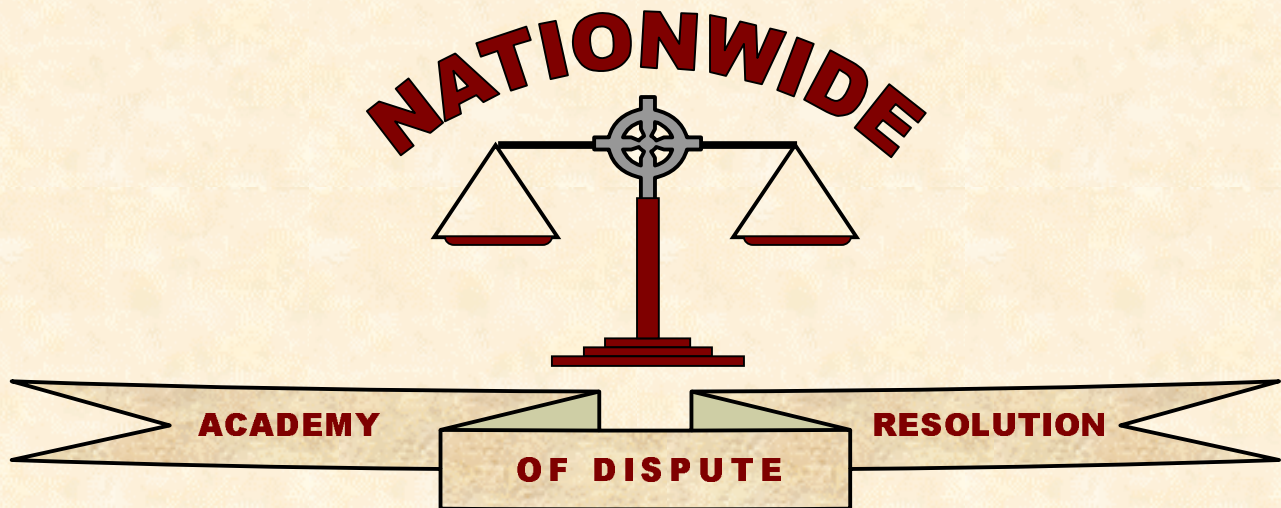


National Association for Dispute Resolution, Inc USA

In affiliation with

Nationwide Academy of Dispute Resolution (M) Sdn Bhd



UK Ltd

N.A.D.R.

MEDIATION MANUAL

Fixed Charge Standard Mediation Scheme

**A Complete Package Containing
Forms And Advice
To Guide You Through
The Dispute Resolution Process**

And in association with

Nationwide Mediation Academy UK Ltd

For the Advancement of Skill and Knowledge in



Dispute Resolution Practice

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Congratulations on joining the NADR Mediation Scheme



Welcome to the NADR Dispute Resolution Mediation System.

This Mediation Package contains essential information and guidance on how to proceed in the event that a dispute arises between yourself and another party. Please keep this user guide at hand in a safe place, ready for use and reference.

This pack contains important forms that you will need to use in order to refer a dispute to mediation.

The pack also contains examples of the forms that you will receive in due course from NADR and from the other party in response to your submission of a dispute to mediation.

It is not a pleasant experience to enter into a dispute and no doubt you would prefer to maintain harmonious relations with your trading partners and others and avoid involving outsiders in your business affairs. However, if you should find yourself confronted with a difference, which cannot be resolved amicably through negotiations, the NADR Dispute Resolution Mediation Scheme is designed to enable you and the other party to settle the difference quickly without undue disruption to your business and other relations.

Whilst it is possible to reach an agreement to refer a dispute to mediation after a problem has arisen, it is equally possible for the other party to refuse to do so, in which case it may be necessary to go to court to settle a dispute. It is essential therefore, in order to take full advantage of this mediation scheme, that you ensure that a NADR Mediation is agreed between you and trading partners at the outset and incorporated, as a standard term, in all your commercial dealings.

If you wish to refer a dispute to mediation please read through this Mediation Pack and carefully follow the instructions.

Please be advised that as is usual in legal proceedings, all references in the guidance notes below to “he” include “she” and all references to “him” includes “her”. Similarly, where appropriate, the singular also embraces the plural. This is to keep things clear and concise. No disrespect is intended.

Glossary of terms.

This glossary is provided to help you to understand any technical terms that you may encounter whilst completing the mediation forms and during the mediation process.

Acceptance. Unconditionally accepting the terms and conditions of an offer containing the substance of an agreement. **Adjudication.** A method of third party settlement of a dispute by an adjudicator. As a general term adjudication includes court proceedings and arbitration, but in the context of alternative dispute resolution it refers to a system of immediately enforceable non binding dispute settlement. Once the adjudication award is made the parties must comply with the award. However, the rights of the parties to pursue the dispute elsewhere are unaffected by the adjudication. Adjudication enables the parties to get on with business pending subsequent court or arbitration action if they are not satisfied with the outcome of the adjudication.

Adjudicator. The person in charge of an adjudication hearing.

Affidavit. A sworn statement used as proof in law.

Agreement to Mediation. Agreements to mediate disputes take two forms. An agreement to mediate future disputes is a term, condition or clause in a contract stating that the parties will seek to settle any disputes about the performance of the agreement by way of mediation. An agreement to mediate an existing dispute is a contract between two parties to a dispute agreeing that the dispute will be referred to mediation. Likewise for an agreement to Adjudication or Arbitration.

Appeal. The reference of a decision by a lower decision making body such as an arbitral tribunal, court or tribunal to a higher body, which may confirm or over turn the decision. The right to appeal is subject to the terms of a dispute resolution agreement and having sufficient grounds to appeal, or the permission of the court and statutory procedures for appeal.

Arbitration. A method of third party settlement of a dispute by an arbitrator. Arbitration may be provided by a government agency or by a private or chartered body.

Arbitrator. The person or persons who conduct the arbitral tribunal.

Arbitration Award. The decision made by an arbitral tribunal.

Attorney. A lawyer. A person appointed by someone to legally represent them, combining the roles of a solicitor and a barrister.

Barrister. A lawyer who represents a client in higher courts and often at arbitration. Sometimes referred to as counsel. In the UK a barrister is approached and retained through the client's solicitor.

Caucus. Private sessions between a mediator and a party (and representatives) to a mediation. Private sessions enable the mediator to discuss the party's options and to search for a solution to the problem.

Civil proceedings. Steps taken to assert or defend a claim in a civil (non-criminal) court.

Claim. The putting forward of a demand for relief to compensate or put right an alleged civil (non criminal) wrong. A claim may be asserted at an adjudication, at an arbitration, before a court, in a mediation or before a tribunal.

Claimant. The person seeking relief. Also referred to as a plaintiff.

Compensation. Monies sought or awarded to compensate for losses. Also referred to as damages.

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Conciliation. A form of third party assisted negotiation. A non-binding form of mediation which results in an agreement binding in honour only. The parties may subsequently decide to conclude a binding agreement.

Consent. The authorising of a third party to do something. An agreement for a mediator to communicate information to the other party.

Consideration. A promise to give something in exchange for something in return. The substance of the promise, often goods or money is also referred to as consideration.

Costs. Expenses incurred by a party to a dispute settlement process, be it adjudication, arbitration or mediation. Costs may include accommodation, travel, representatives fees and the hearing. Each party may bear their own costs. Alternatively a party may be ordered to pay the costs of the other party if it is deemed that the claim was vexatious, frivolous or that party loses.

Counsel. Legal representative. A barrister in the UK.

Counter-claim. The putting forward of a counter-demand for relief to compensate or put right an alleged civil (non criminal) wrong. A counter-claim may be asserted at an adjudication, at an arbitration, before a court, in a mediation or before tribunal. A counter-claim may be accompanied by a denial / defence or admission of liability for a claim. Thus “I don’t owe you anything but you owe me XXX” or “I accept I owe you XXX but you owe me YYY”

Counter offer. The rejection of an offer and its replacement by a new offer.

Corroboration. A statement given in evidence in support of a statement of fact.

Damages. The monies awarded in a civil action to compensate for loss. Damages seek to put a party in the position that they would have been in (in as much a money can do this) if the wrong had not been committed against them.

Defence. Argumentation made to refute a claim.

Defendant. In a civil claim, the person against whom a claim is asserted.

Difference. Also referred to as a dispute. Sometimes used in relation to an unresolved issue which may yet be settled without developing into a dispute – a difference of opinion. A disagreement.

Disclosure. Providing information to the other party informally or in response to an application to a court for discovery.

Discovery. An application to a court to make an “order” requiring someone to disclose information relevant to a claim or defence. Neither a mediator nor a representative cannot be ordered to disclose privileged conversations between you and the mediator or your representative.

Dispute. A disagreement about reciprocal rights and duties.

Enforcement. A court action to make a refusing party comply with an adjudication / arbitral award or a mediation agreement. Relatively quick and inexpensive.

Evidence. Exhibits put before or statements made to a court to establish fact and opinion.

Expert. A person with special knowledge or facts or skills who provides testimony.

Joint session. Mediation proceedings where the mediator, all parties and representatives are present. A mediation opens and concludes with joint sessions. Joint sessions may occur between caucuses (private sessions) if needed in order to break a stalemate situation or to conclude an agreement on specific issues after which the caucuses are resumed.

Judge. A public official who presides over a court.

Jurisdiction. The legal right of an adjudicator, arbitrator or judge to preside over a dispute. Jurisdiction may be accorded by process of law or by agreement between the parties.

Injunction. An order by a court to prevent someone doing something (prohibitory injunction) or compelling them to do something (mandatory injunction). Includes orders preventing monies being removed from the country to ensure funds are available to pay damages and orders to provide access to information.

Interest. Monies awarded in addition to damages to compensate for being deprived of the use of funds.

Interim. Proceedings that take place between the commencement of an action and the hearing.

Law governing the dispute. The substantive law of a country that is used to interpret the meaning of the terms of a contract and which determines the legal rights and duties of the parties to a dispute. May be determined by process of law or by an agreement in a contract eg “subject to English Law” often followed by choice of jurisdiction eg “and jurisdiction”.

Lawyer. A generic term for a legal representative, includes attorney, barrister, counsel and solicitor.

Litigation. Taking a claim to court or defending a claim in court.

Mediation. Negotiated dispute settlement with the assistance of a third party, the mediator.

Mediator. The person who assists the parties at a mediation to seek to settle a dispute.

Mediation/Arbitration Agreement. A term in the agreement to settle a dispute by ADR that provides that if a mediation fails to reach an agreement the dispute will be referred to arbitration. Also a term in the ADR agreement that provides that if the parties should subsequently question a provision of the settlement agreement the issue will be determined by arbitration.

Plaintiff. A claimant in a civil claim. The person seeking to have an alleged wrong put right before an adjudication, arbitration or tribunal or by way of mediation.

Pleadings. Argumentation in support of statements of claim, counter-claim and defence.

Prejudice. Statements which adversely affect rights or interests. Usually used in the context of “without prejudice” meaning an offer to settle without admission of fault or guilt. Statements made during the course of a mediation are without prejudice in that they may not be used subsequently in court as evidence. The mediation process is private and privileged.

Proof. See also evidence. Exhibits put before or statements made to a court to establish fact and opinion.

Pro Se. See unrepresented.

Respondent. The person responding to a claim. See also defendant.

Representative. A person who accompanies and represents a claimant or respondent. A representative in alternate dispute resolution processes does not have to be legally qualified, though they often are. Legal representatives before a court must be legally qualified and have a legal right to audience.

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Seat. The place from which an adjudication or arbitration will be governed, thus “London Arbitration.” The significant factor is the State in which the place is located thus “England and Wales.” Arbitral hearings may be conducted on location outside the State of the seat, but the law of the State of the seat will govern the proceedings (the choice of law clause determines which State’s substantive law governs the dispute). The arbitral award must be made in the State of the seat.

Security of costs. Monies deposited before a tribunal, or a guarantee provided to the tribunal, in respect of the costs of a hearing by a claimant in circumstances where the tribunal considers that there is a strong possibility that the claim might fail and that the claimant will not be able to pay the costs. If the claimant prevails the deposit is returned or the guarantee is discharged.

Settlement. An agreement which brings a dispute to an end, particularly at the conclusion of a mediation.

Solicitor. Legal representative, particularly in the UK.

Statements of Claim, Counterclaim and Defence. Statements outlining what is claimed or denied by the parties. Strict time limits are established for the submission of these statements to provide the decision maker and the other party time to assimilate the information and to prepare for the resolution process and to respond to the statements.

Stay of action. An application to a court to order that a court action be put on hold pending the outcome of an adjudication, an arbitration or a mediation. Used where there is an agreement to settle a dispute by an ADR process but one of the parties tries to bypass the ADR process and refer the dispute to a court for determination.

Tribunal. Generic term for the court or arbitration panel. Also refers to specific tribunals such as The Industrial Tribunal etc.

Unrepresented. Also “*pro se*”. There is no legal requirement for a party to be represented at a dispute resolution hearing. Unless the claimant or defendant is well versed in conducting legal actions or in negotiating at a mediation, representation is recommended where the stakes are significant. An adjudicator, arbitrator, mediator or judge will not give an unrepresented party legal advice or assist in the conduct of an action, though a degree of patience may be extended to the party where procedures are not fully understood and strictly adhered to by the unrepresented party. A mediator will play “devil’s advocate” and indicate that an agreement may not be achievable if a party sets their sights too high, or indicate that an assertion might not be legally justifiable. A mediator will convey offers and counter offers from one party to another during caucus session. The mediator will explain to a party any doubts or reservations expressed to him by the other side. A mediator may well invite the parties to consider the cost implications of pursuing a claim or defence in court and invite the parties to assess their chances of success elsewhere. However, a mediator will not advise a party that they are being too generous, assess the reasonableness of an offer or provide legal advice and assistance or assess their chances of success elsewhere.

Venue. The actual place where an adjudication, arbitration or mediation takes place.

Witness. A person who provides evidence of facts at a hearing. Contrast an expert witness who expresses a professional opinion about the way things should be done or the consequences of doing things in a particular manner.

Handling a Disagreement

The starting point for dealing with a disagreement is to tell the other party about your dissatisfaction. Make sure that where another organisation is involved that you voice your dissatisfaction to an appropriate person who is able to deal effectively with your complaint.

Give the other side the opportunity to make amends and put the problem right. You should not refer a matter to mediation until you have told the other party about your concerns and given them an opportunity to resolve the problem.

Representation

Assuming that you are unable to resolve the problem through negotiations and discussion should you seek advice (perhaps legal) and representation ? You are entitled to represent yourself at a mediation. There is no requirement to retain representation, legal or otherwise. If you are unsure about your legal rights then it would be wise to retain an adviser / representative. Often a dispute can be quickly settled by a letter from you representative. A representative can often negotiate successfully on your behalf. If that fails to resolve the problem the representative can guide you through the dispute resolution / mediation process. If you go to court the representative must be a lawyer (advocate, attorney or solicitor etc). Your representative at a mediation does not have to be legally qualified.

If you choose to engage in a mediation without representation be advised that a mediator will not give you legal advice. A mediator will play devil's advocate and indicate that an agreement may not be achievable if you set your sights too high, or indicate that an assertion might not be legally justifiable. A mediator will convey offers and counter offers from one party to another during caucus session. The mediator will explain to you any doubts or reservations expressed by the other party. A mediator may well invite you to consider the cost implications of pursuing a claim or defence in court and invite you to assess your chances of success elsewhere. A mediator will not advise you that you are being too generous, assess the reasonableness of offers or provide legal advice and assistance or assess your chances of success elsewhere.

If you are an experienced negotiator and have a good understanding of your legal rights there is no reason why you should not represent yourself. However, be advised that even lawyers often retain representation when pursuing a claim. A third person tends to be more objective and less attached to a view point than the claimant or respondent.

Starting the Process

Submitting a claim to mediation. If the other party refuses to discuss the problem or if discussions fail to resolve the problem, inform the other party that you intend to take further action. Fill in the **Mediation Request Form FCSM01** and send it to NADR : send a second copy (mail or fax) to the other party, as advised on the rear side of the form, along with a **Consent to Mediation Form FCSM02R** for the other party to complete and remit to NADR.

If you are both contractually committed to submitting disputes to mediation then tell the other party that you are going to submit the dispute to mediation.

If you have no contractual agreement to submit the dispute to mediation but you wish to resolve the dispute through mediation you should tell the other party that mediation would be your preferred method of seeking to resolve the dispute. If they agree then fill in **Form FCSM01** and send it to NADR and send a copy to the other party accompanied by **Form FCSM03** for the other party to remit to NADR.

If the other party does not agree you may still fill in a **FCSM01 Form** and submit it to NADR. We will then contact the other party and explain to them the advantages of the mediation process. If the other party does not agree, then regrettably, you will have to pursue your claim by other means. In the UK, if you tell the judge, at a preliminary hearing, that you wish to mediate the dispute, the judge will invite the other party to reconsider, but the judge will not force the other party to accept.

Mediation submission by a Respondent. If you are both contractually committed to submitting disputes to mediation but you happen to be a respondent (the other party to a dispute) and the claimant informs you that he intends to disregard the mediation agreement and take the case to court, rather than mediation (or even initiates court action before informing you of his intentions) but you still wish to mediate the dispute there are two courses of action available to you. You may either

Fill in the **Form FCSM01**, sending it to NADR and send a copy to the claimant and then seek a stay of action (on the basis that mediation is a pre-requisite to litigation) stopping the court action pending mediation,

or

Inform the court at a preliminary hearing that you wish the case to be settled through mediation and then submit the dispute to mediation using the **Form FCSM01**. A stay of action pending mediation can then be made by the court.

If you have not already done so, you may wish in such circumstances to take legal advice about applications for stay of action.

Things to do before the Mediation

Preparing for the mediation. As with any other form of negotiation you will get the most out of the mediation process if you are well prepared. If you have an advisor / representative, discuss the case with him. No doubt you feel very strongly about the issues involved in the dispute and think you know what you want to get out of the mediation, what you want the other party to do, what you think you are required to do and what you have already done. Even so, try to make a realistic assessment of the likelihood of successfully pursuing your dispute in court and assess how much a court might award the successful party. This will enable you to enter the mediation with a bottom line, a figure that, whilst less than you would like to receive, or alternatively more than you would like to have to pay, is a figure which you consider to be not unreasonable and which you could, if necessary, agree to and live with.

Authority. It is essential that both parties have **FULL** authority to settle the dispute at the mediation. You will be specifically asked by the mediator to confirm that you have such authority. If you do not have such authority, the mediator will stop the mediation and give you the opportunity to contact someone and secure that authority. If that is not possible the mediation will be rescheduled and you will be required to pay the costs of the lost mediation session. Note that Full authority means authority to pay the Full amount specified in a claim or counterclaim. Conversely you should have the authority to settle for any sum offered. Having the authority to settle does not mean that you are in any way obliged to reach an unacceptable agreement.

Statements of Claim/Counter Claim, Documentary Evidence and Disclosure. You will already have submitted a brief description of your claim, counter-claim or defence on the **Mediation Request Form FCSM01** or on the **Consent To Mediation Form FCSM02**. However, the more the mediator knows about your case in advance the better prepared the mediator will be to assist you in reaching a settlement. You should therefore seriously consider submitting a concise statement of claim, counter claim or defence and any relevant documentary evidence to the mediator for his consideration before the mediation commences. See Form **FCSM03**

Disclosure to the other party. There is no duty to disclose documents in advance of the mediation to the other party. However, advance disclosure of information that supports your case affords the other party an opportunity to reflect on the reasonableness of your claim, assists the mediation process and helps you to achieve an early settlement on terms which are advantageous and acceptable to you. By contrast, the introduction of large amounts of information and documentation, for the first time, during a mediation is likely to go over the head of the mediator and the other party and be less effective or even counter-productive. See Form **FCSM03**

Calling Witnesses to a Mediation FCSM04. It is not usual practice to call witnesses to give evidence at a mediation. In order to persuade the other party of the reasonableness of your case it is normally sufficient to provide and exchange written statements, perhaps in the form of an affidavit, as proof of evidence of fact or of opinion. In exceptional circumstances you may choose to call a witness because you deem that the other side will not accept or consider your viewpoint in the absence of corroboration by a third party.

A mediation is not a court hearing. The mediator is not a judge. The mediator's function is to assist the parties to reach an agreement. It is not to make a decision and a ruling. You do not have to prove your case to the mediator and do not therefore need to call witnesses to prove your case to the mediator. However, as in a court of law, witnesses will be invited to take an oath and expert witnesses have a duty to the mediation process to provide objective testimony.

Witnesses will be called to give evidence during the latter part of the opening joint session. The other party will be afforded an opportunity to ask the witness questions and the witness will have an opportunity to respond. That apart there will be no cross examination of witnesses on the stand. Witnesses may not attend private / caucus sessions. Usually witnesses will leave the mediation at this stage and take no further part in the mediation. However, where it is anticipated that a witness may be required to give evidence at a subsequent joint session, the witness will be placed in a private room until his attendance is next required.

Arrangements for attendance at the mediation. You will receive a **Notice of Mediation Form FCSM05** from NADR which specifies the scheduled date, time and location for your mediation and the name of the mediator. It is your responsibility to ensure that you and all persons accompanying you to the mediation are fully informed about these details. It is your responsibility to make necessary attendance arrangements for you and your team. You may choose to let your representative handle these arrangements.

The blue **Record Of Documents Submitted To The Mediator Form FCSM03** will assist you to compile and record documents to be submitted / submitted to the mediator and track the disclosure status of such documents and whether or not they have been exchanged with the other party. The **Notice Of Intention To Call Witnesses Form FCM04** will assist you to compile and record a list of witness that you wish to attend the mediation and will advise the mediator on the nature of the evidence each witness will give testimony to and the Profession / Status of the witnesses.

Mediation Notice. You will receive in due course from NADR the form **FCSM06 Notice of Mediation** advising you who your mediator will be and the date, time and location of the mediation and the reminder Form **FCSM06 Notice of Initiation of Mediation Process** will be posted to you seven days before the mediation.

At The Mediation

Arrival and Registration. When you arrive at the NADR Dispute Resolution Centre (or other location if relevant) notify the secretary at reception. You will be directed to a private waiting room and asked to complete the **Agreement For Mediation Form FCSM07**. Once everyone is assembled you will be escorted to the main mediation conference room.



One of the main mediation conference rooms at North Central, Dallas.

The mediator will invite everyone present to take a place at the mediation table, introduce himself and invite everyone else present to introduce themselves. You may know some of the people present but it is likely that others will be known to you at best by name only.

The Opening Joint Session. The first joint session will then commence. Whilst each mediator will have his own particular style, the mediation will then proceed as follows, though not necessarily in the order described below.

The mediator will invite each of the parties and their representatives (if any) in turn to briefly set out their position and how they view the events leading up to the mediation. If you have not already done so, this will provide you with a further opportunity to exchange documents with the other party and provide the mediator with a copy of anything disclosed or exchanged at that time which he has not already received. It is essential at this stage that you accord due respect to each of those present, listen to what they say and do not interrupt. You will have plenty of opportunities later to comment on anything you hear during the opening joint session.

The mediator may choose to briefly summarise each party's submissions at this stage, following which he will explain how the mediation will proceed establishing ground rules for the conduct of the mediation and providing you with any information about the facilities available to you, such as smoking areas, use of mobile phones and refreshments.

Witnesses (if any). If the parties have chosen to call witnesses this is likely to be the time when they will be invited to give evidence and an opportunity provided for the other party to ask the witness questions.

Private Sessions / Caucus. At the end of the opening joint session the mediator will usually invite one of the parties to accompany him to a second private mediation conference room.



A mediation room for private sessions at North Central, Dallas.

The mediator will then meet each of the parties in turn for private sessions or what is known as a caucus. (If the mediator considers that the best way to proceed is by round table discussions between the parties everyone will remain in the same room and the joint session will continue.) The mediator will use his discretion to decide which party to commence the private session with. There is likely to be a series of these private sessions with the mediator commuting between the parties.

The mediator will exercise his discretion and judgement to decide how much time is needed in any particular session to take the negotiations forward and at the end of each session with you he will try to give you an indication of how long he is likely to spend with the other party at the next session.

The purpose of private sessions is to afford you the opportunity to explore the situation freely with the mediator without prejudice to your position. The mediator will discuss with you the reasonableness of your position and as and when appropriate, in the light of information he has gathered from the other party, give you an indication of whether or not your position is acceptable to the other party. The mediator may well suggest potential avenues for settlement that the parties might wish to explore. Private sessions are confidential. The mediator will convey information and documentary evidence to the other party that you authorise him to disclose. The mediator will not disclose anything to the other party without your consent and is likely to summarise what has been offered in a session and confirm that he has authority to disclose / convey that information to the other party at the end of a private session. The mediator will use his discretion to decide if as and when to disclose such information to the other party and may well chose not to do so if an offer, for instance, is likely to be regarded as totally unacceptable by the other party and disclosure at that stage might harm the mediation process.

Final Joint Session. If, as and when the mediator considers that an agreement can be concluded he will reconvene the joint session for a final time so that the parties can finalise and sign the agreement. The mediator will draft the agreement with the assistance of the parties and have it reproduced in a presentable form for the parties to sign and witness. See **Sample Form FCMS09(1-3)**.

Interim Joint Sessions. On occasions, the mediator may decide that it is necessary to interrupt the private sessions and convene one or more joint sessions in order to either conclude agreements on particular aspects of the dispute or to break stalemate situations, following which, private sessions will resume.

The mediation will normally continue in session for as long as it takes to broker a settlement. A settlement can usually be reached in one day. If it becomes apparent to the mediator that a settlement is not possible the mediation will end. Either party may chose to end the mediation session at any time without concluding an agreement. Attendance at and participation in the mediation process is entirely voluntary. There is no obligation to conclude an agreement and particularly, there is no obligation to conclude an agreement that is totally unacceptable to you.

Continuation Sessions. Often even when the parties fail to reach an agreement, the parties having had time to reflect on the process, agree to return some time later and continue the mediation at which time a settlement is usually reached.

After the Mediation.

Payment. Often, after the agreement the successful party receives immediate payment from the other party. However, where an organisation is concerned this may not be possible because arrangements have to be made for payment.

Default on Payment. If payment is not duly forthcoming at the appointed time the creditor may enforce payment through the courts as a straight forward action for non-payment of debt. Your lawyer will assist you with this if necessary.

Registering a Settlement. Where a dispute has been the subject of litigation NADR will register the settlement with the court. The agreement is then transformed into a court judgement and is enforceable as such. If payment is not duly forthcoming at the appointed time the creditor may enforce compliance with the court order. Your lawyer will assist you with this if necessary. **Form FCSM09 Clause 4(C) & (D)**

Subsequent Exchanges of Documentation. Where the settlement agreement so requires you or your representative shall deliver drafts of any further documents to be executed in connection with the settlement to the other parties on or before the agreed time specified in the agreement. The parties and their representatives agree to co-operate with each other in the drafting and execution of such additional documents as are reasonably requested or required to implement the provisions and spirit of this Settlement Agreement. **Form FCSM09 Clause 7.**

Interpretation of the Settlement Agreement. If one or more disputes arise with regard to the interpretation and/or performance of this Agreement, or any of its provisions, the parties agree to attempt to resolve same by telephone conference with the Mediator who facilitated this settlement. If the parties cannot resolve their differences by telephone conference, then each agrees to schedule one day of mediation with such Mediator within thirty (30) days to resolve the dispute and to share the costs of same equally. If a party refuses to mediate, then that party may not recover attorneys fees and/or costs in any arbitration or litigation brought to construe or enforce this Agreement. Otherwise, if any mediation is unsuccessful and an arbitration or litigation is brought to construe or enforce this Agreement, then the prevailing party or parties shall be entitled to recover reasonable attorney's fees, court costs and expenses, including the cost of the mediation. All arbitration(s) shall be administered and conducted under the Rules of and before Arbitrators from the Panel of the Nationwide Academy for Dispute Resolution. **Form FCSM09 Clause 8.**

Mediation / Arbitration Clause. If an agreement is not concluded the parties may pursue the dispute through the courts or by means of an NADR arbitration. If the dispute is subject to an arbitration provision you should submit the dispute to arbitration. Any attempt to commence litigation may be resisted by the other party by means of an application for "stay of action". Your lawyer will assist you with this if necessary.

RULES FOR MEDIATION

- 1 Definition of Mediation.** Mediation is a process under which an impartial person, the mediator, facilitates communication between the parties to promote reconciliation, settlement or understanding among them. The mediator may suggest ways of resolving the dispute, but may not impose his own judgement on the issues for that of the parties.
- 2. Agreement of Parties.** Whenever the parties have agreed to mediation they shall be deemed to have made these rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement to mediate.
- 3. Consent to Mediator.** The parties consent to the appointment of the individual named as mediator and the mediation organisation as administrator in their case. The Mediator shall act as an advocate for resolution and shall use his best efforts to assist the parties in reaching a mutually acceptable settlement.
- 4. Conditions Precedent to Serving as Mediator.** The Mediator shall not serve as a mediator in any dispute in which he has any financial or personal interest in the result of the mediation. Prior to accepting an appointment, the Mediator shall disclose any circumstance 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 Mediator shall serve, the Mediator shall not serve.

- 5. Authority of Mediator.** The Mediator does not have the authority to decide any issue for the parties, but will attempt to facilitate the voluntary resolution of the dispute by the parties. The Mediator is authorised to conduct joint and separate meetings with the parties and to offer suggestions to assist the parties achieve settlement. If necessary, the Mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangement for obtaining such advice shall be made by the Mediator or the parties, as the Mediator shall determine.
- 6. Commitment to Participate in Good Faith.** While no one is asked to commit to settle his/her case in advance of mediation, all parties commit to participate in the proceedings in good faith with the intention to settle, if at all possible.
- 7. Parties Responsible for Negotiating Their Own Settlement.** The parties understand that the Mediator will not and cannot impose a settlement in their case and agree that they are responsible for negotiating a settlement acceptable to them. The Mediator, as an advocate for settlement, will use every effort to facilitate the negotiations of the parties. The Mediator does not warrant or represent that settlement will result from the mediation process.
- 8. Authority of Representatives. Party Representatives Must Have Authority To Settle And All Persons Necessary To The Decision To Settle Shall Be Present.** The names and addresses of such persons shall be communicated in writing to all parties and to the Mediator.
- 9. Time and Place of Mediation.** The Mediator shall fix the time of each mediation session. The mediation shall be held at any convenient location agreeable to the parties and the Mediator, or at the office of the Mediator, as the Mediator and the parties shall determine.
- 10. Identification of Matters in Dispute.** Prior to the first scheduled mediation session, each party shall provide the Mediator and all attorneys of record with a Position-Information Statement in the form requested by the Mediator, setting forth its position with regard to the issues that need to be resolved.

On or before the first session, the parties will be expected to produce all information reasonable required for the Mediator to understand the issues presented. The Mediator may require any party to supplement such information.
- 11. Privacy.** Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the Mediator.
- 12. Confidentiality.** Confidential information disclosed to a Mediator by the parties, or by witnesses in the course of the mediation, shall not be divulged by the Mediator. MI records, reports or other documents received by a Mediator while serving in that capacity shall be confidential. The Mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceedings or judicial forum.

Any party that violates this agreement shall pay all fees and expenses of the Mediator and other parties, including reasonable legal fees, incurred in opposing the efforts to compel testimony or records from the Mediator. The parties shall maintain the confidentiality of the mediation. No party or their representative shall rely on, attempt to, or introduce as evidence in any arbitral, judicial or other proceeding:

- 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 mediation proceedings;**
- c) **proposals made or views expressed by the Mediator; or**
- d) **the fact that another party had or had not indicated a willingness to accept a proposal for settlement made by the Mediator.**

13. No Stenographic Record. There shall be no stenographic, electronic or any other record of the mediation process. All notes made by the mediator will be shredded at the termination of the mediation processes. Documents given to the mediator by a party during the process will be shredded or returned to the party.

14. No Service of Process at or near the site of the Mediation Session. No subpoenas, summons, complaints, citations, writs or other process may be served upon any person at or near the site of any mediation session upon any person entering, attending, or leaving the session.

15. Termination of Mediation. The mediation shall be terminated: a) by the execution of a settlement agreement by the parties (a copy will be retained by NADR pending confirmation that the agreement has been fully implemented); b) by declaration of the Mediator to the effect that further efforts at mediation are no longer worthwhile; or c) by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

16 Exclusion of Liability. The Mediator is not a necessary or proper party in judicial proceedings relating to the mediation. Neither the Mediator(s) nor any law firm or mediation firm employing Mediator(s) shall be liable to any party for any act or omission in connection with any mediation conducted under these rules.

17. Interpretation and Application of Rules. The Mediator shall interpret and apply these rules.

18. Fees and Expenses. The Mediator's daily or hourly fee shall be agreed upon prior to mediation and shall be paid in advance of each mediation day. The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including fees and expenses of the Mediator, and the expense of any witness and the cost of any proofs or expert advice produced at the direct request of the Mediator, shall be borne equally by the parties unless they agree otherwise.

COMMON QUESTIONS ABOUT MEDIATION

For Party Representatives new to NADR Mediation Systems

Since mediation is relatively new, party representatives may have some questions about mediation. Some of the most commonly asked questions are listed below. We hope this information will be of assistance to you understanding and using mediation.

What am I (as a party representative) required to do in a mediation? The only requirement is that you and your client meet with the mediator and the other side(s) to try good faith to settle your case. The mediation rules of The Nationwide Academy for Dispute Resolution U.K.Ltd. prohibit the mediator from rendering a decision. The mediator is there to help you settle the case. In excess of 80% of the cases referred to mediation settle at the mediation. If the case does not settle, you still have the right to go to arbitration / trial.

What can a mediation do for the parties that legal representatives cannot already do? Mediation aids negotiation in several ways:

Mediation helps educate everyone, especially the clients. A mediation involves a discussion of all facets of the case, what is involved in preparing the case for trial as well as trying it if cannot be settled. Many lawyers have stated that their clients would not have accepted a reasonable settlement offer if they had not participated in a mediation.

Mediation offers all parties the ability to try out settlement offers without necessarily having to disclose them. In ordinary negotiations, no party wants to give the other side their best settlement numbers too early. They always fear the other side will take advantage of them.. Mediation reduces negotiation posturing. It helps the parties work out a fair settlement as rapidly and inexpensively as possible.

Mediation brings the negotiations “to a head”. Often cases acquire a life of their own and drag on indefinitely. They usually then settle on the eve of trial. A mediation has everyone sit down in the same room and work to settle the case without incurring unnecessary expenses.

How successful is mediation in settling cases?

Approximately 91% of the cases privately referred to NADR mediation settle.

What do I (the party representative) need to do to prepare my case for mediation?

Mediation works best when you are prepared. You can bring and present just about anything or anyone important to your case. However, neither the rules of evidence nor the rules of civil procedure appear in a mediation. Mediation is basically a moderated discussion of each party’s evidence and argument. Mediation (as a process) is non-binding and informal, unlike arbitration or a court trial.

Where and when will the mediation occur? The mediator will work with everyone to set up a convenient date, time, and location. A mediation can be held at any place the parties wish.

Who will be the mediator? Mediators are experienced attorneys, judges, and professional mediators who have received extensive special training in mediation techniques.

How much will mediation cost? The parties in the suit usually split the cost of the mediation equally between them. Most insurance companies, however, will agree to pay the entire cost. Since mediation rarely results in outright winners and losers it is not practicable to arrange for the loser to pay the winner's costs. The basic cost of a standard mediation is £1,000 per party for an 8 hour day or £500 per party for a 4 hour half day mediation. (Where applicable applicants to special mediations are advised to refer to the NADR Mediation Rate Schedule – inside back cover).

Why should I use mediation instead of other forms of ADR? Those programs can be effective, but mediation has certain advantages. Mediation sessions are very effective in educating the parties, which may not take place in judicial settlement conference. Mediation's ability to confidentially "float" settlement offers is a unique and very important tool achieving settlements.

How long does it take to set up a mediation? Most court orders require the mediation to be completed within 30 days. The average time from the case transmittal to a private mediation session is 2-3 weeks. Multi-party cases are harder to co-ordinate everyone's schedule and may take longer.

What if we don't agree with the mediator's decision? The Rules of the Nationwide Academy for Dispute Resolution do NOT allow a mediator to render a decision or impose his opinion on the parties. Therefore there is nothing for the parties to disagree with. It is the parties who must reach an agreement.

Is there any discovery in mediation? There is no formal discovery. However, part of our job is to help all sides obtain the information they need to make intelligent settlement decisions. Therefore, we will arrange informal exchanges of information that help facilitate a settlement. A form is provided for the submission of information to the mediator.

When should a case be sent to mediation? As soon as the parties have sufficient information to settle the case. This is often before the negotiations have "hardened" the positions of the parties. Even so, mediation is frequently successful when all sides were sure no one would move any farther in the negotiations.

Will the mediator be an expert in the particular area of law? Very probably. However, mediation experts will tell you that a good mediator can mediate most cases without being an expert in that particular area of law. It is more important that he be an experienced mediator.

How long will the mediation session last? The average mediation session lasts 3-5 hours. The mediator may also call or meet with parties before the mediation. Sometimes a mediator also works with the parties after the mediation.

Are mediated settlements better than those reached on the courthouse steps? Yes! A mediated settlement is far faster and less expensive. A mediated settlement usually saves the parties discovery expenses and the time and intellectual expense of preparing to go to court.

Who will attend the mediation session? The parties, their representative(s), and the mediator. Mediations are private and confidential by law.

The opposing party has not negotiated in good faith before, why should they now? Everyone negotiates differently. However, when everyone agrees to meet and discuss the case in mediation, cases thought to be impossible to settle are settled.

What if mediation is unsuccessful? Since NADR mediation settles over 91% of the privately referred cases mediated, this is not a major concern. However, even in that event, you can still move to arbitration or trial (and you will know it really did have to be arbitrated or tried). Often, even if a settlement of the dispute is not achieved, the mediation clears up a large number of issues resulting in a much shorter trail than would otherwise have been the case. The inherent savings more than repays the cost and effort involved in having attempted to settle the dispute through mediation.

KEY POINTS TO REMEMBER:

Mediation is not arbitration. Mediation is a non-binding settlement discussion and no one is giving up their right to an arbitration / trial.

The mediation will be convenient – set up at a date, time, and place that fits everyone’s schedule.

The mediator will be a dispute resolution expert, and someone all parties will be comfortable with.

Mediation is effective – while we can’t guarantee a specific result, private mediation settles 91% of the cases submitted.

MEDIATION TIMETABLE

The projected time scale from receipt of submission of dispute to mediation is between 3-4 weeks.

Party becomes aware that there is a problem. Approaches the other party and attempts to reach a settlement. Negotiations break down. Consult representative, if required.

Day 1 Dispute referred to mediation (mail or fax) FCSM01. Inform other party.

Day 2

Day 3 **NADR confirms receipt of reference & dispatches consent form FCSM02.**

Day 4

Day 5 Other party to receive and return consent form FCSM02

Day 6

Day 7 FCSM02 received / appoints mediator / dispatches Mediation Notice FCSM05

Day 8

Day 9 Parties receive Notice of Mediation Form FCSM05

Day 10

Day 11

Commence Preparations for Mediation.

Consult with representatives (if any). Start to compile evidence etc.

Day 12

Once preparations are sufficiently advanced submit documents (if any) to mediator and make disclosures where applicable. Use Form FCSM03 (and FCSM04 if needed).

Day 13

Day 14 NADR dispatches Form FCSM06 Initiation of Mediation Process.

Day 15

Day 16 Receive Form FCSM06 Initiation of Mediation Process.

Day 17

Finalise Preparations for Mediation.

Maintain consultation with representatives (if any). Collate evidence etc.

Day 18

Submit any outstanding documents (if any) to mediator and make disclosures where applicable. Use Form FCSM03 (and FCSM04 if needed).

Day 19

Day 20

Day 21

Day 22

Finalise arrangements for your team to attend the mediation.

Day 23 **NADR target date for Mediation FCSM07 / Settlement FCSM09.**

Day 24 Complete & return evaluation form FCSM10 & any further requests.

Day 25

Day 26 Receipt of evaluation form FCSM10 & notification of any further action.

Day 27

Day 28

Day 29

Day 30 Normal target date for settlement of accounts between parties.

Day 31 Confirm compliance.

Allowing for normal postal practice one clear working day is set aside for dispatch and delivery of notifications. Weekends and bank holidays may slow the process down. The use of confirmed fax facilities where available is advised.

If either of the parties is not able to comply with the time scale for the mediation process and requires an extension in time it is essential that NADR is notified as soon as practicable, in particular regarding dates when a party will not be available to attend. NADR will make every effort to comply with reasonable requests for extension of time. An application for extension of time must NOT be used as a means of evading the mediation process.

UK Mediation Rates

- 1 **Introduction.** NADR provides a range of fixed rate mediation services tailored to the needs of individual organisations and social groups, as reflected in the Schedule of Fixed Charges below. NADR also provides Dispute Resolution Schemes at rates negotiable between NADR and the participating parties.
- 2 **Fixed Charge Community Service Mediation Rates.** £50 per party per day and £25 per part day, payable in advance, inclusive of administrative charges. Community Mediations are conducted within the community by NADR community mediators.
- 3 **Fixed Charge Mediation Rates : Small Claims and Consumer / Supplier Disputes up to £1499.** £50 per party per part day, payable in advance, inclusive of administrative charges, and venue.
- 4 **Fixed Charge Medium Range Contract Claims Disputes** from £1,500 to £9,999. £250 per party per day and £125 per part day, payable in advance, inclusive of administrative charges and venue. If the mediation is conducted at any other venue provided and paid for by the parties, the mediator's costs, reasonably incurred, in attending will be covered by the parties, jointly and severally. Fees and attendance allowances and expenses incurred in calling witnesses to be covered by the party calling the witness. In the event of late submission of documentation by either party or the submission of additional evidence and or expert reports the party responsible will be liable to account to NADR for any resulting additional costs incurred by NADR. A submission to mediation may be withdrawn at any time up to 96 hours before the scheduled time for the mediation. Thereafter, the parties are jointly and severally liable to and for a £200 cancellation fee. In the event that a settlement to a dispute is concluded within a half day mediation session a pro-rata return of fees will be made to the parties by NADR.
- 5 **Fixed Charge Standard Mediation Rates.** £1,000 per party per day and £500 per part day, payable in advance, inclusive of administrative charges and venue. If the mediation is conducted at any other venue provided and paid for by the parties, the mediator's costs, reasonably incurred, in attending will be covered by the parties, jointly and severally. Fees and attendance allowances payable to witnesses and expenses incurred in calling witnesses to be covered by the party calling the witness. In the event of late submission of documentation, the submission of additional evidence and or expert reports the party responsible will reimburse NADR for any resulting costs incurred by NADR. 96 hours notice required to cancel a mediation. Thereafter, the parties are jointly and severally liable for a £500 cancellation fee. In the event that a settlement to a dispute is concluded within a half-day mediation session a pro-rata return of fees may be made to the parties by NADR.
- 6 **Costs.** The mediation settlement may contain provisions, as between the parties, in respect of costs incurred by the mediation process. The mediator may not make an award of costs.
- 7 **Dispute Resolution Packages and Schemes.** NADR will design an integrated dispute resolution package in collaboration with the parties. Packages include inter-alia grievance procedures, negotiation formulae, educational provision for both parties, periodic review processes and Quality Control Mechanisms. Scheme rates are subject to individual negotiation.

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MEDIATION MANUAL



Internet Library

Explore ways towards settling a dispute in an informal setting with a professional mediator.

To be used in conjunction with an NADR Mediation Clause
incorporated into the contract giving rise to the dispute
or
Where the parties subsequently agree to NADR Mediation.

MEDIATION CLAUSE

Any dispute hereafter arising between the contracting parties / any dispute hereafter arising out of or in respect of this agreement (delete as required) to be referred to the Nationwide Academy for Dispute Resolution UK Ltd for mediation, subject to the relevant Mediation Rules, Regulations and Codes of Practice of NADR applicable at the time of referral. Unless the parties otherwise agree, mediation to take place within days (insert the required figure) of referral of the dispute to mediation. Any agreement arising out of the Mediation to be immediately enforceable before any court of law. The main agreement, and this mediation clause are governed by Law (insert the governing law). The mediation process is a pre-requisite to adjudication, arbitration and or judicial settlement. This mediation clause is independent of and severable from the main agreement and will remain in force irrespective of whether or not the main agreement is lawfully enforceable. The main agreement and this mediation clause are subject to the jurisdiction of the courts of (insert required jurisdiction). In the event that any provision of this Agreement is invalid, the parties agree that all remaining provisions shall be deemed to be in full force and effect.