

Practice Guideline 21: Mediation Rules

INTRODUCTION

These Rules were designed by a sub-committee of the Practice and Standards Committee of the Chartered Institute of Arbitrators ("the Institute"). They are based on the August 1, 1999 rules of the Hong Kong International Arbitration Centre (HKIAC), which has kindly consented to their use, and they have been modified to reflect the Institute's international mandate and related activities in the field of private dispute resolution.

These Rules should be interpreted in accordance with the Institute's Code of Professional and Ethical Conduct for Members. They do not preclude mediation occurring simultaneously with arbitration or litigation. These Rules may also apply where there is no conflict or dispute to be resolved but the parties simply wish to use mediation as a facilitative way of achieving an agreed outcome.

The Institute suggests the following model clause for those who may wish to invoke either mediation under these Rules or mediation under these Rules followed by arbitration under the Institute's rules or adjudication. These Rules will apply no matter how they may be invoked.

Suggested Model Mediation Clause with suggested Model Arbitration Clause should mediation not resolve the dispute.

"Any dispute or difference arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to mediation in accordance with The Chartered Institute of Arbitrators' Mediation Rules current at the time when the request for mediation is made under Rule 3 of those Mediation Rules".

[In international contracts, it is usually worth adding provisions relating to the law governing the mediation, the language(s) of the mediation as well as the place for any mediation.]

Add the following if it is desired to go on to arbitration if not settled:

"If not resolved by mediation within [insert number] days from the commencement of the mediation, it shall be referred to and determined by arbitration in accordance with The Chartered Institute of Arbitrators' then current Arbitration Rules, although the parties may continue the mediation proceedings in parallel. The seat of the arbitration shall be [insert location]. The language of the arbitration shall be English [or choose another language]. The number of arbitrators shall be [one or three]."

MEDIATION RULES (the "Rules")

1. Mediation

Mediation under these Rules is a without prejudice, voluntary and private dispute resolution process, in which a neutral person (the mediator) helps the parties to reach a negotiated agreement. It is also as confidential as the law will allow.

2. Application of the Rules

These Rules apply to the mediation of any present or future disputes where the parties seek consensual resolution and have agreed that these Rules shall apply. The parties may vary these Rules at any time in writing signed by the parties and notified to the mediator, subject to the right of the mediator to terminate the mediation under Rule 11.

3. Initiation of Mediation: the Request for Mediation

A party may initiate mediation by delivering to all other parties, in writing (which for the purposes of these Rules includes e-mail) a request for mediation, containing:

- 3.1 a brief explanation of the nature of the dispute; the estimated value of any disputed amounts and any specific relief or outcome sought by the requesting party;
- 3.2 the names, addresses (including e-mail addresses), and contact numbers (including telephone

- and facsimile) of all parties to the dispute and any legal or other representatives involved, so far as known to the requesting party; and
- 3.3 the nomination or proposal for the appointment of a mediator, which may include suggested qualifications, such as language skills or mediation experience of the subject-matter.

4. Response to Request for Mediation

Within 14 days after receipt of the request, each recipient shall respond to the requesting party in writing, with a copy to all other parties, stating whether the recipient accepts any of the proposed names or qualifications suggested by the requesting party and making any additional suggestions the recipient may have regarding names or qualifications for the appointment of a mediator.

5. Appointment of the Mediator

- 5.1 Where all parties have agreed upon a proposed mediator who is willing to serve and is not disqualified under Rule 6, the parties will jointly appoint that person as the mediator. The mediation shall then proceed in accordance with these Rules.
- 5.2 If, within 28 days of the initial request, all parties have not agreed upon a proposed mediator willing to serve and not disqualified under Rule 6, any party may so inform the Institute and, in so doing, must provide to the Institute copies of the request for mediation and the parties' responses. Within 10 days thereafter the Institute shall provide, for the consideration of the parties, a list of the names of at least 3 potential mediators who are on the Panel of Mediators of the Institute. Should the parties within 7 days thereafter not agree upon the appointment of a mediator (whether from that list or not) the Institute shall appoint a mediator from its Panel of Mediators (whether from that list or not), being a mediator prepared to serve and not disqualified under Rule 6. The mediation shall then proceed in accordance with these Rules.
- 5.3 Rules 5.1 and 5.2 shall apply where the parties wish to appoint more than one mediator, save that where one mediator is appointed before any additional mediator(s), the parties (and, where applicable, the Institute) shall consult with that mediator before appointing the other mediator(s).

6. Disqualification and Replacement of a Mediator

- 6.1 No person may act as a mediator in any dispute in which that person has any financial or personal interest or any conflict of interests likely to affect or which might reasonably be perceived to affect the mediator's independence or ability to act impartially at all times, save where the parties have been notified in writing of such circumstances and have subsequently expressly consented in writing to the appointment of the mediator.
- 6.2 If, following appointment, a mediator becomes aware of any circumstances that may create a reasonable perception of bias, partiality or lack of neutrality, the mediator shall immediately so inform the parties and, where the mediator was appointed by the Institute, shall also immediately so inform the Institute. If any party objects to the continued services of the mediator, the mediator shall be disqualified.
- 6.3 Within 7 days following any disqualification, another mediator who is willing to serve and is not disqualified under Rule 6 shall be appointed by agreement of all parties, failing which, within 10 days of being notified by a party of such failure, and without the need to consult the parties, the Institute shall appoint another mediator from amongst its accredited mediators, being a mediator prepared to serve and not disqualified under Rule 6.

7. The Mediation

The mediator shall use his or her reasonable best efforts to achieve an agreed outcome to the mediation as expeditiously as the circumstances of the parties and the nature of the dispute will permit.

8. Role of the Mediator

The mediator may conduct the mediation in such manner as the mediator considers appropriate, taking into account the circumstances of the case, the wishes of the parties and the need for expedition. Meetings may

be held face to face, by telephone, by videoconference, or electronically. The mediator may communicate with the parties together or with any party separately, with or without its representatives. Subject to Rule 12, nothing discussed in a private meeting with a party or its representative may be communicated by the mediator to any other person unless such communication is expressly permitted by that party or representative.

It is not the role of the mediator to give legal advice or to represent any party. The parties should obtain their own advice concerning their situation, the mediation process and any contemplated agreement.

9. Role of the Parties (Reasonable Best Efforts)

Throughout the mediation the parties and their representatives shall use their reasonable best efforts to cooperate with each other and with the mediator to settle their differences and enable the mediation to proceed expeditiously.

10. Authority and Representation

Throughout the mediation, each party must have authority to settle the dispute or be represented by a person or persons having authority to settle the dispute. A party may be assisted by any person(s) it chooses and must keep the mediator and each other party informed of the names, contact details and roles of such persons and of any changes that may occur during the mediation.

No settlement agreement reached during the mediation shall be legally binding unless it is reduced to writing and signed by all parties to that settlement agreement or by their authorised representatives.

11. Termination of the Mediation

The mediation shall end:

- 11.1 upon the signing by the parties of a written settlement agreement; or
- 11.2 upon the mediator, after consultation with the parties, informing them that in his or her opinion further attempts at securing an agreed outcome through mediation are no longer appropriate; or
- 11.3 upon written notification by any party at any time to the mediator and each other party or by the mediator to each party that the mediation is terminated. No reasons need be stated in any such notice.

12. Confidentiality

Save as required or permitted by law:

- 12.1 the Institute, the parties, their representatives, their advisors and the mediator(s) shall keep confidential all information (whether given orally, in writing or otherwise) produced for, or arising out of or in connection with, the mediation passing between any of the participants and between any of them and the mediator made for the purposes of the mediation, including the fact that the mediation is taking place or has taken place. Each party shall be responsible for ensuring that all of its representatives and advisors are bound by appropriate undertakings of confidentiality and shall take appropriate measures to limit the dissemination of any information relating to the mediation only to those persons as may be required for the purposes of the mediation;
- 12.2 unless the parties otherwise agree in writing, confidentiality under this Rule 12 also extends to the existence and content of any settlement agreement except to the extent that disclosure is necessary for its implementation or enforcement; and
- 12.3 no document or other communication that would be admissible in evidence in any court, arbitral or adjudication proceeding shall be rendered inadmissible by reason only of its disclosure in the course of and for the purposes of the mediation.

13. Costs

- 13.1 Unless otherwise agreed or ordered by a court or arbitrator, each party shall bear its own costs of the mediation.
- 13.2 Unless otherwise agreed or ordered by a court or arbitrator, each party shall bear equally the costs and expenses of the mediation including (but not limited to):
 - 13.2.1 the Institute's administrative charges for appointing one or more mediators;

- 13.2.2 the mediator's fees and expenses;
- 13.2.3 the costs of any meeting rooms, meals, translations, photocopies, internet access, communications systems, or other reasonable costs relating to the organization and conduct of the mediation;
- 13.2.4 the fees and expenses of any independent witness, expert advice or opinion requested by the mediator with the consent of the parties; and
- 13.2.5 any additional administrative costs relating to the mediation, as may be assessed by the Institute.

13.3 The mediator may at any time during the mediation require the parties to make deposits with the mediator or the Institute to cover any anticipated fees or expenses and may suspend the mediation until such deposit is made.

13.4 Any surplus funds deposited shall be returned *pro rata* to the parties at the conclusion of the mediation.

14. Mediator's Role in Subsequent Proceedings

14.1 A mediator shall not be appointed as a representative, counsel or expert witness for any party in any subsequent adjudication, arbitration or judicial proceedings whether arising out of the mediation or any other dispute in connection with the same matter, save as may be expressly agreed in writing by all the parties and the mediator. No party shall be entitled to call the mediator as a witness in any subsequent adjudication, arbitration or judicial or tribunal proceedings arising out of the same matter.

14.2 A mediator shall not be appointed as adjudicator or arbitrator in the same dispute nor in any other dispute arising out of the same matter nor shall the mediator accept such appointment unless, at the time of the appointment, the parties expressly waive in writing any objection arising out of the adjudicator or arbitrator having previously acted as mediator between the parties under these Rules, and the mediator consents to the appointment.

15. Exclusion of Liability

15.1 Neither the Institute nor the mediator shall be liable to any party or to any other participant in the mediation for any act or omission in relation to or arising out of any mediation initiated under these Rules or any settlement of the dispute. This exception shall not exclude a person's liability for that person's fraud.

15.2 No communication made during the course of the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any other claim or complaint.