 25–34, 52, 56, and 58–71;
A/CN.9/WG.II/WP.200, paras. 15–20 and 22–28;
A/CN.9/896, paras. 14–24, 27–28, 32–38, 48–60, 66, 113–117, 133, 145–146, 158–163, 169–176, and 205–210;
A/CN.9/WG.II/WP.198, paras. 4–24;
A/CN.9/867, paras. 93–98, 101, 106–108, 118, 125–131, and 133;
A/CN.9/WG.II/WP.195, paras. 6–28;
A/CN.9/861, paras. 24–28, 33–39, 40–43, and 68–69;
A/CN.9/WG.II/WP.190, paras. 28–38.

Article 17. General Principles

Text of article 17

1. A settlement agreement shall be enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this section.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State, and under the conditions laid down in this section, in order to prove that the matter has already been resolved.

Comments on article 17

Obligations of States

123. Article 17 is outlining the obligations of the State regarding both enforcement of settlement agreements (paragraph 1) and the right for a party to invoke a settlement agreement as a defence against a claim (paragraph 2), and reflects article 3 of the Singapore Convention.

124. States are required to ensure that settlement agreements resulting from mediation are enforced in accordance with their own procedural rules, in addition to the conditions outlined in section 3. They shall also allow a party to invoke a settlement agreement as a defence against a claim concerning the matters resolved by a settlement agreement (A/73/17, para. 58).

Direct enforcement – No review/control mechanism in originating State

125. Section 3 provides for direct enforcement of the settlement agreement at the place of enforcement. During the preparation of the Model Law, a proposal for a review or control mechanism in the State where the settlement agreement originated as a precondition for its enforcement was not adopted. Such a review mechanism would have resulted in a double exequatur, which would have been at odds with the objective of providing an efficient and simplified enforcement mechanism (A/CN.9/861, paras. 80–84).

No-use of the term "recognition"

126. Paragraph (2) removes any ambiguity regarding the possibility of invoking the settlement agreement as a defence, and clarifies that a settlement agreement which satisfies the conditions in section 3 constitutes proof that the dispute has been resolved**.** During the drafting of article 17, it was questioned whether the Model Law should use the term "recognition" and explicitly provide for the recognition of settlement agreements (A/CN.9/867, para. 146). As the understanding of the notion of "recognition" varies amongst jurisdictions (A/CN.9/861, para. 72), , it was decided not to use this term.

"in order to prove that the matter has been already resolved"

127. The phrase "in order to prove that the matter has been already resolved" clearly identifies the consequences of invoking the settlement agreement as a defence (A/CN.9/929, para. 45). Paragraph (2) should be understood broadly, as also covering set-off claims (A/CN.9/929, para. 47).

"Enforcement" and "enforceability"

128. The fact that the notions of "enforcement" and "enforceability" are used in the Model Law should not be understood as indicating that enforcement referred to something different than to enforceability. "Enforcement" in the meaning of the Model Law covers both the process of issuing an enforceable title and the enforcement of that title.

References to UNCITRAL documents in respect of article 17

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), paras. 58–59;

A/CN.9/943, para.14;
A/CN.9/934, para. 25;
A/CN.9/929, paras. 44–48 and 73;
A/CN.9/WG.II/WP.202, paras. 29–33
A/CN.9/901, paras. 16–24, 52, 54 and 55;
A/CN.9/WG.II/WP.200, paras. 29–30 and 35–36;
A/CN.9/896, paras. 76–81, 152, 153, 155 and 200–203;
A/CN.9/WG.II/WP.198, paras. 31–33;
A/CN.9/867, para. 146;
A/CN.9/WG.II/WP.195, paras. 44–50;
A/CN.9/861, paras. 19, 47–50, 71–84;
A/CN.9/WG.II/WP.190, paras. 40–45.

Article 18. Requirements for reliance on settlement agreements

Text of article 18

1. A party relying on a settlement agreement under this section shall supply to the competent authority of this State:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is 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.

3. If the settlement agreement is not in an official language of this State, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of this section have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Comments on article 18

Purpose of article 18

129. Article 18 contains formal requirements to be complied with by parties wishing to rely on a settlement agreement, and reflects article 4 of the Singapore Convention. It provides a balance between the requirements for ascertaining whether a settlement agreement resulted from mediation on the one hand, and the need to preserve the flexible nature of the mediation process on the other (A/73/17, para. 60).

Requirement of parties' signature

130. Paragraph (1)(a) requires the parties' signatures on the settlement agreement. The consensual nature of mediation and the settlement agreement resulting from that process are best documented by a signature of the parties. Therefore, the settlement agreement should be signed by the parties or at least, it should be clearly established that the parties concluded the agreement, taking also into account modern means of communication. Indeed, the principle of functional equivalence embodied in UNCITRAL texts on electronic commerce are reflected in article 18, allowing for the use of electronic and other means of communication to meet the form requirements therein (see below, para. 137).

131. Although paragraph (1)(a) does not explicitly provide that settlement agreements might be signed by the parties "or their authorized representatives" (A/CN.9/929, paras. 40–42, 49, and 50), a reference to the parties' representatives is implicit (A/CN.9/929, para. 50). In addition, in light of the possible variety in the understanding of the notion of "parties' representatives" across different jurisdictions or contexts, the matter is left to be addressed by the relevant applicable domestic legislation (A/CN.9/929, para. 49).

"Evidence that the settlement agreement resulted from mediation"

132. Paragraph (1)(b) addresses the need to ascertain that the settlement agreement resulted from mediation. That indication aims at distinguishing a settlement agreement from other contracts and providing for legal certainty, facilitating the procedure of granting relief and preventing possible abuse. Paragraph (1)(b) is drafted so as to ensure that the requirements are not burdensome and are kept as simple as possible.

133. As evidenced by the phrase "such as," paragraph (1)(b) of article 18 contains an illustrative and non-hierarchical list of means to evidence that a settlement agreement resulted from mediation (A/CN.9/929, paras. 56–59). The list reflects the need to balance the necessity for certainty regarding evidence that the settlement agreement resulted from mediation and to preserve flexibility for the parties having to bear such proof (A/CN.9/896, para. 75).

134. The necessary indication that a settlement agreement resulted from mediation can be achieved by:

- The mediator signing the settlement agreement;

- A separate attestation to that effect from the mediator; or

- An attestation by the institution administering the mediation.

135. The mediator's signature in subparagraphs (i) and (ii) is intended to prove the mediator's involvement in the process. Therefore, the signature should not be construed as an endorsement of the settlement agreement, nor as an indication that the mediator was a party to the settlement agreement (A/CN.9/896, para. 75).

136. As indicated in subparagraph (iv), the list is non-exhaustive. However, it must be noted that the requesting party should be allowed to submit "any other evidence" in subparagraph (iv) only if the evidence mentioned in subparagraphs (i) to (iii) cannot be produced (A/CN.9/934, para. 38). The competent authority could have flexibility in determining the acceptability of the evidence in the application, as long as the parties are able to show that the settlement agreement resulted from mediation (A/CN.9/896, para. 190).

Electronic communication

137. Article 18 (2) clarifies if and when a signature requirement either by the parties or, or where applicable, the mediator can be met through electronic means. These functional equivalence rules for the signature requirements under section 3 are derived from article 9 (2) and (3) of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (A/CN.9/896, para. 66).

No need for the settlement agreement to be in a single document

138. The Working Group discussed whether to introduce the requirement that the settlement agreement be a single document, and agreed that this would not necessarily reflect current practice, since the form and content of settlement agreements vary greatly. It was therefore decided not to include such a requirement, to avoid imposing on the parties an additional burden which could jeopardize the flexibility of the process, and which could have the unintended consequence of encumbering enforcement (A/CN.9/896, paras. 67 and 177–185).

Power of the competent authority

139. While paragraphs (1)(a) and (1)(b) deal with what a party would need to supply to the competent authority upon submitting an application, paragraph (4) addresses the power of the competent authority to require, when considering an application, certain necessary documents. Paragraph 4 should not be understood as allowing the competent authority to introduce additional application requirements, as this could unduly burden the party seeking to rely on the settlement agreement (A/CN.9/929, paras. 64–65).

Expeditious Action

140. Paragraph 5 provides that the competent authority shall act expeditiously. Paragraphs (4) and (5) are to be read together, which means that, in exercising its right to request "any necessary document" under paragraph (4), the competent authority should not unduly prolong the procedure, as provided for under paragraph (5) (A/CN.9/929, para. 67, and A/CN.9/896, paras. 82 and 183).

References to UNCITRAL documents in respect of article 18

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), paras. 60–61;

A/CN.9/943, paras. 15–16;
A/CN.9/934, paras. 37–39;
A/CN.9/929, paras. 40–42, 49–67 and 73;
A/CN.9/WG.II/WP.202, paras. 34–38;
A/CN.9/896, paras. 67–75, 82 and 177–190;
A/CN.9/WG.II/WP.198, paras. 25–30;
A/CN.9/867, paras. 133–144;
A/CN.9/WG.II/WP.195, paras. 39–43;
A/CN.9/861, paras. 51–67;
A/CN.9/WG.II/WP.190, para. 39.

Article 19. Grounds for refusing to grant relief

Text of article 19

1. The competent authority of this State may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of this State may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of this State; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of this State.

Comments on article 19

Purpose of article 19

141. Article 19 lists the grounds under which a competent authority may refuse to grant relief, and reflects article 5 of the Singapore Convention. At a party's request, the competent authority may refuse to grant relief on grounds relating to a party (paragraph (1)(a)), to the settlement agreement (paragraph (1)(b), (c) and (d)) and to

the mediator (paragraph (1)(e) and (f)). The competent authority may also refuse to grant relief on the basis of public policy (paragraph (2)(a)) and if the subject matter of the dispute is not capable of settlement by mediation under the law of the State (paragraph (2)(b)). These grounds are exhaustive and are meant to be limited and not cumbersome to implement in order to allow for a simple and efficient verification by the competent authority. The grounds are also stated in general terms, giving flexibility to the competent authority with regard to their interpretation and application (A/CN.9/861, para. 93).

Structure of article 19 – overlap

142. An important matter to note is that there might be overlap among the grounds provided for in paragraph 1. In the drafting process, various attempts to group the grounds differently were unsuccessful; difficulties arose because of the need to accommodate the concerns of different domestic legal systems. The shared understanding is therefore that there might be overlap among the grounds provided for in paragraph 1 and that competent authorities should take that aspect into account when interpreting the various grounds. (A/CN.9/934, paras. 60–65).

Request to refuse granting relief

143. The grounds for refusing to grant relief apply equally when a party seek enforcement under article 17 (1) and when a party invokes a settlement agreement as a defence against a claim under article 17 (2) (A/CN.9/929, para. 74).

Applicable law

144. Different laws might be applicable depending on the grounds. For example, the competent authority might need to consider the law applicable to the parties (in relation to their legal capacity), to the enforcement procedure, to the settlement agreement and to the mediation process.

145. The Model Law does not address the laws applicable with respect to some defences, with the assumption that the competent authority or the court seized with the matter would usually apply the conflict-of-law rules at the place of enforcement and where relevant, consideration of the parties' choice of law in the settlement agreement.

Chapeau to paragraphs 1 and 2 of article 19

146. The list of defences in article 19 is exhaustive, as indicated by the word "only" in the chapeau of paragraph (1) and the word "also" in the chapeau of paragraph (2). The competent authority has the discretion to refuse to grant relief, as indicated by the use of the word "may" in both paragraphs.

147. In contrast to paragraph (1), where the defences need to be raised by the parties, paragraph (2) covers two situations where the competent authority would consider the defences on its own initiative (*ex officio*) (A/CN.9/896, para. 110).

List of defences

Paragraph (1)(a) Incapacity

148. Paragraph (1)(a) provides that the incapacity of a party to enter into the settlement agreement is a ground for refusing to grant relief. The incapacity of a party, which covers various situations, including incapacity in the context of bankruptcy, is commonly recognized in international instruments and domestic legislation as a ground for refusing enforcement (A/CN.9/867, para. 152).

Paragraph (1)(b)(i) – The settlement agreement being "null and void, inoperative or incapable of being performed"

149. Paragraph (1)(b)(i) refers to the settlement agreement being null and void, inoperative or incapable of being performed. The expression "null and void, inoperative or incapable of being performed" in paragraph (1)(b)(i) reflects the language used in article II(3) of the New York Convention, and article 8(1) of the Model Law on Arbitration. These terms have been interpreted in a harmonized manner by courts across multiple jurisdictions (A/CN.9/861, para. 92).

150. Paragraph (1)(b)(i) is sufficiently broad to encompass instances of fraud, mistake, misrepresentation, duress and deceit, despite avoiding specific reference to such elements (A/CN.9/896, para. 100). The paragraph covers not only instances in which an agreement is void, but those in which the agreement is voidable as well.

151. Paragraph (1)(b)(i) should not be construed as giving the competent authority the ability to interpret the validity defence to impose requirements in domestic law (A/CN.9/896, para. 99). For instance, it should not be construed to impose specific requirements, such as domestic requirements of the mediators being licensed or the settlement agreement being notarized (A/CN.9/896, paras. 99– 102).

152. The determination by the competent authority shall be made by reference to the law to which the parties have validly subjected the settlement agreement. The expression "have validly subjected" in article 19 (1)(b)(i) follows the language of article V(1)(a) of the New York Convention (A/CN.9/896, para. 101). The word "validly" highlights the competent authority's right to assess the validity of the choice of law made by the parties in the settlement agreement, in accordance with applicable mandatory laws and public policy (A/CN.9/929, para. 94).

Paragraph (1)(b)(ii) and (iii) – Settlement agreement not binding, not final, or subsequently modified

153. Paragraph (1)(b)(ii) and (iii) encompasses situations where the settlement agreement contains obligations that are not binding, or where the settlement agreement is not a final determination of the dispute.

154. There are indeed instances where the parties, after concluding mediation, do not intend to enforce the obligations therein but rather formulate the settlement agreement as a framework to shape their future relationship and clarify mutual obligations (A/CN.9/934, para. 46). Paragraph (1)(b)(ii) provides therefore a defence for parties who did not intend to enter into a binding settlement agreement when the settlement agreement itself makes that clear "according to its terms." Under paragraph (1)(b)(iii), the competent authority can ascertain that relief shall be granted only with respect to the latest version of the settlement agreement concluded jointly by the parties (A/CN.9/929, para. 86). Paragraph (1)(b)(ii) and (iii) could also apply to situations, such as when the settlement agreement contains conditional or reciprocal obligations and when certain obligations in the settlement agreement have been breached (A/CN.9/867, para. 162).

Paragraph (1)(c) – The obligations in the settlement agreement

155. The defences under paragraph (1)(c) relate to the content of the settlement agreement, and its performance. Paragraph (1)(c)(i) allows the competent authority to refuse to grant relief, where the obligations under the settlement agreement have already been performed. Paragraph (1)(c)(ii) relates to the content of the settlement agreement and provides the competent authority with the discretion to refuse to grant relief where the terms of the settlement are not capable of enforcement due to being unclear or incomprehensible.

Paragraph (1)(d) – Contrary to the terms of settlement agreement

156. Paragraph (1)(d) provides that a competent authority may refuse to grant relief if this would be contrary to the terms of the settlement agreement (A/CN.9/896,

paras. 92–95). This ground is based on party autonomy, meaning that granting relief should not run contrary to what the parties had agreed in the settlement agreement.

157. Paragraph (1)(d) is intended to also encompass a variety of factual situations in which the non-performance of the obligations under a settlement agreement could be justified for a variety of reasons (for instance, the obligations are conditional or reciprocal). Indeed, different circumstances may affect the enforceability of obligations in settlement agreements, particularly in complex contractual agreements (A/CN.9/934 paras. 54–57).

158. Furthermore, mediation is fully consensual, therefore, the regime envisaged under section 3 would not apply if the parties so agreed (A/CN.9/861, paras. 61–63).

Paragraph (1)(e) – Serious breach by the mediator of applicable standards

159. Paragraph (1)(e) allows a party to rely on the serious misconduct of the mediator as a defence. The breach by the mediator of standards applicable to the mediator or the mediation has to be "serious" and should be such that without it, a party would not have entered into the settlement agreement (A/CN.9/896, para. 194). The scope of subparagraph (e) is therefore limited to instances where the mediator's misconduct had a direct impact on the settlement agreement. This ground serves to underscore the importance of compliance with due process in the mediation.

160. The phrase of "applicable standards" in paragraph (1)(e) is used to encompass various standards on conduct (A/CN.9/901, para. 80). Such standards could include, for example, those determined by the parties, or those prescribed by a code of ethical standards set by the mediator's registering authority, where it exists in the relevant jurisdiction. The standards for qualification or ethical conduct for mediators are not defined in the Model Law.

Paragraph (1)(f) – Lack of disclosure

161. Paragraph (1)(f) encompasses situations where a breach of the mediator's duty to disclose certain circumstances could be raised as a defence. This ground is limited to situations where the breach by the mediator had an impact on the parties entering into the settlement agreement (A/CN.9/901, para. 84).

162. Compared to paragraph (1)(e), the ground under paragraph (1)(f) allows the competent authority to refuse to grant relief even when the standards applicable to the mediator do not necessarily include a disclosure obligation (A/CN.9/901, para. 85).

Paragraph (2)(a) – Public policy

163. Paragraph (2)(a) mirrors article V(2)(b) of the New York Convention, and article 36(1)(b)(ii) of the Model Law on Arbitration (A/CN.9/929, para. 100). It enables the competent authority of the enacting State to refuse to grant relief if they find that granting relief would be contrary to the public policy of this State.

164. Public policy covers both substantive and procedural aspects. In light of the flexible nature of mediation, it is advisable that the competent authority takes into account the characteristics of mediation in assessing such defence.

Paragraph (2)(b) Not capable of settlement by mediation

165. Paragraph (2)(b) is also based on the language used in articles V(2)(a) of the New York Convention and 36(1)(b)(i) of the Model Law on Arbitration (A/CN.9/861, para. 88, and A/CN.9/867, para. 154). It enables the competent authority of the enacting State to refuse to grant relief if they find that the subject matter of the dispute which led to the settlement agreement is not capable of settlement by mediation under the law of this State.

References to UNCITRAL documents in respect of article 19

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), paras. 62–63;

A/CN.9/943, para. 17;
A/CN.9/934, paras. 44–59 and 66–67;
A/CN.9/929, paras. 74–101;
A/CN.9/WG.II/WP.202, paras. 39–49;
A/CN.9/901, paras. 41–50, 52 and 72–88;
A/CN.9/WG.II/WP.200, paras. 37–45;
A/CN.9/896, paras. 84–117 and 191–194;
A/CN.9/WG.II/WP.198, paras. 34–45;
A/CN.9/867, paras. 147–167;
A/CN.9/WG.II/WP.195, paras. 51–56;
A/CN.9/861, paras. 85–102;
A/CN.9/WG.II/WP.190, paras. 46–47.

Article 20. Parallel applications or claims

Text of article 20

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 18, the competent authority of this State where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Comments on article 20

Purpose of article 20

166. The purpose of article 20, which is based on article VI of the New York Convention and reflects article 6 of the Singapore Convention, is to address the impact that parallel judicial and arbitral proceedings have on the enforcement process. The provision acknowledges the need for the competent authority to duly take account of decisions by a court or an arbitral tribunal, by providing that the competent authority has the discretion to decide whether to adjourn the process in such circumstances (A/CN.9/934, para. 68).

"relief being sought"

167. The language of article 20 is used to clearly indicate that it applies to both situations when enforcement of a settlement agreement is sought under article 17(1) and when a settlement agreement is invoked as a defence under article 17(2) (A/CN.9/934, para. 69).

References to UNCITRAL documents in respect of article 20

Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), paras. 64–65;

A/CN.9/943, para. 18;
A/CN.9/934, paras. 68–70;
A/CN.9/896, paras. 122–125;
A/CN.9/WG.II/WP.198, paras. 47–48;
A/CN.9/867, paras. 168 and 169;
A/CN.9/WG.II/WP.195, para. 57;
A/CN.9/861, paras. 103–107.