

Model Mediation Procedure & Agreement



Model Mediation Procedure and Agreement (eighth edition)

Summary of changes

The following eighth edition of the Model Mediation Procedure and Agreement has been substantially updated from the previous edition. Summarised below are the main changes. The paragraph numbers in the subheadings refer to the mediation agreement.

Paragraph 2

The Assistant Mediator is no longer named in the agreement but is incorporated by reference through the description of "the Mediator".

Paragraph 3–5

The names of the Lead Negotiator and other attendees are no longer specifically mentioned on the agreement. Rather the person signing the agreement agrees to its provisions on behalf of the party they represent and all persons present at the mediation. A separate list of participants will be exchanged via CEDR Solve.

The requirement for full authority is now clearly set out in paragraph 6 of the procedure. The corresponding guidance notes give further information about authority as well as providing an alternative clause for situations when the authority is, by necessity, restricted.

Paragraph 6

Because of the increase in court referrals, public cases and the growing acceptance of mediation as an effective dispute resolution process, the fact that the mediation is to take place is no longer treated as confidential. It must be emphasised however that what happens at the mediation itself remains confidential and without prejudice, as do the fact and terms of settlement, unless agreed otherwise.

If any of the parties require confidentiality as to the fact that the mediation is to take place or has taken place, the provision can be amended as suggested in the guidance notes.

Paragraph 7

This paragraph in relation to the mediation fee is a new provision.

28 October 2002

Model Mediation Procedure and Agreement

Mediation Agreement

- 1 The parties ("the Parties") to the dispute in question ("the Dispute"), the Mediator and the Centre for Effective Dispute Resolution ("CEDR Solve") will enter into an agreement ("the Mediation Agreement") based on the CEDR Model Mediation Agreement in relation to the conduct of the Mediation. This procedure ("the Model Procedure") will be incorporated into, form part of, and may be varied by, the Mediation Agreement.

The Mediator

- 2 CEDR Solve will, subject to the agreement of the Parties or any court order, nominate an independent third party(ies) ("the Mediator"). The Mediator, after consultation with the Parties where appropriate, will:
 - 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;
 - read before the Mediation each Case Summary and all the Documents sent to him/her (see paragraph 7 below);
 - chair, and determine the procedure for, the Mediation;
 - assist the Parties in drawing up any written settlement agreement; and
 - abide by the terms of the Model Procedure, the Mediation Agreement and CEDR's Code of Conduct.
- 3 The Mediator (and any member of the Mediator's firm or company) 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 neither the Mediator nor CEDR Solve is an agent of, or acting in any capacity for, any of the Parties. The Parties and the Mediator accept that the Mediator (unless an employee of CEDR Solve) is acting as an independent contractor and not as an agent or employee of CEDR Solve.

Optional / additional wording

- 4 CEDR Solve, in conjunction with the Mediator, will make the necessary arrangements for the Mediation including, as necessary:
 - nominating, and obtaining the agreement of the Parties to, the Mediator;
 - drawing up the Mediation Agreement;
 - organising a suitable venue and dates;
 - organising exchange of the Case Summaries and Documents;
 - meeting with any or all of the Parties (and the Mediator if appointed), either together or separately, to discuss any matters or concerns relating to the Mediation; and
 - general administration in relation to the Mediation.
- 5 If there is any issue about the conduct of the Mediation (including as to the nomination of the Mediator) upon which the Parties cannot agree within a reasonable time, CEDR Solve will, at the request of any Party, decide the issue for the Parties, having consulted with them.

Participants

- 6 The Lead Negotiators 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 CEDR Solve and/or the Mediator before the Mediation.

CEDR Solve will inform Parties prior to the date of Mediation of all persons attending the mediation on behalf of each Party.

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 Model Procedure.

Exchange of information

- 7 Each Party will prepare for the other Party(ies), the Mediator and Assistant Mediator sufficient copies of:
 - a concise summary ("the Case Summary") of its case in the Dispute; and
 - all the documents to which the Summary refers and any others to which it may want to refer in the Mediation ("the Documents").

The Parties will exchange the Case Summary and Documents with each other at least two weeks before the Mediation, or such other date as may be agreed between the Parties and CEDR Solve, and send copies directly to the Mediator and Assistant Mediator on the same date. Each Party will send a copy of the Case Summary to CEDR Solve.

In addition, each Party may send to the Mediator (through CEDR Solve) 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 and CEDR Solve.

- 8 The Parties should try to agree:
 - the maximum number of pages of each Case Summary; and
 - 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.

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:
- a Party withdraws from the Mediation; or
 - a written settlement agreement is concluded; or
 - the Mediator decides that continuing the Mediation is unlikely to result in a settlement; or
 - 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 etc.

- 16 Every person involved in the Mediation will keep confidential and not use for any collateral or ulterior purpose 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, save for the fact that the mediation is to take place or has taken place.
- 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/or enforce any settlement agreement arising out of the Mediation or as otherwise required at law.
- 19 None of the Parties to the Mediation Agreement will call the Mediator or CEDR Solve (or any employee, consultant, officer or representative of CEDR Solve) as a witness, consultant, arbitrator or expert in any litigation or other proceedings whatsoever arising from, or in connection with, the matters in issue in the Mediation. The Mediator and CEDR Solve will not voluntarily act in any such capacity without the written agreement of all the Parties.

Fees, expenses and costs

- 20 CEDR Solve's fees (which include the Mediator's fees) and the other expenses of the Mediation will be borne equally by the Parties. Payment of these fees and expenses will be made to CEDR Solve in accordance with its fee schedule 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 Neither the Mediator nor CEDR Solve shall be liable to the Parties for any act or omission in connection with the services provided by them 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 Model Procedure.

The same terms ("the Parties" etc.) are used in the Model Procedure and the Model 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 Model Procedure can be adapted (with or without the assistance of CEDR Solve) to suit the Parties.

A 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 Model Procedure and the Model 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" (such as one of the CEDR Model Contact Clauses) to that effect in a commercial agreement between the Parties, or a court order. Where that is the case the Model Procedure and Mediation Agreement may need to be adapted accordingly.

The Model Agreement, which has been kept short and simple, incorporates the Model Procedure (see paragraph 1).

The Mediation Agreement can vary the Model 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 Model Procedure are to be incorporated.

Mediation Agreement – paragraph 1

If CEDR Solve is asked to do so by a Party wishing to initiate a mediation, it 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 Model Agreement to the other Party(ies).

Representatives of the Parties (and the Mediator if he/she has been nominated) and CEDR Solve may meet to discuss and finalise the terms of the Mediation Agreement.

The Mediator – paragraphs 2-3

The success of the Mediation will, to a considerable extent, depend on the skill of the Mediator. CEDR Solve believes it is very important for the Mediator to have had specific training and experience. CEDR Solve will propose mediators suitable for the particular matter.

In some cases it may be useful to have more than one Mediator, or 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.

It is CEDR Solve's practice, as part of its mediator development programme, to have an assistant mediator ("the Assistant Mediator") attend most mediations. The Assistant Mediator signs the Mediation Agreement and falls within the definition "the Mediator" in the Model Procedure and the Model Agreement.

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

CEDR Solve – paragraphs 4-5

The Model Procedure envisages the involvement of CEDR Solve because in most cases this is likely to benefit the Parties and the Mediator and generally to facilitate the setting up and conduct of the Mediation. The Model Procedure, however, can be amended if CEDR Solve is not to be involved.

Participants – paragraph 6

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 Lead Negotiator must have full authority to settle the Dispute, as detailed in the text of paragraph 6. Full authority means they are able to negotiate freely without restriction or limits on their authority and that the representative does not need to refer to anyone outside the mediation when negotiating and agreeing a settlement. If negotiating authority is less than full, this fact should be disclosed to the other Party and to the Mediator at least two weeks before the Mediation.

The Lead Negotiator should be at the Mediation throughout the whole day. It is easy to forget that the mediation sessions often go well into the evening.

In certain cases, for example claims involving public bodies and class actions, the Lead Negotiator may only have the power to make a recommendation. In these circumstances the following clause should be substituted:

“the Lead Negotiator(s) [for Party] will have full authority to make recommendations on terms of settlement on behalf of its Party”.

Professional advisers, particularly lawyers, can, and usually do, attend the Mediation. The advisers 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. a counsel's opinion, an expert report not yet exchanged) must be clearly marked as such. It can be disclosed confidentially to the Mediator by the Party before or during the Mediation. It will not be disclosed by the Mediator or CEDR Solve without the express consent of the 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.

Should the Parties require CEDR Solve to conduct a simultaneous exchange of Case Summaries and Documents, the following wording is suggested:

“Each party will send to CEDR Solve at least two weeks before the Mediation, or such other date as may be agreed between the Parties and CEDR Solve, sufficient copies of:

- *a concise summary (“the Case Summary”) of its case in the Dispute; and*
- *all documents to which the Summary refers and any others to which it may want to refer in the Mediation (“the Documents”),*

which CEDR Solve will send simultaneously to the other Party(ies), the Mediator and Assistant Mediator.”

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 unless the Parties agree otherwise.

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 after, as a result of the progress made during that 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 [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.

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.

If either Party wishes to keep confidential the fact the Mediation is taking place or has taken place, paragraph 16 can be amended by replacing the wording *"save for the fact that the mediation is to take place or has taken place"* with the wording *"including the fact that the mediation is to take place or has taken place"*.

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. Parties may also amend the agreement to identify that the costs of mediation may be taken into account in any court orders if there is no settlement at the Mediation.

International disputes - language and governing law/jurisdiction

The Model Agreement can be easily adapted for international cross-border disputes by the addition in the Mediation Agreement of wording along the following lines:

"Language

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."

Governing law and jurisdiction

The Mediation 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."

Where the law is not English or the jurisdiction not England, the Mediation Agreement may need to be amended to ensure the structure, rights and obligations necessary for a mediation are applicable.

Model Mediation Agreement

Parties

_____ ("Party A")

_____ ("Party B")

[_____ ("Party C")

etc.]

(jointly "the Parties")

Add full names and addresses

_____ ("the Mediator")

("the Mediator")

Centre for Effective Dispute Resolution Limited, Exchange Tower, 1 Harbour Exchange Square, London E14 9GB
("CEDR Solve")

Dispute ("the Dispute")

Add brief description of the Dispute.

Participation in the Mediation

- 1 The Parties will attempt to settle the Dispute by mediation ("the Mediation"). The CEDR Model Mediation Procedure ("the Model Procedure") [as 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 Model Procedure are used in this agreement.

The Mediator

- 2 The Mediator[s] will be _____

If an Assistant Mediator is appointed by CEDR Solve, he/she will be bound by the terms of this agreement. The Mediator and Assistant Mediator will be referred to individually and jointly as "the Mediator".

Participants

- 3 At least one attendee on behalf of each party at the mediation will have full authority to settle at the Mediation as set out in paragraph 6 of the Model Procedure ("the Lead Negotiator").
- 4 Each representative in signing this agreement is deemed to be agreeing to the provisions of this agreement on behalf of the Party he/she represents and all other persons present on that Party's behalf at the Mediation.

Place and time

- 5 The Mediation will take place on _____ -

Confidentiality

- 6 Each Party to the Mediation and all persons attending the Mediation will be bound by the confidentiality provisions of the Model Procedure (paragraphs 16-19).

Mediation fee

- 7 The person signing this agreement on behalf of the party he/she represents is agreeing on behalf of that party, to proceed on the basis of CEDR Solve’s standard terms and conditions including the mediation fee as set out in the attached covering letter.

Law and jurisdiction

- 8 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

- 9 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.

Model Procedure amendments

- 10 *Set out amendments (if any) to the Model Procedure - see introduction to Model Procedure guidance notes.*

If any litigation or arbitration is to be stayed, paragraph 15 of the Model Procedure should be excluded/deleted and wording along the following lines should be added in the agreement: "No litigation or arbitration in relation to the Dispute is to be commenced [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".

Signed

On behalf of Party A/B _____ Date _____

On behalf of the Mediator _____ Date _____

On behalf of CEDR Solve _____ Date _____