

Uniform [International] Commercial Mediation Act

Comment: The purpose of this Act is to provide a model implementation act to provinces and territories wishing to implement the *UNCITRAL Model Law on International Commercial Conciliation* (“UNCITRAL Model Law”). The term “conciliation” was changed to “mediation” to accommodate Canadian terminology.

GENERAL PRINCIPLES

Purpose

1. (1) The purpose of this Act is to facilitate the use of mediation to resolve [international] commercial disputes.

Comment: This article is based on paragraph 1(1) of the UNCITRAL Model Law. A purpose clause is not standard drafting practice in some Canadian jurisdictions. The first sentence may be deleted to accommodate those jurisdictions which do not use them. It was understood that because “commercial” goes to the essence of the act, parties could not agree to use the act in matters other than commercial matters, for example, family law matters.

Comment: The uniform act gives jurisdictions the option of applying the Model Law to (1) international mediations only or (2) international as well as domestic mediations. Jurisdictions wishing to apply the uniform act to both domestic and international mediations, would delete the terms [international] in the Title and sub-section 1(1) as well as delete sub-sections 1(4) and 1(5) of the uniform act.

Freedom to exclude or modify a rule

(2) This Act applies to [international] commercial mediation. However, the parties are, except as otherwise indicated, free to exclude or modify any provision of the Act to meet their needs.

Comment: This article is based on paragraph 1(7) and article 3 of the UNCITRAL Model Law. The Act applies to international commercial mediations but disputants can contract out of all of its articles except section 2 and sub-section 5(4) of the uniform act.

Meaning of mediation

(3) Mediation means a collaborative process in which parties agree to request a third party (a mediator) to assist them in their attempt to try to reach a settlement of their commercial dispute. A mediator does not have any authority to impose a solution to the dispute on the parties.

Comment: This article is based on paragraphs 1(2) and 1(3) of the UNCITRAL Model Law.

[International mediation

- (4) A mediation is international if, at the time of the conclusion of an agreement to mediate,
- (a) the parties have their places of business in different States; or
 - (b) the State in which the parties have their places of business is different from the State in which a substantial part of the obligations of the commercial relationship is to be performed or with which the subject-matter of the dispute is most closely connected.]

Comment: This article is based on paragraph 1(4) of the UNCITRAL Model Law.

[Place of business

(5) The place of business of a party who has more than one place of business is the one that has the closest relationship to the agreement to mediate. If a party does not have a place of business, the party's habitual residence is to be used.]

Comment: This article is based on paragraph 1(5) of the UNCITRAL Model Law.

Application

(6) This Act does not apply to [*insert provincial mandatory mediation program references*].

Comment: This article is based on paragraph 1(9) of the UNCITRAL Model Law. Jurisdictions with existing mandatory mediation systems, for example, the Ontario Mandatory Mediation program, may want to exclude the application of the uniform act.

UNCITRAL Model Law

2. (1) This Act is based on the United Nations Commission on International Trade Law, (*UNCITRAL*) *Model Law on International Commercial Conciliation (2002)*. In interpreting this Act, consideration must be given to its international origin, the need to promote uniformity in its application and the observance of good faith.

Comment: The first sentence of this section indicates the source of the uniform act. The second sentence is based on paragraph 2(1) of the UNCITRAL Model Law and is a mandatory provision for the parties as stated in article 3 of the Model Law. It is a standard article found in many other international instruments ie. *UN Convention on Contracts for the International Sale of Goods*, *UNCITRAL Model Law on Electronic Commerce*, *UNCITRAL Model Law on Cross-Border Insolvency*, *UNCITRAL Model Law on Electronic Signatures*.

Recourse to certain documents

(2) In interpreting this Act, recourse may be had to

(a) the *Report of the United Nations Commission on International Trade Law on its thirty-fifth session*; and

(b) the *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002*.

Comment: This article is a standard provision included in many uniform acts such as *Uniform Act on the UNCITRAL Model Law on International Commercial Arbitration* (article 14) and many domestic statutes enacting it.

General principles

(3) If a question arises during a mediation that no rule in this Act expressly covers, the question is to be settled in conformity with the general principles on which the Model Law on International Conciliation is based.

Comment: This article is based on paragraph 2(2) of the UNCITRAL Model Law. It is a mandatory provision for the parties as stated in article 3 of the Model Law. It is a standard article found in many other international instruments ie. *UN Convention on Contracts for the International Sale of Goods, UNCITRAL Model Law on Electronic Commerce, UNCITRAL Model Law on Cross-Border Insolvency, UNCITRAL Model Law on Electronic Signatures.*

Mandatory rules

(4) The parties to mediation may not exclude or modify any rule set out in this section.

Comment: This article is based on article 3 of the UNCITRAL Model Law.

Date of commencement

3. (1) A mediation commences on the day on which the parties to a dispute agree to submit that dispute to mediation.

Comment: This article is based on paragraph 4(1) of the UNCITRAL Model Law.

Rejection of invitation

(2) A party who invites another party to mediate may consider their invitation rejected if they do not receive acceptance within 30 days after the day on which they sent their invitation or within the period specified in the invitation.

Comment: This article is based on paragraph 4(2) of the UNCITRAL Model Law.

Termination of mediation

(3) A mediation terminates on the day on which the parties reach a settlement agreement or the day on which the mediator or any party declares to the others that the mediation is terminated.

Comment: This article is based on article 11 of the UNCITRAL Model Law.

MEDIATOR

Appointment by parties

4. (1) Generally, a mediation is to be conducted by a mediator appointed by agreement of the parties.

Comment: This article is based on paragraphs 5(1) and (2) of the UNCITRAL Model Law. “Mediator” also includes the plural.

Recommendation or appointment by third party

(2) The parties may ask an institution or a third person to recommend or appoint a mediator. An institution or third person must make every effort to recommend or appoint a person who is impartial and independent.

Comment: This article is based on paragraphs 5(3) and (4) of the UNCITRAL Model Law. Institution is to be broadly defined. The objective of this article is to indicate to parties that they may ask a third party to facilitate in the naming of a mediator.

Disclosure of conflicts

(3) A mediator and any person who is approached or recommended to be a mediator must disclose without delay any circumstances that are likely to give rise to justifiable doubts about their impartiality or independence.

Comment: This article is based on paragraph 5(5) of the UNCITRAL Model Law.

CONDUCT OF MEDIATION

Manner of conducting mediation

5. (1) The parties are free to agree on the manner in which the mediation is to be conducted. They may agree to follow a set of existing rules.

Comment: This article is based on paragraph 6(1) of the UNCITRAL Model Law. The notion of “rules” is very broad and meant to include rules such as codes of civil procedures or other legislation, rules of institutes (ie. UNCITRAL rules), or non-governmental organisations rules previously agreed to, and rules found in legal texts.

Treatment of parties

(2) To the extent that the parties have not agreed on the manner in which the mediation is to be conducted, the mediator may conduct the mediation as the mediator considers appropriate, taking into account any requests by the parties and the circumstances of the mediation, including the need for a speedy settlement.

Comment: This article is based on paragraph 6(2) of the UNCITRAL Model Law.

Communication with parties

- (3) The mediator may meet or communicate with the parties together or separately.

Comment: This article is based on article 7 of the UNCITRAL Model Law and codifies the mediation practice of caucusing or shuttle mediation.

Fair treatment of parties

(4) The mediator must maintain fair treatment of the parties throughout the mediation, taking into account the circumstances of the mediation. The parties to a mediation may not exclude or modify this rule.

Comment: This article is based on article 3 and paragraph 6(3) of the UNCITRAL Model Law. Paragraph 6(3) of the Model Law is a mandatory provision for the parties. It imposes a minimum legal standard of procedural fairness on the mediator in conducting the process.

Proposals for Settlement

6. The mediator may make proposals for settlement of a dispute at any stage of the mediation.

Comment: This article is based on paragraph 6(4) of the UNCITRAL Model Law.

COMMUNICATION OF INFORMATION

Disclosure of information between parties

7. (1) A mediator may disclose to a party any information relating to a mediation that they receive from another party unless that other party has expressly asked the mediator not to disclose the information.

Comment: This article is based on article 8 of the UNCITRAL Model Law.

Confidentiality with respect to third parties

(2) With respect to third parties, all information relating to a mediation must be kept confidential unless

- (a) all the parties agree to the disclosure;
- (b) the disclosure is required under the law;
- (c) the disclosure is required for the purposes of carrying out or enforcing a settlement agreement; or
- (d) the disclosure is required for a mediator to respond to a claim of misconduct.

Comment: Clauses 2(a), (b) and (c) of this article are based on article 9 of the UNCITRAL Model Law. Disclosure under the law would include requirements under access to information legislation or requirements of disclosure under rules of evidence or reasons of public policy. Sub-paragraph (d) is a new provision aimed at allowing the mediator to put forward a defence to a claim of misconduct.

Non-admissibility of evidence

8. (1) None of the following information, in any form, is admissible in evidence in an arbitral, judicial or administrative proceeding:

- (a) an invitation by a party to mediate, a party's willingness or refusal to mediate a dispute, information exchanged between the parties before a mediation commences and any agreement to mediate;
- (b) a document prepared solely for the purposes of a mediation;
- (c) views expressed or suggestions made by a party during a mediation concerning a possible settlement of the dispute;
- (d) statements or admissions made by a party during a mediation;
- (e) proposals for settlement made by the mediator;
- (f) the fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(g) the fact that a party terminated the mediation.

Comment: This article is based on paragraphs 10(1), 10(2) and 10(3) of the UNCITRAL Model Law.

Admissibility in certain cases

(2) However, the information may be admitted in evidence to the extent required

(a) under the law;

(b) for the purposes of carrying out or enforcing a settlement agreement; or

(c) for a mediator to respond to a claim of misconduct.

Comment: Clauses 2(a) and 2(b) of this article are based on paragraph 10(3) of the UNCITRAL Model Law. Clause 2(a) includes disclosure for reasons of public policy including disclosure of threats made by a participant to inflict bodily harm or unlawful loss or damage or under a legislative requirements (ie. access to information, rules of evidence). Clause (c) is a new provision aimed at allowing the mediator to put forward a defence to a claim of misconduct.

For greater certainty

(3) Except for the limitations set out in subsection (1), information created for purposes other than a mediation does not become inadmissible because it was used in a mediation.

Comment: This article is based on paragraph 10(5) of the UNCITRAL Model Law.

For greater certainty

(4) Subsections (1) and (2) apply whether or not the arbitral, judicial or administrative proceeding relates to a dispute that is or was the subject of a mediation.

Comment: This article is based on paragraph 10(4) of the UNCITRAL Model Law.

MEDIATOR ACTING AS ARBITRATOR

Conflict of Interest

9. A mediator must not act as both a mediator and an arbitrator or act as an arbitrator after acting as the mediator for a dispute or for another dispute that arises from the same contract or legal relationship or a related contract or legal relationship between the parties.

Comment: This article is based on article 12 of the UNCITRAL Model Law.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Agreement not to proceed with arbitral or judicial proceedings

10. (1) The parties to a mediation may agree not to proceed with arbitral or judicial proceedings before a mediation is terminated. However, an arbitrator or court may permit the proceedings to proceed if the arbitrator or court considers that it is necessary to preserve the rights of any party or is otherwise necessary in the interests of justice. The arbitrator or court may make any order necessary.

Comment: This article is based on article 13 of the UNCITRAL Model Law but goes further as it deals with the power of a court to permit the continuation of a proceeding and not only its commencement. Examples of where proceedings could be allowed include proceeding for *ex parte* or *intra parte* interim measures such as an injunction.

Continuation of mediation agreement

- (2) Commencement of arbitral or judicial proceedings is not of itself to be regarded as a termination of the agreement to mediate disputes or as termination of a mediation.

Comment: This article is based on article 13 of the UNCITRAL Model Law. In Canada, parties can almost invariably start proceedings without judicial or state permission. The mere commencement of a proceeding is not to be construed as termination of an agreement to mediate or of the process itself.

ENFORCEMENT OF SETTLEMENT AGREEMENT

Registration with a court

- 11.** A settlement agreement is binding on the parties. It may be registered on application to [*insert name of court*] with notice to all parties.¹ Once registered, the agreement is enforceable as if it were a judgment of that court.

Comment: This article is based on article 14 of the UNCITRAL Model Law but goes further. 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. In Quebec, the mediation agreement falls under the concept of “transaction” (articles 2631 – 2637 of the Civil Code of Quebec). A mediation agreement would be recognised and enforced by way of homologation which already exists for arbitral proceedings (articles 946-946.1 of the Quebec Code of Civil Procedure).

¹ This provision is to be read in conjunction with the common law and with the civil law of Quebec. An application may be contested and defences such as fraud and unconscionability, apply.