

## RULES FOR ARBITRATION-MEDIATION (ARB-MED)

Arb-Med is a two-step process. During the first step a neutral, impartial and independent Arbitrator, listens to evidence, testimonies, opening statements, presentations, cross-examination of witnesses, and closing statements from all parties. Upon review of the evidence and testimony, the Arbitrator renders a signed and written Arbitration Award in a sealed format (e.g., in a sealed envelope or in electronic format that is password protected), and given to the Mediator or a third party to hold onto until the end of the proceedings. Once signed and sealed, the Arbitration Award cannot be modified. During the second step, a neutral, impartial and independent Mediator facilitates communication between the parties to assist reconciliation and settlement, working in joint session and/or caucuses. The mediation step must end at a predetermined time (the "Deadline"). If a settlement agreement is not reached before the Deadline is reached, the sealed Arbitration Award is opened by the Mediator (or third party holding it) and is issued as a binding arbitral award. The parties may repeatedly extend the Deadline by mutual consent, but it is advisable that a specific Deadline be picked and adhered to. The Mediator may suggest ways of resolving the dispute but may not impose his or her own judgment on the issues for that of the parties. The same person may act as the Arbitrator and the Mediator, although this is not advisable as it is preferable that the Mediator not know what the Arbitration Agreement contains. It is strongly suggested that no caucuses are used in that the case where the same person is used, and that everything should happen in joint session (unless the parties expressly authorize otherwise in writing).

### 1. Agreement of Parties

The parties involved in the Arb-Med of the dispute agree to these Rules by their signatures. (The parties and their attorneys will be asked to sign and accept these rules prior to the Arb-Med session, or before the Arbitration Award is issued, if they wish the same person to then act as the Mediator).

### 2. Appointment of Neutral Third Parties

The process may be managed by an ADR institution or *ad-hoc*. If an institution is used, it will be responsible for the appointment of the individuals named as Arbitrator and Mediator and its rules of arbitration and mediation shall apply. If it is *ad-hoc*, the parties shall be responsible for these appointments, and the parties shall incorporate by reference the arbitration and mediation rules of any ADR institution in effect at that date by mutual consent. The Mediator and Arbitrator may be the same person if expressly agreed to in writing by all of the parties to the dispute. Ideally, however, they should not be the same person, so that the Mediator does not know the Arbitrator's award. If the Arbitrator is appointed first, he or she may be asked by one of the parties to appoint the Mediator if the parties cannot agree on one. The Mediator shall be an experienced mediator, who is either certified as a mediator, listed as a panelist, or has otherwise been recognized by a reputable ADR organization. Whether or not they are the same person, the Arbitrator and Mediator may not, and will not act as an advocate for any party to the Arb-Med. Additionally, the Arbitrator and Mediator shall not serve as Arbitrator or Mediator in any dispute in which he or she has any financial or personal interest in the result of the Arb-Med. Prior to accepting an appointment, the Arbitrator and Mediator shall disclose any circumstances likely to create a presumption of bias or prevent a prompt meeting with the parties. In the event that the parties disagree as to whether the Arbitrator and/or Mediator shall serve, the Arbitrator and/or Mediator shall not serve.

### 3. Authority of Representatives

Each party shall designate a representative who shall have the legal authority to settle the dispute involved in the Arb-Med and to execute legally binding documents on behalf of that party. All persons necessary to the decision to settle shall be present or available at the Arb-Med.

4. Parties to Rely on Own Counsel

If the Arb-Med is concluded by a settlement agreement, the parties are advised and agree to have the agreement independently reviewed by their own attorneys and counsel before executing the agreement in final form. The parties understand and agree that the Arbitrator and Mediator is not acting as an advocate for any party and each party states that it has not relied upon legal advice or counsel of the Arbitrator or Mediator in entering into the settlement agreement. The Arbitrator may be asked by either party to ratify the award as an arbitral consent award or as an arbitral award on agreed terms, should they wish the settlement agreement to have the strength of a binding arbitral award under the New York Convention.

5. Parties Responsible for Negotiating Their Own Settlement

The parties understand that once appointed the Mediator (unlike the Arbitrator) will not and cannot impose a settlement in their case and agree that they are responsible for negotiating a settlement acceptable to them. The Arbitrator and Mediator, as advocates for settlement, will use every effort to facilitate the negotiations of the parties. The Arbitrator and Mediator do not warrant or represent that settlement will result from the Arb-Med process. The Arbitrator shall prepare to issue a written and binding award before the mediation step commences. The Arbitrator (and the institution, if one has been appointed) shall also take whatever reasonable precautions are necessary to ensure that any award that he or she may issue will be binding and legally enforceable, and shall benefit from the provisions of the New York Convention.

6. Time and Place of Arb-Med & Procedural Issues

The institution (if one is appointed) or the parties shall coordinate the time and place of each Arb-Med session, working together with the Arbitrator and Mediator (who may be the same person in certain cases). The parties shall also agree on the applicable laws covering their Arb-Med Arb, which shall also be used to apply and construe these rules. In the absence of any agreement by the parties, Swiss law shall apply. The Arb-Med shall be held at a mutually agreed location in the place of the proceedings, under clearly identified arbitration and mediation rules, either face-to-face or using any convenient means of communication (e.g., teleconferencing or webinars) mutually agreeable to the Arbitrator, Mediator and the parties. The Mediator may discuss the parties' procedural preferences with them and the Arbitrator may decide any procedural issues if the parties appear incapable of agreeing on them.

7. Fees and Expenses

If a settlement agreement is reached, the expenses of the Arb-Med process shall be paid equally by the parties. If the Arbitration Award is opened or released, the costs of the proceedings shall be provided in accordance with the Arbitrator's award.

8. Identification of Topics Relating to the Dispute

If requested to do so between the end of the Arbitration session and the beginning of the Mediation session, each party shall use its best efforts to provide the Mediator with a Confidential Information Sheet in the form provided by the Mediator, separating each party's positions from its interests with regard to the issues that need to be resolved, and including an analysis of each party's alternatives in the form of a chart as provided by the Mediator. The parties are also encouraged to fill out a SWOT (Strengths/Weaknesses/Opportunities/Threats) chart for each party. The extent to which the parties agree to fill out these Information Sheets, exchange them, and/or submit them to the Mediator is at each party's sole discretion.

9. Termination of Arb-Med

The Arb-Med shall be concluded either: a) by the execution of a settlement agreement by the parties' representatives within the agreed Deadline for the completion of the Mediation step; b) by declaration of the Mediator to the effect that the mediation has reached impasse; c) by a written or verbal declaration of one party or more parties to the effect that the Mediation proceedings are terminated; or d) by the Deadline for the end of the Mediation session having been reached. If no settlement agreement is reached by the Deadline, or the Mediation is terminated by the Mediator or any party, the Arbitration Award from the first step shall be opened by the Mediator (or the person holding it), and it shall immediately and automatically become a binding award at that stage.

10. Confidentiality

Confidential information disclosed to an Arbitrator and Mediator by the parties or by witnesses in the course of the Arb-Med shall not be divulged by the Arbitrator or Mediator. All records, reports or other documents received by an Arbitrator or Mediator while serving in that capacity shall be confidential. The Arbitrator, Mediator and Dispute Mediation Service shall not be requested or compelled to produce or divulge such records or to testify in regard to the Arb-Med in any adversary proceeding or judicial forum. Any party that violates this agreement shall pay all fees and expenses of the Arbitrator, Mediator, ADR institution and other parties, including reasonable attorneys' fees, incurred in opposing the efforts to request or compel testimony or records from the Arbitrator, Mediator or Dispute Mediation Service.

The parties shall maintain the confidentiality of the mediation step and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceedings: a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute; b) admissions made by another party in the course of the Arb-Med proceedings; c) proposals made or views expressed by the Arbitrator or Mediator; or d) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the Arbitrator or Mediator.

11. Privacy

Arb-Med sessions are private. The parties, their representatives and their witnesses may attend Arb-Med sessions. The Mediator shall attend all arbitration sessions. The Arbitrator has the power to require the exclusion of any witness, other than a party or essential persons, during the testimony of any other witness. Other persons may attend only with the permission of the parties and with the consent of the Arbitrator and the Mediator.

12. No Service of Process at or Near the Site of the Mediation Session

No subpoena, summons, complaints, citations, writs or other process may be served upon any person at or near the site of any Arb-Med session or upon any person entering, attending or leaving the session.

13. Exclusion of Arbitrator and Mediator from Judicial Proceedings

The Arbitrator, Mediator and any ADR institution that has been retained are not necessary or proper parties in judicial proceedings relating to the Arb-Med.

14. Interpretation and Application of Rules

The Arbitrator and Mediator shall interpret and apply these rules. In case of disagreement, the views of the Arbitrator shall be binding.

15. Recordings and Interpreters

The parties shall be responsible for bringing any interpreters. The proceedings may not be recorded unless the parties expressly agree otherwise, or the Arbitrator deems this to be necessary for the arbitration step.

16. Paperwork

Parties must bring to the Arbitration or Mediation all submissions, exhibits, witness statements, and other documents relating to the case or necessary for its resolution. They may be provided in electronic format.

17. Evidence, Discovery and Investigation

a. Arbitration

Conformity to legal rules of evidence shall not be necessary. The parties may offer such evidence as is relevant and material, and shall produce such evidence as the Arbitrator deems necessary to an understanding and determination of the dispute. The Arbitrator shall be the judge of relevance and materiality of any and all evidence.

b. Mediation

Conformity to legal rules of evidence shall not be necessary. The parties may offer such evidence or information as they wish.

18. Binding Arbitration Award

The Arbitration Award shall be signed and sealed promptly, following the end of the arbitration hearing. If the Arbitrator is also asked to serve as Mediator, the Arbitration Award shall be written, signed and sealed before the mediation step starts. The Arbitration Award will not need to include findings of fact or conclusions of law, or provide any reasons for the award. It shall, however, provide a clear and binding award that can be readily understood and applied. The Arbitrator may grant any remedy or relief the he or she deems just and equitable, but within the scope of the agreement of the parties, including but not limited to specific performance of any contractual obligations.

19. Same Order of Proceedings

A sample Order of Proceedings is provided below. The timing and allocation of time can be changed according to the complexity of the case, in accordance with the parties' procedural preferences. The Arbitrator shall set the time allocations of the arbitration step, and the Mediator shall set the time allocations of the mediation step, if the parties have not been able to reach an agreement. The Mediator shall set the Deadline for the end of the mediation step if the parties have not agreed to one. Once a Deadline has been set, the Mediator cannot extend it without the express written consent of all the parties.

## **ARBITRATION MEDIATION (ARB-MED) ORDER OF PROCEEDINGS**

Step 1: Arbitration (4 hours)

1. Opening statement by initiating party (15 minutes)
2. Opening statement by responding party (15 minutes)
3. Presentation of witnesses and direct examination by initiating party (40 minutes)

*Proposed Arb-Med Rules*

4. Cross examination by responding party (20 minutes)
5. Presentation of witnesses and direct examination by responding party (40 minutes)
6. Cross examination by initiating party (20 minutes)
7. Closing statement by initiating party (10 minutes)
8. Closing statement by responding party (10 minutes)
9. Arbitrator reviews evidence and renders a binding advisory decision (50 minutes)

- Lunch Break (30-90 minutes, possibly with the Mediator if the Arbitrator is a separate person)-

Step 2: Mediation (4 hours)

1. Mediator meets with both parties (pre-caucuses are possible if the Mediator is a separate person from the Arbitrator)
2. The parties and the Mediator agree on the Deadline and on whether the parties will have separate sessions/caucuses with the Mediator or only joint sessions.
3. Mediator facilitates a voluntary resolution of the dispute by the parties until the allocated Deadline, without making a Mediator's proposal if the Mediator has also acted as the Arbitrator.
4. If agreement is reached, a binding settlement agreement is signed by both parties. It may be converted into an arbitral consent award/award on agreed terms if one of the parties so requests.
5. If no settlement is reached by the allocated Deadline, the Arbitration Award is released from the envelope of by the third party holding it, and is issued as a binding award.

Read and agreed to by: