

# **MEDIATION RULES AND PROCEDURES**

## CLAUSE: 1

### **PURPOSE**

The purpose of setting forth the **INTERNATIONAL DISPUTE RESOLUTION INSTITUTE ( I D I )** “ hereinafter referred to as the ‘*Institute*’ ”, Mediation Practice and Procedures is to elucidate the procedures and principles to be followed by the *Institute’s* notified mediators, advisory panelists and parties involved in the resolution of issues and disputes that are subjected for resolution via mediation, at both national and international levels. The Mediation Procedure is in compliance with Centre for Effective Dispute Resolution (CEDR) Model Mediation Procedure, and International Mediation Institute (IMI) Model Mediation Rules 2016.

## CLAUSE: 2

### **MECHANISM AND SALIENT FEATURES OF MEDIATION**

1. 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.

2. The principal features of mediation are that it:

- a) involves a neutral third party to facilitate negotiations;
- b) is quick to set up and is inexpensive, and, in most circumstances, is without prejudice and confidential;
- c) involves party representatives with sufficient authority to settle;
- d) is flexible, enabling the process to be designed and managed by the Mediator to suit the parties, in consultation with them;
- e) puts the parties in control (unlike litigation/arbitration);
- f) 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;
- g) 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.

### CLAUSE: 3

#### **REFERRAL TO MEDIATION**

Referral of a dispute to a mediator or to the *Institute* for mediation may be as a result of:

- a) referral by a Court/Tribunal/Regulatory Body/Semi-Governmental Body/Governmental Body for the resolution of a dispute through mediation in accordance with and as stipulated in the laws of that particular jurisdiction;

- b) voluntary referral by all parties before/after litigation has commenced;
- c) referral by one party requesting the *Institute* to secure the involvement of other parties into mediation before/after litigation has commenced;
- d) the provision of a dispute resolution clause in the contract/agreement, stipulating the use of mediation as a step in the parties' agreed dispute resolution process;
- e) the provision for use of mediation within an organization/industry's bye-laws or policy framework;
- f) parties referring a case to *Institute* are encouraged to include a copy of any order or document indicating referral of cases for mediation;
- g) 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.

**CLAUSE: 4**

**APPOINTMENT OF THE MEDIATOR:**

1. The parties may jointly select a mediator from *Institute*'s panel of mediators, list of which may be provided to them by the *Institute*.

2. The parties may also jointly request, in writing, for the appointment of a mediator, which is not listed in the Institute's panel of mediators.
3. In the event, if parties wish the Institute to render assistance with regard to selection from the panel of Institute's notified mediators, they shall submit a written request thereto with the Institute. The request so filed, must contain the names, (e-mail) addresses, telephone and fax numbers of the Parties and their representatives, if any, as well as a general description of the dispute. Upon receipt of the said request, the Institute shall send to the parties:
  - a list of notified mediators empaneled with the Institute,
    - such mediators shall carefully be chosen while keeping in view the description of parties dispute,
    - and/or such selection of shortlisted mediators shall be, as per the relevant criteria as stated by the parties.
  - a copy of the Rules and a copy of the Code of Ethics,
  - an invoice for administrative charges,
4. The Parties shall together, select a Mediator from the aforementioned list. Upon confirmation of the mediator by the parties, the Institute shall inform the mediator concerned with regard to his/her selection, so the parties be contacted by the said mediator.

5. If the parties fail to reach a consensus to appoint a mediator from list shared by Institute, in this regard, the Institute shall suo moto, appoint any from the list of previously nominated mediators and shall share the same with the parties.
6. The Institute shall only nominate or appoint such mediator who, in its view, possesses the relevant skills, expertise and experience to mediate such particular dispute effectively, and who shall comply with the IMI's Code of Ethics (hereinafter referred to as the "Code"). Any mediator so nominated and all the parties to such mediation shall be required to confirm immediately to the Institute, in writing, if there is any matter which might prevent the nominated mediator from complying with the Code in relation to the mediation of such dispute, such as a conflict of interest. The Institute or the mediator himself shall, then notify all the parties of the said dispute with regard to the said conflict.
7. If the case is referred through a Court/Tribunal/Regulatory Body/Semi-Governmental Body/Governmental Body, the relevant referring Judge/Presiding Officer or Authoritative Representative has the authority, with mutual consent of both parties, in accordance with laws, to appoint a mediator.
8. If a case is referred to the Institute after appointment of a mediator from the Institute's panel of notified mediators, or otherwise if the mediator (not from Institute's panel of mediators), chooses to conduct the mediation proceedings at the

premises of the Institute, such mediator shall comply with the Rules and Code at all stages of the said mediation proceedings.

9. If the parties may, at any stage of the mediation proceedings, decide to no longer continue with the appointed mediator; and may jointly select another mediator or request the appointment of another mediator by Institute, the said request for appointment of a new mediator shall be communicated in writing to the Institute for review. The Institute shall, after consultation, appoint a new mediator within five (05) working days of receiving such request.
10. In addition to it, role of the Institute is to develop professionalism in the field of Mediation, the parties may be asked by the Institute to given consent and approve the appointment of an observer/shadow mediator in order to attend the mediation proceedings but not at the cost to the parties, provided that the observer/shadow mediator may also complies appropriately with the Code and Rules with respect to such mediation. Provided that the identity of any such observer/shadow mediator, who is proposed to attend the mediation, will be made known in advance to the parties, who are free to object to any such nomination and may also decline the same. The mediator's signature on the pre-mediation agreement also binds any said observer mediator to its terms.

11. In certain cases where it is required, subject to the nature of dispute involved, the *Institute* may recommend, subject to the agreement of parties, to use co-mediation technique by appointment of one or more of any neutral evaluator(s) (hereinafter referred to as a “co-mediator”) to advise the mediator on technical matters. If such technique of co-mediation is adopted by the parties, the said proceedings shall be convened by the mediator with assistance of any or all the co-mediators. The *Institute* however recommends, that pre-mediation agreement and/or any documents related to the process be adapted to refer the mediator in the plural and that both or all the mediators shall be signatories.

12. The circumstances in which a co-mediation technique may be recommended are:

- a. Where the number of parties or number of attendees within a party is such that it would be beneficial to have co-mediators;
- b. Where a specific technical expertise is required in order to thoroughly understand a dispute;
- c. Where the varying nationalities and cultural backgrounds of the parties. This is separate to the potential need for a translator;
- d. Personal preference of the parties.

CLAUSE: 5

**COMMENCEMENT OF MEDIATION:**

1. In event if, one of the parties approach the *Institute*, through written request, for resolution of a dispute through mediation, the *Institute* shall, inform the other party(s) and explain the process of mediation within five (05) working days after receiving such request. If the other party is in agreement regarding the same, the *Institute* shall thereafter initiate the process, otherwise, in case of the reluctance of the other party(s), the process stands terminated with due notice to the applicant party.
2. Upon joint consent of parties to mediation, a case intake form must be duly filled by both parties (such form shall be provided by the *Institute* via email or physical mail) through which the parties provide details of the dispute and/or their representatives, along with their contact information and authorization documents, and briefly describe the contents of the dispute.
3. Article 5(1) and 5(2) are not relevant for the purpose of the dispute referred by Court/Tribunal/Regulatory Body/Semi-Governmental Body/Governmental Body.

4. The *Institute* or the mediator, when agreed or appointed, shall make the necessary arrangements in order to conduct the mediation proceedings as required or agreed by the parties;
  - a. drafting the pre-mediation agreement, submitting it for approval by the parties and for their signatures, incorporating any agreed amendments if required,
  - b. compiling names and roles of attendees for the circulation amongst the parties before the mediation takes place,
  - c. facilitating agreement as to the date, start time and providing venue arrangements for the mediation when necessary,
  - d. organizing exchange of case summaries and document bundles between the parties and mediator if and when required,
  - e. setting up any pre-mediation meetings, as agreed by the parties and the mediator, if required.
  
5. If the application is in a foreign language, the party/parties shall submit the original translation obtained from official institutions to the Head Office of the *Institute*. The *Institute* does not start the process until all the application, information and documents are duly submitted.

CLAUSE: 6

**OBLIGATIONS OF THE MEDIATOR:**

The mediator shall:

1. ensure at all times that the Code is complied with in respect of mediation of the dispute, reporting any conflict of interest or other relevant matter, if any, to the *Institute* and (subject to any question of confidentiality or privilege) the parties, immediately it emerges,
2. attend any pre-mediation meetings on terms and agenda agreed by the parties, or proposed by the mediator,
3. activities of the mediator encompass the mediation sessions, but may also comprise other activities such as reporting, contacts with the Parties (either electronically, in writing or by telephone), studying papers, contacts with third parties, and drafting up agreements and such other from the commencement of the mediation onwards,
4. make contact with a representative of each of the parties before the mediation to assist in preparation for the mediation proceedings and discuss the arising issues,
5. As the Mediation is a dynamic and flexible process in itself, therefore the mediator engaged in mediation is encouraged to manage the process effectively and efficiently to the best of their knowledge and experience, without being influenced by any internal or external factors.

6. The mediator is obliged to provide the parties with equal and sufficient opportunity for resting, sound thinking and reality testing during the decision-making process.
7. The mediator is obliged to explain all the details of the mediation process to the parties and/or to their representatives, if any.
8. The Parties and the Mediator shall do their best to ensure that the Mediation proceeds in an expeditious manner.
9. At the end of the mediation, the mediator shall provide to the *Institute*, with the information related to the dispute which includes:
  - The current definition of the dispute,
  - The time spent on the dispute,
  - The negotiated value of the dispute,
  - Whether the dispute ended in agreement or not.

CLAUSE: 7

**OBLIGATIONS OF THE PARTIES:**

The parties are obliged to;

1. comply with the appointment of the mediator or with the process to select or appoint the mediator,

2. comply with the communicated date, venue and start time for the mediation (all of which be decided in prior consultation with the parties and mediator),
3. comply the with the terms of the pre-mediation agreement,
4. prepare and exchange a case summary for the mediation with respect to their approach of the dispute, provide and share all such documents which are needed for the mediation at their earliest,
5. notify the mediator and the *Institute* with the names and roles of all those attending the mediation on their behalf, so the parties and the mediator shall be informed prior to the mediation,
6. 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,
7. abide by the confidentiality provisions throughout,
8. treat the *Institute*, mediator and other persons participating in the process in an honest and respectful manner,
9. pay the mediator's fee and administrative charges in accordance with the law of the jurisdiction. In the event, the law doesn't specify the charges, the mediators fee and administrative charges shall be paid as specified in the *Institute's* fee structure prior to the commencement of mediation.

CLAUSE: 8

**PRIVACY:**

1. No person shall be present at mediation proceedings other than the mediator and the parties, or their representatives and/or advisers (if any). For the involvement of other persons in the mediation proceedings, prior consent of the parties shall be required.
2. If either Party intends to be represented through any person during the mediation proceedings, such representative must be authorized to perform all (legal) acts that are necessary for the mediation, including the entering into agreement(s). If the mediator so require, a written power of attorney must be produced confirming the authority of such representative.
3. Documentation intended to be treated as confidential by the mediator or the *Institute* (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 shall not be circulated without express authority.

CLAUSE: 9

**CONFIDENTIALITY:**

1. The entire Mediation process shall be strictly confidential and remain so even after the Mediation has ended. Parties to the said process undertake not to disclose, directly or indirectly, to any third party (including courts and/or arbitrators) any information, concerning the mediation, the positions adopted, proposals made or the information supplied within the mediation, either orally or in writing.
2. The parties undertake not to reveal, quote from, refer to, paraphrase or in any other way invoke any documents that have been revealed, shown or otherwise disclosed during the mediation by any other person involved in the mediation. This obligation shall not apply if and insofar the party already had or could have had this information at his/her disposal independently of the mediation. Such documents that are otherwise admissible in an arbitral or judicial proceeding will not be rendered inadmissible by reason of their use in mediation proceedings.
3. Documents as referred herein above includes the pre-mediation agreement, notes or minutes drawn up by the parties or by the mediator within the framework of the mediation proceedings, or any other document insofar as the Parties have agreed shall

remain confidential, as well as other data carriers, such as audiotapes, videotapes, photographs and digital files in whatever form.

The provisions of Articles 9(1), 9(2), and 9(3) also apply to the Mediator.

4. Right to confidentiality of any party to the mediation shall be waived if, it uses anything that has transpired during the mediation in evidence against any other party and/or against the *Institute*, or its board members or persons employed with or otherwise involved with the *Institute*, examine or cause to examine, the mediator or other persons involved in the mediation as witness or with regard to any information supplied and/or recorded during, or in connection with the mediation, or regarding the contents of the agreement as referred to in Article 9 (1).
5. All the information supplied to the mediator by either party in absence of the other party, shall be treated by the mediator as confidential, unless and insofar as the party sharing such information has explicitly given its consent to disclose the said information during the mediation.
6. The above-mentioned provisions of Articles 9 shall not apply in the case of:
  - a. information concerning criminal acts in respect of which there exists a statutory obligation or a statutory right to report,

- b. information concerning the threat of a criminal act, and
- c. complaints, liability or any disciplinary proceedings. In such an event, the mediator shall be released from his/her obligation to observe confidentiality insofar as may be necessary in order to defend himself against the claims.

CLAUSE: 10

**CONCLUSION OF MEDIATION:**

1. The mediation proceedings may end in a number of ways:
  - a. If a settlement of the dispute in whole or part is achieved, after all the matters as agreed, are written and signed by the parties to be binding.
  - b. If the mediator realizes that the negotiations between the parties are progressing towards an unreasonable or illegal conclusion.
  - c. If the mediator advising the parties that a settlement, for the time being, at least, cannot be reached.
  - d. If one or more parties leaving the mediation before settlement is achieved.
  - e. If an agreed adjournment for such time and on such terms as the parties and the mediator desire for the best interest.

- f. If withdrawal of the mediator in accordance circumstances as set out in the Code occur.
- g. If production of a document or summary or recommendations from a mediator, is requested by all the parties.
- h. If a written statement from the mediator to the parties, stating that the mediation has ended, has surfaced.
- i. If a written statement from one party to the other party or parties and to the mediator, stating that it withdraws from the mediation, has surfaced.
- j. If termination of the mediation shall leave the obligations of confidentiality and payment of the parties under the mediation agreement intact.

In all such circumstances the Mediator shall make a brief report and submit the same with the *Institute*

CLAUSE: 10

**SETTLEMENT AGREEMENT:**

1. In the event if there is partial or full agreement by the parties, the mediator shall, alongwith the mediation advocate or legal counsel, facilitate to draft a settlement agreement wherein the terms, as agreed upon, are explained in detail and are in accordance with agreement of all the parties.

2. The mediator shall ensure that the agreements made by the parties are properly recorded in the settlement agreement. The parties shall solely be responsible for the contents of the said agreement. The Parties shall have the right to call the advice of an external expert in this regard.
3. The Mediator shall not be liable for the contents of the agreement concluded by and between the Parties nor for any damage that may arise from the same.
4. The Parties shall jointly decide and record in writing to what extent the contents of the settlement agreement shall remain confidential.
5. Once the settlement agreement has been drafted and has duly been signed by both the parties and mediator, the *Institute* shall approach the relevant court for submission of the said agreement and the court shall thereafter issue a decree in terms of the ADR Act, 2017.

CLAUSE: 11

**FEES AND EXPENSES:**

1. Fee schedule of the *Institute* shall be valid for its administrative charges and for the mediator's fee with regard to the disputes directly referred by the parties without invoking the jurisdiction of Court.
2. For cases referred directly by the Court, fee structure given in the relevant law of that particular jurisdiction shall be followed. If the law is silent on the fee, the parties shall adhere to the fee structure as annexed with these Rules.
3. If the *Institute* has provided business to any mediator, the mediator shall pay 20% of the mediator's fee, as agreed between the mediator and the parties in the dispute.
4. The parties shall pay a one-time mediator fee in advance whereas administrative charges shall be payable on every date of the mediation proceedings.
5. The responsibility to pay the fee lies with the parties and unless otherwise agreed by the parties, both parties shall be liable to pay equal proportions of the mediator fee as well as the administrative charges.
6. In the event of failure to pay the fee and administrative charges, the *Institute* reserves the right to suspend the mediation proceedings.

CLAUSE: 11

**COMPLAINTS AND FEEDBACK:**

Any formal complaint or feedback about the *Institute* or any mediator empaneled with the *Institute* may be made at [www.wakeell.com](http://www.wakeell.com)