Better conflicts, Better outcomes, Better world

Model Mediation Procedure

2022 Edition

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CEDR Model Mediation Procedure

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, and, in most circumstances, is without prejudice and confidential;
- involves party representatives with sufficient authority to settle;
- is flexible, enabling the process to be designed and managed by the Mediator to suit the parties, in consultation with them;
- puts the parties in control (unlike litigation/arbitration);
- 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 whether or not litigation or arbitration has been commenced.

Many commercial and government contracts now require parties to use mediation in accordance with CEDR's Model Mediation Procedure. While mediation is essentially flexible, the Model Procedure set out in this document, taken with the CEDR Model 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, unless the parties agree or a Court orders otherwise. If settlement terms cannot be agreed through mediation, the parties can revert to litigation or arbitration.

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2. Referral to mediation

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

- voluntary referral by all parties;
- referral by one party who asks CEDR to secure the involvement of other parties into a mediation;
- responding to a Pre-action Protocol, Court Rules, a Court Order or a recommendation by a judge before trial or appeal;
- the provisions of an ADR clause in a commercial or government contract requiring the use of mediation as a step in the parties' agreed dispute resolution process;
- the provisions for use of mediation within an industry or public sector policy framework.

Parties referring a case to CEDR are encouraged to include a copy of any appropriate document or agreement as per above with the referral.

3. Choosing the mediator

The parties may choose their own mediator directly or from any CEDR panel of mediators, or may ask CEDR to nominate one or to recommend names from whom they can choose one to act as the mediator for a dispute in accordance with the wishes of the parties or under contractual agreement or the provisions of any relevant Court Order. Where there is a contractual or court requirement for the parties to act under the auspices of CEDR, CEDR will appoint a mediator where the parties fail to agree on a name within 14 days of notice of the dispute.

CEDR will only nominate or appoint a mediator who, in its view, possesses the relevant skills and experience to mediate the dispute for the parties effectively, and who will comply with the CEDR Code of Conduct for Third Party Neutrals ('the Code'). Any nominated mediator and all other parties to the mediation will be required to confirm immediately to CEDR 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. CEDR or the mediator will then notify all the parties of any such matter immediately it is disclosed to them.

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If required by any of the parties or the Court, or under the published terms of any CEDR dispute resolution scheme, CEDR will appoint a mediator to be used in relation to a dispute, subject always to that mediator not being prevented from complying with the Code in relation to the mediation of that dispute. As part of CEDR's role to develop the field and its professionalism, the parties may be asked by CEDR to approve the appointment of an observer mediator to attend a mediation at no cost to the parties, provided that the observer mediator also appropriately complies with the Code in respect of the mediation. The identity of any observer mediator 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 on the mediation agreement binds any observer mediator to its terms. In appropriate cases CEDR may recommend, or the parties agree, the use of co-mediators or the appointment of a neutral expert to advise the mediator on technical matters. If co-mediators are chosen by the parties, all references to the mediator in a document are taken to indicate the plural. CEDR recommends however, that documents related to the process be adapted to refer to the Mediator in the plural and that both mediators be signatories to the Mediation Agreement. The circumstances in which a co-mediator may be appropriate are:

- The number of parties or number of attendees within a party is such that it would be of benefit to have co-mediators
- Where a specific technical expertise is required.
- The varying nationalities and cultural backgrounds of the parties. This is separate to the potential need for a translator.
- Personal preference of the parties

4. Preparation for the mediation

CEDR 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:

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- drafting the agreement for mediation, submitting it for approval by the parties and preparing the final form for signature, incorporating any agreed amendments if requested;
- compiling names and roles of attendees for the circulation of a participants' form before the mediation takes place;
- facilitating agreement as to the date, start time and providing venue arrangements for the mediation when necessary;
- organising exchange of case summaries and document bundles between the parties and the mediator when requested;
- setting up any pre-mediation meetings agreed by the parties and the mediator if requested.

The parties will:

- agree the appointment of the mediator or a process to select or appoint the mediator;
- agree with CEDR the date, venue and start time for the mediation;
- agree the terms of the mediation agreement;
- pay CEDR's fees and expenses as agreed under CEDR's Terms and Conditions of business;
- each prepare and exchange a case summary for the mediation 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 directly, or to the location indicated by CEDR, a copy of their case summary and a copy of the bundle of documents at the earliest convenience, usually no less than one week before the date set for the mediation, making clear:
    - whether case summaries have or have not yet been exchanged;
    - whether or not and when CEDR or the mediator is to effect exchange; and
    - whether all or any part of any case summary or documentation is intended to be confidential for CEDR and the mediator only.

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(Late submission of documents might call into question that party's good faith involvement in the mediation process, and have detrimental effects on the prospects of success of any mediation;)

- notify the mediator and CEDR of the names and roles of all those attending the mediation on their behalf, so that CEDR can inform all parties and the mediator in advance of the mediation;
- ensure that a lead negotiator with full authority to settle the dispute attends the mediation to sign the mediation agreement and any potential settlement agreement;
- alternatively notify the mediator, CEDR 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, court approval, 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 involvement in the mediation process, and have detrimental effects 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 CEDR and (subject to any question of confidentiality or privilege) the parties, immediately it emerges;
- attend any pre-mediation meetings on terms and agenda agreed by the parties, or proposed by the mediator;
- read each 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 and discuss issues arising.

5. Documentation

Documentation intended to be treated as confidential by the mediator or CEDR (such as a counsel's opinion, an undisclosed expert report, a draft proof of evidence or a confidential

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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 case summaries can be quite brief, and can, to advantage, be prepared jointly by the parties. The parties can ask CEDR to effect simultaneous exchange of case summaries if required.

While documents brought into existence for the purpose of the mediation, such as case summaries, are clearly privileged from later production in 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 CEDR) all agree by signing it that the mediation is to be conducted consistent with both this CEDR Model Mediation 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 by all. 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 CEDR. Upon appointment of the mediator by the parties (or by CEDR) any pre-mediation contact between the parties, CEDR staff and CEDR mediator, will observe the mediation agreement's terms as to confidentiality, regardless of whether the agreement has already been signed or not.

7. The mediation

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.

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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 meetings with each of the parties when they arrive at the venue;
- a joint meeting of all attending the mediation, at which each of the parties 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 attending for each of the parties remain present or, at worst, available by telephone or video conference for so long as the mediation continues. Any time constraints should be reported to CEDR 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

The CEDR Model Mediation Agreement provides that what happens at the mediation is to be treated as confidential by the parties, the mediator and CEDR, including the terms of settlement, unless otherwise agreed by the parties in writing. However, the fact that the mediation is to take place or has taken place is not normally made confidential, as one or other of the parties may wish to claim credit for agreeing to engage in the process or it may

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have been directed from a public court. If it is desired to make the fact that the mediation is taking place confidential also, the agreement can be amended.

As the mediation is held under the auspices of CEDR, and CEDR is a party to the mediation agreement, CEDR is also bound to keep confidential information which the mediator may share with CEDR for the purposes of case reports or queries regarding professional conduct. 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 a number of ways:

- by settlement of the dispute in whole or part, when all agreed matters must be written down and signed by the parties to be binding;
- by an 'in principle settlement' of the dispute with an agreement to draft binding terms after the mediation day;
- by the mediator advising the parties that a settlement, for the time being, at least, cannot be reached;
- by one or more parties leaving the mediation before settlement is achieved;

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- 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;
- by production of a document of summary or recommendations from a mediator, if requested by all parties and agreed by the mediator.

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. 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 to be agreed either at or after the mediation and later lodged with the relevant tribunal to end the proceedings on the terms agreed. Parties should agree who will be responsible for lodging the Consent Order.

Where the mediation does not end in complete settlement, the mediator may make contact with the parties thereafter to see whether further progress might be possible. Many disputes which do not settle at the mediation settle later, usually as a result of what occurred or was learned at the mediation. Where the mediator agrees to stay in contact with the parties after a mediation, the provisions of the mediation agreement should be taken to continue to apply to those communications with and/or including the mediator.

In the event that a settlement is not reached, the mediator if requested and if agreed by each of the parties and the mediator, may produce a non-binding opinion or recommendation in an effort to take the matter forward.

CEDR endeavours to make contact with all 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 mediator as part of the mediator's continuing learning and development and CEDR's quality assurance.

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10. Complaints

Any formal complaint about CEDR or any mediator nominated by CEDR should follow the procedure set out on the CEDR website at http://www.cedr.com/complaints.

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