

UK Intellectual Property Office Model Mediation Procedure & Agreement

Based on the Ninth (A) edition of the CEDR Model Mediation Procedure and Agreement (www.cedr.com)

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UK Intellectual Property Office Model Mediation Procedure

Mediation Agreement

1 The parties ("the Parties") to the dispute in question ("the Dispute") and the Mediator will enter into an agreement ("the Mediation Agreement") based on the UK Intellectual Property Office Model Mediation Agreement in relation to the conduct of the Mediation. This procedure ("the Model Procedure") will be incorporated into, form part of, and may be varied by, the Mediation Agreement.

The Mediator

2 The Mediator, after consultation with the Parties where appropriate, will:

- attend any meetings with any or all of the Parties preceding the mediation, if requested or if the Mediator decides this is appropriate and the Parties agree;
- read before the Mediation each Case Summary and all the Documents sent to him/her (see paragraph 7 below);
- chair, and determine the procedure for, the Mediation;
- facilitate the drawing up of any settlement agreement; and
- abide by the terms of the Model Procedure and the Mediation Agreement.

3 The Mediator will not act for any of the Parties individually in connection with the Dispute in any capacity either during the currency of this agreement or at any time thereafter. The Parties accept that in relation to the Dispute the Mediator is not an agent of, nor acting in any capacity for, any of the Parties.

4 The Mediator will make the necessary arrangements for the Mediation including, as necessary:

- drawing up the Mediation Agreement;
- organising a suitable venue and dates;
- organising exchange of the Case Summaries and Documents;
- meeting with any or all of the Parties, either together or separately, to discuss any matters or concerns relating to the Mediation; and
- general administration in relation to the Mediation.

Participants

5 The Lead Negotiators must be sufficiently senior and have the full authority of their respective Parties to settle the Dispute, without having to refer to anybody else. If there is any restriction on that authority, this should be discussed with the Mediator before the Mediation. Parties should inform the Mediator prior to the date of Mediation of all persons attending the mediation on behalf of each Party.

Exchange of information

6 Each Party will prepare for the other Party(ies) and the Mediator sufficient copies of:

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

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

In addition, each Party may send to the Mediator and/or bring to the Mediation further documentation which it wishes to disclose in confidence to the Mediator but not to any other Party, clearly stating in writing that such documentation is confidential to the Mediator.

7 The Parties should try to agree

- the maximum number of pages of each Case Summary; and
- a joint set of Documents or the maximum length of each set of Documents.

The Mediation

8 The Mediation will take place at the arranged place and time stated in the Mediation Agreement.

9 The Mediator will chair, and determine the procedure at, the Mediation.

10 No recording or transcript of the Mediation will be made.

11 If the Parties are unable to reach a settlement in the negotiations at the Mediation, and only if all the Parties so request and the Mediator agrees, the Mediator will produce for the Parties a non-binding recommendation on terms of settlement. This will not attempt to anticipate what a court might order but will set out what the Mediator suggests are appropriate settlement terms in all of the circumstances.

Settlement agreement

12 Any settlement reached in the Mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, the Parties.

Termination

13 Any of the Parties may withdraw from the Mediation at any time and shall immediately inform the Mediator and the other representatives in writing. The Mediation will terminate when:

- a Party withdraws from the Mediation; or
- the Mediator, at his/her discretion, withdraws from the mediation; or
- a written settlement agreement is concluded.

The mediator may also adjourn the mediation in order to allow parties to consider specific proposals, get further information or for any other reason, which the mediator considers helpful in furthering the mediation process. The mediation will then reconvene with the agreement of the parties.

Stay of proceedings

14 Any litigation or arbitration in relation to the Dispute may be commenced or continued notwithstanding the Mediation unless the Parties agree otherwise or a court so orders.

Confidentiality etc.

15 Every person involved in the Mediation will keep confidential and not use for any collateral or ulterior purpose all information (whether given orally, in writing or otherwise) arising out of, or in connection with, the Mediation, including the fact of any settlement and its terms, save for the fact that the mediation is to take place or has taken place.

16 All information (whether oral, in writing or otherwise) arising out of, or in connection with, the Mediation will be without prejudice, privileged and not admissible as evidence or disclosable in any current or subsequent litigation or other proceedings whatsoever. This does not apply to any information, which would in any event have been admissible or disclosable in any such proceedings.

17 The Mediator will not disclose to any other Party any information given to him by a Party in confidence without the express consent of that Party.

18 Paragraphs 15 - 17 shall not apply if, and to the extent that:

- all Parties consent to the disclosure; or
- the Mediator is required under the general law to make disclosure; or
- 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 his/her being subject to criminal proceedings unless the information in question is disclosed.

19 None of the Parties to the Mediation Agreement will call the Mediator as a witness, consultant, arbitrator or expert in any litigation or other proceedings whatsoever arising from, or in connection with, the matters in issue in the Mediation. The Mediator will not voluntarily act in any such capacity without the written agreement of all the Parties.

Fees, expenses and costs

20 The UK Intellectual Property Office's fees and the other expenses of the Mediation will be borne equally by the Parties unless agreed otherwise. A schedule of the fees and expenses will be detailed on an invoice which must be settled within 28 days (unless other arrangements have been agreed with the UK Intellectual Property Office).

21 Each Party will bear its own costs and expenses of its participation in the Mediation.

Exclusion of liability

22 The Mediator shall not be liable to the Parties for any act or omission in connection with the services provided by them in, or in relation to, the Mediation, unless the act or omission is shown to have been in bad faith.

Guidance notes

The paragraph numbers and headings in these notes refer to the paragraphs and headings in the Model Procedure. The same terms ("the Parties" etc.) are used in the Model Procedure and the Model Agreement.

Introduction

The essence of mediation is that it:

- involves a neutral third party to facilitate negotiations;
- is quick and inexpensive, without prejudice and confidential;
- enables the Parties to devise solutions which are not possible in an adjudicative process, such as litigation or arbitration, and which may be to the benefit of both/all Parties, particularly if there is a continuing business relationship;
- involves representatives of the Parties who have sufficient authority to settle. In some cases, there may be an advantage in the representatives being individuals who have not been directly involved in the events leading up to the dispute and in the dispute itself.

The procedure for the mediation is flexible and this Model Procedure can be adapted to suit the Parties.

A mediation can be used:

- in both domestic and international disputes;
- whether or not litigation or arbitration has been commenced; and
- in two-party and multi-party disputes.

Rules or rigid procedures in the context of a consensual and adaptable process, which is the essence of ADR, are generally inappropriate. The Model Procedure and the Model Agreement and this Guidance note should be sufficient to enable parties to conduct a mediation.

In some cases the agreement to conduct a mediation will be as a result of an "ADR clause" to that effect in a commercial agreement between the Parties, or a court order. Where that is the case the Model Procedure and Mediation Agreement may need to be adapted accordingly.

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

The Mediation Agreement can vary the Model Procedure; the variations can be set out in the body of the Mediation Agreement, or the Mediation Agreement can state that variations made in manuscript (or otherwise) on the Model Procedure are to be incorporated.

Mediation Agreement – paragraph 1

If the UK Intellectual Property Office Mediator is asked to do so by a Party wishing to initiate a mediation, it will approach the other Party(ies) to a Dispute to seek to persuade it/them to participate.

Alternatively, the Party who has taken the initiative in proposing the mediation may wish to send a draft agreement based on the Model Agreement to the other Party(ies).

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

The Mediator – paragraphs 2-4

The success of the Mediation will, to a considerable extent, depend on the skill of the Mediator.

In some cases it may be useful to have more than one Mediator, or to have an independent expert who can advise the Mediator on technical issues. All should sign the Mediation Agreement, which should be amended as appropriate.

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

Participants – paragraph 5

The lead role in the mediation is usually taken by the Lead Negotiators, because the commercial or other interests of the Parties will often take the negotiations beyond strict legal issues.

The Lead Negotiator must have full authority to settle the Dispute, as detailed in the text of paragraph 5. Full authority means they are able to negotiate freely without restriction or limits on their authority and that the representative does not need to refer to anyone outside the mediation when negotiating and agreeing a settlement. If negotiating authority is less than full, this fact should be disclosed to the other Party and to the Mediator at least two weeks before the Mediation.

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

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

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

Professional advisers, particularly lawyers, can, and usually do, attend the Mediation. The advisers play an important role in the exchange of information, in supporting their clients (particularly individuals) in the negotiations, advising their clients on the legal implications of a settlement and in drawing up the settlement agreement.

Exchange of information - paragraphs 6-7

Documentation which a Party wants the Mediator to keep confidential from the other Party(ies) (e.g. a counsel's opinion, an expert report not yet exchanged) must be clearly marked as such. It can be disclosed confidentially to the Mediator by the Party before or during the Mediation. It will not be disclosed by the Mediator without the express consent of the Party.

One of the advantages of ADR is that it can avoid the excessive disclosure process (including witness statements) which often blights litigation and arbitration. The Documents should be kept to the minimum necessary to understand the Party's case and to give the Mediator a good grasp of the issues. The Summaries should be similarly brief.

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

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

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

The Mediation - paragraphs 8-11

The intention of paragraph 11 is that the Mediator will cease to play an entirely facilitative role only if the negotiations in the Mediation are deadlocked. Giving a settlement recommendation may be perceived by a Party as undermining the Mediator's neutrality and for this reason the Mediator may not agree to this course of action. Any recommendation will be without prejudice and will not be binding unless the Parties agree otherwise.

Settlement agreement - paragraph 12

If no agreement is reached, it is nonetheless open to the Parties to adjourn the Mediation to another time and place. Experience shows that even where no agreement is reached during the Mediation itself, the Parties will often reach a settlement shortly after, as a result of the progress made during that Mediation.

Termination- paragraph 13

A mediator may withdraw from the mediation at any time if, in their view, there is not a reasonable likelihood of the parties achieving a workable settlement; or if in their discretion there is any other reason that it would be inappropriate to continue with the mediation.

Stay of proceedings - paragraph 14

Although a stay may engender a better climate for settlement, it is not essential that any proceedings relating to the Dispute be stayed. If they are stayed, it is the responsibility of the Parties and their legal advisers to consider and, if necessary, deal with the effect of any stay on limitation periods. Suggested wording for a stay, which can be incorporated into the Mediation Agreement, is:

"No litigation or arbitration in relation to the Dispute is to be commenced [Any existing litigation or arbitration in relation to the Dispute is to be stayed] from the date of this agreement until the termination of the Mediation."

Confidentiality - paragraphs 15-19

Documents which would in any event be disclosable will not become privileged by reason of having been referred to in the Mediation and will therefore still be disclosable. The position on this may depend on the relevant jurisdiction and it is the responsibility of the Parties and their legal advisers to consider and, if necessary, deal with this.

If either Party wishes to keep confidential the fact the Mediation is taking place or has taken place, paragraph 15 can be amended by replacing the wording "save for the fact that the Mediation is to take place or has taken place" with the wording "including the fact that the Mediation is to take place or has taken place".

[Paragraph 18 provides an exception to the general requirement for confidentiality where all Parties consent to disclosure or where the Mediator reasonably considers that there are public interest or similar reasons that would require disclosure to be made; this would include any circumstances arising under the Proceeds of Crime Act 2002 or any similar legislation.]

Fees, expenses and costs - paragraphs 20-21

The usual arrangement is for the Parties to share equally the fees and expenses of the procedure, but other arrangements are possible. A Party to a Dispute, which is reluctant to participate in mediation, may be persuaded to participate if the other Party(ies) agree to bear that Party's expenses. Parties may also amend the agreement to identify that the costs of mediation may be taken into account in any court orders if there is no settlement at the Mediation.

International disputes - language and governing law/jurisdiction

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

"Language

The language of the Mediation will be [English]...Any Party producing documents or participating in the Mediation in any other language will provide the necessary translations and interpretation facilities."

Governing law and jurisdiction

The Mediation Agreement shall be governed by, construed and take effect in accordance with, [English] law.

The courts of [England] shall have exclusive jurisdiction to settle any claim, dispute or matter of difference which may arise out of, or in connection with, the Mediation."

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

Model Mediation Agreement

Parties

_____ ("Party A")

_____ ("Party B")

_____ ("Party C")

(jointly "the Parties") Add full names and addresses

_____ ("the Mediator")
Mediation Service, UK Intellectual Property Office, GY62, Concept House, Cardiff Road, Newport, NP10 8QQ

Dispute ("the Dispute")

Add brief description of the Dispute.

Participation in the Mediation

1 The Parties will attempt to settle the Dispute by mediation ("the Mediation"). The UK Intellectual Property Office Model Mediation Procedure ("the Model Procedure") [as varied by this agreement] will determine the conduct of the Mediation and is incorporated into, and forms part of, this agreement. The definitions in the Model Procedure are used in this agreement.

The Mediator

2 The Mediator[s] will be _____

Participants

3 At least one attendee on behalf of each Party at the Mediation will have full authority to settle at the Mediation as set out in paragraph 5 of the Model Procedure ("the Lead Negotiator").

4 Each representative in signing this agreement is deemed to be agreeing to the provisions of this agreement on behalf of the Party he/she represents and all other persons present on that Party's behalf at the Mediation.

Place and time

5 The Mediation will take place on _____

Confidentiality

6 Each Party to the Mediation and all persons attending the Mediation will be bound by the confidentiality provisions of the Model Procedure (paragraphs 15-19).

Mediation fee

7 The person signing this agreement on behalf of the Party he/she represents is agreeing on behalf of that Party, to proceed on the basis of the UK Intellectual Property Office's mediation fees as previously agreed by the Parties.

Law and jurisdiction

8 This agreement shall be governed by, construed and take effect in accordance with, English law. The courts of England & Wales shall have exclusive jurisdiction to settle any claim, dispute or matter of difference which may arise out of, or in connection with, the Mediation.

Human Rights

9 The referral of the Dispute to mediation does not affect any rights that may exist under Article 6 of the European Convention on Human Rights. If the Dispute is not settled by the Mediation, the Parties' rights to a fair trial remain unaffected.

Model Procedure amendments

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

If any litigation or arbitration is to be stayed, paragraph 14 of the Model Procedure should be excluded/deleted and wording along the following lines should be added in the agreement: "No litigation or arbitration in relation to the Dispute is to be commenced [Any existing litigation or arbitration in relation to the Dispute is to be stayed] from the date of this agreement until the termination of the Mediation".

Signed

On behalf of Party A: _____ Date: _____

On behalf of Party B: _____ Date: _____

On behalf of Party C: _____ Date: _____

On behalf of the Mediator: _____ Date: _____