United Nations A/CN.9/1031/Add.1

General Assembly

Distr.: General
9 June 2020
English
Original: Chinese

United Nations Commission on International Trade Law
Fifty-third session
New York, 6–17 July 2020

Dispute settlement: Draft UNCITRAL mediation rules and notes on mediation

Compilation of comments from Governments

Note by the Secretariat

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V.20-03011 (E) 120620 150620

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[Original: Chinese]
[Date: 29 April 2020]

We believe that the revised draft rules reflect the latest developments in mediation practice and the actual needs of parties with respect to dispute resolution and that this facilitates alignment of the rules with, and the application of, the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) ("the Model Law"). While taking a general approach to international mediation practice, the informative and well-structured draft notes are also flexible and easy to use. By providing important practical guidance on the expanded use of mediation, these two instruments will facilitate the settlement of disputes through mediation.

At the same time, we note that there is still room for further exploration and discussion in respect of the mechanisms envisaged in the draft texts. In order to further improve those mechanisms, we submit herewith our suggestions based on practical experience in China, as follows:

1. The draft rules should reflect and actively guide the global development of online dispute resolution.

Rationale: (1) Global online dispute resolution is emerging as a worldwide trend, as an element of which online mediation is becoming increasingly popular in many countries, including China. (2) While paragraph 53 of the draft notes mentions online mediation, the draft rules do not provide a framework in respect of online mediation and therefore do not fully reflect the above-mentioned trend. (3) As dispute resolution in the area of electronic commerce has already been covered in the context of Working Group IV, it would be advisable to include the relevant elements in the draft rules.

2. It should be made clear both in the draft rules and in the draft notes that the term "settlement agreement" refers only to a settlement agreement resulting from mediation.

Rationale: (1) Both instruments should be consistent with the definition set out in the Singapore Convention on Mediation. (2) Since China treats settlement and mediation as two different modes of alternative dispute resolution, whereby a settlement agreement is a signed agreement reached between the parties themselves through consultation and a mediated agreement is an agreement facilitated through mediation, further clarification to that effect would help to avoid discrepancies and misunderstandings.

3. The basis upon which mediation is carried out needs to be further clarified.

Rationale: Article 1, paragraph 1, of the draft rules provides that "The Rules may apply irrespective of the basis upon which the mediation is carried out." In order to ensure accurate understanding and application, it would be advisable to add to that provision an explanation along the lines of annotation 1 (a) ("Commencement of the mediation: various basis"), paragraph 18, of the draft notes as to what is meant by "basis". That explanation might read as follows: "Mediation can also be carried out on the basis of an agreement between the parties, an obligation established by an international instrument or by law or an order or recommendation issued by a court, an arbitral tribunal or a competent government entity."

4. In order to improve the provision of the draft rules concerning the assistance of a selecting authority in appointing a mediator, it is suggested that article 3, paragraph 3 (b), be amended to read "The parties may agree that the selection should be made directly by the selecting authority, in which case the mediator shall be selected and

appointed in accordance with the relevant rules of the selecting authority" and that a new subparagraph be added to paragraph 3, to read: "Where the parties have agreed on the method to appoint the mediator, the selecting authority shall make the selection in accordance with that agreement."

Rationale: Article 3, paragraph 3 (b), of the draft rules provides that "The parties may agree that the selection shall be made directly by the selecting authority, in which case the parties shall subsequently appoint the selected mediator." This means that the appointment of the mediator directly selected by the selecting authority is subject to confirmation by the parties, but such a practice would be inconsistent with the rules and practices of a number of arbitration institutions. The respective mediation rules of the China International Economic and Trade Arbitration Commission (CIETAC), the Mediation Center of the China Council for the Promotion of International Trade (CCPIT) and the Singapore International Mediation Centre (SIMC) all have rules establishing that if the parties fail to agree on the mediator within the prescribed or agreed time limit (or if they fail to jointly entrust a mediation institution with appointing the mediator), the mediator is appointed directly by the mediation institution and no confirmation by the parties is required (art. 4 of the CIETAC rules, art. 17 of the CCPIT rules and art. 4.2 of the SIMC rules).

5. It would be desirable to add a new paragraph to article 3 of the draft rules to address situations in which the mediator has to be replaced without agreement between the parties.

Rationale: There may be situations in which the mediator, during mediation, is unable to continue to perform his or her functions, or it may not be appropriate for him or her to do so, for reasons including but not limited to illness, death, conflict of interests, lack of confidence on the part of one of the parties or disqualification. In order to ensure smooth mediation proceedings in such circumstances, it should be possible to replace the mediator in question even in the absence of agreement between the parties and a procedure of this kind should be provided for in the draft rules.

6. It would be helpful if the annex to the draft rules contained model statements of independence, impartiality and availability that the mediator could elect to sign and the parties could keep for their records.

Regarding article 3, paragraphs 6 and 7, the secretariat has invited the Commission to consider whether model statements of independence, impartiality and availability should be provided in the annex to the draft rules, along the same lines as those provided for in the annex to the UNCITRAL Arbitration Rules (2010). We are in support of providing such a model in the annex to the draft rules.

Rationale: Article 5, paragraph 1 (f), of the Singapore Convention on Mediation establishes that a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence constitutes a ground for refusing to grant relief. Considering the role that the draft rules are likely to play in the field of commercial mediation and the need to align the text with the Convention, a model statement would be useful to the competent authorities in assessing whether the mediator has fulfilled his or her duty of disclosure, and has ensured his or her availability, in situations where a party seeks relief pursuant to the Convention and the party against whom the relief is sought, while bearing the burden of proof, invokes the above-mentioned provision in requesting refusal to grant relief.

7. It would be advisable to include in article 4 of the draft rules a new paragraph on the duty to act in good faith. In that regard, the Commission is invited to "note that the 1980 Conciliation Rules include the parties' duty to act in 'good faith' without spelling out legal consequences in case parties do not act accordingly. Such a duty is therefore not reflected in the draft Rules as it appeared redundant." We suggest that the statement of the good faith principle be retained.

Rationale: (1) The duty to act in good faith is established in the Model Law, which requires the parties to participate in mediation in good faith. (2) Participation in good faith also requires the parties to avoid acting in a manner that is detrimental

to any third person or public interests. Rules for regulating mediation fees and reviewing the enforcement of settlement agreements are to some extent predicated on such a duty. We therefore propose that the draft rules establish the duty to act in good faith as a statement of principle that "in the course of mediation the parties shall make efforts in good faith to reach a settlement."

8. A specific provision on a reasonable time frame for mediation should be included so that mediation proceedings can be conducted expeditiously. As an example, a new subparagraph could be added to article 4 (2) of the draft rules, to read as follows: "Upon commencement of the mediation, the mediator shall proceed to mediation as soon as possible and shall make every effort to conclude mediation within the agreed time limit (if any)."

Rationale: This will further reflect the advantages of mediation as being expeditious and efficient.

9. In order to improve the rules governing representation, the following text should be added to article 4 (4) of the draft rules: "The representative of the party's choice shall present a power of attorney document and an explanation of his or her authority."

Rationale: Clearer scope of authority in order to clarify what is meant by "choice" and "intended role" in the English text.

10. Article 5 (3) of the draft rules, which is a default rule concerning the confidentiality obligation on the part of the mediator, should be amended as follows: "When the mediator receives information concerning the dispute from a party, the mediator may disclose that information to another party in order for the latter party to have an opportunity to provide an explanation as that party deems appropriate. However, the mediator shall not disclose such information to another party if the information is provided subject to the express condition that it should be kept confidential."

Rationale: (1) According to article 5 (3) of the draft rules, the mediator is expected to keep confidential any information concerning the dispute received from a party, unless the relevant party indicates that the information is not subject to the condition that it should be kept confidential, or expresses its consent to the disclosure of such information to another party. The relevant default rule in the UNCITRAL Conciliation Rules (1980) and the Model Law is that when a party gives any information to the mediator and clearly indicates that the information must be kept confidential, the mediator may not disclose that information to any other party. (2) Mediation practice shows that the exchange of information between the parties and the restructuring of interests are essential to successful mediation and that a default rule that does not make confidentiality conditional upon a specific non-disclosure instruction better meets the practical need for efficiency. (3) With regard to article 5 (3), the draft rules seem to establish a default rule that is different from paragraph 49 of the draft notes. Furthermore, it is not clear whether the reference to "the relevant party" means the submitting party only or any one of the relevant parties mentioned in the submission. Article 5 (3), if retained as it is in order to make such a provision on confidentiality a default rule, would establish an important duty for the mediator to fulfil. The notion of "the relevant party" needs to be made clear and for this reason we suggest that reference be made to "that party" instead of "the relevant party".

11. The treatment of confidential information and the persons subject to the duty of confidentiality need to be made clear through the amendment of article 6 of the draft rules as follows: "1. Unless otherwise agreed by the parties, all information prepared and created for the purpose of mediation, including the settlement agreement, shall be kept confidential by those involved in the mediation, except where disclosure is required by the law or required to invoke the settlement agreement for the purposes of implementation and enforcement. 2. The persons subject to the duty of confidentiality include the parties and their representatives, the mediator(s), the mediation institution, the persons administering the mediation and any other

person involved in the mediation process." The article will thus be consistent with paragraph 46 of the draft notes.

Rationale: (1) The scope of application implied by "all information relating to the mediation" in article 6 of the draft rules is too broad. As it is practice for the parties to submit evidentiary materials, the parties should be allowed, if mediation fails, to use such materials in subsequent proceedings, a practice that is acknowledged in article 7 of the draft rules. We therefore suggest that the aforementioned formulation exclude evidentiary materials submitted by the parties from that rule and that the applicability of the confidentiality requirement be limited to materials prepared specifically for the purposes of mediation or materials created during the course of mediation.

(2) It is not clear to what persons "those involved in the mediation" in article 6 of the draft rules refers. The article should clarify which persons are subject to the duty of confidentiality by providing examples.

(3) In order to avoid differences in applying that article and to achieve conformity with other provisions of the draft rules and the relevant provisions of the Singapore Convention on Mediation, it would be helpful to reproduce in the article the formulation used in the Convention.

12. The provisions on settlement agreements need to be improved to make them clear with respect to the effect of the agreement.

(1) We propose that the following sentence be added to article 8 (1): "The settlement agreement is binding on the parties."

Rationale: One of the grounds for refusing to grant relief is the determination that the settlement agreement "is not binding, or is not final, according to its terms", as established in article 5, paragraph 1 (b)(ii), of the Singapore Convention on Mediation.

(2) In order to align the draft rules with the Convention with regard to fulfilment of "the requirements for reliance on settlement agreements" as stipulated in the latter text, and thus to ensure the smooth enforcement of the settlement agreement reached between the parties, we propose that the following text be inserted in article 5 as a new paragraph 3: "Unless otherwise agreed by the parties, the mediator or the mediation institution may sign or stamp the settlement agreement or provide other evidence to prove that the agreement resulted from mediation."

13. The provisions on termination of mediation require improvement.

(1) Article 9 (c) of the draft rules provides for an exception ("unless the parties are prohibited to unilaterally terminate the mediation before the expiration of a defined period") that does not appear to be sufficiently clear and runs the risk of contravening the principle of party autonomy. No such provision is contained in the UNCITRAL Conciliation Rules (1980), in the Model Law or in paragraph 79 (iv) of the draft notes. If something like court-ordered mediation is meant, such situations might well be covered by article 1 (5) of the draft rules. We therefore propose the deletion of this phrase from article 9 (c).

(2) Compared with paragraph 79 (ii) of the draft notes, article 9 (d) of the draft rules is much narrower in terms of conditions and scope of application in that it draws attention only to situations in which the required deposits are not paid by the parties within the set period and does not refer to other possible situations in which mediation is no longer justified. Given that article 11 (5) already provides that "the mediator may suspend the mediation … in accordance with article 9 (d)", it is unnecessary to repeat the information by referring specifically to the non-payment situation. Therefore, we propose using the following formulation, which is drawn from the above-mentioned provision of the draft notes: "By a declaration of the mediator, after consultation with the parties, to the effect that further mediation efforts are no longer justified on the date of the declaration".

(3) The “date of the declaration” referred to in article 9, paragraphs (b), (c) and (d), is vague, as it is unclear whether that phrase refers to the date of dispatch (according to the principle of dispatch) or the date of receipt (according to the principle of receipt). The English text of the draft rules suggests that the latter is more likely, i.e., the principle of receipt. If that is the case, the corresponding Chinese text should be changed to “声明到达日” (“the date of receipt of the declaration”). Accordingly, the references to the date of the declaration in subparagraphs 79 (ii), (iii) and (iv) of the draft notes should be changed likewise in the Chinese text.

(4) In China, mediation may be terminated if the mediator expects no satisfactory conclusion to be reached and declares, unilaterally and in writing, the termination of the mediation. In other words, when the mediator finds the mediation unlikely to succeed, he or she may terminate it by a unilateral declaration. Such a practice could effectively prevent the mediation process from being undecided for a long period of time. We therefore suggest that that practice be reflected in the draft rules.

14. The provisions on costs need to be further improved.

(1) Article 11 of the draft rules does not define the costs of mediation as including costs that may be charged by the mediation institution (including registration and administration fees and other administrative assistance costs such as lease fees for the premises used for mediation), whereas paragraph 37 of the draft notes does include such costs. The same costs should be listed in each text for the sake of consistency.

(2) The phrase “which shall be reasonable in amount” in article 11, paragraph (1) (a), is not appropriate, since the mediator’s fees depend on the market and therefore vary from one person or place to another. Reasonableness is therefore irrelevant in this instance.

(3) Paragraph 2 of article 11 provides that in the case of multiparty mediation, costs are shared pro rata. It is not clear, however, whether the pro rata sharing is based on the amounts stated by the parties in their applications for mediation or on the number of the parties. It is advisable that, in the absence of agreement between the parties, the costs be shared equally on the basis of the number of parties.

15. The provisions dealing with the role of the mediator in other proceedings need to be made stricter. Accordingly, article 12 of the draft rules should be amended as follows: “Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that is related to the mediation. Irrespective of the basis upon which the proceedings are carried out, the mediator shall not act as a representative or counsel of a party in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that is related to the mediation.”

Rationale: The mediator should not be allowed to act as a representative or counsel of a party in other dispute resolution proceedings, even with the consent of the parties. Reference is made to the Non-Waivable Red List of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, which is based on the overriding principle that “no one is allowed to be his or her own judge.” According to how mediation is defined in the draft rules, the mediator is a third person who must be independent and impartial and who acquires information through the mediation process. The situations in which the parties may waive a claim against the mediator do not include situations where the mediator acts as a representative or counsel of a party in another dispute resolution proceeding in respect of the dispute that is related to the mediation, especially when the mediation proceedings are conducted in parallel with other dispute resolution proceedings. In this context, we also propose that in article 13 of the draft rules, the selecting authority and any persons playing a supporting role in the mediation process also be excluded from liability.

16. The following translations are suggested with respect to the Chinese text of the draft rules:

(1) In article 1 (5), the current translation “且当事人又不得背离的” for the phrase “from which the parties cannot derogate” may lead to different understandings. The first part of the paragraph could be changed to “凡与调解所适用的某项当事人不得背离的法律规定相抵触，包括……”.

(2) In article 3, paragraph (4) (c), the Chinese translation “司职” for the word “availability” is not quite accurate. What is meant by that word is not the required qualification or competency, but rather the requirement for commitment in terms of time and dedication. Our suggested translation would be “调解员的时间安排是否允许”.

(3) In article 5, paragraphs 2 and 3, the word “information” is translated as “材料” [translator’s note: corresponding to the English word “material”], which is vague and very likely to be misinterpreted as limited to content that is documented on paper-based media. Since “information” is a rather broad term, meaning both written and oral material/information, we suggest that the Chinese word “材料” be replaced with “材料或信息”.

(4) In article 3, different Chinese expressions are used for what is meant by the notion of candidates for the role of mediator, for example, “候选人” for “candidates” in paragraph (3) (a), “未来调解员” for “prospective mediator” in paragraph 4 (a) and (b) and paragraph 7 but “可能被指定为调解员的人” for “… mediator” in paragraph 6. Similarly, the Chinese term “可能指定的调解员” is used for the English phrase “the mediator, if appointed” in article 9 (c) of the draft rules and paragraph 79 (iv) of the draft notes, while the term “未来调解员” is used for “prospective mediator” in paragraph 32 of the draft notes. We suggest that the Chinese term “调解员候选人” be used in all these instances.

(5) We suggest that the translation used for the word “admission” in article 7, paragraph 1 (c), of the draft rules – “供述” – be changed to “承认” and that the term “供述”, used for the same word in paragraph 50 of the draft notes, be changed to “陈述”, because in legal Chinese the term “供述” is more often used in its criminal sense.

17. In the draft notes, it would be helpful if part 3 (“Preparatory steps”) of the “List of matters for possible consideration in organizing a mediation” referred to the time limit for the mediation. Such a reference could be formulated along the following lines: “The parties may agree between themselves on the time limit for the mediation, or the mediator with the consent of the parties may determine the time limit.” For the rationale for this suggestion, please refer to point 8 above.

18. It may be more appropriate to use the Chinese word “要式” than to use “正式” for the English word “formal” in paragraph 6 of the draft notes.

Rationale: (1) Although mediation proceedings are more flexible than judicial and arbitral proceedings, there are a number of sets of rules on international mediation, including the draft rules, which clearly show that mediation has its own particular operational norms and processes that must be followed. (2) With regard to paragraph 6 of the draft notes, which states that mediation “does not rely on complex rules of form and procedure”, the Chinese word “正式” can refer to what is done (“要式”) or how something is done (“正式”) and may therefore have differing interpretations in legal English. Consequently, it would be preferable to replace that rendition with the word “要式”.

19. We suggest that the phrase “the establishment of mediation institutions or organizations,” be inserted after the phrase “access to mediation,” in paragraph 14 of the draft notes.

Rationale: As informal mediation organizations play a very important role in China, we suggest that our national practice be taken into account in the draft text so as to achieve wider application.

20. We suggest that the phrase ", except where such a stay is prohibited by law", be inserted at the end of the first sentence of paragraph 22 of the draft notes ("Where a mediation takes place during arbitral or court proceedings, the arbitration or litigation may be stayed to allow time for conducting the mediation").

Rationale: Under Chinese civil procedure law, mediation is not a statutory ground for staying such proceedings.

21. In order to ensure the neutrality of the mediator, it would be helpful to add the following sentence to paragraph 35 of the draft notes: "Irrespective of the basis upon which the proceedings are carried out, the mediator shall not act as a representative or counsel of a party in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that is the subject of the mediation." For the rationale for this suggestion, please refer to point 15 above.

22. We suggest that expert fees and expenses (if any) be added to the list of mediation costs in paragraph 37 of the draft notes.

Rationale: (1) The inclusion of such expenses would underscore the importance of experts, whose arguments are crucial to the outcome of mediation in highly specialized areas. (2) That information is needed in light of the possibility of high expert fees and expenses, which, if not mentioned explicitly in the draft notes, might come as an unexpected surprise to the parties. This in turn might have an impact on the conclusion of a settlement agreement.

23. We suggest that the Chinese translation for the phrase "parties' allegations and arguments" in paragraph 55 of the draft notes be changed to "当事人的主张和论点" or similar, in conformity with the idiomatic Chinese expression.

24. In part 4 of the draft notes ("Conduct of the mediation"), it should be clarified that the mediator, with the parties' consent, and the parties may consult the relevant experts or request their professional opinions.

Rationale: As specialized technical issues may be addressed during the course of mediation, it would be helpful to provide that the mediator or the parties may consult with experts in order to clarify such issues in order to facilitate the conclusion of a settlement agreement.

25. We suggest that in paragraph 69 of the draft notes, the second part of the second sentence ("interested stakeholders may be invited to attend and participate as necessary") be amended to read "interested stakeholders and experts may be invited to attend and participate as necessary." For the rationale for this suggestion, please refer to points 23 and 24 above.

26. The draft notes should provide clear guidance as to the scope of the formulation "any person acting on behalf of a governmental agency" as contained in the Singapore Convention on Mediation by clarifying that State-owned enterprises engaged in commercial activities shall not be regarded as persons acting on behalf of a governmental agency.

Rationale: The above-mentioned formulation is clarified neither in the Convention nor in the draft rules and if misapplied or interpreted too broadly could reduce the use of mediation by such enterprises to settle disputes and possibly affect the enforceability of the settlement agreements that they conclude.