**Mediation Procedure**

NDR welcomes new and old users of its mediation service. Set out below are some introductory notes and the NDR Mediation Procedure. If you go ahead with a mediation the Mediation Procedure will govern how the mediation works and includes agreements on several important points, such as confidentiality.

1. Introduction

1.1 The essence of mediation is that it:

* involves a neutral third party to facilitate negotiations;
* is quick, inexpensive and confidential;
* enables the Parties to reach results not possible in processes such as litigation or arbitration;
* may benefit *both* parties, (particularly if there is a continuing business relationship);
* is usually on the basis that each party (or a person representing that party) will participate with authority to settle the dispute.

1.2 The procedure for mediation is flexible and can be adapted to suit the parties.

1.3 Mediation can be used:

* whether or not litigation or arbitration has been started;
* in two party and multi-party disputes;
* in English and international disputes.

1.4 The success of the Mediation will, to a large extent, depend on the skill of the Mediator. It is very important for the Mediator to have had specific training and experience. NDR has its own body of trained and experienced mediators and can identify suitable mediators.

1.5 If NDR 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.

1.6 Who attends the Mediation? Each party to the Dispute (“the Parties”) should attend in person. Where a party is an organisation, it should be represented by someone at a senior level. (There may be an advantage in the person representing the organisation being someone who has not been directly involved in the events leading up to the dispute. (Further notes about this are in the Appendix below)

* Lawyers or other advisers. For example, a solicitor, a barrister and or another type of professional (collectively referred to as “Advisers”)
* Insurers, if any. If a party is insured in respect of the dispute, it is often important that a senior representative from the insurer attend as well.

1.7 Neither NDR nor any of its mediators will give legal advice. Parties are recommended to seek legal advice on their Dispute (for example, on the following point).

1.8 Although a stay or proceedings (a formal pause in proceedings, ordered by the court) may engender a better climate for settlement, it is not however essential that any proceedings relating to the Dispute should be stayed. If they are stayed, the effect on limitation should be considered. Although under English law the parties can agree to limitation periods not running, the position may differ in other jurisdictions and the position on this should be checked.

1.9 Rules or rigid procedures in the context of a consensual and adaptable process, which is the essence of mediation, are generally inappropriate. Some rules, however, are necessary, and the Agreement to Mediate and this Mediation Procedure (which is part of the Agreement to Mediate) should be sufficient to enable the parties to conduct a mediation.

*Further introductory notes for mediations in commercial cases appear in the Appendix on page 7.*

2. The Mediation Procedure

2.1. Agreement.

2.1.1 The Parties and the Mediator will enter into an Agreement to Mediate (which incorporates this Mediation Procedure) setting out the terms relating to, and the conduct and procedure of, the Mediation.

2.1.2 The Agreement to Mediate and this Mediation Procedure can be amended, if required, save that no amendment shall be effective unless made in writing and signed by the Parties or Advisers on their behalf.

2.1.3 In the event of any conflict, the terms and clauses of the Agreement to Mediate shall take precedence over this Mediation Procedure.

2.2 The Mediator.

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

* drawing up the Agreement to Mediate;
* organising a suitable venue and dates;
* organising exchange of the Summaries and Documents;
* communicating (in person, by phone, correspondence or e mail) with any or all of the Parties/their Advisers, either together or separately, to discuss any matters or concerns relating to the Mediation;
* general administration in relation to the Mediation.

2.3 The Parties and other Participants.

2.3.1 Each party will notify the other party[ies], and the Mediator, of the names of those people (the Parties/their representatives, any Advisers, any witnesses etc), each party intends will be present on its behalf at the Mediation. Any subsequent changes should also be notified immediately.

2.3.2 Those representing the Parties have authority to settle the Dispute.

2.4 Exchange of Information.

2.4.1 Each party will exchange with the other and send to the Mediator, at least two weeks before the Mediation (or such other date as may be agreed between the Parties):

* the Summary - a concise summary stating its case in the Dispute; and
* the Documents - copies of all the documents to which it refers in the Summary and to which it may want to refer in the Mediation. The Documents should be kept to the minimum necessary to give the Mediator a good grasp of the issues. Preferably the Documents should be supplied to the Mediator in the form of an Agreed Mediation Bundle.
* (An advantage of mediation is that it can avoid the excessive disclosure process (including witness statements) which often blights litigation and arbitration. The Mediator will not need to see all of the papers in the case.)

2.4.2 In addition each Party may send to the Mediator (and/or bring to the Mediation) a Confidential Summary and or Confidential Documents – such further information and or documents which it wishes to disclose in confidence to the Mediator, but not to any other Party; (eg a counsel's opinion or an expert report not yet exchanged). Such documentation or information must be clearly identified to the Mediator as confidential. (Such confidential information/documents will not be disclosed by the Mediator, without the express consent of the producing party or, most exceptionally, an Order of the Court.)

2.5 The Mediation.

2.5.1 By signing the Agreement to Mediate incorporating this Mediation Procedure it is agreed:

* The Mediator is independent and neutral.
* The Mediator will work with the Parties/their Advisers by way of facilitative mediation, with a view to the Parties reaching a mutually agreed resolution of the Dispute.
* Mediation is a non-adversarial procedure in which a neutral, specially trained professional assists the Parties in reaching a settlement of a dispute or difference.
* The mediator avoids being judgmental, but rather employs techniques, which facilitate constructive and productive negotiations.
* Throughout, the Parties remain in complete control and ultimately decide whether and how a dispute will be settled.
* In the event that the Parties agree to settle, that settlement will be documented in a form called a Mediation Settlement.
* The mediation session normally begins with a brief joint meeting at which the Parties come together to understand the background to the dispute and any underlying issues, to identify each party's true interests and to explore possible ways in which the dispute might be resolved.
* Thereafter the mediator conducts a series of private sessions with each party during which settlement positions are discussed.
* The Parties may wish to consult with their legal and/or other advisers before and during the mediation as the mediator at no time acts as legal adviser to any of the parties
* The Mediator will not adjudicate, evaluate or determine the dispute.
* To the extent that the Mediator might appear to one or more party to hold an opinion, it will not be interpreted as advice, guidance, or an indication as to the outcome of the Dispute.
* The mediator has full responsibility for the way in which the mediation is conducted.

2.5.2 The Mediator may terminate the Mediation if:

* after consultation with the Parties, the Mediator feels unable to assist the Parties to achieve resolution of the Dispute;
* the Mediator receives, from a source outside the Mediation, confidential information relevant to the Dispute or any party;
* the Mediator receives confidential information relevant to a client during the Mediation; or
* the Mediator in his absolute discretion considers it appropriate for any other reason (which reason the Mediator may decline to give to the parties, in which event the Parties undertake not to pursue the Mediator in any way for an explanation).

2.5.3 The Mediation shall end if a settlement is reached by the Parties and reduced into writing and signed. No settlement shall be deemed to have been concluded, nor any Settlement Agreement deemed to have been reached unless and until:

* it is reduced into writing; and
* signed by the Parties and/or their Advisers.

(See paragraph 2.6.7 below regarding the confidentiality of any settlement which may be reached.)

2.5.4 In cases where a settlement is not reached on the day of the Mediation, any mediation follow-up such as continuing discussions and communications between the Mediator and the Parties shall be governed by the terms of the Agreement to Mediate and this Mediation Procedure so that, in particular, the arrangements concerning confidentiality and without prejudice communications shall continue to apply. (No further fee will be payable without the Parties’ written consent.)

2.6 Confidentiality

2.6.1 By signing the Agreement to Mediate incorporating this Mediation Procedure it is agreed as follows:

2.6.2 The Parties and the Mediator agree to keep confidential all information and documents exchanged before and during the Mediation (and during any Mediation follow-up initiated by the Mediator) unless

* it is so agreed in writing among all the Parties and the Mediator,
* it is required by law and ordered by the Court,
* 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 being subject or NDR being subject to criminal proceedings unless the information in question is disclosed.

Proviso 1: Documents or information, publicly available, cannot be confidential; nor is evidential information otherwise admissible, rendered inadmissible, by virtue of its use in mediation.

Proviso 2: The provisions in this Agreement and Mediation Procedure as to confidentiality are subject to any over-riding legal obligation imposed on the Mediator by the Money Laundering legislation or otherwise by law.

2.6.3 Furthermore, except for the final written agreement, the entire mediation process shall be conducted on a “without prejudice” basis, which means that nothing said or done during the process can be referred to or relied on in any subsequent proceedings (subject to the exceptions provided by law).

2.6.4 Either party may inform the court of the fact of the Mediation and whether or not agreement was reached.

2.6.5 The parties will not seek to involve the Mediator in any correspondence after the end of the mediation or call the Mediator as a witness, require him/her to produce in evidence any record or notes relating to the Mediation, in any litigation, arbitration or other formal process arising from or in connection with the Dispute and/or the Mediation; nor will the Mediator act or agree to act as a witness, expert, arbitrator or consultant in any such process.

Proviso: If, exceptionally and notwithstanding the above, the Mediator is called upon to spend time in relation to such matters the Parties will be liable together and separately to the Mediator for reasonable fees for all time spent.

2.6.6 It is recorded that there is no agreement whether, where settlement is reached at the Mediation, the settlement terms or outcome of the Mediation are to remain confidential. This is a matter for the parties to negotiate and agree upon.

2.7 Fees, Expenses and Costs.

2.7.1 The Parties shall pay the Mediator (or, upon request, the Mediator’s firm/company) remuneration for the services provided by the Mediator in connection with the Mediation in accordance with the Fee Schedule in the Agreement to Mediate (“the Fees”).

2.7.2 Although it is anticipated that the Parties will make payment according to the terms in the Fee Schedule the Parties will share equally and will be liable together and separately to the Mediator for the Fees.

2.7.3 Each party will pay its own legal costs and disbursements (expenses) in respect of the Mediation.

2.7.4 Notwithstanding the above:

* the Parties shall be at liberty to agree (and to incorporate into any written Settlement Agreement or Tomlin Order) such terms on costs as they think appropriate;
* there will be a presumption that, unless it is otherwise agreed or otherwise ordered by the court, the Fees and all expenses, legal costs and disbursements in respect of the Mediation will, as between the Parties, be costs in the case (that is, paid by the party who loses the action to the party who wins the action, if an order for costs is made in that party's favour);
* whatever agreement the Parties may reach on costs as between themselves, paragraphs 2.7.1 and 2.7.2 above shall continue to govern the liability of the Parties to the Mediator regarding the Fees.

2.8 Liability of the Mediator

2.8.1 Where the Agreement to Mediate states that the services of the Mediator are provided to the Parties by the Mediator’s firm/company all liability for any of the services provided by or obligations owed by the Mediator shall attach to the Mediator’s firm/company and not the Mediator. Further, if a situation should arise whereby a party considers that a liability is owed to the Parties or either of them by both the Mediator and the Mediator’s firm/company it is agreed that the party or Parties will proceed solely against the Mediator’s firm/company.[[1]](#footnote-1)

2.8.2 Neither the Mediator, the Mediator’s firm/company or NDR shall be liable for any act or omission in connection with the Mediation, other than as a result of its/his/her own wilful misconduct or gross negligence. Further, the Parties agree that any liability the Mediator’s firm/company (or, where the Mediator is mediating as an individual, the Mediator) may have in respect of the Mediation shall be capped at £1 million. For the avoidance of doubt this cap is in respect of the total overall liability for all claims arising directly or indirectly out of or connected with the Mediation and “claim” shall include damages, compensation, interest, costs or any other item of claim.

2.9 Prior and Future Relationships with the Mediator

2.9.1 The Mediator will make a reasonable effort to learn and will disclose to the Parties in writing:

1. all business or professional relationships which the Mediator has/has had with any party within the past five years, including all instances in which the Mediator served in a professional capacity for any party or adverse to any party;
2. any financial interest the Mediator has in any party;
3. any significant social, business or professional relationship the Mediator has/had with an officer or employee of a party or with an individual representing a party in the Mediation; and
4. any other circumstances that may create doubt regarding the Mediator’s impartiality in the Mediation.

2.9.2 Each party and its lawyer have made a reasonable effort to learn and has disclosed to every other party and the Mediator in writing any relationships of a nature described in paragraph 2.9.1. not previously identified and disclosed by the Mediator.

2.9.3 The Parties and the Mediator are satisfied that any relationships disclosed pursuant to paragraphs 2.9.1 and 2.9.2 will not affect the Mediator’s independence or impartiality.

2.9.4 Notwithstanding such relationships or others which the Mediator and the Parties did not discover despite good faith efforts, the Parties wish the Mediator to serve in the Mediation, waiving any claim based on said relationships, and the Mediator agrees to so serve.

2.9.5 The disclosure obligations in paragraphs 2.9.1 and 2.9.2 are continuing until the Mediation is concluded. The ability of the Mediator to continue serving in this capacity shall be explored with each such disclosure.

2.9.6 The Mediator shall not undertake any work for or against a party regarding the Dispute, and pending the Mediation, any other matter.

2.9.7 The Mediator shall not personally work on any matter for or against a party, regardless of specific subject matter, prior to six months following cessation of the Mediation without the consent of the Parties.

3 Proceeds of Crime legislation

3.1 The Parties’ Advisers hereby agree and confirm to the Mediator that they have made any or all necessary disclosures relevant to the Proceeds of Crime Act 2002 (and similar and or updating legislation and relevant case law) and that if and insofar as it may be necessary they will indemnify the Mediator against the consequences of any non-disclosure.

4 Complaints

4.1 Any complaint about NDR or one of its mediators should be sent in writing to the NDR Quality Director, c/o the Scheme Administrator, c/o 1 Trinity Chare, Broad Chare, Newcastle upon Tyne NE1 3DF. A copy may also be sent by e mail to the address below.

5 Governing Law/Jurisdiction

5.1 This Mediation Procedure and the Agreement to Mediate and this is governed and shall be subject to the law and jurisdiction of England and Wales.[[2]](#footnote-2)

**Appendix**

*Further introductory notes for mediations in commercial cases:*

1. In some cases the agreement to conduct a mediation, will be as a result of an "Alternative Dispute Resolution” (ADR) clause to that effect, in an underlying commercial agreement between the parties. Where that is the case, the Agreement to Mediate may need to be adapted accordingly.
2. If mediation of a dispute is referred to NDR as a result of a mediation (or other ADR) clause in a contract, and if there is any issue with regard to the conduct of the Mediation (including the appointment of the Mediator) upon which the Parties cannot agree within a reasonable time from the date of the notice initiating the Mediation ("the Mediation notice"), NDR will, at the request of any party, decide the issue for the parties, having consulted with them.
3. Who attends the mediation? Advisers can, and usually do, attend the Mediation. They often play an important role in the exchange of information, in advising their clients on the legal implications of a settlement and in drawing up the settlement agreement. However, as mentioned above at, para 1.6 of the Introduction, where a party is an organisation, it should be represented by someone at a senior level. This is because at mediation a lead role is often taken by the Parties themselves. Further, the commercial interests of the Parties do often take the negotiations beyond strict legal issues. The person representing the organisation needs to be of sufficient seniority and have sufficient negotiating authority to make the best of the opportunities which do arise, particularly if unexpected opportunities arise.
4. International Disputes and Language. The Agreement to Mediate and this Mediation Procedure is designed for disputes in England and Wales but can be adapted for international cross-border disputes. For example, the following clause makes provisions about language etc : "*Language - The language of the Mediation will be... Any party producing documents or participating in the Mediation in any other language will provide the necessary translations and interpretation facilities."* Where the law is not English, or the jurisdiction not England and Wales, the Agreement to Mediate may need to be amended to ensure the structure, rights and obligations necessary for a mediation are applicable.

1. The Mediator may be prepared to proceed on different terms but only on the basis that different insurance arrangements are made, at the expense of the Parties. [↑](#footnote-ref-1)
2. Notes on International Disputes appear in the Appendix [↑](#footnote-ref-2)