



## CPR INTERNATIONAL MEDIATION PROCEDURE (2017)

Effective: March 1, 2017

### 1. Agreement to Mediate

The CPR International Mediation Procedure may be adopted by agreement of the parties, with or without modification, before or after a dispute has arisen. The following provisions are suggested:

#### **Pre-dispute Clause**

*The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by mediation under the [then current] CPR International Mediation Procedure [in effect on the date of this Agreement], before resorting to arbitration or litigation.*

#### **Existing Dispute Submission Agreement**

*The parties hereby agree to submit to mediation under the CPR International Mediation Procedure the following controversy:  
[Describe briefly]*

### 2. Selecting the Mediator

The mediation shall be commenced by a party sending a written request for mediation to the other party(ies) (the "Mediation Request").

Unless the parties agree otherwise, the mediator shall be selected from the CPR Panels of Distinguished Neutrals. If the parties cannot agree promptly (and in any event within 15 days of the Mediation Request) on a mediator, they will notify CPR of their need for assistance in selecting a mediator. The parties should inform CPR of any preferences as to matters such as candidates' mediation style, subject matter expertise (technical or juridical) and geographic location.

CPR will submit to the parties the names of not less than three candidates, with their resumes and hourly rates. If the parties are unable to agree on a candidate from the list within 7 days following receipt of the list, each party will, within 15 days following receipt of the list, send to CPR the list of candidates ranked in descending order of preference. The candidate with the lowest combined score will be appointed as the mediator by CPR. CPR will break any tie.

Before proposing any mediator candidate, CPR will request the candidate to disclose any circumstances known to him or her that would cause reasonable doubt regarding the candidate's impartiality. If a clear conflict is disclosed, the individual will not be proposed. Other circumstances a candidate discloses to CPR and which do not prevent that candidate to be put forward will be disclosed to the parties. A party may challenge a mediator candidate if it knows of any circumstances giving rise to reasonable doubt regarding the candidate's impartiality.

The mediator's rate of compensation will be determined before appointment. Such compensation, and any other costs of the process, will be shared equally by the parties unless they otherwise agree. If a party withdraws from a multiparty mediation but the procedure continues, the withdrawing party will not be responsible for any costs incurred after it has notified the mediator and the other parties of its withdrawal.

Before appointment, the mediator will assure the parties of his or her availability to conduct the proceeding expeditiously. It is strongly advised that the parties and the mediator enter into a mediation agreement to address, among other things, the following matters:

- (a) The location and duration of the mediation;
- (b) The scope and nature of the dispute to be the subject of the mediation;
- (c) The identity of attendees at the mediation and the authority of decision-makers for the parties;
- (d) Confidentiality;
- (e) The remuneration of the mediator and responsibility for all costs and expenses associated with the mediation;
- (f) The incorporation of this CPR International Mediation Procedure.

### **3. Ground Rules of Proceeding**

The following ground rules will apply, subject to any changes on which the parties and the mediator agree:

- (a) The process is non-binding until a written settlement agreement is signed by all parties.
- (b) Any party may withdraw at any time after attending the first meeting of the mediation (whether with the mediator separately or jointly with the other party(ies)), and before signature of a written settlement agreement, by written notice to the mediator and to the other party(ies).

- (c) The mediator shall be neutral and impartial.
- (d) The mediator shall control the procedural aspects of the mediation in consultation with the parties. The parties will cooperate with the mediator.
  - i. The mediator is free to meet and communicate separately with each party and confidentially with each party.
  - ii. The mediator will decide whether and when to hold joint meetings with the parties and whether and when to hold separate meetings. The mediator will fix the time and place of each meeting and its agenda in consultation with the parties. There will be no stenographic or other record of any meeting.
- (e) Each party will be represented at each mediation session by a business executive or other person duly authorized to negotiate a resolution of the dispute (including executing a written settlement agreement, if appropriate), unless excused by the mediator as to a particular meeting or meetings. Each party may be represented by more than one person, *e.g.* a business executive and counsel. The mediator may limit the number of persons representing each party.
- (f) Each party may be assisted by counsel to advise it in the mediation, whether or not such counsel is present at the mediation.
- (g) The process will be conducted expeditiously. Each representative will make every effort to be available for meetings.
- (h) The mediator will not transmit information and/or documents received in confidence from any party to any other party(ies) or any third party unless authorized to do so by the party transmitting the information, or unless ordered to do so by a court of competent jurisdiction.
- (i) Unless the parties agree otherwise, they will refrain from pursuing litigation or any administrative or judicial remedies during the mediation process or for a set period of time, insofar as they can do so without prejudicing their legal rights.
- (j) Unless all parties and the mediator otherwise agree in writing and unless required by the applicable law, the mediator and any persons assisting the mediator will be disqualified as a witness, consultant or expert in any pending or future investigation, action or proceeding relating to the subject matter of the mediation (including any investigation, action or proceeding which involves persons not party to this mediation).
- (k) If the dispute goes into arbitration, the mediator shall not serve as an arbitrator, unless permitted by applicable law and all parties agree in writing.
- (l) Neither CPR nor the mediator shall be liable for any act or omission in connection with the mediation, except for its/his/her own willful misconduct.

(m) The mediator may withdraw at any time by written notice to the parties

- i. for serious personal reasons;
- ii. if the mediator believes that a party is not acting in good faith; or
- iii. if the mediator concludes that further mediation efforts would not be useful.

If the mediator withdraws pursuant to (i) or (ii), he or she need not state the reason for withdrawal.

#### **4. Exchange of Information**

The parties shall attempt to agree on the documents to be provided to the mediator and used at the mediation. If any party has a substantial need for documents or other information in the possession of another party that may facilitate a settlement, the parties shall attempt to agree thereon. Either party may request a consultation (whether joint or separate) with the mediator who shall assist the parties in reaching agreement.

The parties shall exchange with each other, with a copy to the mediator, the names and job titles of all individuals who will attend the mediation.

At the conclusion of the mediation, upon the request of a party which provided documents or other material to one or more other parties, the recipients shall return the same to the originating party without retaining copies.

#### **5. Presentation to the Mediator**

At least 10 business days before the first joint mediation meeting, unless otherwise agreed, each party will submit to the mediator a written statement summarizing the background and present status of the dispute, including any settlement efforts that have occurred, and such other material and information as the mediator requests or the party deems helpful to familiarize the mediator with the dispute. It is desirable for the submission to include an analysis of the party's real interests and needs and of its litigation risks. The parties may agree to submit jointly certain records and other materials and to exchange part or all of the written statements prepared for the mediator. The mediator may request any party to provide clarification and additional information.

The parties are encouraged to discuss the exchange of all or certain materials they submit to the mediator to further each party's understanding of the other party(ies)'s viewpoints. The mediator may request the parties to submit a joint statement of facts. The parties and their representatives are not entitled to receive or review any materials or information submitted to the mediator by another party or representative without the concurrence of the latter. At the conclusion of the mediation process, upon request of a party, the mediator will return to that party all written materials and information which that party had provided to the mediator without retaining copies.

At the first joint meeting at the mediation each party may make an opening oral statement.

## **6. Negotiations**

The mediator may facilitate settlement in any manner the mediator believes is appropriate in consultation with the parties. The mediator will help the parties focus on their underlying interests and concerns, explore resolution alternatives and develop settlement options.

The parties are expected to initiate and convey to the mediator proposals for settlement. Each party shall provide a rationale for any settlement terms proposed.

Finally, if the parties fail to develop mutually acceptable settlement terms, before terminating the mediation, and only with the express consent of the parties:

- (a) the mediator may submit to the parties a final settlement proposal; and/or
- (b) if the mediator believes he/she is qualified to do so, the mediator may give the parties an evaluation (which if all parties choose, and the mediator agrees, may be in writing) of the likely outcome of the case if it were tried to final judgment.

Thereupon, the mediator may suggest further discussions to explore whether the mediator's evaluation or proposal may lead to a resolution.

The mediation will continue until:

- (a) a written settlement is reached; or
- (b) the mediator concludes and informs the parties that further efforts would not be useful; or
- (c) one of the parties or the mediator withdraws from the process. However, if there are more than two parties, the remaining parties may elect to continue following the withdrawal of a party.

## **7. Settlement**

If a settlement is reached, the parties should attempt to execute a written settlement agreement at the mediation, if at all possible.

If this is not possible, a preliminary memorandum of understanding or term sheet providing for the settlement terms should be prepared and signed or initialed before the parties separate. Thereafter, unless the mediator undertakes to do so, representatives of the parties will promptly draft a written settlement document incorporating all settlement terms. The draft will be circulated, amended as necessary, and formally executed.

If litigation or arbitration is pending, the settlement may provide that the parties will request dismissal of the case. Where the dispute is the subject of a pending judicial or arbitral proceeding, the parties also may request the applicable court or an arbitral tribunal to enter the settlement agreement as a consent judgment or award, as applicable.

## **8. Failure to Agree**

If a resolution is not reached, the mediator will discuss with the parties the possibility of their agreeing on binding arbitration or another form of ADR. If the parties agree in principle, the mediator may offer to assist them in structuring a procedure designed to result in a prompt, economical process. The mediator will not serve as arbitrator, unless permitted under applicable law and all parties agree.

## **9. Confidentiality**

The entire mediation process is confidential, as well as the existence of the mediation itself. Unless agreed among all the parties or required to do so by law, the parties and the mediator shall not disclose to any person who is not associated with participants in the process, including any judicial officer, any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms or outcome of the proceeding. If litigation or arbitration is pending, the participants may, however, advise the court or tribunal of the schedule and overall status of the mediation for purposes of litigation or arbitration management, including the timing of any mediation or the fact that the mediation has or has not yielded a settlement as the case may be. Any written settlement agreement resulting from the mediation may be disclosed for purposes of enforcement.

Under this procedure, the entire process is a settlement negotiation subject to any applicable statutes or regulations regarding the secrecy and confidentiality of such negotiations and mediation, if any. All offers, promises, conduct and statements, whether oral or written, made in the course of the proceedings by any of the parties, their agents, employees, experts and counsel, and by the mediator are confidential.

Where the law governing the mediation and/or the procedural rules of any tribunal exercising supervisory jurisdiction over the mediation recognizes concepts of the admissibility of evidence, mediation privilege or "without prejudice" privilege, offers, promises, conduct and statements are considered privileged to the process of mediation and are inadmissible as evidence or for any other purpose in any litigation and/or arbitration between the parties. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible solely as a result of its presentation or use during the mediation.

The exchange of any tangible material shall not preclude or affect any claim that such material is privileged under the applicable law.

The mediator and any documents and information in the mediator's possession will not be used in any investigation, action or proceeding, and all parties will act in accordance with this obligation unless otherwise required by the applicable law of the mediation or order of a court of competent jurisdiction, as the case may be. The mediator will promptly advise the parties of any attempt to compel him/her to divulge information received in mediation.