

## Annex III

### **Recommendations to assist mediation centres and other interested bodies with regard to mediation under the UNCITRAL Mediation Rules (2021)**

#### **I. Introduction**

##### **A. The UNCITRAL Mediation Rules (2021)**

1. The UNCITRAL Mediation Rules (2021) (the “Rules”) provide a comprehensive set of procedural rules upon which parties may agree for the conduct of mediation proceedings arising out of their relationship. The Rules cover all aspects of the mediation process: they define when mediation is deemed to have commenced and terminated, address the appointment and role of mediators, and provide for the general conduct of mediation. A model mediation clause is also attached to the Rules.

2. The Rules are the result of a revision of the 1980 UNCITRAL Conciliation Rules, undertaken to ensure consistency with the provisions of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation) and the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (the “2018 Model Law on Mediation”), both finalized by the Commission at its fifty-first session in 2018.<sup>1</sup> Revision of the 1980 Conciliation Rules was also considered appropriate in the light of developments in the field of mediation since 1980, including the development of court-ordered mediation.<sup>2</sup>

3. Until 2018, UNCITRAL primarily used the term “conciliation” with the understanding that the terms “conciliation” and “mediation” were interchangeable. In preparing the Singapore Convention on Mediation and the 2018 Model Law on Mediation, the Commission decided to use the term “mediation” to adapt the terminology to the current use and with the expectation that that terminology would simplify the promotion and heighten the visibility of the instruments developed by UNCITRAL in the area of mediation. The change in terminology is not meant to have any substantive or conceptual implications.<sup>3</sup>

##### **B. Purpose of the recommendations**

4. These recommendations are intended to inform and assist mediation centres and other interested bodies (hereinafter referred to generally as “institutions”) that envisage using the Rules in the institutional context. In particular, the Rules could:

(a) Serve as a model for institutions drafting their own mediation rules, the degree to which can range from inspiration to full adoption of the Rules (see chapter II below);

(b) Be utilized by institutions in offering to administer disputes under the Rules (or when requested by the parties to do so) or rendering administrative and logistical services in ad hoc mediation under the Rules (see chapter III below); or

(c) Enable institutions to appoint a mediator or mediators upon request by the parties, as provided by, and in accordance with, the Rules (see chapter IV below).

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

<sup>2</sup> *A/CN.9/1026*, para. 5.

<sup>3</sup> *Official Records of the General Assembly, Seventy-third Session Supplement No. 17 (A/73/17)*, para. 19.

## II. Adoption of the UNCITRAL Mediation Rules (2021) as the institutional rules of institutions

### A. Substance of the UNCITRAL Mediation Rules (2021)

5. Institutions, when preparing or revising their institutional rules, may wish to consider using the Rules as a model. An institution that intends to do so should take into account the expectations of the parties that the rules of the institution will faithfully follow the text of the Rules (see paras. 7 and 8 below). In such cases, the institutional rules could provide as follows:

“The present [*name of the institution’s institutional rules*] are based on the UNCITRAL Mediation Rules (2021).”

6. This appeal to follow closely the substance of the Rules does not mean that the particular organizational structure, the unique circumstances of a country, region or jurisdiction, and the needs of a given institution could not be taken into account. Institutions adopting the Rules as their institutional rules will understandably need to comply with the national legal framework, and add, delete or further modify provisions, for instance, on administrative services or fee schedules (see paras. 13–16 below). In addition, potential modifications affecting some provisions of the Rules, as indicated below in paragraphs 9 to 19, may also be taken into account.

### B. Presentation of possible adjustments

#### 1. A short explanation

7. If an institution uses the Rules as a model for drafting its own institutional rules, it may be useful for the institution to consider referring to the Rules and indicating where their rules diverge from the Rules. Such indications may be helpful to potential users of those institutional rules who would otherwise have to embark on a comparative analysis to identify any disparity.

8. The institution may wish to include a text, for example, after the sentence outlined in paragraph 5, which refers to the specific provisions in the institutional rules that diverge from the Rules. Furthermore, it may be advisable to prepare a short explanation of the reasons for such modifications, which could accompany the institutional rules.

#### 2. Right of parties to exclude or vary provisions of the rules at any time

9. The right of the parties to agree to exclude or vary provisions of the Rules at any time as prescribed by article 1, paragraph 4, may oblige institutions to administer mediations under provisions that are inconsistent with their institutional approach. Therefore, institutions may wish to consider amending article 1, paragraph 4, as follows:

“The parties may agree in writing, in consultation with the mediator where one has been appointed, to exclude or vary any provision of the [*name of the institutional rules*] at any time. [*Name of institution*] may refuse to administer mediations under the [*name of the institutional rules*] if any agreed variations are incompatible with [*name of institution*]’s approach to consensual dispute resolution.”

#### 3. Communication

10. When an institution administers mediation, the initial communication between the parties is often carried out through the institution.<sup>4</sup> Therefore, it is recommended

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<sup>4</sup> It is also possible for the institution to take charge of the correspondence throughout the proceedings between the parties and between the parties and the mediator as part of their

that institutions adapt article 2, paragraph 2, of the Rules relating to any invitations from one party to the other party to engage in mediation. Article 2, paragraph 2, may be amended as follows:

“If the 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 by [*name of the institution*] through any means that provides for a record of its transmission, or within such other period of time as specified in the invitation, that party may elect to treat this as non-acceptance of the invitation to mediate. In such circumstances, [*name of institution*] may provide evidence of such an attempt to mediate upon request of any of the parties.”

#### **4. Reference to the institution for the appointment of a mediator**

11. The institution may assist the parties by recommending and selecting a mediator under its institutional rules upon request by the parties. For this purpose, institutions should amend the following provisions of the Rules:

(a) Article 3, paragraph 3: “The parties may seek the assistance of [*name of institution*] for appointing a mediator.”;

(b) The chapeau of article 3, paragraph 4: “In recommending or selecting individuals to act as mediator, [*name of institution*] shall have regard to ...”;

(c) Article 3, paragraph 5: “If the parties have different nationalities, [*name of institution*] may also take into account the advisability of appointing a mediator of a nationality other than the nationalities of the parties in consultation with the parties. In addition, [*name of institution*], in selecting a mediator, shall take into consideration geographical diversity and gender of the candidates.”.

12. Moreover, in the light of the role of the institution as the administrator of the mediation, it is recommended that article 4, paragraph 3 (b), be deleted.

#### **5. Fees and schedule of fees**

13. Where an institution wishes to adopt the Rules as its own institutional rules, and if the institution charges a fee for the administration, it may wish to amend article 11, paragraph 1 (d), as follows:

“The cost of any assistance provided by [*name of institution*] including those pursuant to article 3, paragraph 3, and article 4, paragraph 3, of the [*name of the institutional rules*].”

14. If an institution wishes to administer all costs, it may wish to amend article 11, paragraph 1, as follows:

“[*Name of the institution*] shall determine a preliminary advance on costs for the prospective administrative fees of [*name of the institution*], the down payment on the mediator’s fees and the anticipated expenses (such as travel and subsistence costs of the mediator, delivery charges, rent, etc.) as early as possible in the mediation. Upon termination of the mediation, [*name of institution*] shall fix the costs of the mediation, which shall be reasonable in amount and give written notice thereof to the parties. The term “costs” includes only:

- (a) The fees of the mediator;
- (b) The travel and other expenses of the mediator;

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services, which would consequently require further amendments, notably to articles 2, 3, paragraph 6, and 4, paragraph 5, as well as the need to add a rule governing the exchange of documents. Any variation or adaption should not affect article 5, which is a core element of the mediation.

(c) The cost of expert advice requested by the mediator with the agreement of the parties;

(d) The cost of any assistance provided by [*name of institution*] including those pursuant to article 3, paragraph 3 and article 4, paragraph 3, of the [*name of the institutional rules*]; and

(e) Any other expenses that may have been accrued out of the mediation, including in relation to translation and interpretation services.”

15. Article 11, paragraphs 3–6, might be amended as follows:

“[*Name of institution*], upon appointment, may request each party to deposit an equal amount in advance for the costs referred to in paragraph 1, unless otherwise agreed by the parties and the mediator.”

“During the course of the mediation, [*name of institution*] may request supplementary deposits in an equal amount from each party, unless otherwise agreed by the parties and the mediator.”

“If the required deposits under paragraphs 3 and 4 are not paid in full by all parties within a reasonable period set by [*name of institution*], [*name of institution*] may suspend the mediation or may declare the termination of the mediation, in accordance with article 9, subparagraph (e).”

“Upon termination of the mediation and if deposits were received, the [*name of institution*] shall render an accounting to the parties of the deposits received and return any unexpended funds to the parties.”

16. Additionally, in case the institution chooses the option in paragraphs 13–15 above, the institution would need to adapt article 9, subparagraph (e), accordingly:

“By a declaration of [*name of institution*], after consultation with the parties, in the situation referred to in article 11, paragraph 5, on the date of the declaration;”

## **6. Form requirement of settlement agreements**

17. In order to allow parties to provide evidence that a settlement agreement resulted from mediation, which may, for example, be required at the enforcement stage, and in accordance with article 4 (b) of the Singapore Convention on Mediation, the institution may wish to provide an attestation and amend article 8, paragraph 2, accordingly:

“[*Name of institution*] shall upon the request of either party provide an attestation that the settlement agreement resulted from mediation.”

## **7. Staff of the institution as witness**

18. The institution might further add a prohibition to call representatives of the institution or its employees as witnesses in any further proceedings. Article 12, paragraph 3, may be amended as follows:

“The parties shall not present the mediator, representatives of [*name of institution*], or its employees or any participant in the mediation as witnesses in any such proceedings.”

## **8. Exclusion of liability**

19. The exclusion of liability might apply to the institution and its employees, so article 13 would read as follows:

“Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the mediator, [*name of the institution*] and its employees based on any act or omission in connection with the mediation.”

### **III. Institutions administering mediation under the UNCITRAL Mediation Rules (2021) or providing some administrative and logistical services**

20. The following remarks are intended to assist interested institutions in avoiding conflicts with the Rules in the administration of cases under the Rules or the provision of administrative and logistical services in relation to mediation under the Rules.

#### **A. Administrative procedures or rules in conformity with the UNCITRAL Mediation Rules (2021)**

21. In devising administrative procedures or rules, the institutions should have due regard to the interests of the parties. Since parties using the institutional services would have agreed that mediation is to be conducted under the Rules, their expectations should not be frustrated by practices or administrative rules that conflict with the Rules. Administering mediation under the Rules requires minimal adaptations, similar to those mentioned above in paragraphs 9–13. In this connection, it may be advisable that the institution clarify the role it will play by:

(a) Listing the administrative and logistical services offered; and/or

(b) Proposing to the parties a text of the UNCITRAL Mediation Rules (2021) highlighting the modifications made for the purpose of the administration of mediation; in this case, it is recommended that the institution indicates to potential users that the UNCITRAL Mediation Rules (2021) are “as administered by/amended by [*name of the institution*]” so that the user is made aware that the applicable rules are different to the UNCITRAL Mediation Rules (2021).

22. In addition, it is also recommended that:

(a) The administrative procedures of the institution distinguish clearly between the provision of administrative and logistical services and the provision of recommending and selecting a mediator under the UNCITRAL Mediation Rules (2021) (see chapter IV below), including a clear delineation between the services offered and, if charged, the related costs; and

(b) The institution indicates whether it is prepared to only administer mediation under the UNCITRAL Mediation Rules (2021) (and not leave a choice to the parties) or to also provide certain selected services of a technical and secretarial nature, which should be clearly described.

23. In setting out the administrative and logistical services that an institution offers, it is also recommended that the institution indicate:

(a) Which services are covered by which fee and which services would not be covered (that is, which would be billed separately) or whether the institution charges hourly fees;

(b) Which services are provided by its own staff and which are arranged to be provided by outside service providers; and

(c) That parties may also choose to have only a particular service (or services) provided by the institution without having the mediation fully administered by the institution.

#### **B. Offer of administrative and logistical services**

24. Article 4, paragraph 3 (b), provides that the parties, or the mediator with the consent of the parties, may arrange for administrative assistance. In this regard, institutions may consider providing the following non-exhaustive list of services as standing facilities or upon request:

- (a) Maintenance of an online platform to facilitate administrative services with secure data protection and cybersecurity measures;
- (b) Facilitating communication both in-person and virtually, including technical assistance during online mediations, taking into account the principles provided in the UNCITRAL Technical Notes on Online Dispute Resolution;<sup>5</sup>
- (c) Providing secretarial or clerical assistance;
- (d) Providing necessary practical arrangements for meetings, including:
  - (i) Assistance to the mediator in establishing the date, time and place of meetings;
  - (ii) Securing meeting rooms for in-person or hybrid (in-person and online) meetings during the mediation process;
  - (iii) Facilitating secured or encrypted telephone conference and videoconference facilities for remote or hybrid meetings;
  - (iv) Secretarial and clerical assistance in relation to meetings;
  - (v) Arranging for third-party services, including interpretation and translation;
  - (vi) Organizing, where possible, entry visas for the purpose of in-person meetings when mediation is carried out on the premises of the institution or in the same city in an outside facility;
- (e) Attestation of settlement agreements in accordance with article 8 of the UNCITRAL Mediation Rules;<sup>6</sup>
- (f) Translation of the settlement agreement; or
- (g) Providing services with respect to the storage of settlement agreements and files relating to the mediation.

### **C. Administrative fee schedule**

25. The institution, when indicating the fee or fees it charges for its services, if any, may reproduce its administrative fee schedule or, in the absence thereof, indicate the basis for calculating the fee or fees.
26. In view of the possible categories of services that an institution may offer, such as recommending and selecting the mediator or mediators and/or providing administrative and logistical services, it is recommended that the fee for each category be stated separately (see para. 22 (a) above).

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<sup>5</sup> Facilitating communication could include ensuring that communications among parties and mediators are kept open and up to date and may also consist in merely forwarding written communications. It should also be noted that in accordance with article 4, paragraph 2 (a), of the Singapore Convention on Mediation, where a party requesting to rely on a settlement agreement concluded through electronic communications, the method used for the electronic communication shall meet certain criteria. Institutions may wish to follow these criteria in the method used for settlement agreements concluded through electronic communications.

<sup>6</sup> This provision mirrors both article 4, paragraph 1 (b) (iii), of the Singapore Convention on Mediation and article 18, paragraph 1 (b) (iii), of the 2018 Model Law on Mediation.

## D. Draft model clauses

27. In the interest of procedural efficiency, institutions may wish to propose model mediation clauses covering the above services. It is recommended that:

(a) Where the institution fully administers mediation under the UNCITRAL Mediation Rules (2021), the model clause could read as follows:

“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 (2021) administered by *[name of the institution]*.”

(b) Where the institution provides certain mediation services only, the agreement as to the services that are requested should be indicated:

“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 (2021). *[Name of institution]* shall assist the parties by recommending a prospective mediator and, if the parties cannot agree, select the mediator. *[Name of institution]* shall also provide administrative services in accordance with its administrative procedures for mediation proceedings under the UNCITRAL Mediation Rules (2021).”

(c) Where the institution fully administers mediation in the context of ongoing arbitration proceedings, the multi-tiered model clause could read as follows:

“If the parties, in the context of ongoing arbitration proceedings, wish to submit the dispute, or any part thereof, to mediation, then the parties agree that the dispute shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules (2021) administered by *[name of institution]*.”

(d) Where the institution would provide certain mediation services only in the context of ongoing arbitration proceedings, the multi-tiered model clause could read as follows:

“If the parties, in the context of ongoing arbitration proceedings, wish to submit the dispute, or any part thereof, to mediation, then the parties agree that the dispute shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules (2021). *[Name of institution]* shall assist the parties by recommending and, if the parties cannot agree, selecting the mediator or mediators and providing administrative services in accordance with its administrative procedures for cases under the UNCITRAL Mediation Rules (2021).”

(e) In the above cases under subparagraphs (a)–(d), institutions may consider adding the following to the model clause:

“(i) The parties agree that there will be one mediator appointed by agreement of the parties *[within thirty days of the mediation agreement]*.”

“(ii) The language of the mediation shall be *[language]*.”

“(iii) The location of mediation shall be *[location]* *[The mediation shall be performed remotely]*.”

(f) Where the institution would, in the event that mediation does not result in a settlement agreement, fully administer or provide certain services related to subsequent arbitration, the multi-tiered model clause could read as follows:

“If the dispute, or any part thereof, is not settled within *[(60) days]* of the request to mediate under the UNCITRAL Mediation Rules (2021), then the parties agree to resolve any remaining matters by arbitration in accordance with the *[UNCITRAL Arbitration Rules (2021)]* *[arbitration rules of [name of the institution]]*.”

- (g) In such cases, institutions may consider adding the following note:
  - “(i) The appointing authority shall be [*name of institution*];”
  - “(ii) The number of arbitrators shall be [*one or three*];”
  - “(iii) The place of arbitration shall be [*city and country*];”
  - “(iv) The language of the arbitration shall be [*language*].”

#### **IV. Institutions recommending and selecting mediators**

28. Article 3, paragraph 3, of the UNCITRAL Mediation Rules (2021) provides that parties can seek the assistance of an institution for the recommendation or selection of the mediator. Article 3, paragraphs 4 and 5, outline the considerations to which an institution should have regard in recommending or selecting individuals to act as mediators. Such considerations include:

- (a) The professional expertise, language skills, and qualifications of the prospective mediator;
- (b) Any relevant accreditation and/or certification awarded to the prospective mediator by a recognized professional mediation standards body;
- (c) The availability of the prospective mediator;
- (d) Elements likely to secure the appointment of an independent and impartial mediator;
- (e) Elements likely to ensure diversity, including the nationality, gender or culture of the prospective mediator.

29. An institution that is willing and able to recommend and select mediators should describe the manner in which it will perform those functions (see para. 28 above) and the associated costs, if any.