Submission on

Adoption of UNCITRAL Model Law on International Commercial Conciliation in Canada

NATIONAL ALTERNATIVE DISPUTE RESOLUTION SECTION
CANADIAN BAR ASSOCIATION

February 2005

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PREFACE

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Alternative Dispute Resolution Section with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Alternative Dispute Resolution Section of the Canadian Bar Association.

Submission on

Adoption of UNCITRAL Model Law on International Commercial Conciliation in Canada

I. INTRODUCTION

The Canadian Bar Association's National Alternative Dispute Resolution Section (the CBA Section) is pleased to have this opportunity to consider adapting the United Nations Commission on International Trade Law (UNCITRAL) *Model Law on International Commercial Conciliation* (the Model Law),[1] prepared by a Working Group of UNCITRAL (UNCITRAL Working Group), for use in Canada. The CBA Section members have an interest and practical experience in the area of ADR.

An inter-governmental committee of the Uniform Law Conference of Canada (ULCC) is presently reviewing the Model Law to create a Canadian version that could be implemented for use in both international and domestic spheres. The CBA Section's recommendations are to assist the ULCC committee in its review.

The CBA Section has specifically considered the following:

1. Whether or not a Canadian version of the Model law should be limited to international commercial mediations[2] or should apply to all commercial mediations within the enacting jurisdiction;
2. The enforceability of agreements to mediate;

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1 A copy of the Model Law can be found at http://www.uncitral.org/en-index.htm.

2 Although the title of the Model Law refers to "Conciliation", Article 1(3) of the Model Law provides, "For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute." This paper refers to "mediation" throughout as that term is in widespread use in Canada.

3. The enforceability of settlement agreements reached through the mediation process; and
4. The scope of confidentiality in the mediation process.

In our view, the current success of commercial mediation would be enhanced if Canadian jurisdictions each enacted legislation based on the Model Law. Our recommendations are intended to adapt the excellent work of the UNCITRAL Working Group to specific Canadian needs, in the hope that mediation will become more widely used for the resolution of commercial disputes in Canada.[3]

II. THE ISSUES

A. Scope of Model Law – Domestic and International

The UNCITRAL Working Group clearly contemplated that the Model Law could apply to both domestic commercial mediations and international mediations.[4] Given the widespread and growing use of mediation in Canada, as well as the absence of any federal, provincial or territorial legislation that applies generally to the mediation process, the CBA Section is of the view that a Canadian version of the Model Law should, in fact, apply to both domestic and international commercial mediations.

B. Scope of Model Law – "Commercial"

The Model Law comments on what is meant by "commercial":

> The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing;

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3 The Model Law on International Commercial Conciliation was adopted by UNCITRAL on 24 June 2002 at its 35th Session in New York, and was published as Annex 1 to the Report of the United Nations Commission on International Trade Law on its 35th Session, Official Records of the General Assembly (A/57/17). The adoption of the Model Law followed more than two years of deliberation by UNCITRAL Working Group II on Arbitration and Conciliation.

4 Footnote (a) of the Model Law, which provides express drafting instructions for states wishing to adopt the Model Law as applying to domestic as well as international mediations.

> construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.[5]

The UNCITRAL Working Group intended from the outset that the scope of this Model Law should be limited to commercial matters.[6]

In Canada, the use of mediation has developed in a number of areas that likely would not be included within even the broadest interpretation of the term "commercial". For example, family mediation, grievance mediation, employment mediation and workplace mediation would all appear to fall outside the ambit of "commercial" mediation.

While it may be tempting to extend the application of a Canadian version of the Model Law to other areas, we believe that it should be limited to commercial matters at this time. The Model Law was developed by UNCITRAL over a two-year period focusing exclusively on commercial matters. The application of the Model Law to other, non-commercial contexts has not been fully studied. In our view, its application should not be extended absent such study.

C. Enforcing Agreements to Mediate

In some situations (for example in a commercial agreement), the parties agree in advance that they will refer any future disputes to mediation. When a dispute subsequently arises, one party may be unwilling to proceed with the mediation because they believe, for example, that the nature of the dispute or the prevailing attitude of the other parties would make mediation useless. If the other party or parties wish to proceed with mediation, the question is whether a Court or arbitral tribunal should enforce the initial agreement to mediate.

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5 Footnote (b) to Article 1.(1) of the Model Law.

6 See para. 21 of the Report of the Working Group on Arbitration on the work of its 32nd Session, Vienna, 20-31 March, 2000 – UNCITRAL document A/CN.9/468, found at http://www.uncitral.org/en-index.htm.

Article 13 of the Model Law says:

> **Article 13. Resort to arbitral or judicial proceedings:**
>
> Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specific period of time or until a specific event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or the termination of the conciliation proceedings.

This provision is limited to situations where the parties have agreed that conciliation will be a condition precedent to litigation or arbitration: such undertakings would be given effect by an arbitral tribunal or court. In our view, a Canadian version of the Model Law should go further and require mediation to proceed even if the parties have not made it an express condition precedent.[7] Courts[8] and commentators,[9] recognizing the dynamic nature of the mediation process, are increasingly supportive of this approach. The CBA Section believes that the Canadian version of the Model Law would be strengthened by such a provision.

D. Enforcing Settlement Agreements Reached in the Mediation Process

With some exceptions, settlement agreements arrived at through mediation are generally enforceable contracts under Canadian law. The UNCITRAL Working Group considered whether or not settlement agreements arrived at in the context of a commercial mediation should be given special status in terms of enforcement.

On the one hand, it was argued that legislating expedited enforcement of such settlement agreements would tend to encourage use of, and participation in, the mediation process. On the other hand, the consensual and voluntary nature of the mediation process (as

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7 Clearly, this would only be the case where at least one party wished to proceed with the mediation.

8 See for example the decision of Mr. Justice Colman of the English Commercial Court in *Cable & Wireless PLC* (C&W) *v. IBM United Kingdom Ltd.* (IBM), [2002] EWHC 2059 (Comm Ct) http://www.cedr.co.uk/library/edr_law/Cable_Wireless_v_IBM.pdf.

9 See for example Talpis, J., *Enforcing International Commercial Agreements to Mediate and Settlements Reached through Mediation* (Paper presented to the Canadian Bar Association, June 18th, 2003).

opposed to arbitration) could mean that parties would tend to comply with the agreements they made without special enforcement mechanisms. Moreover, during mediation, parties could choose to build security and enforcement mechanisms (such as consent judgments or the granting of security) into their settlement agreements.

In the end, the UNCITRAL Working Group was unable to reach a consensus on this issue, and left the matter of enforcement to the discretion of the enacting country.[10]

Canadian common law jurisdictions permit expedited enforcement of settlement agreements in limited circumstances. For example, in the context of mediations conducted pursuant to the Ontario Mandatory Mediation Plan,[11] Rule 24.1.15 of the Ontario Rules of Practice provides,

> **24.1.15** (1) Within 10 days after the mediation is concluded, the mediator shall give the mediation co-ordinator and the parties a report on the mediation. O. Reg. 453/98, s. 1.
>
> (2) The mediation co-ordinator for the county may remove from the list maintained under subrule 24.1.08 (1) the name of a mediator who does not comply with subrule (1). O. Reg. 453/98, s. 1.
>
> **Agreement**
>
> (3) If there is an agreement resolving some or all of the issues in dispute, it shall be signed by the parties or their lawyers. O. Reg. 453/98, s. 1.
>
> (4) If the agreement settles the action, the defendant shall file a notice to that effect,
>
> (a) in the case of an unconditional agreement, within 10 days after the agreement is signed;
>
> (b) in the case of a conditional agreement, within 10 days after the condition is satisfied. O. Reg. 453/98, s. 1.

10 See Article 14 of the Model Law.

11 At present the OMMP has effect in Ottawa, Toronto and the County of Essex (Windsor). Effective December 31, 2004, the formal mandatory mediation program described in the Rules of Practice has been suspended in Toronto and replaced with a new form of mandatory mediation pursuant to a Practice Direction of the Superior Court of Justice.

> **Failure to Comply with Signed Agreement**
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> (5) Where a party to a signed agreement fails to comply with its terms, any other party to the agreement may,
>
> (a) ***make a motion to a judge for judgment in the terms of the agreement, and the judge may grant judgment accordingly;*** [emphasis added] or
>
> (b) continue the action as if there had been no agreement. O. Reg. 453/98, s. 1; O. Reg. 288/99, s. 14.

Similarly, for settlements arrived at in the context of arbitral proceedings, section 36 of the *Arbitrations Act*, *1991* (Ontario) provides,

> **Settlement**
>
> **36.** If the parties settle the dispute during arbitration, the arbitral tribunal shall terminate the arbitration and, if a party so requests, may record the settlement in the form of an award. 1991, c. 17, s. 36.

Section 36 of the *Arbitrations Act*, *1991* echoes one possible approach considered by the UNCITRAL Working Group:

> If the parties reach agreement on a settlement of the dispute, they may appoint an arbitral tribunal, including by appointing the conciliator or a member of the panel of conciliators, and request the arbitral tribunal to record the settlement in the form of an arbitral award on agreed terms.[12]

In Quebec, there is a special contract known as the "***transaction***" (Article 2631 C.c.Q.). If a settlement qualifies as a transaction, which it usually does, it becomes "chose jugée", i.e., it has the effect of being *res judicata* and precludes any subsequent proceedings between the same parties in the same matter.

The CBA Section believes that a Canadian version of the Model law would benefit from the inclusion of a mechanism to provide for expedited enforcement of settlement agreements reached in mediation. The best mechanism for achieving this would be to import the civil law concept of the "transaction" into the Canadian version of the law. This would:

12 UNCITRAL document A/CN.9/506 at paragraph 39.

1. encourage lawyers to recommend the process to their clients;
2. facilitate common understanding between parties as to the outcome of the process;
3. enhance the credibility of a process still not widely used in international matters;
4. take advantage of civil law concepts that have proven effective, as has been done with the concept of "amiable compositeur" for arbitration; and
5. avoid use of an arbitration tool to enforce mediated agreements, which would be contrary to the spirit of mediation and negate the collaborative approach potentially developed through the mediation process.

E. The Scope of Confidentiality in the Mediation Process.

Confidentiality is a cornerstone of the mediation process. Yet, in Canada, the absence of legislation confirming the scope of confidentiality has left some doubt as to how confidential mediation discussions actually are. For example, the Ontario Court of Appeal decision in *Rogacki v. Belz et al*[13] made clear that the Rules of Court governing mandatory mediation in that province do not provide a protection of full, enforceable confidentiality. The Court held that a contempt order was not an available remedy when the opposing party reported what had transpired during a mandatory mediation session to a community newspaper.

Article 9 of the Model Law deals with confidentiality:

> **Article 9. Confidentiality**
>
> Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

The CBA Section has considered the tension between this type of confidentiality requirement and various statutes providing for access to information when one of the parties to the mediation is a public authority to which such statutes apply. In our view, while settlement reached through mediation should properly be the subject of access

13 http://www.ontariocourts.on.ca/decisions/2003/october/rogackiC38522.htm.

legislation, mediation communications should not. The *United States Uniform Mediation Act*[14] provides a useful definition of "mediation communications" that must be kept confidential (subject to reasonable exceptions[15]). Such a definition could be incorporated into a Canadian version of the Model Law:

> **SECTION 2. DEFINITIONS.** In this [Act]:
>
> (2) "Mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

III. SUMMARY OF RECOMMENDATIONS

The CBA Section recommends that:

- **the Uniform Law Conference of Canada prepare a Canadian version of the UNCITRAL Model Law on International Commercial Conciliation.**
- **the Canadian version of the Model Law should apply to domestic as well as international commercial mediations.**
- **the Canadian version of the Model Law should strongly favour the enforceability of agreements to mediate.**
- **the Canadian version of the Model Law should contain a mechanism for the expedited enforcement of settlement agreements reached during the mediation process and that mechanism should be modeled after the "transaction" concept from Quebec civil law.**
- **the Canadian version of the Model Law should make mediation communications (broadly defined) confidential, subject to reasonable exceptions, and, specifically, that they are not subject to access to information legislation.**

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14 http://www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm.

15 With respect to the reasonable exceptions to Mediation Confidentiality see the article, "Absolute Confidentiality: Is it Wise? by Jeff Kichavan at http://www.irmi.com/Expert/Articles/2004/Kichaven08.aspx