


MEDIATION GUIDANCE NOTES



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MEDIATION GUIDANCE NOTES

This booklet is a practical companion to the ICC Mediation Rules. Its purpose is to offer guidance on issues that deserve attention when choosing and organizing mediations. Helpful information will be found on the many administrative and procedural questions which a party may wish to consider when preparing mediation proceedings on its own or in discussions with the other party and the mediator. Mediations may be conducted in various ways depending on the backgrounds of the parties, their advisors and the mediator and the nature of the dispute. In keeping with the spirit of mediation, the Mediation Guidance Notes do not dictate solutions, but encourage parties to work out the best arrangements for their particular case in light of common mediation practices and the flexibility offered by the ICC Mediation Rules.

Although a stand-alone procedure, mediation can also be combined with other dispute resolution procedures as part of a tiered dispute resolution process. Increasingly, mediation is considered as a useful and even an indispensable first step in situations where parties are keen on reaching a solution that upholds their mutual business or contractual interests. It can also be used once arbitration has commenced if parties wish to seek a settlement. For these reasons, the Mediation Guidance Notes also address the relationship between mediation and arbitration.

The Mediation Guidance Notes result from work and consultations conducted within the ICC Commission on Arbitration and ADR, whose members are dispute resolution practitioners and specialists from some ninety countries worldwide. The range of legal and cultural traditions represented within the Commission allows it to transcend local differences and create products that offer a basis for international understanding between contracting parties and dispute resolution professionals.

FOREWORD

The ICC Mediation Rules to which these Mediation Guidance Notes relate are published with the ICC Arbitration Rules in hard copy (ICC Publication 865, available in several languages from the ICC) and online (at www.iccwbo.org and in the ICC Dispute Resolution Library at www.iccdri.com). ICC mediations are overseen by the ICC International Centre for ADR, which is the only body empowered to administer proceedings under the ICC Mediation Rules. The Centre's experience and expertise help to ensure that proceedings progress efficiently, transparently, fairly and are respectful of the parties' wishes.

TABLE OF CONTENTS

| | |
|---|-----------|
| WHAT IS MEDIATION? | 04 |
| WHY MEDIATION? | 05 |
| MEDIATION SESSIONS | 06 |
| PREPARATION FOR MEDIATION SESSIONS | 08 |
| Attendees | 08 |
| Procedural agreements - time and language | 09 |
| Logistical arrangements | 09 |
| Information and documents | 09 |
| Mediation agreement | 10 |
| Applicable law | 10 |
| AUTHORITY | 10 |
| CASE SUMMARIES AND DOCUMENTS | 11 |
| RELATIONSHIP BETWEEN MEDIATION AND ARBITRATION PROCEEDINGS | 13 |
| MISCELLANEOUS | 16 |
| Co-mediation | 16 |
| Independent expert | 16 |
| Legal representation | 16 |
| Costs | 17 |
| Recommended terms of settlement | 17 |
| Combining mediation with other settlement procedures | 17 |

WHAT IS MEDIATION?

- 1 For the purpose of the ICC Mediation Rules (the “Rules”), mediation is a flexible settlement technique, conducted privately and confidentially, in which a mediator acts as a neutral facilitator to help the parties try to arrive at a negotiated settlement of their dispute. The parties have control over both the decision to settle and the terms of any settlement agreement.
- 2 In these Guidance Notes,¹ the term “mediation” refers to the entire proceedings and the term “mediation session” refers to one or more sessions during the proceedings when the mediator and the parties meet together.² Further information on mediation sessions is set out below, from paragraph 11 onwards.
- 3 Since mediation is flexible, the mediation procedure to be used can be adapted to the needs of the parties, including their cultural and legal backgrounds, and the specifics of the dispute. The manner in which the procedure is to be conducted will be the subject of the discussion provided for in Article 7(1) of the Rules. As provided for in Article 7(3) of the Rules, in establishing and conducting the mediation, the mediator is guided by the wishes of the parties and treats them with fairness and impartiality.
- 4 During the mediation, the mediator may hold meetings or conference calls with all of the parties present and may also hold separate meetings or calls with each of the parties alone.

1 These Mediation Guidance Notes provide guidance regarding the process of mediation. They do not offer guidance on other settlement procedures that parties may agree to use under the ICC Mediation Rules.

2 Internationally, the terms “conciliation” and “mediation” are used sometimes to describe processes that are substantively the same and sometimes to describe processes that are similar but have some differences. Where there are substantive differences, there is no uniform understanding of what those differences are. Mediation as referred to in the ICC Mediation Rules and these Mediation Guidance Notes is a concept sufficiently broad to encompass both mediation and conciliation.

- 5 In the course of the mediation, the parties can exchange settlement proposals, which may lead to a negotiated agreement. Such proposals can be made directly between the parties or through the mediator.
- 6 Since control over the decision to settle and the terms of any settlement agreement remains with the parties, the mediator has no power to impose a settlement on the parties.

WHY MEDIATION?

- 7 Mediation takes significantly less time than arbitration or litigation and involves much lower costs.
- 8 The mediation process enables the parties to reach agreement on solutions which could not be achieved through an adjudicative process such as arbitration or litigation and which would not therefore be available through the rendering of an arbitral award or a court decision. For example, the parties' preferred solution to a contractual dispute may be to renegotiate the terms of the contract. The renegotiation of a contract is possible in mediation, whereas there is unlikely to be any legal basis for seeking such relief in arbitration or litigation.
- 9 Whilst the adjudicative processes focus on the parties' legal rights, mediation helps parties also to take into consideration commercial and other interests. This is an important difference between mediation and arbitration or litigation. The mediation process can help parties acquire a better understanding of each other's needs and interests so that they can look for a solution which accommodates these needs and interests as far as possible.

MEDIATION GUIDANCE NOTES

- 10 Mediation can be a particularly useful tool when the parties in dispute have an ongoing relationship (such as a joint venture or long-term supply contract). Mediation is likely to be less disruptive to that relationship than litigation or arbitration.

MEDIATION SESSIONS

- 11 At the core of most mediations will be one or more mediation sessions which are attended by all parties, their advisers (if any) and the mediator. The number of sessions, their duration and the purpose of each session can be tailored to the requirements of the case and the approach favoured by the mediator and the parties. It is possible, even in large cases, for there to be just one mediation session, which may be scheduled to last a full day.
- 12 During mediation sessions, the mediator may meet with the parties together (a joint meeting), or meet with one or more parties without other parties being present (a private meeting). The mix between joint meetings and private meetings will depend upon the requirements of the case and the approach favoured by the mediator, the parties and their advisers. This is something that may form part of the discussion between the mediator and the parties provided for in Article 7(1) of the Rules.
- 13 Typically, a private meeting or discussion between the mediator and a party will be confidential. The mediator will agree that any new information discussed during that meeting will not be disclosed by the mediator to any other party without express permission. However, any party may specifically ask the mediator to relay new information to another party, and the mediator may seek permission to disclose information where such disclosure is likely to assist the parties in resolving their dispute.

- 14 During all meetings (both joint and private) the mediator will seek to create an environment conducive to constructive negotiations, but the purpose of the meetings may vary. Some may be used for the parties and/or their lawyers to make presentations to each other. Others may be used for the mediator to explore the background to the dispute, identify the interests and needs of each of the parties for their mutual benefit, and consider any alternative options for settlement. Later in the process, meetings may be used for bargaining, with offers and counter-offers being exchanged either directly or via the mediator. If agreement is reached, then the meetings may be used to draft³ and agree upon the terms of a written settlement agreement.
- 15 In some cases, it may be appropriate for there to be more than one mediation session a few days or weeks apart. It may be helpful for the parties to meet first to discuss and make presentations to each other regarding the dispute and to meet again, at a later date, to negotiate a resolution of the dispute. This allows time between the meetings, which may be useful for different reasons. For example, it may be used for the exchange of further information or documents, for specific investigation to be carried out, or for reflection or conferring with colleagues and advisers.
- 16 In other cases it may be appropriate for a single session to last two or more consecutive days. This may be the case where there are several parties to the dispute and more time is needed for the mediator to meet with each of them.
- 17 In each case, the parties, their advisers and the mediator should consider what type of mediation sessions will be most useful in achieving a successful and efficient resolution of the dispute.

³ Where legal advisers are present, it is common for those advisers to take primary responsibility for the drafting of the settlement agreement, seeking input from their clients as appropriate. The mediator will continue to facilitate discussions regarding the draft, as necessary.

MEDIATION GUIDANCE NOTES

18 If no agreement is reached at the end of the mediation session(s), the mediator may, with the agreement of the parties, continue to work with them over the following days or weeks to assist them with their continuing negotiations. This further assistance may be provided in any way that is convenient and practical, for example through follow up telephone discussions, emails, videoconferences or meetings.

PREPARATION FOR MEDIATION SESSIONS

19 Preparation for any mediation session is a responsibility shared by the parties, their advisers and the mediator. To this end, Article 7(1) requires the parties and the mediator to discuss the manner in which the mediation is to be conducted. The mediator may further assist the parties with their preparation through telephone discussions and/or meetings prior to the mediation session.

20 In advance of any mediation session, the following matters may need to be addressed:

Attendees

- 20.1 Have all the parties who need to be involved in the negotiation of a resolution of the dispute agreed to attend the session? If not, should other parties be invited to participate?
- 20.2 Which individuals will attend the mediation session on behalf of each party? In this regard, see paragraphs 21–23 below on the importance of settlement authority.
- 20.3 Will the parties be represented by legal or other advisers at the session (see also paragraph 38 below)?

- 20.4 Will any experts retained on behalf of the parties attend the session and if so, what role will they have?
- 20.5 Does everyone who is attending the session understand the nature of the mediation process and the purpose of the session?

Procedural agreements – time and language

- 20.6 Is the period for conducting the mediation (before recourse to arbitration or litigation) limited by the relevant agreement to refer the dispute to mediation under the Rules? If so, what is the time limit and is it appropriate to extend it by agreement between the parties?
- 20.7 Is there an agreement as to what language or languages will be used at the mediation session?⁴

Logistical arrangements

- 20.8 Have the date, venue, start and finish time and other administrative arrangements for the session been agreed?
- 20.9 Does the venue selected have the necessary facilities? Ideally, each party should have its own room and another room large enough to hold joint meetings with all parties present should also be available.

Information and documents

- 20.10 How and when will the parties provide each other and the mediator with information regarding their respective positions and interests in relation to the dispute and any relevant documents? In this regard, see paragraph 26 below regarding the importance of exchanging relevant information in good time before a mediation session.

⁴ To the extent that agreement cannot be reached on the place of physical meetings or the language to be used at those meetings, Article 4 of the Rules provides for these matters to be determined by the ICC International Centre for ADR or the mediator so that the mediation can proceed.

Mediation agreement

- 20.11 Is it appropriate for the mediator and the parties to sign a mediation agreement setting out any agreed procedural matters not covered by the Rules (e.g. an agreement that no binding settlement agreement shall have been reached between the parties unless and until the terms of the agreement have been reduced to writing and signed by authorized representatives of each party)?⁵

Applicable law

- 20.12 Does the law of the place where the mediation sessions are taking place, or any other applicable law (e.g. the substantive law of the mediation agreement or of the country where any arbitration or litigation proceedings may take place), contain any mandatory provisions regarding the conduct of the mediation? For example, some countries may have rules regarding the qualifications which a mediator is required to have.

AUTHORITY

- 21 One of the advantages of mediation is that it enables parties to reach a binding agreement which resolves their dispute. Ideally, such an agreement is executed at the conclusion of a mediation session, thereby providing certainty to all parties that a binding agreement has been reached.
- 22 In order for a binding agreement to be executed at a mediation session, it is generally necessary for someone with authority to negotiate and then to sign such an agreement to be present at the session.

⁵ Where the parties and the mediator wish to enter into a mediation agreement, it is recommended that a draft of such agreement be sent to the ICC International Centre for ADR, so that the Centre can ensure that the provisions of the proposed agreement are consistent with the Rules and the Centre's practices in administering the proceedings.

23 At all mediation sessions, and in particular at any session at which it is anticipated that terms of settlement may be negotiated, each party should therefore ideally be represented by a lead negotiator with full and unqualified authority to settle the dispute. If this is not possible, in advance of the mediation session a party should inform the mediator and the other parties (either directly or through the mediator) of any limitation on authority to settle (e.g. where any settlement will need to be ratified by a board of directors, a ministerial committee or an insurer). This will allow the mediator to discuss with the parties in advance of the mediation session how to address the limitation on authority in a way which minimizes any adverse effect on the prospects of a settlement agreement being concluded.

CASE SUMMARIES AND DOCUMENTS

24 Each of the parties needs to understand every other party's views on the matters in dispute that are to be discussed at a forthcoming mediation session. This enables each party to undertake its own risk analysis and consider possible settlement options in advance. To this end, it is common for parties, prior to the mediation session, to exchange short papers (sometimes called position papers, mediation statements or case summaries) in which they set out the background to the dispute, the issues, the negotiation history and their positions. The mediator is also provided with these case summaries as a source of information on the background to the dispute.

MEDIATION GUIDANCE NOTES

- 25 One of the advantages of mediation is that it generally does not require numerous documents to be exchanged or supplied to the mediator. However, in addition to the case summaries, it is important that each party receives copies of any documents which another party considers to be of importance for the mediation. Such documents are commonly provided with the case summaries (a single lever arch file of documents is often sufficient). After reading those case summaries, the mediator may, in the course of discussions held with the parties in advance of the mediation session, help the parties identify any additional information or documents that it might be helpful to exchange.
- 26 If case summaries and documents are exchanged sufficiently far in advance of a mediation session, each party will have time to properly digest the information and prepare for the session. This helps avoid difficulties arising during the mediation session as a result of late disclosure of information and a party's consequent inability (or unwillingness) to take such information into account in the negotiations.
- 27 A party may wish to share information in confidence with the mediator in advance of the mediation. This information may, for example, relate to particular needs or interests that the party does not wish to disclose to the other party in advance of the mediation session. Such information can be provided in confidence to the mediator either orally or in a confidential paper which is sent to the mediator on the express understanding that the information in the paper is not to be disclosed by the mediator to any other party. The mediator may invite all parties to provide such confidential papers if the mediator considers this helpful to the process.

RELATIONSHIP BETWEEN MEDIATION AND ARBITRATION PROCEEDINGS

- 28 Mediation under the Rules may take place either before arbitration (or litigation) proceedings have been commenced, or in the course of those proceedings.⁶
- 29 Where mediation takes place in the course of arbitration proceedings, it may be appropriate for the arbitration to be stayed to allow time for conducting the mediation (such a stay or pause in the proceedings is sometimes referred to as a mediation window). This enables the parties to focus on the mediation without being distracted by the need to take steps in the arbitration and incurring the costs of those steps when a settlement may be imminent. In other cases, the parties may prefer to conduct the mediation without requiring a stay or pause in the arbitral proceedings.
- 30 The suggestion that mediation be used during the arbitration proceedings may be made by one of the parties. Whether or not it is helpful to build a mediation window into the timetable for the arbitration proceedings – and, if so, when that window should occur – is also a topic which may be discussed between the parties and the arbitral tribunal at the first and subsequent case management conferences provided for in Article 24 of the ICC Arbitration Rules.

⁶ Mediation can even take place after arbitration or litigation proceedings have concluded. For example, this may arise after an award has been made but prior to the outcome of enforcement proceedings or a challenge to the award before a national court, or after a court judgment has been issued and pending an appeal against that judgment.

MEDIATION GUIDANCE NOTES

- 31 Where mediation takes place before arbitration (or litigation) proceedings have been commenced, the parties may agree that the expiry of limitation or prescription periods during the mediation process shall not prevent a party from initiating arbitration or litigation proceedings in relation to the dispute. Applicable law may also contain provisions to this effect, or may provide that limitation periods will not expire whilst mediation proceedings are pending.
- 32 The ICC publishes various standard clauses referring to the ICC Mediation Rules.⁷ Clause D creates an obligation to refer a dispute to the ICC Mediation Rules, followed by ICC arbitration if required. When using Clause D, parties may wish to consider whether they do or do not want to have access to the ICC Emergency Arbitrator Provisions during the mediation process. Standard variations to Clause D are provided in order to clarify the parties' choice in this respect.
- 33 As provided for in Article 9 of the Rules, unless otherwise agreed by the parties or required by applicable law, the mediation (but not the fact that it is taking place, has taken place or will take place) is private and confidential. Consequently, as set out in Article 9(2) of the Rules, documents, statements or communications which are submitted by another party or by the mediator in or for the mediation proceedings may not be produced as evidence in any arbitration, litigation or similar proceedings, unless they can be obtained independently by the party seeking to produce them in those proceedings. The same applies to views expressed, suggestions made regarding settlement, or any admissions made by another party in the mediation.

⁷ The standard clauses can be found in ICC Publication 865 containing the ICC Arbitration Rules and the ICC Mediation Rules, on the ICC website (www.iccwbo.org) and in the ICC Dispute Resolution Library (www.iccdri.com).

34 In the course of an arbitration, the parties may agree that they would like a sole arbitrator or a member of a tribunal (usually the chairman) to assist the parties in negotiating a settlement of their dispute by acting as a mediator. The parties may further agree that if the mediation does not produce a settlement of all issues in dispute in the arbitration, then the mediator may return to the role of arbitrator and proceed to make or participate in the making of an award in the arbitration. This practice is quite common in some jurisdictions, but used rarely, if at all, in others. In those jurisdictions where it is rarely used, a common concern is that if, while acting as mediator, an arbitrator meets in private with one party without all other parties present, or otherwise acquires information in confidence from one party which is not shared with all other parties, the rules of due process will not have been respected. A consequence might be that the arbitrator is challenged, that a subsequent award made by the arbitrator is susceptible to being challenged or that its enforceability is impaired. Because of the potential risks in some jurisdictions, Article 10(3) allows a mediator to act as an arbitrator in the same dispute only when all of the parties have consented thereto in writing. In any event, parties and their advisers may wish to consider the pros and cons of using an arbitrator as mediator, and the steps that need to be taken to minimize the risk of jeopardizing the arbitral process and the enforceability of any award.

35 Where the parties agree terms of settlement through mediation proceedings conducted in the course of arbitration proceedings, they may be able to record the terms of settlement in a consent award pursuant to Article 32 of the ICC Arbitration Rules. Such a consent award may be of assistance where, for example, one or more parties wishes to be able to enforce the settlement agreement as an arbitral award.

MISCELLANEOUS

Co-mediation

36 It may be appropriate for two or more mediators to be appointed and to work together on the same matter. This is often referred to as co-mediation. Co-mediation may be used where there are several parties involved in the dispute, or where the parties wish to have the benefit of mediators from different cultural backgrounds or with different expertise and experience.

Independent expert

37 It may be appropriate, with the agreement of the parties, for the mediator to be assisted by an independent expert who can advise the mediator on technical issues which it is important for the mediator to understand in assisting the parties to resolve their dispute.

Legal representation

38 In the Rules, there is no requirement or expectation that parties will be represented by lawyers (either in-house or external). However, it is common, particularly in cross-border disputes of the type that are typically referred to mediation under the Rules, for lawyers to assist parties in some or all parts of the mediation process.

Costs

39 Article 6(6) of the Rules provides that, unless agreed otherwise in writing by the parties, all deposits requested and costs fixed in respect of the mediation proceedings shall be borne by the parties in equal shares. Article 6(7) provides that a party's other expenditure shall remain the responsibility of that party, unless otherwise agreed by the parties. There may be instances where the parties agree to vary these default provisions. For example, in advance of the mediation, one party may agree in any event to bear all costs of the mediation process in order to encourage a counterparty to participate. Alternatively, the parties may agree that, in the event that the dispute is not settled through the mediation, the costs of the mediation should be allocated between the parties by the arbitral tribunal or court in any subsequent arbitration or litigation. The costs of the mediation may also be allocated differently under the terms of any settlement agreement arrived at through the mediation.

Recommended terms of settlement

40 Without imposing terms of settlement on the parties, the mediator may, if requested by all parties, recommend terms of settlement for their consideration.

Combining mediation with other settlement procedures

41 The parties and the mediator may agree that in certain circumstances (e.g. where a settlement agreement has not been arrived at after a certain period of time) the parties may jointly request the mediator to provide a non-binding evaluation of the merits of the dispute in order to assist them in reaching a negotiated settlement agreement.

ICC COMMISSION ON ARBITRATION AND ADR

The ICC Commission on Arbitration and ADR is the ICC's rule-making and research body for dispute resolution services and constitutes a unique think tank on international dispute resolution. The Commission drafts and revises the various ICC rules for dispute resolution, including arbitration, mediation, experts and expertise, and dispute boards. It also produces reports and guidelines on legal, procedural and practical aspects of dispute resolution. In its research capacity, it proposes new policies aimed at ensuring efficient and cost-effective dispute resolution, and provides useful resources for the conduct of dispute resolution. The Commission's products are published regularly online, in the ICC International Court of Arbitration Bulletin and as individual booklets.

The Commission brings together experts in the field of international dispute resolution from all over the globe and from numerous jurisdictions. It currently has over 600 members from some ninety countries. The Commission holds two plenary sessions each year, at which proposed rules and other products are discussed, debated and voted upon. Between these sessions, the Commission's work is often carried out in smaller task forces.

The Commission aims to:

- Promote on a worldwide scale the settlement of international disputes by means of arbitration, mediation, expertise, dispute boards and other forms of dispute resolution.*
- Provide guidance on a range of topics of current relevance to the world of international dispute resolution, with a view to improving dispute resolution services.*
- Create a link among arbitrators, counsel and users to enable ICC dispute resolution to respond effectively to users' needs.*

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