IBA MEDIATION COMMITTEE

Sub-Committee on the UNCITRAL Model Law on International Commercial Conciliation ("MLICC")

Singapore, October 2007

I INTRODUCTION

1. An ad hoc Sub-committee was created at the IBA meeting in Chicago in 2006 for the purpose of working on a short and "ready to use" guideline on the adoption of the MLICC. In this purpose, the UNCITRAL MLICC Sub-committee developed a questionnaire on three key aspects of the MLICC, --- statute of limitations, confidentiality, admissibility & privilege, and enforcement of settlements --- which was circulated in July and August 2007 and published in the Newsletter (Vol. 3 n°1)(Appendix I).

2. Responses were received from national reporters in 17 countries, namely Argentina, Belgium, Canada, Finland, France, Germany (4 responses), Indonesia, Israel, Italy Netherlands, Poland, Romania, Spain, Sweden, Switzerland, the United States and the United Kingdom (2 responses).

3. A user friendly spread sheet of all answers to the questionnaire received is available on the IBA Mediation Committee website (www.ibanet.org). A thorough look at the answers of a specific country may provide some interesting and useful solutions to problems. It is however not the intention of the Sub-Committee to compare and contrast the answers to the Questionnaire, since, as pointed out below, the vast majority of countries have not implemented the MLICC. Rather the objective is (a) to facilitate an un-

derstanding and exchange of views as to what the UNCITRAL provisions in question are trying to accomplish and why, and (b) to produce a short but useful guide as to certain of the most important aspects of the UNCITRAL proposal.

4. The UNCITRAL Web site http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html (last visited October 4, 2007) claims that there have been enactments of the MLICC in a total of *five* countries so far, namely: Canada (2005), Croatia (2003), Hungary (2002), Nicaragua (2005), and in the United States, via the Uniform Mediation Act ("UMA"), in six states. This indicates a slow acceptance. Furthermore, in the case of Canada, it is an exaggeration since it refers in fact only to enactment by at least one of the 10 provinces of those elements of the MLICC which were adopted by the Uniform Law Conference of Canada.

5. The fact that the MLICC is presently not widely enacted in whole or in part provides considerable room for discussion, commentary and interpretation. For example, The EC Commission proposal adopted some of the MLICC, for example Article 10, and the European Parliament has already made significant amendments.[1]

II **SCOPE**

6. The questionnaire was directed to international commercial conciliation or mediation --- as that term is defined in the MLICC[2] --- which means that the parties have their places of business in different countries at the point in time when they agree to conciliate, or, the jurisdiction in which the parties have their place of business is different from either (i) the country in which a substantial part of the obligations of the commercial relationship is

to be performed; or (ii) the country with which the subject matter of the dispute is most closely connected.

7. This may exclude vast areas of well established mediation practice and experience such as family mediation, workplace mediation, or any purely domestic commercial dispute --- however, as a practical matter, mediation procedures, techniques and experience often turn out to be transferable across the board. The deliberations on the MLICC suggest that many delegates thought that it should apply to all commercial conciliations and not only to the international arena but UNCITRAL accepted that it would enhance adoption if domestic conciliation was left out[3].

8. The MLICC is a floor of lowest common denominator protection, not a ceiling, so that it might be expected that some countries would add to the protection of mediation as a special regime.

9. Indeed, UNCITRAL's own deliberations on the MLICC excluded final provisions on the statute of limitations (Article 4. footnote 3) due to extensive controversy as summarized in the extremely long paragraph 48 of the Guide to Enactment and Use 2002 ("Guide"), and, the provision on enforceability (Article 14.) provides only that an eventual settlement agreement "is binding and enforceable" which paragraph 88 of the Guide laconically observes *"… reflects the smallest common denominator between the various legal systems*".

10. As a practical matter, the UNCITRAL initiative on conciliation faces more competition from other agencies or legislatures than in the 1970s & 1980s, when the UNCITRAL Model Law on International Commercial Arbitration [1985]and related Arbitration Rules [1976] were adopted. Today, UNCITRAL must compete with multiple initiatives throughout the world, for example: a growing number of service providers with their own rules and

regulations; existing national legislation; the Uniform Mediation Act in the United States and the Uniform [International] Commercial Mediation Act in Canada, which are influenced by the MLICC but have not adopted all of its provisions and will face state by state or province by province variations; the European Commission and the European Parliament, which are also similarly influenced by the MLICC but do not propose its enactment as such; and, generally in federal systems, the tendency of states, provinces, cantons and the like to adopt their own legislation on mediation.

11. Thus, the chances for a uniform template for mediation across the "globalized" world of commerce are limited with the result that private international law and conflicts of law analysis will remain important points of reference for the lawyers and parties involved in international commercial mediations. One size will not fit all.

III KEY ISSUES ANALYZED

A. Statute of limitations(Article 4 footnote 3 MLICC)

12. The MLICC footnote 3 to Article 4[4] is a welcome suggestion for suspension or tolling of the statute of limitations when mediation commences and resumption of the running of the statute after mediation ends without a settlement. Just as a matter of policy it is desirable to avoid burdening the mediation process with uncertainty about the parties risking the loss of effective access to the courts or arbitration, and, to avoid giving encouragement to delaying tactics in mediation and the like --- but as the UNCITRAL staff have clearly shown its implementation is likely to be controversial due to different concepts of the statute of limitations in various countries. The EC Commission proposal follows the MLICC footnote and the Commission Staff Working Paper annexed to the proposal comments

very favorably on the statute of limitations provision in Article 7 of the Commission proposal.[5]

13. It is not useful here to compare and contrast all the differences as to the application of the statute of limitations on a country by country basis since it is likely that in most mediations lasting days rather than months, the issue will not be of concern. The more so if proceedings have already been timely commenced. However, some key points as to the limitations issue in international mediation *must* be understood by lawyers, clients and mediators contemplating mediation if it is desired to avoid any surprises.

14. An international conciliation will require a determination, or an agreement if permitted, as to which statute of limitations is to be controlling because it may be a matter of procedure or substance[6] depending on the jurisdiction where an eventual arbitration or suit might be commenced in the event that a mediation fails.

15. The law of the forum may not be the local domestic law which is applied to purely national disputes because a conflict of laws analysis in an international dispute could cause the forum to apply the law of another jurisdiction. For instance, there will invariably be these conflicts of law analysis if the statute of limitations is considered to be a matter of substance rather than procedure. In other words, some jurisdictions will just look only to the domestic *lex fori* but others will "borrow" from another jurisdiction the statute of limitations deemed most relevant to the dispute. In countries with federal and regional or state law systems there may be multiple levels of inquiry.[7]

16. Thus, the applicable statute of limitation may well depend on the law applicable to the dispute according to International Private Law rules.

17. When in doubt about the status of the statute of limitations, reliance on the concept of “party autonomy” should be investigated thoroughly. A written agreement may take care of any concern about the running of the statute because the parties can agree not to assert the expiration of the statute in any reference to arbitration or litigation commenced within an agreed period after an unsuccessful conciliation. Countries with strong public policy law or jurisprudence may not uphold such “party autonomy” in every case but an agreement between the parties is nevertheless desirable to try to avoid doubt by recording the intention and understanding of the parties at the time they commenced mediation.

18. One should bear in mind that in some countries some time limits cannot be suspended and/or extended freely by the parties as they provide for so called “statute of expiration”, whereby the right expires if not formally exercised at court within a certain period of time.

19. Last but not least, to the extent that conciliation or mediation takes place *after* commencement of an arbitration or litigation, the issue of the expiration of the statute of limitations is effectively removed except for those instances where an *amended claim or counterclaim* is asserted later in the proceedings and arguably does not “relate back” to the date of the relevant original pleading. This may suggest that, unless there is a specific clause providing for a suspension of the limitations period, it will be difficult to avoid the bias of forcing people to the courts, when they should be given every encouragement to settle privately.

20. In this context, court mandated mediation or voluntary mediation after commencement of suit might be a safer but certainly not the exclusive choice for lawyers and parties.

B. **Confidentiality, Admissibility and Privilege (Articles 8, 9 and 10 MLICC)**

21. MLICC Articles 8[8] and 9[9] , which deal with mediation confidentiality in general, outside of the admissibility or not of mediation communications in subsequent legal proceedings, are probably not very controversial because most people assume that confidentiality and discretion is the cornerstone of mediation. However they are not necessarily generally accepted as default provisions because some authorities hold that the parties should determine the confidentiality or not of mediation as between themselves and the mediator, and between themselves and their relatives, friends and business associates. Under this approach, default provisions are necessary only to preserve confidentiality in subsequent legal proceedings (MLICC Article 10) since, as a matter of public policy, private parties cannot agree to keep evidence from the courts and specific statutory authority is necessary. Notably, the EC Commission proposal left out the equivalent of these Articles 8 and 9 on confidentiality because they were deemed best left to the Members States and/or the parties as being inextricably linked with mediation procedures and mediation quality. The UMA is similarly drafted to provide for the parties or local law to determine the level of confidentiality outside of subsequent proceedings for which a special “privilege” is created.

22. Article 8 is effectively an “internal to the mediation” rule which is made for a practical solution: if you tell the mediator something make it clear if you don’t want the other side to be told, bearing in mind that the context of the mediation negotiations is that, after all, mediation is supposed to be about communicating as fully as possible and not holding back.

23. Article 9 provides for overall confidentiality except as otherwise agreed by the parties or as the law may require disclosure or for purposes of implementation or enforcement of a settlement. The instances in which Article 9 confidentiality may be overcome by local law will likely include such considerations as the protection of minors or the prevention of crime. An example is the EC Parliament's amendment to the Commission proposal [now new Article 6a)] which, after lumping confidentiality and admissibility together, permits in certain circumstances, disclosure and introduction into evidence of "information arising out of or in connection with a mediation". [10]

24. Article 10[11] is a lengthy statement, as to non-admissibility, in later court or arbitral proceedings, of what went on in the mediation, again with exception of what may be required by law or to implement or enforce a settlement agreement. It is difficult to imagine a party refusing to implement a settlement agreement and then relying on confidentiality to prevent a court or arbitrator or even subsequent mediator from understanding what the settlement agreement was intended to achieve.

25. The extension of the Article 10 protection to "third persons" should not be read to include "any" third person because it is fundamental that parties who contract with each other cannot bind an independent third party. The Guide offers the example of witnesses or experts.[12]

26. As such Article 10 is sound but will not satisfy those who want to create a "privilege" for mediation (see below).

27. The EC proposal follows the MLICC Article 10 (proposal Article 6) [but the European Parliament has amended this proposal], whereas the Uniform Mediation Act ("UMA") in the United States creates a mediation privilege (UMA Section 4) akin to an attorney client privilege and expressly mentions that nothing in MLICC Article 10 derogates from the privilege sec-

tions of the UMA (UMA Section 11). Whether the subsequent legal proceedings take place in a common law or civil law country, and whether the parties had legal counsel in the mediation, may affect the admissibility of mediation communications and documents in those proceedings but the particular details of such instances are better dealt with, for present purposes, in specialist legal articles.[13] Ultimately there may be differences between jurisdictions as to admissibility of evidence which is invariably involves a balancing between probative value and potential for unreasonable prejudice.

28. The answers to the questionnaire seem to suggest that some civil law jurisdictions regard an agreement on mediation confidentiality as a blanket covering any subsequent reference to communications and/or documents which figured in the mediation. This makes for potential problems for two reasons. First a subsequent judge, arbitrator or mediator may need to know what went on in the mediation in order to understand and to try to give effect to what may have been agreed – the MLICC Articles 9 and 10 take care of this by allowing, for this purpose, disclosure of confidential information & documents and their admissibility in a subsequent proceeding. Secondly, there is a strong public policy argument that a party, who refuses an offer to settle and after pursuing litigation or arbitration obtains less than, or no more than, what was offered at the outset, should be penalized on costs and fees incurred by the party who made the offer (counsel might wisely make separate mention of this in any mediation agreement).

29. Notwithstanding the efforts of UNCITRAL or the EC Commission or the various uniform law conferences, the common law concept of a “without prejudice” negotiation or discussion or offer still has substantial merit, and jurisprudence in both common law and civil law countries often seems to

unite in excluding admission of such “settlement negotiation” evidence in subsequent proceedings.

C. Enforcement of settlement agreements (Article 14 MLICC)

30. Article 14[14] provides for binding and enforceable settlement agreements but leaves open the method of enforcement. The starting point is invariably an agreement which should be in writing in order to serve as a proof and, notably, as enforceable debt recognition.

31. The EC Commission proposed that incorporation in a judgment be available in the EC at the request of the parties (Proposal Article 5) but the Parliament has amended the provision in a manner which seems to make it less clear what form of enforcement will be available[15]

32. It is not always the case that parties who settle litigation or pay arbitral awards want to have a judgment --- and mediation settlements should be no different because at least some parties will want to keep the confidentiality and privacy at a maximum and do what they agreed to do without the need for court sanctions.

33. Availability of a judgment (homologation decision), an arbitral award or a notarial deed (similarly security devices such as letters of credit, bonds or guarantees) is useful and fair ground for negotiation between the parties as to the form and content of any settlement agreement, and it should be available if the parties want it in mediation settlements.

34. In international mediation such reinforcement is more likely to be sought because of the potential of expensive and difficult cross-border litigation in the event of a failure to implement a settlement.

35. In national and international commercial conciliation, the enforceability of a settlement agreement is generally of the utmost important and is often further guaranteed by performance damages and other contractual guarantees (e.g. delivery of an immediately callable bank guarantee).

IV. **CONCLUSION**

36. The Sub Committee has taken account of the answers to the questionnaire and the actual progress to date in implementing the MLICC and will seek to determine the consensus of the Mediation Committee as to adoption or not of the MLICC. There are some tensions to be examined: lawyers do not necessarily want to promote mediation when there is no accepted standard for mediator competence[16]; mediators who come from many different backgrounds are wary of standard setting in mediation especially only by or for lawyers; service providers are protective of their own rules and procedures as well as rosters of mediators.

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Endnotes

[1] Proposal for a Directive Of The European Parliament And Of The Council on certain aspects of mediation in civil and commercial matters, Brussels 22.10.2004, COM(2004) 718 final, OJ C49, 28.2.2004; European Parliament, first reading with amendments, 29.3. 2007 (http://europa.eu/bulletin/en/200703/p120006.htmhttp://euopa.eu/bulletin/en/200703/p120006.htm) (last visited October 3, 2007)

[2] *Article 1 (3) MLICC indicates: "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 attempts 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"*)

[3] See Guide at p. 22, paragraph 34

[4] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period :[Guide at p. 29 paragraph 42]
Article X. Suspension of limitation period
1. When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.
2. Where the conciliation proceedings have terminated without a settlement the limitation period resumes running from the time the conciliation ended without a settlement agreement.

[5] This should also avoid that the parties launch judicial proceedings at the same time for no other reason than to stop the limitation period from running, which may be counterproductive for an amicable resolution of the dispute itself or represent a potential waste of resources of the competent court, which may never be called upon to decide the case

[6] One of the UK reporters mentions the following specific legislation:

Foreign Limitations Periods Act 1984.

An Act to provide for any law relating to the limitation of actions to be treated, for the purposes of cases in which effect is given to foreign law or to determinations by foreign courts, as a matter of substance rather than as a matter of procedure

[7] See for example the following extract [edited with comments] from a recent decision by Judge Miriam Cedarbaum in the Southern District of New York (Chrobak v. Hilton Group et al.. 06 Civ. 1916, August 15, 2007)

Because subject matter jurisdiction over this suit is based on diversity of citizenship, New York state law determines the applicable statute of limitations *[a federal court sitting in the state of New York in a case between citizens of different states or between an alien and a citizen of a state, looks to that forum state's law on limitations rather than relying on any relevant federal law but then it is necessary to determine what law the forum state, New York, will apply in the circumstances]*---An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either New York or the place without New York where the cause of action accrued, except where

the cause of action accrued in favor of a resident of New York the time limited by the laws of New York shall apply *[under the law of the forum, if the cause of action arose outside of New York, a "foreign" limitations period might apply if shorter]*---Plaintiff is not a resident of New York---Thus her claims are time barred if they are untimely under the shorter of either New York's limitation period or the limitation period of the Dominican Republic---Because neither party provides the statute of limitations of the Dominican Republic, nor asserts that the law of the Dominican Republic should apply, New York's statute of limitations applies [if the court cannot determine the foreign law, or none of the parties rely on it, then the purely domestic law of the forum will apply]

[8] Article 8. Disclosure of Information

When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any party. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation

[9] 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 he purposes of implementation or enforcement of a settlement agreement.

[10] …[new Article 6a]… for overriding considerations of public policy or other substantial reasons, in particular where necessary in order to ensure the protection of the best interests of children or to prevent harm to the physical or mental integrity of a person

[11] Article 10. Admissibility of evidence in other proceedings

1. A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;

(b) Views expressed or suggestions made by a party to the conciliation in respect of possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the conciliation proceedings;

(d) Proposals made by the conciliator;

(e) The fact that a party to a conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator;

(f) A document prepared solely for the purposes of the conciliation proceedings.

2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.

3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

4. The provisions of paragraphs 1,2, and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.

5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or court proceedings does not become inadmissible as a consequence of having been used in a conciliation.

[12] Guide at p. 44, paragraph 64

[13] The UMA's insistence on a mediation privilege (UMA Article 4) and its exceptions (UMA Articles 5 and 6) reflects perceived differences between common law and civil law approaches to confidentiality in subsequent legal proceedings which may or may not be of any practical significance. Technically there are differences between attorney client type "privilege" in the common law and civil law professional secrecy which are beyond the scope of the present report. See generally (2007) 73 Arbitration 2 (May 2007) [published by the Chartered Institute of Arbitrators], *Attorney Secrecy v Attorney Client Privilege in International Commercial Arbitration*, Bernhard F. Meyer-Hauser and Philipp Sieber. The argument of Meyer-Hauser and Sieber is that in Switzerland, attorney secrecy is considered to be part of the *procedural* law and imposes a personal secrecy obligation on the attorney who must claim it during judicial proceedings unless the client waives it --- *the client may not invoke attorney secrecy to prevent his or her testimony or production of documents* (but under Swiss federal and cantonal civil procedure, complainant and respondent, as opposed to third parties, may not be ordered to actively support the proceedings in any way *although failure to do so may jeopardize their case*) [emphasis added]

[14] Article 14. Enforceability of settlement agreement

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable… [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*].

Footnote 4 : When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory

[15] European Parliament first reading as amended 29 March 2007:

Article 5 Paragraph 1. Member States shall ensure that it is possible for the parties, or one of them with the explicit consent of the others, to request that the content of a written agreement resulting from a mediation be made enforceable to the extent that enforceability of the content of the agreement is possible under and not contrary to the law of the Member State where the request is made.

Paragraph 1a. The content of the agreement may be made enforceable in a judgment or a decision or by an authentic act by a court or other competent authority in accordance with the law of the Member State where the request is made.

Paragraph 2. Member States shall inform the Commission of the courts or other authorities that are competent to receive a request in accordance with paragraphs 1 and 1a .

Paragraph 2a. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of agreements resulting from mediation which have been made enforceable in accordance with paragraph 1.

[16] The UMA has failed to be adopted so far in the State of New York in large measure because lawyers groups have argued that there were no generally accepted standards for mediators so why should there be a law on mediation.