Executive Summary

PROPOSED LEGISLATION, SECTIONS 684.0050 TO 684.0060, FOR MEDIATED SETTLEMENT AGREEMENTS (MSA) OBTAINED IN FLORIDA IN INTERNATIONAL DISPUTES TO BE TREATED AS ARBITRATION AWARDS ENFORCEABLE AS SUCH

Submitted by the Mediation Committee of the International Law Sections of Bar the Florida

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1. Background

- Florida enacted the Florida International Arbitration act, effective July 2010, which incorporated the UNCITRAL Model Law on International Commercial Arbitration, F.S. Chapter 684;
- The Florida Supreme Court approved Rule1-3.11, "Appearance By Non-Florida Lawyer In an Arbitration Proceeding in Florida," which permits the appearance of a lawyer currently eligible to practice law in another United States jurisdiction or a non-United States jurisdiction in an arbitration proceeding in Florida if the appearance falls under certain specific circumstances set out in the Rule;
- The Eleventh Judicial Circuit of Florida, in Miami-Dade County, has established a judicial unit specifically designated and trained at the International Arbitration Institute, under the auspices of the University of Miami's Law School, to hear motions and other petitions related to international arbitration proceedings held in Miami-Dade County;
- Miami-Dade County is the seat of the Miami International Arbitration Society (MIAS), which has as one of its goal the active promotion of Florida as a seat of international arbitration, hosting speakers on that topic from Florida, the U.S. and from around the world;
- The Florida Bar's International Law Section (ILS), is also active in the promotion of Florida as a seat of international arbitration, with a significant number of its members practicing in the areas of international litigation and arbitration; The ILS is presently in the process of having The Florida Bar designate a board certification in the area of international litigation and arbitration;
- As noted, U.M.'s School of Law has an International Arbitration Institute, staffed by world renowned professors, and frequent visiting professors;

- The State of Florida, by and through its Legislature, and the Florida Supreme Court, and the international arbitration unit of the Eleventh Judicial Circuit of Miami-Dade County, and the International Law Section of the Florida Bar, and MIAS, and U.M.'s School of Law's International Arbitration Institute have collectively invested a significant amount of effort and resources to raise the profile of Florida in the world stage as an attractive and friendly seat for international commercial arbitration;

2. The Rise of International Mediation In Connection With International Arbitration

- International commercial mediation has increased in popularity in connection with international arbitration, much in the way that mediation in the United States began in the 1980s and has continued to grow in connection with civil litigation;
- Several international arbitration providers are now providing in their arbitration rules a "mediation window" whereby the parties are permitted, and at times encouraged, to take a break from the arbitration proceedings to try to resolve their dispute by means of mediation;
- Part of the reason for this rise in international mediation in connection with international arbitration is the increased costs, complexity and duration of international commercial arbitration;
- A significant number of international arbitration corporate users are now signaling to their attorneys and the arbitration providers that mediation should be employed as early as possible in a dispute;
- Settlement rates in international mediation have been reported to range between 70% to 85%;
- Florida as a whole, and South Florida in particular, has a very well-developed mediation infrastructure, including many mediators fluent in Spanish and Brazilian Portuguese;

3. The Purpose and Need for the Proposed Statute

- If in the course of an ongoing international arbitration, the parties choose to attempt to resolve their dispute by the use of mediation, and a MSA is reached, in that event it is the standard and acceptable practice for the parties to go back to the arbitrator and request that their MSA be turned into a consent arbitration award by the arbitrator. Such a consent arbitration

award, under this scenario, will be enforceable under the provisions of the New York Convention of 1958;

- Likewise, if the parties agree to undertake a med-Arb or an Arb-Med-Arb proceeding, and a MSA is reached during the course of the mediation phase of the those proceeding, then the resulting MSA could also be, at the request of the parties, turned into a consent arbitration award by the arbitrator, which will also be enforceable under the provisions of the new York Convention of 1958;
- However, agreements to mediate a dispute as part of a comprehensive escalating dispute resolution clause under an international contract have become a popular option, for the same reasons noted above;
- Some of the escalating dispute resolution clauses in international contracts may require the parties to mediate their dispute before they go to international arbitration, in order to potentially save significant costs and fees;
- In the event an MSA is reached in an international dispute before a demand for arbitration is made or an arbitration panel is empaneled, the general consensus in the literature is that if such MAS is turned into a consent arbitration award by the parties and the mediator, that such a consent award would likely not be enforceable under the provisions of the New York Convention of 1958;
- As a result, some jurisdictions have enacted legislations and/or rules which would permit in that event the MSA to be treated as an arbitration award rendered by an arbitral tribunal duly constituted and with the same force and effect as a final award in arbitration;
- Such legislation is found in the California Arbitration and Conciliation of International Commercial Disputes, Sections 1297.341, et. seq., where in Section 1297.401 states:

  If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing, and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this State, and shall have the same force and effect as a final award in arbitration

- Other jurisdictions have enacted similar provisions, mainly: Hungary's Act LXXI of 1994 on Arbitration (6 VERZAL 1, Section 39); the Singapore Mediation Center and the Singapore International Arbitration Center (SMC-SIAE); the Arbitration Rules of the Korean Commercial Arbitration Board, Article 18 (3); the Rules of the Mediation Institute of the Stockholm Chamber of Commerce, Article 12, Confirmation of an Settlement Agreement in an Arbitration Award (there may be others);
- Some other jurisdictions, such as Colorado, Bolivia and the EU under its 2008 Directive, would treat an MSA reached under the above scenario as a final judgment, upon petition of the parties to the local court. This approach, however, would immediately turn the MSA into a public document;
- The Mediation Committee of the International law Section of the Florida Bar believes that the proposed legislation, which would be an amendment as Part II to F.S. Chapter 684, as Sections 684.0050 to 684.0060, and specifically proposed Section 684.0058 (copy attached), would facilitate the enforcement of a MSA as an arbitration award in Florida and in other jurisdictions with similar legislations and/or rules;
- This, in turn, may further increase the attractiveness and competitiveness of Florida as a seat of international arbitration and international mediation;
- This may also contribute to the international commerce and concomitant economic benefits for Florida.

Chapter 684

Part II

Mediation of International Commercial Disputes

§ 684.0050 State policy; resolution of disputes by Mediation

It is the policy of the State of Florida to encourage parties to an international commercial agreement or transaction which qualifies for arbitration or mediation pursuant to Fla. Stat. Section 684.001 et seq. to resolve disputes arising from such agreements or transactions through mediation. The parties may select, or permit an arbitral tribunal or other third party to select, one or more persons to serve as the mediator or mediators who shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. The parties may select anyone they choose as the mediator, and may select mediation rules from the applicable Florida or federal statutes or rules, the AAA, ICDR, the ICC, the LCIA or any other international arbitration organization of their choosing or no formal rules at all.

§ 684.0051 Role and obligations of mediators

"Mediator" means a neutral, impartial third person who facilitates the mediation process. The mediator's role is to reduce obstacles to communication, assist in identifying issues, explore alternatives, and otherwise facilitate voluntary agreements to resolve disputes, without prescribing what the resolution must be or otherwise force parties to settle.

The mediator or mediators shall be guided by principles of objectivity, fairness, and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous practices between the parties.

§ 684.0052. Conduct of proceedings

The mediator or mediators shall conduct the Mediation proceedings in the State of Florida in such a manner as they consider appropriate, taking into account the circumstances of the case and the wishes of the parties.

§ 684.0053. Choice of party representatives; qualification

The parties hall appear in person and may be represented by a lawyer in good standing in their respective jurisdiction if the representation is:

(1) for a client who resides in or has an office in the lawyer's home state; or

(2) where the representation arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Such lawyer shall comply with the applicable portions of this Part and of R.

(b) Lawyer Prohibited from Mediating. No lawyer is authorized to represent a party in a mediation pursuant to this rule if the lawyer:

(1) is disbarred or suspended from practice in any jurisdiction;

(2) is a member of The Florida Bar but ineligible to practice law; or

(3) has previously been disciplined or held in contempt by reason of misconduct committed while engaged in representation permitted pursuant to Rule 1-3.11 of [CITE}

§ 684.0054. Mediation settlement agreements;

The mediator or mediators may assist the parties in preparing a settlement agreement. The parties and their representatives, however, remain fully responsible for the form and content of any settlement agreement and the mediator shall have no liability for the form of the agreement, or in connection with any term or terms that the settlement agreement contains or fails to include.

§ 684.0056 Mediation Confidentiality and Privilege; Definitions

Sections 44.403-05 of the Florida Statutes is incorporated herein.

As used in ss. [ ] term:
(1) "Mediation communication" means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication.
(2) "Mediation participant" means a mediation party or a person who attends a mediation in person or by telephone, videoconference, or other electronic means.
(3) "Mediation party" or "party" means a person participating directly, or through a designated representative, in a mediation and a person who:
(a) Is a named party;
(b) Is a real party in interest; or

(c) Would be a named party or real party in interest if an action relating to the subject matter of the mediation were brought in a court of law.
(4) "Mediator" means a neutral, impartial third person who facilitates the mediation process. The mediator's role is to reduce obstacles to communication, assist in identifying issues, explore alternatives, and otherwise facilitate voluntary agreements to resolve disputes, without prescribing what the resolution must be.
(5) "Subsequent proceeding" means an adjudicative process that follows a mediation, including related discovery.

§ 684.0057 Mediation; duration

Mediation begins when a party begins conferring orally or in writing with a mediator and ends when:
(a) A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by applicable law, approved in the form of a consent award by an arbitrator, an arbitration panel or the court.
(b) The mediator declares an impasse by reporting to the parties or, if applicable, to an arbitrator or arbitration panel the lack of an agreement;
(c) The mediation is terminated by an arbitrator, an arbitration panel, court order or applicable law; or
(d) The mediation is terminated by:
1. Agreement of the parties; or
2. One party giving written notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.

§ 684.0058 Confidentiality; Privilege; exceptions

(1) Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. A violation of this section may be remedied as provided by s. 684.0059.
(2) A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.
(3) If, in a mediation involving more than two parties, a party gives written notice to the other parties that the party is terminating its participation in the mediation, the party giving notice shall have a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding only those mediation communications that occurred prior to the delivery of the written notice of termination of mediation to the other parties.
(4)(a) Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:
1. For which the confidentiality or privilege against disclosure has been waived by all parties;

2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;
3. That requires a mandatory report pursuant to chapter 39 of the Florida Statute or chapter 415 of the Florida Statutes, solely for the purpose of making the mandatory report to the entity requiring the report;
4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;
5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or
6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.
(b) A mediation communication disclosed under any provision of subparagraph (a)3., subparagraph (a)4., subparagraph (a)5., or subparagraph (a)6. remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this section.
(5) Information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation.
(6) A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation.

§ 684.0059 Confidentiality; remedies

(1) Any mediation participant who knowingly and willfully discloses a mediation communication in violation of s. 684.0058 shall, upon application by any party to an arbitration panel, applicable arbitration service or a court of competent jurisdiction, be subject to remedies, including:
(a) Equitable relief.
(b) Compensatory damages.
(c) Attorney's fees, mediator's fees, and costs incurred in the mediation proceeding.
(d) Reasonable attorney's fees and costs incurred in the application for remedies under this section.
(2) Notwithstanding any other law, an application for relief filed under this section may not be commenced later than 2 years after the date on which the party had a reasonable opportunity to discover the breach of confidentiality, but in no case more than 4 years after the date of the breach.

§ 684.0056. Mediator as arbitrator; ineligibility for appointment; exception

No person who has served as mediator may be appointed as an arbitrator for, or take part in any arbitral or judicial proceedings in, the same dispute unless all parties manifest their consent in writing to such participation or the rules adopted for mediation or arbitration otherwise provide.

§ 684.0057. Nonwaiver of rights or remedies by submission to Mediation

By submitting to Mediation, no party shall be deemed to have waived any rights or remedies which that party would have had if mediation had not been initiated, other than those set forth in any settlement agreement which results from the mediation.

§ 684.0058. Written Mediation agreement as arbitration award; effect

(1) If the mediation succeeds in settling the dispute prior to arbitral proceedings or before a panel is in place, and the result of the mediation is reduced to writing in the form of a consent award and signed by the parties the written agreement shall, with the consent of the parties, be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the same force and effect as a final award in arbitration. The award shall deemed to be made at the place in this state where the mediation was successfully concluded. Such an award may be on agreed terms under § 684.0041, unless the parties have agreed that no reasons are to be given. The award shall be signed by the Mediator and shall have the same status and effect as any other award on the merits of the case.

§ 684.0059. Equality of costs among parties; expenses

All costs of the Mediation shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.

§ 684.0060. Nonliability of mediators

(1) mediators serving under Sections 684.0050-59 shall have judicial immunity in the same manner and to the same extent as a judge.

(2)The mediator does not have immunity if he or she acts in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.