

IBA MEDIATION SUB-COMMITTEE ON THE UNCITRAL MODEL LAW ON
INTERNATIONAL COMMERCIAL CONCILIATION ("MLICC")

As mentioned in the introduction letter, this questionnaire shall help to indicate how the MLICC compares to existing mediation or conciliation practice in **YOUR COUNTRY** regarding the key areas:

1. statute of limitations (Article 4 footnote 3 MLICC);
2. confidentiality, admissibility and privilege (Article 8, 9 and 10 MLICC);
3. enforcement of settlement agreement (Article 14 MLICC).

1. Statute of limitations

(a) In international commercial conciliation or mediation in your country how easy or difficult is it to determine the applicable statute of limitations?

Under French Law, there is no specific statute of limitations applicable to international conciliation or mediation proceedings per se.

The applicability of a statute of limitation will depend on the nature of the claim as per the relevant provisions of the French Civil Code.

(b) What should the mediator and the parties be aware of with regard to the relevant law and rules as to: (i) permitted shortening, (ii) tolling (suspending), (iii) extending the applicable statute of limitations in general, or, if relevant, with particular reference to international commercial conciliation (including any special requirements or formalities as to dates of commencement and ending with positive or negative results of the process)?

(i) Regarding shortening the applicable statute of limitations: The validity of clauses which shorten the applicable statute of limitations has been upheld by French courts¹, provided that such shortening does not result in the elimination of the creditor's ability to act. There are, however, some exceptions in particular in insurance matters².

(ii) Regarding the tolling of statutes of limitations: French courts have held that conciliation proceedings toll statutes of limitations, until the end of the conciliation proceedings³.

A difficulty, however, may arise with regard to the determination of the commencement and the end of such proceedings. Where the conciliation process

¹ Cour de Cassation, chambre commerciale, 12 July 2004.

² Article L 111-2 of the French Insurance Code.

³ Cour de Cassation, chambre mixte, 14 February 2003.

takes place outside the rules of an institution, there is no clear rule in this regard, unless the parties have agreed to how to determine the beginning and end of the proceedings in their conciliation clause or agreement.

(iii) Regarding extending the applicable statute of limitations: Since, under French law, it is not possible to waive in advance a statute of limitations (see para. c) below), French courts regularly refuse to admit the validity of clauses which extend the statute of limitations, which are also considered as a form of waiver to the benefit of the statute of limitations.

(c) Can the parties eliminate any statute of limitations (irrespective of the law and rules as to the statute of limitations as such)?

No

Article 2220 of the French Civil Code provides that *"it is not possible to waive, in advance, to the statute of limitations"*. Consequently, any provision to such an effect inserted in a conciliation clause or agreement will be considered as null and void.

Article 2220, however, provides that a party, who may invoke the benefit of a statute of limitations which has lapsed, may agree to a waiver of same.

(d) Does your country make a distinction between a statute of limitations as such and a condition precedent attaching to a right, which provides a shorter time, without reference to the statute of limitations, in which to commence an action?

Yes, please provide reference:

French law indeed makes a distinction between statutes of limitations and so-called "prefix-deadlines" which are essentially a condition precedent attaching to a right. Prefix-deadlines typically provide that an action must be brought within a (usually) short period of time as from, for example, the discovery of a fact which creates the basis for the cause of action.

In practice, a claim can therefore be dismissed notwithstanding the fact that the statute of limitations is still running, because the action was not commenced prior to the applicable "prefix-deadline".

2. Confidentiality, Admissibility & Privilege

- (a) **Are there any statutory or common law provisions of general application that are sufficient to safeguard the desired degree of legal protection against unwanted disclosure as expressed in MLICC Article 9, or is it necessary to refer to some special legislation or rules of procedure?**

Yes, please provide reference:

Under French law, there is no legal provision which specifically relates to the confidentiality of contractual conciliation proceedings, notwithstanding the fact that confidentiality is considered by French practitioners as being an essential component of conciliation.

The provisions under French law applicable to judicial mediation (i.e. mediation ordered by a judge), however, specifically provide that: "*The mediator [is] bound by the obligation of confidentiality towards third parties. The observations of the mediator and the declarations that he gathered cannot be referred to before the judge in charge of the dispute, except with the parties' consent. They cannot be used in other proceedings (...).*"⁴.

French courts have extended this rule to contractual conciliation proceedings, ruling that "*by its very nature, aiming at favouring amicable settlement of a dispute, the judicial or contractual conciliation implies that each party can confide in the mediator in a free manner, and that, except unanimous agreement, the confidentiality is kept on information, proposals or concessions received by the latter*"⁵.

Since there is no special legislation or rule of procedure that can be referred to in order to secure the confidentiality of contractual conciliation proceedings, and notwithstanding the case law referred to above, it is advisable to include appropriate confidentiality clauses in any agreement providing for conciliation.

- (b) **Are there nevertheless statutory requirements or rules of court which would oblige a party or mediator or witness to disclose confidential information in certain situations with the result that MLICC Article 9 offers only a relative protection?**

Yes, please provide reference:

⁴ Article 24 of the law n°95-125 of 8 February 1995; Such Article is codified under Article 131-14 of the New French Code of Civil Procedure which provides as follows: "*The observations of the mediator and the declarations that he gathered cannot be referred to before the judge in charge of the dispute, except with the parties' consent. They cannot be used in other proceedings (...).*"

⁵ TGI Paris, Ord. Réf., 19 January 1999 ;

Pursuant to Article 10 of the French Civil Code and Article 11 of the French Code of Civil Procedure, each person is held to support the judiciary's purpose to establish the truth in any one case. Consequently, a judge can order a party to provide documents, information which are considered necessary to the manifestation of truth, subject to of fine or daily penalty, in the event of a failure to comply with the order.

The judge's power is only limited by the existence of a legitimate ground, which can either be the respect of privacy or professional confidentiality.

(c) Does your country follow the rule in MLICC Article 8 as to the need for a party to specify that information being given *ex parte* to a mediator is confidential?

Yes

French practitioners would expect to see such a rule in a well-drafted conciliation agreement.

But there is no provision for such a rule in the French Civil Code and the French Code of Civil Procedure.

(d) Is the very fact that a mediation has commenced or ended, with or without a resolution, confidential *per se* or is an agreement necessary between parties, mediator, and / or a service provider such as ICC or AAA?

Mediation *per se* confidential

Agreement necessary to ensure confidentiality

While the very foundation of the mediation process is confidentiality, in the absence of specific provisions under French law, it is nevertheless recommended to contractually reiterate that confidentiality applies both to the content of the mediation, but also to the very existence of the mediation.

**(e) To what extent may the parties agree upon consequences
in the event of a breach of confidentiality**

liquidated damages

contractual penalties

in anticipation of a disclosure

provide for an expedited injunction proceeding

the right to intervene in an action

the posting of a bond

(f) **Do laws or rules of general application exist that satisfy MLICC Article 10 as to the admissibility or use of information obtained in conciliation proceedings in arbitral, judicial or similar proceedings?**

No, please provide reference:

Here again, there are no specific provisions relating to the admissibility/use of information obtained in contractual conciliation proceedings, under French law.

However, one would expect that, on the basis of the general principle of confidentiality, that all information obtained during the conciliation proceedings is confidential and therefore, that the subsequent use of any such information be declared inadmissible before a court of law.

French courts have confirmed the scope of this principle to the admissibility or use of information in other proceedings, considering that the principle of confidentiality applied *"necessarily not only to the purely technical information communicated by the parties to the mediator, but also to all the proposals made by each one of them in view of a settlement agreement. This confidentiality also obviously applies to the minutes of the mediation, whose content, in principle covered by confidentiality, can only be released within the limits and conditions agreed by the parties and the mediator (...). When there has been no agreement on said use, the telling, in the subsequent writ of summons of one of the parties, of facts observed or of information received by the mediator in carrying out his mission is likely to constitute a breach of the duty of confidentiality imposed on all the actors of mediation (...)"*⁶.

In the case of a judicial mediation, the French Supreme Court has held that the observations of a mediator and the statements made by the parties, could not be used as a basis for criminal liability unless the parties had in fact consented that their statements could be subsequently produced before a judge⁷.

(g) **In view of the answer to (2f) above, what can a party, mediator, witness or other relevant third party testify to or introduce in a later proceeding, whether the conciliation was successful or unsuccessful?**

As illustrated above (see 2 f), a party, a mediator, a witness or any other relevant third party cannot testify to or introduce in subsequent proceedings, unless this has been expressly agreed by the parties.

⁶ TGI Paris, Ord. Réf., 19 January 1999

⁷ Cour de Cassation, chambre criminelle, 28 February 2001 ;

(h) Is there any rule that arguments as to admissibility and / or privilege are waived if a document or communication is relied on in litigation and does it make any difference if such a reliance was made in the context of a prior conciliation solely to facilitate a possible settlement?

- Yes
- No, please provide reference:

French courts will declare inadmissible documents obtained in conciliation proceedings sealed by confidentiality, without the consent of the parties.

It does not make a difference whether the documents were relied on solely to facilitate settlement or not.

(i) To what extent does the answer to (2e) above as to a penalty or injunction for a breach in respect of confidential information protected by MLICC Article 8, apply to use or admission of the categories of information protected by MLICC Article 10 in a court proceeding or an arbitration?

In the event of a breach of confidentiality during subsequent court or arbitration proceedings, a party could claim for liquidated damages or for contractual penalties if such remedies had been previously agreed by the parties.

(j) To the extent not otherwise addressed above, if a settlement agreement is made following an international conciliation, can a court or arbitrator or subsequent mediator hear witnesses or receive documents which are otherwise subject to a restriction arising out of the prior conciliation as being non-admissible and / or confidential, and in particular in order to (i) understand what the parties intended, (ii) implement the agreement, or (iii) enforce the agreement.

If the parties provided for such a clause in their settlement agreement, it may be possible. Otherwise, the information will be kept strictly confidential.

(k) How would an “offer of settlement” be treated in the context of an unsuccessful conciliation when a party obtains less in a litigation or arbitration than it was offered by its adversary during the conciliation?

In principle, any offer of settlement made in the context of conciliation proceedings is confidential and therefore cannot be disclosed by any party.

In the event, however, that the parties had agreed to waive confidentiality over the content of the conciliation proceedings, an offer of settlement subsequently produced before a court or an arbitral tribunal could influence the latter especially because a negative finding could be drawn against the party that refused the offer and decided to initiate the court or arbitral proceedings (e.g. abuse of process).

3. Enforcement of Settlement Agreement

(a) **How are settlement agreements generally arrived at and enforced following an international conciliation in your country?**

- by ordinary contract, or**
- by agreement, and / or**

(b) **In addition, are there special agreements, procedures or tactics which can enhance recognition and enforcement, such as:**

- Or, some but other *sui generis* system of expedited enforcement, please specify:**

In France, a settlement agreement is granted enforcement by way of approval from the District court (*tribunal de grande instance*), upon a party's request⁸.

As part of the courts' homologation review, the court only checks the apparent regularity of the settlement agreement, in particular, that it does not run foul of French public order.

(c) **Are there any defences ordinarily or exceptionally available against enforcement of post-conciliation settlement agreements?**

Under French law, there are no specific defences for post conciliation settlement agreements. The defences against these agreements are the same as the defences against any "normal" settlement agreement.

Pursuant to Article 2044 of the French Civil Code, for a settlement agreement to be valid, it must settle the dispute between the parties or prevent any forthcoming dispute, and contain reciprocal concessions. Therefore, should there remain some issues unresolved by the settlement agreement, or should only one of the parties make a concession, the validity of the settlement agreement could be challenged.

Furthermore, a settlement agreement can be rescinded:

- when there was an error on the person or on the subject of the dispute⁹;
- in case of fraud or in case of violence¹⁰;
- when it was entered into on the basis of a title which is null and void¹¹.

⁸ Article 1441-4 of the French Code of Civil Procedure

⁹ Article 2053 paragraph 1 of the French Civil Code

¹⁰ Article 2053 paragraph 2 of the French Civil Code

¹¹ Article 2054 of the French Civil Code

It can be declared null and void:

- when it was entered into on the basis of documents which have been declared to be false,¹²
- when it was entered into, whereas the parties or one of them ignored a court decision having res judicata authority, which had already settled the dispute¹³.
- when title documents are discovered after the settlement agreement, relating to the subject matter of the settlement agreement, which establish that one of the parties had no right on the concerned title¹⁴.

It is however not possible to challenge a settlement agreement on the ground of error of law (*erreur de droit*) or in case of financial prejudice caused to a party (*lésion*)¹⁵.

(d) What law or rules apply in the enforcement of a settlement agreement as to costs, interest and attorney fees in the enforcement of a settlement agreement?

Under French law, there are no specific rules applicable to enforcement of settlement agreement regarding costs, interest and attorney fees.

Therefore, unless otherwise agreed by the parties, the general provisions of civil procedure should apply.

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¹² Article 2055 of the French Civil Code

¹³ Article 2056 of the French Civil Code

¹⁴ Article 2057 of the French Civil Code

¹⁵ Article 2052 of the French Civil Code