



# **The Model Mediation Agreement of the Chartered Institute of Arbitrators**

by  
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## The Model Mediation Agreement of the Chartered Institute of Arbitrators

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We may fix the date when the Mediation Sub-Committee of the CIArb was first given, by the Practice and Standards Committee (PSC), the task to prepare a Model Mediation Agreement, at June 14, 2007, when a “thread” was opened under that title in the Forum of the Mediation Sub-Committee by the then Chairman, Alan Limbury. At the time, however, the Sub-Committee was busying itself on other more urgent tasks, inter alia the preparation of the CIArb Mediation Rules and Guidelines, and the real work began in April 2008. Then, and during the period devoted to the project, the Sub-Committee was composed of Andrew Burr and David Cornes (England), Giovanni De Berti (Italy), Jeremy Lack (Switzerland), Christopher Lau (Singapore), Alan Limbury (Australia), Peter Michaelson (United States), Mercedes Tarrazón (Spain) and Colin Wall (Hong Kong): not every country and not even every continent was represented, but it could be taken as an acceptable mix of civil and common-law jurisdictions.

At the beginning, the approach chosen was to take into consideration some precedents and derive from them a first common draft on which to work. A text jointly prepared on a previous occasion by Jeremy Lack and Alan Limbury was taken as the base for the work. After some time and work had been devoted in this way, the Sub-Committee took stock of the position during a meeting held in London on September 23, 2008, the day before the first mediation symposium of the CIArb. It was agreed then that the draft circulated until then was too detailed and complex, and that a new approach should be followed: the draft Model Mediation Agreement would be covering the basic elements of a mediation. In this way it would be more flexible and adaptable to the needs of both the different jurisdictions and the specific features of the actual case.

As a basis for the creation of this draft, it was also decided that a framework document would be prepared. This was to have the form of a schedule or questionnaire to be circulated to the members of the Sub-Committee. David Cornes volunteered to prepare it. He took as a guideline the CIArb Mediation Rules, by then officially adopted by the Institute. They covered most of the ground that the Sub-Committee had already discussed. By expressly incorporating them, our workload (and potential debate) would be drastically reduced, in size and time.

In the course of the work, the framework document had successive and increasingly sophisticated versions, covering first of all the necessary core provisions and then, in a separate section, what could be considered as optional provisions and/or explanatory notes. In the latter section, the existing draft mediation agreement was cross-referenced to see whether the Rules covered its provisions, and it was discovered that generally the Rules did cover most of them.

To give examples, the core provisions covered items such as dates, names and description of the dispute, but also the express incorporation of the Rules, amendments to those (in a Schedule to be attached), payments and exclusion of the mediator’s liability. The optional provisions and explanatory notes referred to procedural aspects, settlement in writing, conflict of interest, privilege: as indicated, upon examination most of these aspects were fully covered by the Rules. Most but not all: certain cases, like for instance the setting of the duration of the mediation (with possible impact on the statute of limitation) were considered to be among the clauses to be inserted. In short, every possible choice was taken into consideration

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as a candidate core provision, always with a view of creating an essential (as opposed to all-inclusive) model. Notes and optional provisions would be attached to the model agreement to alert the users to special or local needs.

By the beginning of December 2008 the work of circulating the framework document, collecting and integrating answers and comments had been substantially concluded. The next stage was to start drafting the Model Mediation Agreement, and again David Cornes volunteered to prepare a draft, based on the text of his own mediation agreement but taking into account all information gathered through the framework document.

In this very first new draft, certain features of what is now the Model Mediation Agreement were already present:

- The operative part of the Agreement covered only a few pages (three, now four) and few clauses (six, now eight).
- Clear and exclusive reference was made to the CI Arb Mediation Rules, allowing only for specific amendments to be clearly and expressly listed in an attached Schedule (and not simply “subject to different agreement between the parties”).
- A number of Schedules attached to the Agreement would cover its “movable” parts, such as the description of the dispute, dates, possible amendments (as seen above), mediator’s fees and their apportionment, attendance, the confidentiality agreement and notes and optional provisions, calling the attention of the signatory parties to matters relating to the European Convention on Human Rights, assessment of costs in England, Wales and Northern Ireland and the formal transcript of records, as the case may be.

The following months saw a lively correspondence being exchanged between the members of the Sub-Committee. Actually, a face-to-face meeting in Paris had been planned at the beginning of February 2009, taking advantage of the fact that a number of us were attending the ICC International Mediation Competition, as mediators and/or judges. However, the combination of our duties and of a very full and pleasurable social agenda, made that impossible. Resorting to correspondence allowed us to finally agree on a text, that was submitted to the meeting of the PSC held on June 22, 2009. That text was approved by the authorities of the CI Arb and is now available on the new website.<sup>1</sup>

As already mentioned, our aim was to put at the disposal of mediators and parties the simplest of mediation agreements, which however could not be used without adherence to the CI Arb Mediation Rules. Actually, this would be the hallmark of a mediation conducted under the aegis of the Institute, and every improvement, refinement and updating of the Rules would be automatically incorporated in future agreements without the need of revising the Model Mediation Agreement.

Looking now at its text, a few comments and explanations may be of some interest to our readers. The first thing to be noted is that the Model Mediation Agreement can only be read and understood in conjunction with the Rules. Clause 2.1 leaves no doubts about this:

“The Mediation Rules of the Chartered Institute of Arbitrators (‘Mediation Rules’) effective at the Effective Date (as defined in Schedule 1) are incorporated into, and form part of, the Agreement save as otherwise provided by any amendments and/or additions set out in Schedule 2. *If no such amendments and/or additions are set out in Schedule 2, then there are deemed to be no such amendments and/or additions.*” (Emphasis added.)

References to the Rules, both general or specific ones, are interspersed throughout the text. Indeed, a first debate among the Sub-Committee members centred on whether the Rules

<sup>1</sup> <http://www.ciarb.org/information-and-resources/21%20Mediation%20Rules.pdf> [Accessed December 4, 2009].

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should be physically attached to the Model Mediation Agreement as one of its schedules. In favour of this solution was the argument of expediency and user-friendliness, coupled with the fear that some “simple soul” would attach to the agreement some other set of mediation rules, making the whole at best complex, at worst meaningless. In favour of a simple but clear reference to the Rules was the argument, indicated above, of the prompt and automatic adaptation of the Model Mediation Agreement to changes of the same. The latter argument carried the day.

In line with the aim of expediency and simplicity, the Model Mediation Agreement contains very few and modestly sized blank spaces to be filled in. Where lengthier or more complex text was likely to be needed, the task was reserved to the Schedules. This is apparent from the very recitals, where the description of the “Dispute... arisen between the parties” is delegated to Sch.1. The latter, in turn, requires a “Brief description of the Dispute [e.g. court file reference number]”. The same Sch.1 contains the definition of effective date, about which more later.

Another point that attracted much debate was the first part of cl.1.3, which now states:

“If the Parties are unable to reach a settlement during the Mediation, and only if all the Parties so request and the Mediator agrees, the Mediator may produce for the Parties a non-binding recommendation on possible processes or terms of settlement.”

The debate was not so much on the “evaluative” flair of recommending settlement terms, rather on recommending other possible processes (arbitration, early neutral evaluation, etc.). Some of us would fear that by doing this mediators would seriously overstep their remit, giving, with inadequate instructions, a kind of advice more in the role of the parties’ lawyers. In the end, it was concluded that proposing, upon express request by the parties, a range of procedural possibilities would not run counter to the role of the mediator and indeed would reflect the pragmatic approach that we should be applying to help our clients in resolving their disputes.

It was clarified, in the same cl.1.3, that,

“[t]his will not attempt to anticipate what a court or arbitrator might order or award but will set out what the Mediator suggests are appropriate ways of resolving any outstanding issues or possible settlement terms in all of the circumstances of the Dispute”,

and would help to counter any submission by counsel, or assumption by judges, maybe in jurisdictions less experienced in mediation, that such recommendation would be akin to an early neutral evaluation of the legal merits of the dispute.

Clause 3 of the Model Mediation Agreement, dealing with confidentiality and privilege, is again referring to the Mediation Rules, namely r.12.1, which states:

“[T]he Institute, the parties, their representatives, their advisors and the mediator(s) shall keep confidential all information (whether given orally, in writing or otherwise) produced for, or arising out of or in connection with, the mediation passing between any of the participants and between any of them and the mediator made for the purposes of the mediation, including the fact that the mediation is taking place or has taken place.”

Clause 3.2 of the Model Mediation Agreement further and specifically provides that:

“Following termination of the Mediation, the provisions of Rules 1 and 12 of the Mediation Rules shall continue in effect as to all information (whether given orally, in writing or otherwise) produced for, or arising out of or in connection with, the Mediation passing between any of the Parties and/or between any of them and the Mediator and made for the purposes of the Mediation.”

There was some discussion as to whether or not every individual attending the mediation should be expressly bound into the confidentiality and privilege requirements of the mediation

agreement. That is something that has not been routinely done in England up to now but has been adopted in other parts of the world. It was agreed that it was no longer acceptable for the parties to sign the mediation agreement and, thereby, purport to bind all the attendees, including experts and the like, to confidentiality because that might not be effective in law. So the Model Agreement contains, in Sch.4, under the title “Attendance and Confidentiality Agreement”, a requirement that all the persons attending the mediation, including the parties’ representatives, their lawyers, experts, and any additional advisors to the parties, sign that Schedule on their own behalf under the following words:

“In consideration of my being permitted to attend the Mediation taking place under the provisions of the Agreement to which this Schedule 4 is part, I agree to be personally bound by the without prejudice nature and the confidentiality provisions of the Mediation Rules (as defined in Clause 2.1 of the Agreement, including but not limited to Rules 1 and 12 of the Mediation Rules. I also agree to be personally bound by Clause 5.1 of this Agreement (Exclusion of Liability and Indemnity).”

The interaction of these provisions was examined with special attention by the Sub-Committee after the issue of the judgment in the English case *Farm Assist (No.2)*.<sup>2</sup> In that case, some considerable time after a mediation had taken place a mediator was served with a witness summons seeking her attendance at court to give evidence. She made an application to the court to set aside that witness summons. Ramsey J. examined the current state of English law in mediation in relation to without prejudice, privilege and confidentiality. The judge’s conclusions, with regard to confidentiality, were that mediation proceedings are confidential both as between the parties and as between the parties and the mediator. As a result, even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but, where it is necessary in the interests of justice for evidence to be given of confidential matters, the courts will order or permit that evidence to be given or produced. On the facts of the case before the court, the application to set aside the witness summons was dismissed.

A significant element in reaching this conclusion was highlighted by the judge. Namely, calling the mediator to give evidence would not be contrary to the express terms of the mediation agreement which, in that case, limited her appearance to being a witness in proceedings concerning the underlying dispute. That limitation would not apply to the dispute before the court, which was an application to set aside the settlement agreement entered into at the mediation, as having been improperly obtained by oppression.

The decision might have been different if the mediation agreement had prevented the parties from calling the mediator to give evidence not only in relation to the underlying dispute but also in relation to any disputes arising out of or in connection with the mediation itself. As stated by the judge himself in *Farm Assist (No.2)*,<sup>3</sup> even such a provision may not be conclusive in the eyes of a judge, but rather a factor to be taken into account in a decision as to whether a mediator should be required to give evidence.

The Sub-Committee considered that cl.3 of the Model Mediation Agreement (“Confidentiality and Privilege”) refers to:

“all information (whether given orally, in writing or otherwise) produced for, or arising out of or in connection with, the Mediation passing between any of the Parties and/or between any of them and the Mediator and made for the purposes of the Mediation” (emphasis added),

<sup>2</sup> *Farm Assist Ltd (In Liquidation) v Secretary of State for the Environment, Food and Rural Affairs (No.2)* [2009] EWHC 1102 (TCC); [2009] B.L.R. 399; David Cornes, “Mediator Fails to Have Witness Summons Set Aside: *Farm Assist Ltd v Secretary of State for the Environment etc (No.2)*” (2009) 75 *Arbitration* 583.

<sup>3</sup> *Farm Assist Ltd (No.2)* [2009] EWHC 1102 (TCC).

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which is a very broad formulation. Clause 6.1 (“Exclusion of Liability and Indemnity”) then bars the parties from calling the mediator to give evidence in any separate proceedings “in relation to or arising out of the Dispute and/or the Mediation”, which employs the same wording, and provides for indemnity costs.

In the Mediation Rules, r.12.1 (“Confidentiality”) reflects the broad cl.3 wording recited above and r.14.1 (“Mediator’s Role in Subsequent Proceedings”) refers to other proceedings “arising out of the mediation or any other dispute in connection with the same matter”. The Sub-Committee concluded that no changes in the wording of the Model Mediation Agreement were necessary, since the relevant clauses appeared already to deal with this issue.

Clause 4 of the Model Mediation Agreement deals with the start date and termination of the mediation. Namely, with regard to the former, it provides that: “The Mediation shall begin on the Effective Date (as defined in Schedule 1)” and Sch.1 in turn provides that:

“‘Effective Date’ means [insert date of start of preparation for the Mediation] or if no such date is here stated, the date of this Agreement.”

These provisions take into consideration the usual practice of signing the mediation agreement on the (first) day of the mediation, while often documents and communications have been exchanged before that date, but specifically in view of the mediation. These provisions allow the parties and the mediator to refer the effect of the mediation agreement back to the true beginning of the mediation process.

Finally, in the last attachment to the Model Mediation Agreement, titled “Notes and Optional Provisions”, an “Important Note” cautions the reader in no uncertain terms that:

“The CI Arb Model Mediation Agreement is drafted specifically for use with the Mediation Rules of the Chartered Institute of Arbitrators, which are expressly incorporated by reference into the Agreement. The CI Arb Model Mediation Agreement is not suitable for use with mediation rules other than those of the Chartered Institute of Arbitrators. The Mediation Rules of the Chartered Institute of Arbitrators can be found at <http://www.ciarb.org>.”

The last reference to the CI Arb website is the result of an interesting debate on the risks of online communications. It had been proposed originally that it would have been very user-friendly to include the internet link to the page of the website containing the Mediation Rules: a mere click would have been sufficient to reach them. It was energetically and authoritatively objected that we could not take the risk of having the proper legal interpretation of an agreement all upset because the CI Arb webmaster had moved the Rules to a different web address without realising that he was affecting the legal rights of third parties. The argument had weight and our Sub-Committee took the course of making reference only to the general internet address, leaving the researcher to meander through our renewed and improved website to fish out the page in question: less user-friendly maybe, but certainly more prudent in its ultimate results.

Will the Model Mediation Agreement become a worldwide standard? The future will tell.

### CIARB MODEL MEDIATION AGREEMENT

This Mediation Agreement (the “Agreement”) is made on [Insert Date] between [Insert names and addresses of the parties] (collectively referred to as “the Parties” and individually as a “Party”) and [Insert name and address of the mediator] (“the Mediator”).

#### WHEREAS

- A. A dispute (briefly described in Schedule 1 and called “the Dispute”) has arisen between the Parties, and
- B. The Parties have requested the Mediator to assist them to resolve the Dispute by mediation (the “Mediation”) in accordance with the terms of the Agreement.

**IN CONSIDERATION** of the mutual agreements set out below

**IT IS AGREED BETWEEN THE PARTIES AS FOLLOWS:**

**1. THE MEDIATOR, MEDIATION DATES, VENUE AND RECOMMENDATION**

- 1.1 The Parties appoint the Mediator to assist them to resolve the Dispute in accordance with the Agreement.
- 1.2 If the date or dates and venue of the Mediation are not set out in Schedule 1, they shall be determined in writing by the Mediator after consultation with the Parties.
- 1.3 If the Parties are unable to reach a settlement during the Mediation, and only if all the Parties so request and the Mediator agrees, the Mediator may produce for the Parties a non-binding recommendation on possible processes or terms of settlement. This will not attempt to anticipate what a court or arbitrator might order or award but will set out what the Mediator suggests are appropriate ways of resolving any outstanding issues or possible settlement terms in all of the circumstances of the Dispute.

**2. MEDIATION RULES**

- 2.1 The Mediation Rules of the Chartered Institute of Arbitrators ("Mediation Rules") effective at the Effective Date (as defined in Schedule 1) are incorporated into, and form part of, the Agreement save as otherwise provided by any amendments and/or additions set out in Schedule 2. If no such amendments and/or additions are set out in Schedule 2, then there are deemed to be no such amendments and/or additions.

**3. CONFIDENTIALITY AND PRIVILEGE**

- 3.1 As a pre-condition to attendance of any person at the Mediation, that person must sign the agreement set out in Schedule 4.
- 3.2 Following termination of the Mediation, the provisions of Rules 1 and 12 of the Mediation Rules shall continue in effect as to all information (whether given orally, in writing or otherwise) produced for, or arising out of or in connection with, the Mediation passing between any of the Parties and/or between any of them and the Mediator and made for the purposes of the Mediation.
- 3.3 The Mediator shall be under no obligation whatever to retain any documents or electronic records made or obtained for the purposes of the Mediation. The Mediator may destroy or delete such materials at any time after termination of the Mediation under Mediation Rule 11 and/or Clause 4 of the Agreement.

**4. START DATE AND TERMINATION OF THE MEDIATION**

- 4.1 The Mediation shall begin on the Effective Date (as defined in Schedule 1).
- 4.2 The Mediation shall terminate either under the provisions of Rule 11 of the Mediation Rules or, in default of termination under the said Rule, 28 days after the date fixed for the Mediation (or, where more than one date is agreed, the last of such dates) unless expressly otherwise agreed in writing and signed by the Parties.

**5. PAYMENT**

- 5.1 Each Party shall pay the Mediator's fees and expenses set out in Schedule 3 in accordance with the payment terms in that Schedule in an amount equal to the total divided by the number of Parties unless otherwise agreed and set out in Schedule 3.



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**6. EXCLUSION OF LIABILITY AND INDEMNITY**

6.1 Subject to Rule 15 of the Mediation Rules, none of the Parties may call the Mediator as a witness in any litigation, arbitration or adjudication in relation to or arising out of the Dispute and/or the Mediation. In the event that any Party, in breach of this provision, calls the Mediator as a witness, that Party shall indemnify and hold harmless the Mediator from and against all and any costs, including legal costs that the Mediator may thereby incur.

**7. APPLICABLE LAW AND DISPUTES**

7.1 This Agreement shall be governed by the law of [ ]. The Parties hereby consent to the exclusive jurisdiction of the Courts of [ ], which shall be competent to hear any claim, dispute or difference in connection with or arising out of

7.1.1 this Agreement and/or

7.1.2 the Mediation and/or

7.1.3 any agreement in settlement and/or purported settlement of the Dispute.

The Parties agree, however, to use their best efforts, before any court proceedings are started, to settle by mediation, in accordance with the Mediation Rules, any such claim, dispute or difference.

**8. LANGUAGE OF THE MEDIATION**

8.1 The language of the Mediation shall be [ ]. Unless all other Parties and the Mediator agree otherwise, any Party producing documents or participating in the Mediation in any other language shall, at that Party's expense, provide the necessary translations and interpreters.

**IN WITNESS WHEREOF**, the Parties and the Mediator have caused this Agreement to be executed by their undersigned duly authorised representatives

For: \_\_\_\_\_  
[Insert name of Party]

By:

.....  
Signature

For: \_\_\_\_\_  
[Insert name of Party]

By:

.....  
Signature

For: \_\_\_\_\_  
[Insert name of Party]

By:

.....  
Signature

[PLEASE ADD ANY ADDITIONAL SIGNATURE LINES AS ARE NECESSARY]

**SCHEDULE 1**

**Brief description of the Dispute:** [e.g. court file reference number]



**If agreed by the date of this Agreement:**

**Date(s) of the Mediation session(s):**

**Venue(s) for the Mediation:**

“Effective Date” means *[insert date of start of preparation for the Mediation]* or if no such date is here stated, the date of this Agreement.

## **SCHEDULE 2**

The amendments to the Mediation Rules referred to in Clause 2.1 of this Agreement are as follows:

## **SCHEDULE 3**

The Mediator’s fees and expenses (including payment terms) referred to in Clause 5 are:

If an apportionment of fees other than an amount equal to the total divided by the number of Parties has been agreed, that apportionment is:

(Note: If no different apportionment is agreed, please insert “Not applicable” above.)

## **SCHEDULE 4**

### **ATTENDANCE AND CONFIDENTIALITY AGREEMENT**

[Note: to be signed by all those in attendance, including the Parties’ representatives, their lawyers, experts, and any additional advisors to the Parties.]

In consideration of my being permitted to attend the Mediation taking place under the provisions of the Agreement to which this Schedule 4 is part, I agree to be personally bound by the without prejudice nature and the confidentiality provisions of the Mediation Rules as defined in Clause 2.1 of the Agreement, including but not limited to Rules 1 and 12 of the Mediation Rules. I also agree to be personally bound by Clause 5.1 of this Agreement (Exclusion of Liability and Indemnity).

<i>Name</i>	<i>Signature</i>

Date:.....

*[Note: The Mediator, and/or any Party, may request that this Schedule be re-signed at any and all subsequent Mediation sessions, or whenever new persons attend any Mediation session.]*

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### NOTES & OPTIONAL PROVISIONS

#### 1. IMPORTANT NOTE

The CIARB Model Mediation Agreement is drafted specifically for use with the Mediation Rules of the Chartered Institute of Arbitrators, which are expressly incorporated by reference into the Agreement. The CIARB Model Mediation Agreement is not suitable for use with mediation rules other than those of the Chartered Institute of Arbitrators. The Mediation Rules of the Chartered Institute of Arbitrators can be found at <http://www.ciarb.org>.

#### 2. HUMAN RIGHTS IN EUROPE

Article 6 of The European Convention on Human Rights guarantees a right to a fair trial in the countries of the EU. The following draft additional provision is suggested:

Insert a new provision after Clause 7 as follows:

#### 8. EUROPEAN CONVENTION ON HUMAN RIGHTS

- 8.1 The referral of the Dispute to Mediation in accordance with the Agreement 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 rights of the Parties to a fair trial remain unaffected.

#### 3. COSTS IN ENGLAND WALES AND NORTHERN IRELAND

Mediation Rule 13 may have the effect that each Party has to bear its own costs of the mediation in circumstances where the Dispute did not settle in Mediation and ultimately, as part of a court decision on the merits or an Award of an Arbitrator, a Party obtains an order that the other pays the costs of the proceedings/arbitration (see *National Westminster Bank PLC v Thomas James Feeney and Linda Catherine Feeney* on appeal). If the Parties wish to try to preserve the position to argue that the costs and expenses of the Mediation should be part of a costs assessment later, the following draft additional provision is suggested:

Insert additional Rule in Schedule 2 as follows:

- 13.2A In the event that the Dispute is not settled in the Mediation, nothing in the Mediation Rules 13.1 and 13.2 shall prevent any Party from seeking to recover on a post-mediation assessment of costs pursuant to a Court order or arbitration award on costs, as the case may be, its costs and expenses referred to in the Mediation Rules 13.1 and 13.2.

#### 4. OPTIONAL PROVISION AS TO NO TRANSCRIPT OR RECORD

If there is to be a requirement that no formal note or transcript of the mediation is to be made, the following draft additional provision is suggested:

Insert an additional Rule in Schedule 2 as follows:

16. No formal record or transcript of the Mediation shall be made by any person attending the Mediation.