



# **MSMS CODE OF PRACTICE FOR MEDIATION**

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## **INTRODUCTION**

The Maritime Solicitors Mediation Service (MSMS) recommends that all mediations should be conducted in accordance with this code.

This code is designed to deal with the fundamentals of mediation. It is not intended that it should cover every situation that may arise. The concept of not giving legal advice to the parties, individually or collectively, when acting as a mediator, permeates this entire code.

## **SECTION 1 – Objectives of Mediation**

Mediation is a process in which:-

- 1.1 two or more parties who are in dispute
- 1.2 whether or not they are legally represented
- 1.3 and at any time, whether or not there are or have been legal proceedings
- 1.4 agree to the appointment of a neutral third party (the mediator)
- 1.5 who is impartial
- 1.6 who has no authority to make any decisions with regard to their issues
- 1.7 which may relate to all or any part of a dispute
- 1.8 but who helps them reach their own decisions
- 1.9 by negotiation
- 1.10 without adjudication.

## **SECTION 2 – Qualification and Appointment of Mediator**

- 2.1 Every mediator must comply with the criteria and requirements for mediators stipulated from time to time by at least one recognised mediation body such as CEDR, ADR Group, ACI, ADR Net or the Law Society, including those relating to training, consultancy, accreditation and regulation.
- 2.2 Save where appointed by or through the court, a mediator may only accept appointment if both or all parties to the mediation so request, or agree.
- 2.3 Whether a mediator is appointed by the parties or through the court or any other agency, he or she may only continue to act as such as long as both or all parties to the mediation wish him or her to do so. If any party does not wish to continue with the mediation, the mediator must discontinue the process as regards that party and may discontinue the process as regards all parties. Also, if the mediator considers that it would be inappropriate to continue the

mediation, the mediator shall bring it to an end, and may, subject to the terms of the mediation agreement, decline to give reasons.

### **SECTION 3 – Conflicts of Interest, Confidential Information and the Impartiality of the Mediator**

- 3.1 The impartiality of the mediator is a fundamental principle of mediation.
- 3.2 Impartiality means that:
  - 3.2.1 the mediator does not have any significant personal interest in the outcome of the mediation;
  - 3.2.2 the mediator will conduct the process fairly and even-handedly, and will not favour any party over another.
- 3.3 Save as set out in 3.2 above, a mediator with an insignificant personal interest in the outcome of the mediation may act if, and only if, full disclosure is made to all of the parties as soon as it is known, and they consent.
- 3.4 The mediator must not act, or, having started to do so, continue to act:
  - 3.4.1 in relation to any issues on which he or she or a member of his or her firm has at any time acted for any party;
  - 3.4.2 if any circumstances exist which may constitute an actual or potential conflict of interest;
  - 3.4.3 if the mediator or a member of his or her firm has acted for any of the parties in issues not relating to the mediation, unless that has been disclosed to the parties as soon as it is known, and they consent.
- 3.5 Where a mediator has acted as such in relation to a dispute, neither he or she nor any member of his or her firm may act subsequently for any party in relation to the subject matter of the mediation.

### **SECTION 4 – Mediation Procedures**

- 4.1 The mediator must ensure that the parties agree the terms and conditions regulating the mediation before dealing with the substantive issues. This should be in a written agreement which should reflect the main principles of this code. Such agreement should also contain the terms of remuneration of the mediator.
- 4.2 The procedure for the conduct of the mediation is a matter for the decision of the mediator. Insofar as the mediator establishes an agenda of matters to be covered in the mediation, the mediator should be guided by the needs, wishes and priorities of the parties in doing so.

- 4.3 In establishing any procedures for the conduct of the mediation, the mediator must be guided by a commitment to procedural fairness and a high quality of process.

## **SECTION 5 –The Decision-Making Process**

- 5.1 The primary aim of mediation is to help the parties to arrive at their own decisions regarding the disputed issues.
- 5.2 The parties should be helped to reach such resolution of such issues which they feel are appropriate to their particular circumstances. Such resolution may not necessarily be the same as that which may be arrived at in the event of adjudication by the court. That allows the parties to explore and agree upon a wider range of options for settlement than might otherwise be the case.
- 5.3 The mediator may meet the parties individually and/or together. Solicitors, barristers or other professional advisers acting for the individual parties may, but need not necessarily, participate in the mediation process if the parties so wish. Such solicitors and/or advisers may take part in discussions and meetings, with or without the parties, and in any other communication and representation, in such manner as the mediator may consider useful and appropriate.
- 5.4 Parties are free to consult with their individual professional advisers as the mediation progresses. The mediator may make suggestions to the parties as to the appropriateness of seeking further assistance from professional advisers such as lawyers, accountants, expert valuers or others.
- 5.5 The mediator must not seek to impose his or her preferred outcome on the parties.
- 5.6 The mediator shall be free to make management decisions with regard to the conduct of the mediation process.
- 5.7 The mediator may suggest possible solutions and help the parties to explore these, where he or she thinks that this would be helpful to them.
- 5.8 The mediator must recognise that the parties can reach decisions on any issue at any stage of a mediation.
- 5.9 Agreements reached in mediation fall into three categories:
- 5.9.1 non-binding agreements
  - 5.9.2 binding agreements (which would be enforceable by a court)
  - 5.9.3 binding agreements enshrined in a court or arbitration order.

The mediator should ascertain how the parties wish their agreement to be treated. Where the parties do not wish to have a legally binding solution (for

example, where they have resolved personal rather than legal issues), their wishes should be respected.

- 5.10 At the end of the mediation or at any interim stage, the mediator and/or the parties or their representatives may prepare a written memorandum or summary of any agreements reached by the parties, which may, where considered by the mediator to be appropriate, comprise draft heads of such agreements for formalisation by the legal advisers acting for the parties.
- 5.11 If the parties wish to consult their respective individual legal advisers before entering into any binding agreement, then any terms which they may provisionally propose as the basis for resolution will not be binding on them until they have each had an opportunity of taking advice from such advisers and have therefore agreed, in writing, to be bound.
- 5.12 Mediation does not provide for the disclosure and inspection of documents in the same way or to the same extent as required by court rules. The parties may voluntarily agree to provide such documentation, or any lesser form of disclosure considered by them to be sufficient. This should be considered in advance of the mediation. The mediator may indicate any particular documents that he or she considers should be brought to the mediation.
- 5.13 The mediator may assist the parties, so far as appropriate and practicable, to identify what information and documents will help the resolution of any issue(s), and how best such information and documents may be obtained. However, the mediator has no obligation to make independent enquiries or undertake verification in relation to any information or documents sought or provided in the mediation.
- 5.14 If, in cases where one or more parties is unrepresented at the mediation and the parties are proposing a resolution which appears to the mediator to be unconscionable, having regard to the circumstances, then the mediator must inform the parties accordingly and may terminate the mediation and/or refer the parties to their legal advisers.

## **SECTION 6 – Dealing with Power Imbalances**

- 6.1 The mediator should be alive to power imbalances existing between the parties. If such imbalances seem likely to cause the mediation process to become unfair or ineffective, the mediator must take reasonable steps to try to prevent this.
- 6.2 The mediator must seek, in particular, to prevent abusive or intimidating behaviour by any of the parties.
- 6.3 If the mediator believes that, because of power imbalances, the mediation would not be able to be fairly and effectively conducted, he or she may discuss this with the parties, recognising that the mediation may have to be brought to an end and/or the parties referred to their lawyers.

## **SECTION 7 - Confidentiality and Privilege**

- 7.1 Before the mediation commences, the parties should agree in writing as to the provisions concerning confidentiality and privilege that will apply to the mediation process itself and any resultant mediation agreement, save as otherwise agreed in the mediation settlement agreement.
- 7.2 The mediator must maintain confidentiality in relation to all matters dealt with in the mediation. The mediator may disclose:
- 7.2.1 matters which the parties and the mediator agree may be disclosed;
  - 7.2.2 matters which are already public;
  - 7.2.3 matters which the mediator considers appropriate where he or she believes that the life or safety of a person is or may be at serious risk;
  - 7.2.4 matters where the law imposes an overriding obligation of disclosure on the mediator.

In any such event the mediator should, where appropriate, try to agree with the party furnishing such information as to how disclosure shall be made.

- 7.3 Subject to 7.2 above, where the mediator meets the parties separately and obtains information from any party which is confidential to that party, the mediator must maintain the confidentiality of that information from all other parties, except to the extent that the mediator has been authorised by that party to disclose any such information.
- 7.4 Mediators should note that the mediation privilege will not ordinarily apply in relation to communications indicating that any person is suffering or likely to suffer serious bodily harm, or where other public policy considerations prevail, or where for any other reason, the rules of evidence render privilege inapplicable.
- 7.5 The mediator should remind the parties that (unless the mediation agreement provides otherwise) the confidentiality and privilege attaching to the mediation process may not extend to the provisions of any settlement agreement which results. The mediator should suggest to the parties that they consider the extent to which they wish the terms of the resulting settlement agreement to be disclosable – and to provide accordingly in the agreement itself.

## **SECTION 8 – Professional Indemnity Cover**

- 8.1 All mediators must carry professional indemnity cover in respect of their acting as mediators.