

**UNIFORM LAW CONFERENCE OF CANADA**

**CIVIL LAW SECTION**

**UNIFORM ACT ON INTERNATIONAL COMMERCIAL MEDIATION**

**REPORT OF THE WORKING GROUP**

**St-John's, Newfoundland and Labrador**

**August 21-25, 2005**



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**I – INTRODUCTION**

**(i) Request to the Uniform Law Conference of Canada (“ULCC”)**

[1] At the August 2004 meeting, the ULCC adopted a proposal by the Department of Justice that it undertake a working group to prepare a uniform act for the implementation of the *UNCITRAL Model Law on International Commercial Conciliation* (“UNCITRAL Model Law”).

[2] The Working Group was led by Manon Dostie, Counsel to the International Private Law Section of the Department of Justice of Canada. The Group worked through electronic mail and met by conference calls held on December 7, 2004; January 18; February 1; February 15; March 1; March 15; April 5; April 12; April 26; May 3; May 25; May 31; June 7 and June 14, 2005.

[3] The Working Group included representatives from the Federal and many provincial governments as well as leading practitioners involved in the National Alternative Dispute Resolution Section of the Canadian Bar Association and the two experts who assisted the Canadian delegation in the negotiation of the Model Law.

[4] The legislative drafters participated in the conference calls and met separately with Manon Dostie and Peter Noonan, of the Dispute Resolution Section of the Federal Department of Justice, to discuss their drafting instructions. All documents including minutes, record of decisions and outstanding questions as well as draft uniform acts and reports were produced in both official languages throughout the process.

**(ii) Mandate of the Working Group**

[5] The mandate of the Working Group was to draft in both official languages (1) a uniform act to enact the *Model Law on International Commercial Conciliation* in domestic law, (2) Commentaries on each provision to the act and (3) a Report which describes the Model Law and the methodology followed to enact it, including an

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assessment as to any options available to the jurisdictions under the Uniform Act. These documents are presented to the ULCC during the August 2005 Annual Meeting for discussion and adoption.

### **II – BACKGROUND OF THE MODEL LAW**

#### **A – History of the negotiations**

[6] In 1999, the United Nations Commission on International Trade Law (UNCITRAL) mandated the Working Group on International Arbitration and Conciliation to draft a model law on international commercial conciliation. The Commission adopted the *Model Law on International Commercial Conciliation* in June 2002.

[7] Canada actively participated in all stages of the development of the Model Law. At the negotiations, Canada was represented by Manon Dostie, Counsel to the International Private Law Section of the Department of Justice of Canada; Mr. Robert Cosman, expert in common law and Professor Guy Lefebvre, expert in civil law.

[8] Extensive consultations were conducted throughout the process. Those invited to participate in the consultations throughout the process include provincial and territorial government authorities, federal departments, private bar, academics, and non-governmental organisations. The comments received from those consulted provided insight and guidance to the Canadian delegation during negotiations.

#### **B – Model Law on International Commercial Conciliation**

##### **(i) Overview of the UNCITRAL Model Law**

[9] The Model Law was designed to provide uniform rules in respect of the conciliation process. Issues covered by the Model Law include scope of application, definition of "commercial", disclosure of information, confidentiality, limitation period, admissibility of evidence in other proceedings, and enforcement of the settlement agreement.

##### **(ii) Specific policy questions and decisions addressed by the ULCC Working Group**

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### **a) Form of the Uniform Act**

[10] The Working Group agreed that changes to the Model Law were necessary but endeavoured to follow the UNCITRAL Model Law as much as possible, so as to ensure recognition by UNCITRAL and the international community for the enactment by Canadian jurisdictions of the Model Law.

[11] Some provisions were simplified, for example Articles 4 and 11 of the Model Law on the Commencement and termination of proceedings were collapsed into a simple section. Articles 2 and 6(3) of the Model Law were retained as is as they are mandatory provisions. The article on the recognition and enforcement of the conciliation agreement was also strengthened.

[12] A table of correspondence between the sections of the Uniform Act and the articles of the Model Law can be found in Annex 2.

### **b) Purpose clause**

[13] A purpose section to broadly encourage conciliation was important for some Members. However, recognizing that not all legislative drafting protocols of the jurisdictions allow purpose clauses, it may be deleted.

### **c) Scope of application**

[14] The uniform act allows jurisdictions the option of applying the Model law to (1) international conciliations only or (2) international as well as domestic conciliations. Jurisdictions wishing to apply the uniform act to both domestic and international conciliations would delete the terms [international] in the Title and paragraph 1(1) as well as delete paragraphs 1(4) and 1(5) of the uniform act.

[15] UNCITRAL developed this Model Law strictly for commercial mediations as it does not have the mandate or the expertise to develop instruments outside its mandate of furthering the progressive harmonization and unification of international commercial law. As well, it must be noted that the ULCC Working Group drafted the uniform act in the

context of commercial mediations. It did not examine the impact of the uniform act on civil and family law matters. The uniform act is limited to "commercial" conciliation implicitly as "commercial" goes to the essence of the act. Parties could not agree to use the act in matters other than commercial, for example, family law matters.

[16] Given the very sophisticated and specific mediation systems adopted by certain jurisdictions, the Working Group made provision for excluding existing mandatory mediation systems, for example, the Ontario Mandatory Mediation program, from the application of the uniform act.

**d) Conciliation or mediation**

[17] The Working Group decided to change the term "conciliation" to "mediation" to accommodate Canadian terminology.

**e) Interpretation**

[18] The Working Group decided to include supplementary interpretation provisions. Treaty interpretation principles found in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, have been recognized as part of Canadian law by recent court decisions. In *Thomson v. Thomson* [1994], 3 S.C.R. 551, at pp. 577-578, Justice La Forest wrote

“[i]t would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the State parties to the treaty must have intended. Not surprisingly, then, the parties made frequent references to this supplementary means of interpreting the Convention, and I shall also do so. I note that this Court has recently taken this approach to the interpretation of an international treaty in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689”.

[19] A paragraph referring to the Guide to enactment and UNCITRAL Report as a tool for interpretation is also found in many ULCC uniform act implementing international

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instruments such as the *Uniform Act on the UNCITRAL Model Law on International Commercial Arbitration* (section 14).

### **f) Disclosure of information – additional defence for mediators?**

[20] The Working Group decided to include an additional exception to the rule of non-disclosure to allow a mediator to put forward a defence to allegations of malpractice or professional misconduct. Although debated, the Working Group decided not to create an exception to enable mediators to begin legal proceedings to recover unpaid fees for service as this was not done for arbitrators and could be solved by every day practices, for example, by way of a retainer.

### **g) Limitation period - art. X**

[21] This question of whether or not a section suspending the limitation period when parties were engaged in or considering mediation was carefully examined by the Working Group. However, as the *ULCC Limitations Working Group* included a provision in their uniform act to allow parties to extend the prescription period, it was deemed unnecessary for this uniform act to do so.

### **h) Resort to arbitral or judicial proceedings**

[22] The Working Group seemed to agree that this rule was important to support confidence in the conciliation process. However, the Working Group was not comfortable with a proposal that would have required completion or termination of a mediation before a party was permitted to bring arbitral or judicial proceedings.

### **i) Enforcement of the settlement agreement**

[23] The Working Group decided to draft a stronger provision on recognition and enforcement of a mediation agreement. The chosen method was a simple one – it simply provides that the mediation agreement may be registered on application to a court with notice to all parties. This provision is intended to be read in conjunction with existing procedures of the court and available defences to recognition and enforcement under

contract law, fraud, public policy, etc. Some jurisdictions may wish to codify or refer to specific procedures or available defences. If not contested, the agreement can be registered as if it were a judgment of the court in which it was registered.

**j) Other**

[24] A rule concerning the inability of the conciliator to act as counsel for a party was deemed outside the scope of this uniform act and would most likely be covered in the rules of ethics in each jurisdiction.

[25] Some mediation practices included in the Model Law and recognized in Canadian practice have been codified in the uniform act, for example: the ability for a mediator to conduct mediation via caucus sessions or by shuttle mediation; ability of a mediator to make suggestions for settlement if parties do not object; ability for parties to resort to a third party or an institution to assist in the choice of a qualified mediator; and allowing and encouraging parties to set out their own rules of conduct for the mediation. The practice of med-arb whereby an arbitrator conducts both the mediation and the arbitration is not allowed under the act but parties may expressly agree to it.

[26] At the same time, certain legislative requirements are included to protect the parties and the process: the obligation of a mediator to maintain fair treatment of the parties; the confidentiality of mediation proceedings; impartiality or independence of a chosen mediator; general non-admissibility of evidence with exceptions, and a binding and enforceable settlement agreement demonstrating the seriousness of conciliation proceedings. Parties can expressly opt out of all but the fair treatment requirements.

**C – Implementation Issues**

**(i) Enactment of the Model Law**

[27] A Model Law is a recommended legislative text that can be used by States in their legislation. States enacting a Model Law may modify and even delete provisions. However, the essence of the Model Law must be retained if a State wants to be recognized as having enacted the Model Law by UNCITRAL and the international community.



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[28] Once a jurisdiction has incorporated the Uniform Act into domestic legislation, it is recommended that it inform the federal Department of Justice which will in turn inform the UNCITRAL Secretariat that X jurisdiction has enacted the Model Law.

### (ii) Questions to be answered

[29] The following questions should be considered by jurisdictions enacting the uniform act:

- (a) Should a purpose clause be included in the act? (Uniform Act, sub-section 1(1), 1<sup>st</sup> sentence)
- (b) Should the act apply to both international and domestic conciliations? If both, then delete the terms [international] in the Title and paragraph 1(1) as well as delete sub-paragraphs 1(4) and 1(5) of the Uniform Act.
- (c) Is there a need to exclude a specific mediation system from the application of the act or otherwise restrict the application of the Act? (Uniform Act, sub-section 1(6))
- (d) Will the *ULCC Working Group's Uniform Act on Limitations* be adopted by the jurisdiction? If so, the parties may be able to extend the limitation period by agreement.
- (e) Is there a need to include or refer to specific procedures or available defences in Uniform Act, Section 11?

## D - Miscellaneous Issues

### 1 – Address of UNCITRAL website

<http://www.uncitral.org>

**2 – Other useful documents**

[30] The text of the Model Act on International Commercial Conciliation and Guide to Enactment and Use are available on the UNCITRAL web site at:

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html)

**IV – THE ULCC WORKING GROUP MEMBERS**

[31] A list of Members of the Working Group is attached to this Report for information.

**V – RECOMMENDATION**

[32] That this Report and the attached Uniform Act be discussed and be adopted.

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**ANNEX 1**

**ULCC Working Group Members List**

Jean-Paul Chapdelaine Légiste-expert Section du perfectionnement et des projets spéciaux - Direction des services législatifs Ministère de la Justice Canada	Lynn Douglas Senior Drafter Department of Justice Canada
Janice L. Brown Solicitor - Legal Services Division Nova Scotia Department of Justice	Vincent Pelletier Avocat - Direction de la recherche et de la législation ministérielle Ministère de la Justice – Québec
Paul Nolan Counsel - Department of Justice Newfoundland and Labrador	Lynn Romeo General Counsel - Civil Legal Services Manitoba Justice
Sarah Perkins Articling Student Ministry of the Attorney General (Ontario)	John D. Gregory General Counsel, Policy Division Ministry of the Attorney General (Ontario)
Frédérique Sabourin Direction des affaires juridiques Ministère de la Justice du Québec	Ron Tucker Barrister & Solicitor - Dispute Resolution Office Ministry of the Attorney General British Columbia
Guy Lefebvre Professeur - Faculté de droit Université de Montréal	Robert Cosman Fasken Martineau DuMoulin Toronto, Ontario
Manon Dostie Counsel International Private Law Section Department of Justice Canada	Hélène de Kovachich (avocat, médiateur, arbitre) Groupe Option Médiation Past Vice-Chair, National Alternative Dispute Resolution Section - Canadian Bar Association Montréal, Québec

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<p>Peter Noonan Counsel - Dispute Resolution Services Department of Justice Canada</p>	<p>Todd Stanley Department of Justice Newfoundland and Labrador</p>
<p>Richard J. Weiler LL.B., C.Med., F.I.A.Med. Vice-Chair, National Alternative Dispute Resolution Section - Canadian Bar Association</p>	

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**ANNEX 2 - Table of correspondence**

<b>Uniform Act</b>	<b>UNCITRAL Model Law</b>
1(1)	1(1)
1(2)	1(7) and 3
1(3)	1(2) and (3)
1(4)	1(4)
1(5)	1(5)
1(6)	1(9)
2(1)	2(1) and no equivalent
2(2)	no equivalent
2(3)	2(2)
2(4)	3
3(1)	4(1)
3(2)	4(2)
3(3)	11
4(1)	5(1) and (2)
4(2)	5(3) and (4)
4(3)	5(5)
5(1)	6(1)
5(2)	6(2)
5(3)	7
5(4)	3 and 6(3)
6	6(4)
7(1)	8
7(2)a), b) and c)	9
7(2)d)	no equivalent
8(1)	10(1), (2) and (3)
8(2)a) and b)	10(3)
8(2)c)	no equivalent
8(3)	10(5)
8(4)	10(4)
9	12
10(1)	13
10(2)	13
11	14

