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Settlement of commercial disputes

International commercial mediation: draft UNCITRAL Mediation Rules

Note by the Secretariat

Contents

	<i>Page</i>
I. Introduction	2
II. Draft UNCITRAL Mediation Rules	2
A. Text of the draft Rules	2
B. Annotations	7



I. Introduction

1. At its fifty-first session, in 2018, the Commission noted that the Secretariat would undertake work on updating the UNCITRAL Conciliation Rules (1980) to both reflect current practice and ensure consistency with the contents of the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) and the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (the “Model Law”) finalized by the Commission at that session.¹
2. In accordance with the decision of the Commission, this note contains the draft UNCITRAL Mediation Rules with annotations.

II. Draft UNCITRAL Mediation Rules

A. Text of the draft Rules

3. The text of the draft Rules reads as follows.

UNCITRAL Mediation Rules ([2019])

Article 1 – Application of the Rules

1. Where parties have agreed that disputes between them, whether contractual or not, shall be submitted to mediation under the UNCITRAL Mediation Rules, or where parties have been referred to mediation under the Rules by an international instrument, a court order or a mandatory statutory provision, then these Rules shall apply.
2. Mediation under the Rules is a process, whether referred to by the term 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. The mediator shall not have the authority to impose upon the parties a solution to the dispute.
3. The parties to a mediation shall be presumed to have referred to the Rules in effect on the date of commencement of the mediation, unless the parties have agreed to apply a particular version of the Rules.
4. The parties may agree to exclude or vary any provision of the Rules.
5. Where any of these Rules is in conflict with a provision of the law applicable to the mediation from which the parties cannot derogate, that provision shall prevail.

Article 2 – Commencement of mediation

1. Mediation in respect of a dispute that has arisen shall be deemed to have commenced on the day on which the parties to that dispute agree to engage in mediation unless otherwise provided by the agreement to mediate, the applicable international instrument, court order or mandatory statutory provision.
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.

¹ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 246 and 254.

Article 3 – Number and appointment of mediators

1. There shall be one mediator unless otherwise agreed by the parties or provided in the applicable international instrument, court order or mandatory statutory provision. Where there is more than one mediator, the mediators shall act jointly.
2. The parties shall endeavour to appoint a mediator by agreement, unless a different appointment procedure applies. They may agree to replace a mediator at any time.
3. The parties may seek the assistance of an appointing authority for appointing a mediator. In particular:
 - (a) A party may request an appointing authority to recommend suitable candidates; or
 - (b) The parties may agree that the appointment shall be made directly by the appointing authority.
4. In recommending or appointing individuals to act as mediator, the appointing authority shall have regard to:
 - (a) The professional expertise and qualifications of the prospective mediator, including expertise in the subject matter in controversy, experience as a mediator and ability to conduct the mediation;
 - (b) The availability of the mediator; and
 - (c) Such considerations as are likely to secure the appointment of an independent and impartial mediator.
5. If the parties have different nationalities, the appointing authority may also take into account the advisability of appointing a mediator of a nationality other than the nationality of one of the parties. In addition, the appointing authority shall respect gender and geographical diversity in the appointment process.
6. When a person is approached in connection with a possible appointment as mediator, that person shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence, including the disclosure of details of any personal, professional, financial or other interest that may influence the outcome of the dispute. A mediator, from the time of appointment and throughout the mediation, shall, without delay, disclose to the parties any such circumstances as they arise.
7. Prior to accepting the appointment, the prospective mediator shall ensure his or her availability to devote the time necessary to conduct the mediation diligently and efficiently.

Article 4 – Conduct of mediation

1. The parties may agree on the manner in which the mediation is to be conducted. Otherwise the mediator may determine the conduct of the mediation in consultation with the parties, 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.
2. The mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.
3. In order to facilitate the conduct of the mediation:
 - (a) The parties and the mediator may convene a meeting at an early stage to agree on the organization of the mediation; and
 - (b) The parties, or the mediator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

4. A party may be represented or assisted by a person of its choice. The names, addresses and functions of such persons should be communicated to all parties and to the mediator in advance of the mediation or without delay if it occurs during the mediation. This communication shall also indicate the intended role of such persons in the mediation.

Article 5 – Communication between the parties and the mediator

1. The mediator may meet or communicate with the parties together or with each of them separately (“caucus”).
2. At any stage of the mediation, the parties may submit information concerning the dispute, such as statements describing the general nature of the dispute, the points at issue, and any supporting document or additional information deemed appropriate. The information may also include a description of the goals, interests, needs and motivations of the parties as well as any relevant documents.
3. 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 the condition that it should be kept confidential, that information shall not be disclosed to any other party to the mediation.

Article 6 – Confidentiality

Unless otherwise agreed by the parties, all information relating to the mediation, including, if relevant, the settlement agreement, shall be kept confidential by those involved in the mediation, except where disclosure is required by the law or as referred to under article 8, paragraph 2.

Article 7 – Introduction of evidence in other proceedings

1. Unless otherwise agreed by the parties, a party to the mediation, the mediator and any third person, including those involved in the administration of the mediation shall not, in arbitral, judicial or other dispute resolution proceedings, rely on, introduce as evidence or give evidence regarding any of the following:
 - (a) An invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation;
 - (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;
 - (d) Proposals made by the mediator or the parties;
 - (e) The fact that a party had indicated its willingness to accept a proposal (or parts thereof) for settlement made by the mediator or the parties;
 - (f) A document prepared solely for purposes of the mediation.
2. Paragraph 1 applies irrespective of the form of the information or evidence referred to therein.
3. Paragraphs 1 and 2 apply whether or not the arbitral, court proceedings or other dispute resolution proceedings relate to the dispute that is or was the subject matter of the mediation.
4. Subject to the limitations of paragraph 1, evidence that is otherwise admissible in arbitral, judicial or other dispute resolution proceedings does not become inadmissible as a consequence of having been used or disclosed in the mediation.

Article 8 – Settlement agreement

1. Once the parties agree on the terms of a settlement to resolve all or part of the dispute, they should prepare and sign a settlement agreement. If requested by the parties and if the mediator deems it appropriate, the mediator may provide support to the parties in preparing the settlement agreement.
2. By signing the settlement agreement, the parties agree that the settlement agreement can be used as evidence that it resulted from mediation, and that it can be relied upon for seeking relief under the applicable legal framework.

Article 9 – Termination of mediation

The mediation shall terminate:

- (a) By the signing of the settlement agreement by the parties, on the date of the agreement;
- (b) By a declaration of the parties to the mediator to the effect that the mediation is terminated, on the date of the declaration;
- (c) By a declaration of a party to the other party and the mediator, if appointed/selected, to the effect that it no longer wishes to pursue mediation, on the date of the declaration, unless the parties are prohibited by the applicable international instrument, court order or mandatory statutory provision to unilaterally terminate the mediation before the expiration of a defined period;
- (d) 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; or
- (e) At the expiration of a defined period in the applicable international instrument, court order or mandatory statutory provision.

Article 10 – Arbitral, judicial or other dispute resolution proceedings

1. Mediation may take place under the Rules at any time regardless of whether arbitral, judicial or other dispute resolution proceedings have been already initiated.
2. Where the parties have agreed to mediate and have also expressly undertaken not to initiate during a specified period of time or until a specified event has occurred, arbitral, judicial or other dispute resolution proceedings with respect to an existing or future dispute, such an undertaking shall be complied with, except to the extent necessary for a party, in its opinion, to preserve its rights.

Article 11 – Costs and deposit of costs

1. The method for fixing the costs of mediation should be agreed upon by the parties and the mediator as early as possible in the mediation. Upon termination of the mediation proceedings, the mediator shall fix the costs of the mediation and give written notice thereof to the parties. The term “costs” includes only:
 - (a) The fees of the mediator, which shall be reasonable in amount;
 - (b) The travel and other expenses of the mediator;
 - (c) The cost of any expert advice requested by the mediator with the agreement of the parties;
 - (d) The cost of any assistance provided pursuant to article 3, paragraph 3 and article 4, paragraph 3 of the Rules.
2. Unless otherwise agreed by the parties, the costs, as defined above, are borne equally by the parties. In case of multiparty proceedings, the costs are

shared pro rata, unless otherwise agreed by the parties. All other expenses incurred by a party are borne by that party.

3. The mediator, upon appointment, may request each party to deposit an equal amount, unless otherwise agreed by the parties and the mediator as an advance for the costs referred to in paragraph 1 which the mediator expects will be incurred.
4. During the course of the mediation, the mediator may request supplementary deposits in an equal amount from each party, unless otherwise agreed by the parties and the mediator.
5. If the required deposits under paragraphs 3 and 4 are not paid in full by all parties within a reasonable period set by the mediator, the mediator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.
6. Upon termination of the mediation and if deposits were received, the mediator shall render an accounting to the parties of the deposits received and returns any unexpended funds to the parties.

Article 12 – Role of the mediator in other proceedings

Unless otherwise agreed by the parties, the parties and the mediator agree that the mediator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that is related to the mediation. The parties also agree that they shall not present the mediator as a witness in any such proceedings.

Article 13 – Exclusion of liability

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the mediator based on any act or omission in connection with the mediation.

Annex

Model mediation clauses

Mediation only

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules.

Note: The parties should consider adding:

- (a) The parties agree that there will be one mediator, appointed by agreement of the parties [within thirty days of the mediation agreement], and if the parties cannot agree, then the mediator shall be appointed by [relevant appointing authority];
- (b) The language to be used in the mediation proceedings shall be ...;
- (c) The place of mediation shall be

Multi-tiered clause

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules.

Note: Parties should consider adding:

- (a) The appointing authority shall be [name of institution or person];

- (b) The language of the mediation shall be ...;
- (c) The place of mediation shall be... .

If the dispute, or any part thereof, is not settled within [(60) days] of the request to mediate under these Rules then the parties agree to resolve any remaining matters by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note: Parties should consider adding:

- (a) The appointing authority shall be (name of institution or person);
- (b) The number of arbitrators shall be (one or three);
- (c) The place of arbitration shall be (town and country);
- (d) The language of the arbitration shall be... .

B. Annotations

1. General remarks

4. The Commission may wish to note that the draft Rules have been prepared with a view to align them with the mediation procedure as defined in the newly adopted instruments referred to in para. 1 above, and to take account of developments in the field since the initial version of the Conciliation Rules, in 1980, (the “1980 Conciliation Rules”) including the development of court-ordered mediation.

5. The Commission may wish to note that the draft Rules emphasize that mediation is an interest-based process, and therefore terms that are normally used in connection with adversarial proceedings have been avoided. Further, the text includes gender neutral language. For the sake of simplicity, provisions of the 1980 Conciliation Rules have been grouped differently, and sometimes merged, as indicated below.

2. Article-by-article comments

Article 1 (Application of the Rules)

6. Paragraph 1 clarifies that the Rules can apply to mediation regardless of the origin of the process (agreement, international instrument such as an investment treaty, court order, mandatory statutory provision).

7. A definition of mediation has been included in paragraph 2, which mirrors the definition contained in the Model Law. The definition is meant to cover the range of possible outcomes of mediation.

8. Paragraph 3 is a new provision addressing the temporal application of the Rules. It provides, as a default rule, for the application of the Rules in effect at the date of the commencement of the mediation.

9. Paragraphs 4 and 5 mirror article 1, paragraphs 2 and 3 of the 1980 Conciliation Rules.

Article 2 (Commencement of mediation)

10. Article 2 of the draft Rules mirrors article 5 of the Model Law, with the necessary adjustments.

11. In line with article 1(1) of the draft Rules, paragraph 1 provides for the possibility that mediation commences under different bases (contractual, court order or mandatory statutory provision). It provides that a mediation commences when the parties to a dispute “agree to engage” in the mediation. The effect of this paragraph 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, such mediation will not commence until the parties agree to actually engage in such

proceeding. Also, for the sake of simplicity, article 2(1) applies to agreement to mediate, regardless whether the mediation agreement is entered before or after the dispute arises.

12. Paragraph 2 addresses the invitation to mediate. It does not contain details about the content of such invitation or response thereof in order to leave flexibility to the parties on how they wish to approach their mediation.

Article 3 (Number and appointment of mediators)

13. Article 3 of the draft Rules merges articles 3 (number of conciliators) and 4 (appointment of conciliators) of the 1980 Conciliation Rules. It is modelled on article 6 of the Model Law.

14. Paragraph 1 reflects the default rule that one mediator is usually appointed by the parties. Paragraph 2 indicates that the process of appointing a mediator must remain consensual.

15. Paragraphs 3 to 5 refer to the possible involvement of an appointing authority in the appointment process. An appointing authority may be any person or institution chosen by the parties.

16. With respect to paragraphs 6 (disclosure of circumstances regarding impartiality or independence) and 7 (availability), the Commission may wish to note that the draft Rules do not refer to any declaration by mediators as to their independence, impartiality and availability. It may wish to consider whether standard declarations of independence, impartiality and availability should be provided for in the annex to the draft Rules, along the same lines as those provided for in the Annex to the UNCITRAL Arbitration Rules (2010).

Article 4 (Conduct of mediation)

17. Article 4 of the draft Rules addresses the conduct of the mediation in a manner consistent with article 7 of the Model Law. It also reflects provisions that were formerly contained in articles 6 (representation and assistance), 7 (role of conciliator) and 8 (administrative assistance) of the 1980 Conciliation Rules.

18. The Commission may wish 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.

19. The Commission may wish to also note that early organizational meetings, envisioned paragraph 3, are mentioned as a practice that is increasingly common.

Article 5 (Communication between the parties and the mediator)

20. The Commission may wish to note that article 5 of the draft Rules merges the provisions of article 5 (submission of statements to conciliator), article 9 (1) (communication between conciliator and parties) and 10 (disclosure of information) of the 1980 Conciliation Rules. It also mirrors the provisions of articles 8 and 9 of the Model Law.

Article 6 (Confidentiality)

21. Article 6 reflects the provisions of article 10 of the Model Law. The matter of confidentiality was addressed in article 14 of the 1980 Conciliation Rules.

Article 7 (Introduction of evidence in other proceedings)

22. Article 7 of the draft Rules is modelled after article 11 of the Model Law. The matter covered under article 7 was dealt with under article 20 of the 1980 Conciliation Rules. As the matter is closely connected with confidentiality, the provision has been relocated after article 6.

Article 8 (Settlement agreement)

23. Article 8 of the draft Rules updates the provisions on settlement agreements contained in article 13 of the 1980 Conciliation Rules. It also takes account of the new legal framework adopted by the Commission on settlement agreements.

24. Paragraph 1 provides insight on the settlement agreement and the assistance that the mediator can provide to the parties at that stage.

25. Paragraph 2 signals the existence of a legal framework for relying on settlement agreements for the purpose of seeking relief, using terms similar to that of the Model Law and the Singapore Convention on Mediation.

Article 9 (Termination of mediation)

26. Article 9 of the draft Rules is modelled after the corresponding provisions of article 15 of the 1980 Conciliation Rules and article 12 of the Model Law.

Article 10 (Arbitral, judicial or other dispute settlement proceedings)

27. Article 10 of the draft Rules addresses the possible link between mediation and other proceedings. It contains two distinct paragraphs.

28. Paragraph 1 refers to the possibility to hold mediation under the Rules as part of other proceedings.

29. Paragraph 2 mirrors, with necessary adjustments, article 14 of the Model Law and article 16 of the 1980 Conciliation Rules. It covers the situation where parties agreed not to initiate proceedings in parallel to their mediation.

Article 11 (Costs and deposit of costs)

30. Article 11 of the draft Rules merges articles 17 and 18 of the 1980 Conciliation Rules. It provides that the parties and the mediator should agree upfront on the methods for fixing the cost of mediation. As the mediator provides services to all parties equally and the proceeding is an interest-based negotiation, it is suggested that the costs in multi-party mediation should be shared on a pro rata basis.

31. The Commission may wish to consider whether the reference to the reasonable amount of the mediator's fees in paragraph 1(a) is useful.

Article 12 (Role of the mediator in other proceedings)

32. Article 12 of the draft Rules is modelled after article 19 of the Conciliation Rules (1980).

Article 13 (Exclusion of liability)

33. Article 13 of the draft Rules provides for exclusion of liability of mediators. It is modelled after article 16 of the UNCITRAL Arbitration Rules (2010).

Model mediation clauses (annex)

34. Model mediation clauses include variants, from a simple clause to a multi-tiered provision.

3. Other matters

35. The Commission may wish to consider whether it would be useful to prepare recommendations on how to adjust the draft Rules for their use by mediation institutions, so that the draft Rules may serve as a model for institutional rules.