

# Mediation Procedure

## Mediation Agreement

- 1 The parties ("the Parties") to the dispute in question ("the Dispute") and the Mediator will enter into an agreement ("the Mediation Agreement") in relation to the conduct of the Mediation. This procedure ("the Mediation Procedure") which is based closely upon the CEDR Mediation Procedure, will be incorporated into, form part of, and may be varied by, the Mediation Agreement.

## The Mediator

- 2 The Mediator, after consultation with the Parties where appropriate, will:
  - i) Attend any meetings with any or all of the Parties preceding the mediation, if requested or if the Mediator decides this is appropriate and the Parties agree;
  - ii) Read before the Mediation each Case Summary and all the Documents sent to him (see paragraph 7 below);
  - iii) Chair, and determine the procedure for, the Mediation;
  - iv) Assist the Parties in drawing up any written settlement agreement; and
  - v) Abide by the terms of this Mediation Procedure, the Mediation Agreement and CEDR's Code of Conduct.
- 3 The Mediator will not act for any of the Parties individually in connection with the Dispute in any capacity either during the currency of this agreement or at any time thereafter. The Parties accept that in relation to the Dispute the Mediator is not an agent of, or acting in any capacity for, any of the Parties.

## Venue, Procedure and Administration

- 4 The Mediator will make the necessary arrangements for the Mediation including, as necessary:
  - i) drawing up the Mediation Agreement;
  - ii) Organising a suitable venue and dates;
  - iii) Organising exchange of the Case Summaries and Documents;
  - iv) Meeting with any or all of the Parties either together or separately, to discuss any matters or concerns relating to the Mediation; and
  - v) General administration in relation to the Mediation.
- 5 If there is any issue about the conduct of the Mediation upon which the Parties cannot agree within a reasonable time, the Mediator will, at the request of any Party, decide the issue for the Parties, having consulted with them.

## Participants

- 6 Each Party will state in the Mediation Agreement the names of:
  - i) The person(s) who will be the lead negotiator(s) for that Party, who must have full authority to settle the Dispute; and
  - ii) Any other person(s) (such as professional advisers or colleagues) who will also be present at, and/or participating in, the Mediation on that Party's behalf.

The person signing the Mediation Agreement on behalf of each Party will be deemed to be agreeing, on behalf of both the Party he/she represents and all persons present on

that Party's behalf at the Mediation, to be bound by the provisions of this Mediation Procedure.

### Exchange of information

- 7 Each Party will send to the Mediator and all other parties at least two weeks before the Mediation, or such other date as may be agreed between the Parties and the Mediator, sufficient copies of:
- i) A concise summary ("the Case Summary") of its case in the Dispute; and
  - ii) All the documents to which the Summary refers and any others to which it may want to refer in the Mediation ("the Documents").

In addition, each Party may send to the Mediator and/or bring to the Mediation further documentation which it wishes to disclose in confidence to the Mediator but not to any other Party, clearly stating in writing that such documentation is confidential to the Mediator.

- 8 The Parties should try to agree:
- i) The maximum number of pages of each Case Summary; and
  - ii) A joint set of Documents or the maximum length of each set of Documents.

### The Mediation

- 9 The Mediation will take place at the arranged place and time stated in the Mediation Agreement.
- 10 The Mediator will chair, and determine the procedure at, the Mediation.
- 11 No recording or transcript of the Mediation will be made.
- 12 If the Parties are unable to reach a settlement in the negotiations at the Mediation, and only if all the Parties so request and the Mediator agrees, the Mediator will produce for the Parties a non-binding recommendation on terms of settlement. This will not attempt to anticipate what a court might order but will set out what the Mediator suggests are appropriate settlement terms in all of the circumstances. The provision of such a recommendation is not a common occurrence.

### Settlement agreement

- 13 Any settlement reached in the Mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, the Parties.

### Termination

- 14 Any of the Parties may withdraw from the Mediation at any time and shall immediately inform the Mediator and the other representatives in writing. The Mediation will terminate when:
- i) A Party withdraws from the Mediation; or
  - ii) A written settlement agreement is concluded; or
  - iii) The Mediator decides that continuing the Mediation is unlikely to result in a settlement; or

- iv) The Mediator decides he/she should retire for any of the reasons in the Code of Conduct.

### Stay of proceedings

- 15 Any litigation or arbitration in relation to the Dispute may be commenced or continued notwithstanding the Mediation unless the Parties agree otherwise or a court so orders.

### Confidentiality

- 16 Every person involved in the Mediation will keep confidential and not use for any collateral or ulterior purpose:
  - i) the fact that the Mediation is to take place or has taken place, other than to inform a court dealing with any litigation relating to the Dispute of that fact; and
  - ii) all information (whether given orally, in writing or otherwise) arising out of, or in connection with, the Mediation, including the fact of any settlement and its terms.
- 17 All information (whether oral or in the form of documents, tapes, computer discs etc.) arising out of, or in connection with, the Mediation will be without prejudice, privileged and not admissible as evidence or disclosable in any current or subsequent litigation or other proceedings whatsoever. This does not apply to any information, which would in any event have been admissible or disclosable in any such proceedings.
- 18 Paragraphs 16 and 17 shall not apply insofar as any such information is necessary to implement and enforce any settlement agreement arising out of the Mediation.
- 19 None of the Parties to the Mediation Agreement will call the Mediator as a witness, consultant, arbitrator or expert in any litigation or other proceedings whatsoever. The Mediator will not voluntarily act in any such capacity without the written agreement of all the Parties.

### Fees, expenses and costs

- 20 The Mediator's fees and the other expenses of the Mediation will be borne equally by the Parties. Payment of these fees and any expenses incurred by the Mediator will be made to the Mediator in accordance with his fee schedule (or as specifically otherwise agreed) and terms and conditions of business.
- 21 Each Party will bear its own costs and expenses of its participation in the Mediation.

### Exclusion of liability

- 22 The Mediator shall not be liable to the Parties for any act or omission in connection with the services provided by him in, or in relation to, the Mediation, unless the act or omission is shown to have been in bad faith.

## Guidance notes

The paragraph numbers and headings in these notes refer to the paragraphs and headings in the Mediation Procedure.

The same terms ("the Parties" etc.) are used in the Mediation Procedure and the Mediation Agreement.

### Introduction

The essence of mediation is that it:

- involves a neutral third party to facilitate negotiations;
- is quick and inexpensive, without prejudice and confidential;
- enables the Parties to devise solutions which are not possible in an adjudicative process, such as litigation or arbitration, and may be to the benefit of both/all Parties, particularly if there is a continuing business relationship;
- involves representatives of the Parties who have sufficient authority to settle. In some cases, there may be an advantage in the representatives being people who have not been directly involved in the events leading up to the dispute and in the dispute itself.

The procedure for the mediation is flexible and this Mediation Procedure can be adapted to suit the Parties.

Mediation can be used:

- in both domestic and international disputes;
- whether or not litigation or arbitration has been commenced; and
- in two-party and multi-party disputes.

Rules or rigid procedures in the context of a consensual and adaptable process, which is the essence of ADR, are generally inappropriate. The Mediation Procedure and the Mediation Agreement and this guidance note should be sufficient to enable parties to conduct a mediation.

In some cases the agreement to conduct a mediation will be as a result of an "ADR clause" to that effect in a commercial agreement between the Parties, or a court order. Where that is the case the Mediation Procedure and Mediation Agreement may need to be adapted accordingly.

The Mediation Agreement incorporates the Mediation Procedure (see paragraph 1).

The Mediation Agreement can vary the Mediation Procedure; the variations can be set out in the body of the Mediation Agreement, or the Mediation Agreement can state that variations made in manuscript (or otherwise) on the Mediation Procedure are to be incorporated.

### Mediation Agreement - paragraph 1

If the (proposed) Mediator is asked to do so by a Party wishing to initiate a mediation, he will approach the other Party(ies) to a Dispute to seek to persuade it/them to participate.

Alternatively, the Party who has taken the initiative in proposing the mediation may wish to send a draft agreement based on the Mediation Agreement to the other Party(ies).

Representatives of the Parties and the Mediator may meet to discuss and finalise the terms of the Mediation Agreement.

### **The Mediator - paragraphs 2-3**

In some cases it may be useful to have an independent expert who can advise the Mediator on technical issues. All should sign the Mediation Agreement, which should be amended as appropriate.

With the agreement of the Parties an assistant mediator ("the Assistant Mediator") may attend the Mediation. The Assistant Mediator signs the Mediation Agreement and falls within the definition "the Mediator" in the Mediation Procedure and the Mediation Agreement. The primary purpose of the Assistant Mediator's attendance is his or her continuing professional development. The Assistant Mediator does not receive a fee.

It is advisable, but not essential, to involve the Mediator in any preliminary meeting between the Parties.

### **Participants - paragraph 6**

The lead negotiator(s) must be sufficiently senior and have the full authority of their respective Parties to settle the Dispute, without having to refer to anybody else. If there is any restriction on that authority, this should be discussed with the Mediator before the Mediation.

Professional advisers, particularly lawyers, can, and usually do, attend the Mediation. The lead role in the Mediation is usually taken by the lead negotiators, because the commercial or other interests of the Parties will often take the negotiations beyond strict legal issues. The advisers, however, can play an important role in the exchange of information, in supporting their clients (particularly individuals) in the negotiations, advising their clients on the legal implications of a settlement and in drawing up the settlement agreement.

### **Exchange of information - paragraphs 7-8**

Documentation which a Party wants the Mediator to keep confidential from the other Party(ies) (e.g. counsel's opinion or an expert report not yet exchanged) must be clearly marked as such. It can be disclosed confidentially to the Mediator by that Party before or during the Mediation. It will not be disclosed by the Mediator without the express consent of that Party.

One of the advantages of ADR is that it can avoid the excessive disclosure process (including witness statements) which often blights litigation and arbitration. The Documents should be kept to the minimum necessary to understand the Party's case and to give the Mediator a good grasp of the issues. The Summaries should be similarly brief.

### **The Mediation - paragraphs 9-12**

The intention of paragraph 12 is that the Mediator will cease to play an entirely facilitative role only if the negotiations in the Mediation are deadlocked. Giving a settlement recommendation may be perceived by a Party as undermining the Mediator's neutrality and for this reason the

Mediator may not agree to this course of action. Any recommendation will be without prejudice and will not be binding.

### **Settlement agreement - paragraph 13**

If no agreement is reached, it is nonetheless open to the Parties to adjourn the Mediation to another time and place. Experience shows that even where no agreement is reached during the Mediation itself, the Parties will often reach a settlement shortly afterwards, as a result of the progress made during the Mediation.

### **Stay of proceedings - paragraph 15**

Although a stay may engender a better climate for settlement, it is not essential that any proceedings relating to the Dispute be stayed. If they are stayed, it is the responsibility of the Parties and their legal advisers to consider and, if necessary, deal with the effect of any stay on limitation periods. Suggested wording for a stay, which can be incorporated into the Mediation Agreement, is:

*"No litigation or arbitration in relation to the Dispute is to be commenced and any existing litigation or arbitration in relation to the Dispute is to be stayed from the date of this agreement until the termination of the Mediation."*

### **Confidentiality - paragraphs 16-19**

The CEDR Code of Conduct provides that the Mediator is not to disclose to any other Party any information given to him by a Party in confidence without the express consent of that Party.

In paragraph 16, the proviso as to informing the court is to assist the court in deciding what, if any, steps should be taken by the Parties in relation to mediation.

Documents which would in any event be disclosable will not become privileged by reason of having been referred to in the Mediation and will therefore still be disclosable. The position on this may depend on the relevant jurisdiction and it is the responsibility of the Parties and their legal advisers to consider and, if necessary, deal with this.

### **Fees, expenses and costs - paragraphs 20-21**

The usual arrangement is for the Parties to share equally the fees and expenses of the procedure, but other arrangements are possible. A Party to a Dispute, which is reluctant to participate in mediation, may be persuaded to participate if the other Party(ies) agree to bear that Party's expenses.

# Mediation Agreement

Date        \_\_\_ / \_\_\_ /200\_\_

## Parties

\_\_\_\_\_ ("Party A")

\_\_\_\_\_ ("Party B")

[ \_\_\_\_\_ ("Party C") etc.]

(jointly "the Parties") *Add full names and addresses*

Trevor Harrison \_\_\_\_\_ ("the Mediator")

\_\_\_\_\_ ("the Assistant Mediator")

(and/or any adviser to the Mediator)

(jointly and individually "the Mediator")

## Dispute ("the Dispute")

Add a brief description of the Dispute.

## Participation in the Mediation

1 The Parties will attempt to settle the Dispute by mediation ("the Mediation"). The Mediator's Mediation Procedure ("the Mediation Procedure") as may be varied by this agreement] will determine the conduct of the Mediation and is incorporated into, and forms part of, this agreement. The definitions in the Mediation Procedure are used in this agreement.

## The Mediator

2 The Mediator will be \_\_\_\_\_ Trevor Harrison

[The Assistant Mediator will \_\_\_\_\_]

[The Mediator's Adviser will be \_\_\_\_\_]

## The Lead Negotiators

3 The Lead Negotiator(s) for each of the Parties at the Mediation will be:

Party A: \_\_\_\_\_

Party B: \_\_\_\_\_

[Party C: etc. \_\_\_\_\_]

(jointly "the Lead Negotiators")

*Add full names and corporate title*

Each of the Lead Negotiators will have full authority to settle on behalf of its Party - see the Mediation Procedure paragraph 6 and notes thereto.

A Party will immediately notify the other Party(ies) and the Mediator of any change to the above.

4 The person signing the Mediation Agreement on behalf of each Party, will be deemed to be agreeing, on behalf of both the Party he/she represents and all persons present on that Party's behalf at the Mediation, to be bound by the provisions of the Model Procedure.

## Other participants including legal advisors

5 The following, in addition to the Lead Negotiators, will be present on behalf of each of the Parties at the Mediation:

Party A: \_\_\_\_\_

Party B: \_\_\_\_\_

[Party C: etc. \_\_\_\_\_]

A Party will immediately notify the other Party(ies) and the Mediator of any change to the above.

## Place and time

6 The Mediation will take place

at: \_\_\_\_\_

on: \_\_\_\_\_

starting at: \_\_\_\_\_ o'clock

## Confidentiality

7 The person signing this agreement on behalf of each Party is deemed to be agreeing to the confidentiality provisions of the Mediation Procedure (paragraphs 16-19) on behalf of the Party he/she represents and all other persons present on that Party's behalf at the Mediation.

## Mediation Procedure amendments

8 The following amendments are made to the Mediation Procedure:

*[Identify any changes to be made]*

## Language

9 The language of the Mediation will be English. Any Party producing documents or participating in the Mediation in any other language will provide the necessary translations and interpretation facilities."

## Law and jurisdiction

10 This agreement shall be governed by, construed and take effect in accordance with, English law. The courts of England shall have exclusive jurisdiction to settle any claim, dispute or matter of difference which may arise out of, or in connection with, the mediation.

## Human Rights

11 The referral of the Dispute to mediation does not affect any rights that may exist under Article 6 of the European Convention on Human Rights. If the Dispute is not settled by the Mediation, the Parties' rights to a fair trial remain unaffected.

## Signed

On behalf of Party A \_\_\_\_\_

On behalf of Party B \_\_\_\_\_

[On behalf of Party C etc. \_\_\_\_\_]

The Mediator \_\_\_\_\_