

Mediation Resolution

MODEL PROCEDURE FOR 'FACE TO FACE' MEDIATIONS

1. What is Mediation?

Mediation is a flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

The principal features of mediation are that it:

- involves a neutral third party to facilitate negotiations.
- is quick to set up and is inexpensive, without prejudice and confidential.
- involves party representatives with sufficient authority to settle.
- is flexible, with no set procedure, enabling the process to be designed and managed by the Mediator to suit the parties, in consultation with them.
- enables the parties to devise solutions which are not possible in an adjudicative process such as litigation or arbitration, and which may benefit all the parties, particularly if there is the possibility of a continuing relationship between them.
- can be used in both domestic and cross-border disputes, two-party and multi-party disputes, and irrespective of whether litigation or arbitration has been commenced.

Many commercial and government contracts now require parties to use mediation in accordance with a Model Procedure such as this one. While mediation is essentially flexible, the Model Procedure set out in this document, taken with the attached Mediation Agreement, will give sufficient certainty to enable the process to be set up and used.

Any contemplated or existing litigation or arbitration in relation to the dispute may be started or continued despite the mediation having been commenced, save for when the parties agree or a Court orders otherwise. If settlement terms cannot be agreed at a mediation, the parties are free to revert to litigation or arbitration.

2. Referral to Mediation

Referral of a dispute to a mediator for mediation may be as a result of:

- voluntary referral by all parties.
- referral by one party who asks Mediation Resolution to secure the involvement of the other party or parties to it in a mediation.
- responding to a Pre-action Protocol, the Civil Procedure Rules, a Court Order or a recommendation by a Judge before trial or a pending appeal.
- the provisions of a clause in a commercial or government contract requiring the use of mediation as a step in the parties' agreed dispute resolution process.

3. Choosing the Mediator

Parties may choose their own mediator directly, or may ask Mediation Resolution to nominate one or more persons to act as the mediator for a dispute in accordance with the wishes of the parties or any relevant Court Order (a copy of which must be supplied to Mediation Resolution

by the parties as soon as possible after Mediation Resolution have been so instructed). If the parties require it, more than one mediator can be appointed to work as co-mediators, or the parties can agree on an independent neutral expert to advise the mediator upon any technical issues or facts. Mediation Resolution will only nominate or appoint a mediator who, in their view, possesses the relevant skills and experience to mediate the dispute for the parties effectively, and who will comply with the current CEDR Code of Conduct for Mediators to which the mediator is obliged to adhere ("the Code"). Any nominated Mediator will be required to confirm immediately to Mediation Resolution if there is any matter which might prevent the nominated mediator from complying with the Code in relation to the mediation of the dispute, such as a conflict of interest. Mediation Resolution will then notify the parties of any such matter immediately it is disclosed to them.

The parties may be asked by Mediation Resolution to approve the appointment by them of an assistant mediator (who will be an Accredited Mediator) or an observer to attend a mediation at no cost to the parties, provided that they too comply with the Code in respect of the mediation of that dispute. The identity of any assistant mediator or observer proposed to attend the mediation will be made known in advance of the mediation to the parties, who are free to object to any such nomination or decline any such appointment. The mediator's signature of the mediation agreement binds any assistant mediator or observer to its terms.

4. Preparation for the Mediation

Either Mediation Resolution or the mediator when agreed or appointed, will make the necessary arrangements for the mediation as required or agreed by the parties or under the terms of any scheme, including:

- providing a pro forma mediation agreement and assisting with the completion of it.
- facilitating agreement as to the date, venue and start time for the mediation.
- writing up a suggested timetable for all pre-mediation day preparation and circulating the same for the parties to agree soon after the mediator has been appointed.
- Once such has been agreed by the parties and the mediator, the latter will 'police' the parties' adherence to the preparation timetable.
- organising exchange of document bundles as well the parties' position statements/case summaries as between the parties and the mediator.
- setting up any pre-mediation meetings or telephone conferences agreed by the parties and the mediator.

The parties will:

- agree the appointment of the mediator or a process to select or appoint the mediator.
- agree with the mediator or Mediation Resolution the date, venue (unless it is to be an online mediation in which case see paragraph 8 below) and start time for the mediation.
- pay Mediation Resolution's fees and expenses as agreed under Mediation Resolution's Mediation Terms and Conditions of Business.
- each prepare and exchange a position statement/case summary in respect of their approach to the dispute at the mediation and endeavour to agree with all other parties what documents are needed for the mediation.
- send to the mediator (direct or through Mediation Resolution) a copy of their position statement/case summary and one copy of the document bundle within the timeline stipulated in the agreed pre-mediation timetable, making clear whether position statements/case summaries have or have not yet been exchanged, whether or not and when Mediation Resolution is to effect exchange, and whether all or any part of any position statement/case summary or particular item of documentation is intended to be confidential for the mediator's eyes only.

- notify the mediator direct or through Mediation Resolution of the names and roles of all those attending the mediation on their behalf, so that Mediation Resolution can inform all parties and the mediator in advance of the mediation.
- ensure that a lead negotiator with full authority to settle the dispute (or not) attends the mediation to sign the mediation agreement.
- alternatively notify the mediator, Mediation Resolution and (unless very good reason exists to the contrary) the other parties of any limitation on authority to settle, for instance lack of legal capacity, or the need for ministerial committee or board ratification, in which case the lead negotiator will need to have power to recommend acceptance of any settlement. Late disclosure of limited authority to settle can call into question that party's good faith in the context of their involvement in the mediation process, thus perhaps having a detrimental effect on the prospects of success of any mediation.

The mediator will:

- ensure at all times that the Code is complied with in respect of the mediation of the dispute, reporting any conflict of interest or other relevant matter, if any, to Mediation Resolution (subject to any question of confidentiality or privilege) the parties immediately it emerges.
- attend any pre-mediation meetings on terms and pursuant to any agenda agreed by the parties.
- read each position statement/case summary and document bundle submitted in advance of the mediation by the parties.
- make contact with a representative of each of the parties before the mediation to assist in preparation for the mediation.

5. Documentation

Documentation intended to be treated as confidential by the mediator or Mediation Resolution (such as a counsel's opinion, an undisclosed expert report, a draft proof of evidence or a confidential briefing for the mediator) must be clearly marked as such, and will not be circulated further without express authority.

One of the advantages of mediation is that its success is not dependent on exhaustive disclosure of documents. Bundles can usually be relatively limited in size, containing only key documents, and position statements/case summaries can be quite brief, and can to advantage be prepared jointly by the parties. The parties can ask Mediation Resolution to effect simultaneous exchange of position statement/case summaries if required.

While documents brought into existence for the purpose of the mediation, such as position statements/case summaries, are clearly privileged from later production in those or other proceedings, the fact that a document which is otherwise disclosable in proceedings is produced for the first time during the mediation does not normally confer privileged status on it. The parties must take legal advice on such matters if they arise.

6. The Mediation Agreement

The agreement to mediate provides the essential legal basis for the mediation. Its signatories (the parties to the dispute, the mediator and Mediation Resolution) all agree by signing it that the mediation is to be conducted consistent with both this Model Procedure and the Code.

A draft mediation agreement will be sent for approval to the parties as part of the preparation process for the mediation, and any proposed amendments can then be discussed and inserted

if agreed. The mediation agreement will normally be signed at the beginning of the mediation day on behalf of each of the parties and the mediator, having been pre-signed on behalf of Mediation Resolution. In any pre-mediation contact with the parties, Mediation Resolution's staff and any mediator once appointed will observe its terms as to confidentiality, even though the agreement has not yet been signed.

7. Face to face mediations

It is normal for each of the parties to have a private room for confidential consultations on their own and with the mediator during the mediation. There should also be a further room large enough for all parties to meet with the mediator jointly.

The mediator will chair and take responsibility for determining the procedure at the mediation, in consultation with the parties.

The likely procedure will comprise:

- preliminary private meetings with each of the parties and their representatives when they arrive at the mediation venue.
- a joint meeting of all attending the mediation, at which each of the parties or their representatives will normally be invited to make an oral presentation.
- a mix of further private meetings and joint meetings (which may involve all or some of each party's team), as proposed by the mediator and agreed by the parties.

Professional advisers, particularly lawyers, can and usually do attend the mediation. Such advisers play an important role in the exchange of information and opinion on fact, evidence and law; in supporting their clients (particularly individuals) in the negotiations; in advising clients on the implications of settlement; and in drawing up the settlement agreement and any consent order.

No verbatim recording or transcript should be made of the mediation by the parties or the mediator in any form, but participants can make their own private notes which will not be disclosable to anyone else, including in any subsequent litigation or arbitration.

Mediations can last beyond a normal working day and it is important that the key people present for each of the parties remain present or at worst, available by telephone for so long as the mediation continues. Any time constraints should be reported to Mediation Resolution or the mediator as soon as known, as any unexpected departure can be detrimental to the progress of the mediation and perceived as disrespectful by other parties.

8. Confidentiality in relation to the mediation

Mediation Resolution's standard mediation agreement provides that what happens at the mediation is to be treated as confidential by the parties, Mediation Resolution and the mediator, including the fact and terms of settlement. However, the fact that the mediation is to take place or has taken place is not normally made confidential, as either or both of the parties may wish to claim credit for agreeing to engage in the process. If it is desired to make the fact that the mediation is taking place confidential also, the agreement can be amended.

Apart from where the parties agree in writing to consent to disclosure of what would normally be confidential, there may be rare circumstances in which the confidentiality of the mediation process cannot be preserved, such as where:

- the mediator or any party or their representative is required by law to make disclosure.

- the mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
- the mediator reasonably considers that there is a serious risk of being personally subject to criminal proceedings unless the information in question is disclosed.

Such questions might arise in relation to duties under the Proceeds of Crime Act 2002 or related legislation or under any other legislation. Legal representatives (who may themselves be under a comparable duty of disclosure in their own capacity) must take full responsibility for advising their clients of the implications of disclosure in relation to any such matters at a mediation.

9. Conclusion of the Mediation

The mediation may end in several different of ways:

- by settlement of the dispute in whole or part, when all agreed matters must be written down and signed by the parties for it to be binding.
- by one or more parties leaving the mediation before a settlement is achieved.
- by an agreed adjournment for such time and on such terms as the parties and the mediator agree.
- by withdrawal of the mediator in accordance with the mandatory and optional circumstances set out in the Code.

The mediator will facilitate the drawing up of any settlement agreement, though the drafting is normally done by the lawyers representing each of the parties. It is they who will have the responsibility of ensuring that the terms of the agreement reached are recorded accurately in the settlement agreement and that it will be contractually binding upon all parties. Where proceedings **have not** been started in respect of the dispute, the settlement agreement will (if so intended and drafted) be a contract enforceable by legal action. Where proceedings **have** been issued in relation to the dispute, it is normal for a Consent Order (known as a Tomlin Order) to be agreed either at or after the mediation and later lodged with the court to end the proceedings on the terms agreed.

Where the mediation does not end in complete settlement, the Mediator will usually contact the parties or their representatives thereafter to determine whether further progress towards a settlement might be possible and if so whether he or she might assist in that regard. Many disputes which do not settle at the mediation settle later, usually because of what occurred or was learned at the mediation.

Mediation Resolution will endeavour to contact all the parties after every mediation to obtain their feedback on both the process itself and, in particular, the mediator. Any feedback obtained regarding the mediator will be given in full to the him or her as part of the mediator's continuing learning and development.

10. Complaints

Any formal complaint about Mediation Resolution or any mediator nominated by Mediation Resolution should be addressed to Kevin Smyth at the email address shown below.

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