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UNCITRAL'S COMMITMENT TO PROMOTE MEDIATION

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Abstract

Mediation, as a completely voluntary and confidential form of Alternative Dispute Resolution (ADR), has today taken an important place in the resolution of disputes around the globe. It provides a neutral and confidential environment in which the parties can openly discuss their views on the underlying dispute. Enhanced communication can lead to resolution that will be satisfactory and acceptable to the parties involved. Mediation usually occurs early in the dispute, and much mediation is completed in one or two meetings. The parties having an equal say in the process and they, not the mediator, decide on the terms of the settlement and the eventual settlement. Therefore, there is no determination of guilt or innocence in the process. The parties may agree to use a set of mediation rules. Such rules usually determine the procedural framework of the mediation. Decades of work by the United Nations Commission on International Trade Law (UNCITRAL) has resulted in UNCITRAL providing states, mediation practitioners, parties to a dispute and mediators with a set of legal documents applicable to the mediation process. The analysis, synthesis, normativism and empiricism used in this paper provides an overview of UNCITRAL's commitment to the adoption of legal rules and the importance that these rules have in implementation, in the form of the convention, model law, rules, explanatory notes and recommendations. The results of the research provide evidence that this commitment is ongoing in order to respond to the changes and innovations that characterize today's disputes.

Keywords: ADR, mediation, voluntary, neutral, confidential, dispute, mediator, UNCITRAL, legal rules.

I. Introduction

Due to the pervasive presence of disputes and the need to save money, time, physical, emotional, and other aspects that are often associated with them, people have always been looking for peaceful ways of resolving differences between them. In search of dispute management and resolution, they have made continuous efforts to develop procedures that are efficient and effective, to satisfy their interests, to build or change relations for the better, to reduce suffering, and to control unnecessary depletion of emotional and physical energy or tangible resources. Approaches and procedures for resolving disputes vary depending on who the participants are, how cooperative or advisory the process is, the degree of force (coercion) that can be used by the parties or to the parties to the dispute, the level of formality of the procedures, the degree of privacy given to the parties, the types and qualities of the results, and the roles and influence of

third parties, if they are present and used.[1] In this case parties to a dispute are often in the best position to determine which dispute mechanism best meets their goals in achieving access to justice. As a result, one party, perhaps on the advice of their solicitor, may suggest mediation or conciliation prior to the commencement of litigation. The other party is entirely free to accept or reject this invitation.

When the parties to a dispute are unable to resolve it by negotiation, the intervention of a third party is a possible means of breaking the impasse and producing an acceptable solution. Such intervention can take a number of different forms. The third party may simply encourage the disputing parties to resume negotiations, or does nothing more than provide them with an additional channel of communication. In these situations the intermediary is said to be contributing 'good offices'.

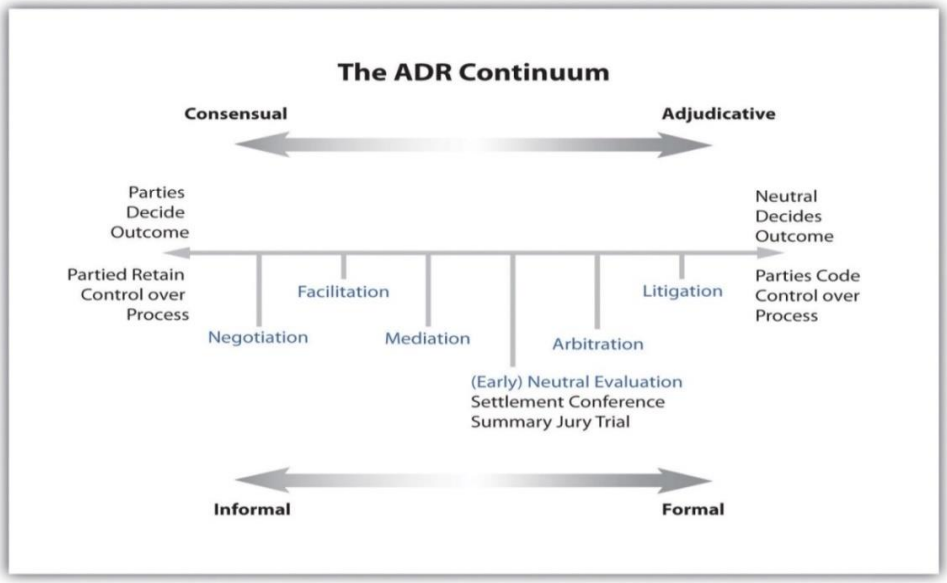
On the other hand, the assignment may be to investigate the dispute and to present the parties with a set of formal proposals for its solution. This form of intervention is called 'conciliation'. Between good offices and conciliation lies the form of third-party activity known as 'mediation'.[2]

As a key form of Alternative Dispute Resolution (ADR), mediation often exists alongside facilitation, good offices and dialogue efforts. Mediation, however, has its own logic and approach, aspects of which may be relevant to other approaches to the peaceful settlement of disputes.[3]

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.[4]

[1] Drita M. Fazlia, Faton Z. Shabani, *Zgjidhja jashtëgjyqësore e kontesteve*, Tetovë, 2019, 280.
[2] John G. Merills, *International Dispute Settlement* (4th edition), Cambridge: Cambridge University Press, 2005, 28.
[3] *United Nations Guidance for Effective Mediation*, 2012, 4.
[4] *Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* (2018), 16.

Figure 1 - A Continuum of Different ADR Methods



Source: https://saylordotorg.github.io/text_the-legal-and-ethical-environment-of-business/s07-00-alternative-dispute-resolution.html [accessed: 14.12.2023].

Mediation occupies a very important position in this new broad concept of justice. It is approached as a flexible and easily tailored way for parties to work out solutions to their disputes in many different fields. However, its treatment varies deeply from country to country. Although it is firmly established in many legal systems, in some other jurisdictions the institution remains mostly unknown, is subject to some degree of suspicion or, unfortunately, lacks any practical application.[5]

United Nations considers that mediation is one of the most effective methods of preventing, managing and resolving conflicts.[6] In this spirit, United Nations Convention on International Settlement Agreements Resulting from Mediation defines mediation as: "A process irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute".[7] The mediator is a neutral observer who is not emotionally related either to disputing parties or to the subject matter and can get through to the heart of the matter in order to open up discussions as to how to resolve the dispute. For this reason, the mediator cannot make a decision regarding the outcome and supports the parties to reach their own agreement.[8] To be effective, however, a mediation process requires more than the appointment of a high-profile individual to act as a third party. Antagonists often need to be persuaded of the merits of mediation, and peace processes must be well-supported politically, technically and financially.

[5] Guillermo Palao (editor), *The Singapore Convention on Mediation: A Commentary on the United Nations Convention on International Settlement Agreements Resulting from Mediation*, Cheltenham: Edward Elgar Publishing Limited, 2022, xviii.
[6] Foreword of Ban Ki-Moon, Secretary-General of the United Nations, United Nations Guidance for Effective Mediation, 1.
[7] Article 2(3) of the *United Nations Convention on International Settlement Agreements Resulting from Mediation* (2018).
[8] Faton Shabani, *Mediation – Current State of use in the Republic of North Macedonia*, VADYBA: Journal of Management, Vol. 37, No. 1, 2021, 43-52, 44.

Ad-hoc and poorly coordinated mediation efforts – even when launched with the best of intentions – do not advance the goal of achieving durable peace.[9]

With the world growing smaller in terms of trade and business interactions, it is only natural that the existence of disputes would arise given that different procedures and laws are governing the process included within the trade and business deals, which are respective to the parties and their countries' laws regarding the matter. In 1966, the need for a body of unification was felt, which would focus not only on harmonizing the process of international trade and business but also govern the procedure surrounding it, the United Nations Commission on International Trade Law (UNCITRAL) was established keeping these goals in target, to improve the process and procedure involved in international trade and business deals.[10]
As a result, UNCITRAL offers states, mediation practitioners, parties to a dispute and mediators a complete package of legal instruments applicable to the mediation process: the Mediation Convention, the Model Law on Mediation (and its predecessor the Model Law on Conciliation with Guide to Enactment and Use, 2002), the Mediation Rules (and its predecessor the Conciliation Rules) for conducting the mediation process, and the Notes on Mediation for better understanding the mediation process and its main features.[11]
UNCITRAL recognized the value of conciliation or mediation, an interchangeable term used to adapt to the actual and practical use, as a method of amicably settling disputes arising in the context of international commercial relations and responded by adopting the UNCITRAL Conciliation Rules (1980), which offer an internationally harmonized set of procedural rules for the conduct of conciliation proceedings, and which were amended by the UNCITRAL Mediation Rules (2021).
Further, in the context of recognition of the increasing use of conciliation as a method for settling commercial disputes, the UNCITRAL Model Law on International Commercial Conciliation (2002) was initially developed and later amended by the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018). It complements the United Nations Convention on International Settlement Agreements Resulting from Mediation, which opened for signature in Singapore on 7 August 2019 and entered into force on 12 September 2020. The Convention will further enhance the use of mediation and foster access to justice. Additionally, UNCITRAL adopted the Notes on Mediation (2021), which is an explanatory text on the organization of mediation proceedings.[12]

II. United Nations Convention on International Settlement Agreements Resulting from Mediation

Adopted in December 2018, the United Nations Convention on International Settlement Agreements resulting from Mediation, also known as the "Singapore Convention on Mediation" applies to international settlement agreements resulting from mediation. It establishes a harmonized legal framework for the right to invoke settlement agreements as well as for their

[9] United Nations Guidance for Effective Mediation, 1.
[10] https://viamediationcentre.org/readnews/MTE1Mg==/The-Role-of-UNCITRAL-in-the-World-of-ADR [accessed: 14.12.2023].
[11] Nadja Alexander, Shouyu Chong, Vakhtang Giorgadze, *The Singapore Convention on Mediation: A Commentary*, Alphen aan den Rijn: Kluwer Law International, 2022, 0.15.
[12] https://uncitral.un.org/en/texts/mediation [accessed: 14.12.2023].

enforcement. The Convention is an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes. Being a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation, thereby contributing to the Sustainable Development Goals (SDG), mainly the SDG 16.[13] The Convention is open for signature by states and regional economic integration organizations.[14]
Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations, and also convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to states with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations, UNCITRAL adopted the Convention.[15]

The Convention provided for the enforcement of settlement agreements, the requirements for reliance on settlement agreements, and the grounds for refusing to grant relief. By unifying the rules related to the enforcement of settlement agreements, the Convention reduced the risk of refusal to enforce such agreements, strengthened predictability and certainty in the use of mediation, and encouraged the resolution of cross-border disputes in a non-confrontational, cost-effective and efficient manner, in line with the United Nations Sustainable Development Goals, more specifically SDG 16 on access to justice.[16] In the commentary made to the Convention, Nadja Alexander, Shouyu Chong, Vakhtang Giorgadze, from a user perspective, the Convention offers a risk management mechanism accessible in terms of its flexibility and affordability to cross-boarder business players, whether they are multi-national corporations, publicly listed corporations, traditionally incorporated limited entities, sole traders, or start-ups.[17]
This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that: at least two parties to the settlement agreement have their places of business in different states; or the state in which the parties to the settlement agreement have their places of business is different from either (the state in which a substantial part of the obligations under the settlement agreement is performed; or the state with which the subject matter of the settlement agreement is most closely connected).[18]
However, the Convention does not apply to: settlement agreements that have been approved by a court or concluded in the course of proceedings before a court, and that are enforceable as a judgment in the state of that court; and settlement agreements that have been recorded and are enforceable as an arbitral award.[19]

[13] https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements [accessed: 11.12.2023].
[14] Until December 31, 2023, the status of the Convention is: 57 signatory states, in 13 of them it has entered into force, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status [accessed> 07.01.2024].
[15] *Resolution adopted by the General Assembly* on 20 December 2018 for the adoption of the Convention.
[16] Nadja Alexander, Shouyu Chong, Vakhtang Giorgadze, op. cit., Foreword.
[17] Ibid, Introduction.
[18] Article 1(1) of the Mediation Convention.
[19] Article 1(3) of the Mediation Convention.

III. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation

The Model Law is designed to assist states in reforming and modernizing their laws on mediation procedure. It provides uniform rules in respect of the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use. The Model Law was initially adopted in 2002. It was known as the "Model Law on International Commercial Conciliation", and it covered the conciliation procedure. The Model Law has been amended in 2018 with the addition of a new section on international settlement agreements and their enforcement. The Model Law has been renamed "Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation". 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 amending the Model Law, UNCITRAL 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.[20]

The Model Law aims at encouraging the use of mediation by providing greater predictability and certainty regarding the process and its outcome. International trade 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.[21]

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.[22]

To avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of mediation, including appointment of conciliators, commencement and termination of mediation, conduct of the mediation, communication between the mediator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-mediation issues, such as the mediator acting as arbitrator and enforceability of settlement agreements. The Model Law provides uniform rules on enforcement of settlement agreements and also addresses the right of a party to invoke a settlement agreement in a procedure. It provides an exhaustive list of grounds that a party can invoke in a procedure covered by the Model Law. The Model Law can be used as a basis for enactment of legislation on mediation, included, where needed, for implementing the Mediation Convention.

Accompanying the Model Law, the Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from

[20] https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation [accessed: 11.12.2023].
[21] Guide to Enactment and Use of the Model Law, 14.
[22] Ibid, 18-19.

Mediation was adopted by the Commission in 2002. The Guide is a tool that provides background and explanatory information that states can use in the process of modernizing legislation in the area of mediation. The Guide also provides other users of the text with useful insight into the Model Law.[23]

IV. UNCITRAL Mediation Rules

UNCITRAL Mediation Rules (2021) are intended to serve as an instrument for the concretized implementation of the Mediation Convention. The Mediation 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.[24] Where parties have agreed that disputes between them shall be submitted to mediation under the Rules, then these Rules shall apply. The Rules may apply irrespective of the basis, whether contractual or not, upon which the mediation is carried out.[25] 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.[26]

In addition to the rules for the main issues about the mediation procedure (such as: commencement of mediation, number and appointment of mediators, conduct of mediation, communication between the parties and the mediator, confidentiality, settlement agreement or termination of mediation), the Rules contain special Annex that include: Model mediation clauses; Model declaration of disclosure; and Model statement of availability.

Conclusion

Mediation is when the parties seek the help of a neutral person (mediator) to help them resolve the conflict. Mediation is one of several ADR methods available to parties. It is an alternative to resolving a legal dispute largely outside of court procedures, rules and facilities. Mediation is gaining ground among dispute resolution methods. Distinguished by its flexibility and lack of strict procedural rules such as the case of judicial and arbitration procedures. The international scope of mediation has since years since constituted the main commitment of the UNCITRAL.

The commitment in question has resulted in the adoption of the acts that today constitute the cornerstone of the regulation of mediation in national legislations and in international law in general. The pillar of all this commitment undoubtedly remains the Mediation Convention, which aims to unify the mediation regulations, but also the Model Law as an instrument that has

[23] https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation [accessed: 11.12.2023].
[24] *UNCITRAL Recommendations to assist mediation centres and other interested bodies with regard to mediation under the UNCITRAL Mediation Rules* (2021), 2023, 3.
[25] Article 1(1) of Mediation Rules.
[26] UNCITRAL Recommendations, 5.

served and continues to serve the states during the adoption or amendment of their national laws. An important addition is intended to be the Mediation Rules providing rules to cover all aspects of the mediation process. Finally, UNCITRAL has taken care to compile and publish Explanatory Notes and Recommendations in order to assist the organization of mediation procedures and mediation bodies.

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