

# Model ADR Clauses for Commercial Contracts

A drafting guide to key ADR clauses  
for early resolution of disputes

2023 Edition

This publication is intended as a guide to using ADR Clauses in general and cannot cover every type of transaction or specific situation. Readers should take legal advice before applying the information covered in this publication to specific issues or transactions. CEDR accepts no liability for any issue arising out of a dispute over the usage of these clauses.

## Model ADR contract clauses summary of changes

### The following changes have been made:

#### 2018 Edition

- The option to include working days is applied in relation to the timescales provided in the mediation clauses (notice of the dispute, commencement of the mediation and nomination of the mediator) in order to clarify the length of time indicated. It is important to note, however, that the use of such should be done with caution with respect to International (cross-border) contracts as there is not necessarily a global, homogenous working week or business practice. Furthermore, these are general working days and are not specific to an individual or industry.
- Parties may now request CEDR to decide on points of the logistical arrangements of the mediation (for example venue) beyond the appointment of the mediator within 14 days of service of the ADR Notice. This will be done following a consultation with the parties and the mediator.
- The Cautionary Statement, Section 7 of *How to insert an effective ADR clause* has been clarified and expanded on to assist contracting parties should they choose to adapt the Model Documents contained within/below. Particular attention has been paid to '*Binding Mediation*', and the need to avoid the inclusion of this reference.

#### 2017 Edition

- The guidelines on How to insert an effective ADR clause were updated to clarify the importance – and flexibility – of the time span in the clauses, according to various situations and needs.
- In order to protect the essential nature of the mediation process, a cautionary statement was added to specify that although the clauses are flexible, they should not re-invent the mediation process. This paragraph was added after observing some clauses based on our model that potentially jeopardised confidentiality, or demanded a solution imposed by the mediator in case of non-settlement.
- The clauses' wording has been updated with "in good faith" to better suit international contracts. This change has been made in many ADR clauses we received. This wording – often present in European regulations – encourages the parties to attempt to settle, rather than coming to the process with no intention to negotiate.

The International Clause is also available on the CEDR website in the following languages: Arabic, Armenian, Brazilian Portuguese, Dutch, Finnish, French, German, Georgian, Greek, Indonesian, Italian, Japanese, Korean, Mandarin, Mongolian, Polish, Portuguese, Romanian, Russian, Spanish, Swedish, Thai and Turkish.

These can be found at <https://www.cedr.com/foundation/currentprojects/mediationcontractclause/>

## Why should you include an ADR clause in your commercial contract?

It is now standard practice to insert an ADR Clause into any commercial contract. At its simplest, an ADR clause allows the contracting parties to agree that if a dispute arises, they will use an alternative form of dispute resolution (such as mediation) as a step prior to, or at least alongside, court action or binding arbitration. An effective ADR Clause will usually save time and costs, as well as potentially preserve valuable commercial relationships. An ADR clause both leaves commercial parties in control and provides parties with a simpler way of resolving a dispute prior to court or arbitration proceedings, but also significantly offers parties a constructive way of proceeding beyond stalled or ineffective negotiations.

Since the introduction of the Civil Procedure Rules in 1998, courts in England and Wales (as well as many other jurisdictions) will expect parties to consider ADR and there can be severe costs consequences for parties in failing to engage with ADR appropriately, with parties unable to recover legal costs post trial to which they would otherwise be entitled. The courts' commitment to encouraging parties to use mediation and other ADR processes has only been strengthened by the introduction of the Jackson Reforms in England and Wales in April 2013 and Lord Justice Briggs in 2016. Globally, many jurisdictions have similar provisions in relation to ADR and it is important that contracting parties are aware of any legal obligations that they have in relation to ADR. Further details about these provisions can be found on the CEDR website.

There are multiple advantages to inserting an ADR clause into a commercial contract:

- The mediation process involves a skilled, third party neutral, trained to work with parties to facilitate communication which is geared towards an agreed, durable settlement even when initial direct negotiations have not been successful.
- The mediation process changes the focus for the parties away from the events of the past towards the realism of the present and the needs of the future.
- A constructive and non-adversarial process allows parties to maintain and/or repair working relationships.
- It prompts the parties to consider a process which may not necessarily occur to them (and if ADR did occur to them, it can trigger this process at an earlier stage than it might otherwise happen).
- It introduces a specific process, which gives the parties a clear framework for exploring settlement and overcoming obstacles to settlement. (It also encourages the other side to come to the negotiation table despite potential reluctance.)
- Parties are able to devise solutions to their problems which can be creative and go far beyond what a court or arbitrator would be able to order.

- Mediation is entirely confidential and there is no strict need for any disclosure of settlement to the wider public (unless the parties agree to do so). A court judgment alternatively is usually a public document and can be extremely damaging for the losing party (and sometimes all parties).
- The potential of achieving a binding solution. Some 83 per cent of mediations run by CEDR result in settlement or progression of the case.
- Even where settlement is not achieved, mediation helps the parties to focus on their further steps.
- An early successful conclusion to the dispute will provide substantial savings in legal and management costs, freeing up the business for more productive endeavours.
- Finally, an ADR Clause does not prevent parties from being able to resort to the courts for justice, as this option remains open to them if the ADR process is unsuccessful. A party should therefore not fear that an ADR Clause will deny them justice. Any settlement reached at the end of mediation will only be agreed if consensual.

## How to insert an effective ADR clause

There are various key points which need to be considered when constructing an ADR Clause. The example clause that CEDR provides will cover these points but the following is a checklist for the draftsman of some key areas to consider:

### 1. Post deadlocked negotiations

As a first stage before any ADR clause is activated, there is likely to be a period of time when the parties will resort to some form of negotiation or discussion of the issues. An ADR clause should clearly identify the point when it can be considered that negotiations have failed (for example by giving a time period after certain key representatives have met to attempt to resolve the issue). This means that the parties can move on to considering other methods for resolving their dispute and thus progress the issues. An additional benefit to having an ADR clause is that in itself it can be used as a tool within the negotiation phase to encourage early settlement or more productive negotiations.

### 2. Pre-litigation

The clause can clarify whether court proceedings can run in parallel with the ADR process or be stopped whilst ADR is attempted. In England and Wales one cannot oust the jurisdiction of the court, but the court will stay proceedings to allow parties to honour their agreement to mediate. A party's

right to seek injunctive or declaratory relief or to avoid a time bar by agreement will always be preserved. The prospect of settlement may be higher before the lines of battle have been drawn by a hostile step of commencing court proceedings/arbitration. The CEDR Model Mediation Procedure – 2017 Edition provides that litigation or arbitration may be commenced or continued unless the parties agree otherwise.

### **3. Single or multi-step clause**

There are differences between having an ADR Clause which references a multi-stage procedure (e.g. moving from negotiation to mediation to arbitration or going to litigation) or one which references a single process such as mediation. The choice is whether to move straight to mediation or to combine different ADR processes, for example to provide for direct negotiations followed by mediation if the negotiations fail. Multiple processes provide a clear structure. However, it may be that not all processes (e.g. arbitration) are desired by the contracting parties.

### **4. Time limits/time span**

To be effective, it is better to provide for a clear process and timetable. The CEDR Clauses have built in timescales which make the clauses more effective. This can be adapted by the contract's draftsman to suit the organisation or the sector's usual practice or specific needs – for example a need for quick resolution to keep business running, or longer timeframe to allow for compliance with other legal requirements. However, one of the key purposes of having a clause is to compel the other party to mediate with you in a timely manner.

Further the CEDR Model Mediation Procedure – 2017 Edition covers termination provisions under section 9 - Conclusion of the Mediation.

### **5. Identifying procedural rules**

Reference to an agreed set of procedural rules for the mediation or ADR process is critical to ensure that the clause has sufficient certainty. The CEDR Model Mediation Procedure is considered to have that degree of certainty and can be referred to with confidence. In *Cable & Wireless plc v IBM* [2002] EWHC Ch 2059, Mr Justice Colman said “Resort to CEDR and participation in its recommended procedure are, in my judgment, engagement of sufficient certainty for a court readily to ascertain whether they have been complied with.” Your clause will be more effective if you refer to a known and accepted model mediation procedure and institution under whose auspices the mediation can be conducted. The CEDR Model Mediation Procedure can be found on CEDR's website at <https://www.cedr.com/foundation/currentprojects/mediationcontractclause/>

## 6. Decision makers

You may want to identify the decision makers engaging in the ADR process e.g. managing director, CEO. Identifying the relevant decision makers can be helpful in providing clarity, however, it is not strictly necessary to do so. As an alternative, you can simply refer to the parties, leaving the decision as to appropriate attendees to the relevant time. Under the CEDR Model Mediation Procedure attendees are encouraged to come with full authority to settle and thus the parties can be satisfied that the other side have the power to resolve the dispute fully.

## 7. Cautionary statement

These clauses are meant to be adapted within the frame of your commercial contracts. They can be simply copied, but any modification should be done in accordance with the CEDR Model Mediation Procedure – 2017 Edition and the CEDR Code of Conduct for Third Party Neutrals – 2017 Edition.

Modifications such as those stating the mediator will issue a decision in case of non-settlement, or ones that jeopardise the confidentiality of mediation, may end up in the clause being ineffective.

CEDR advises that parties, when adapting these clauses, avoid using the terms '*Binding Mediation*' and the '*Deciding Mediator*'. This is because Mediation is distinct from adjudicative processes such as Arbitration and is voluntary in nature. Arbitration, like litigation, provides a binding decision imposed by an independent third party. Mediation on the other hand seeks to help parties achieve their own binding agreement through a mutually acceptable commercial and legal solution. To avoid ineffectively conflating Mediation and Arbitration, if parties wish to include, as part of their dispute resolution process, a final, binding stage, CEDR suggests the use of the multi-tiered process.

If you require verification, guidance or further information, please contact [adr@cedr.com](mailto:adr@cedr.com) to speak with one of our advisors.

### To be effective ensure that you have:

- a) a clear process;
- b) a trigger for the process;
- c) a time frame (beginning and end);
- d) easily identifiable decision makers;
- e) clarity on whether you want the mediation to take place before or during an adversarial procedure or whether you want to leave your options open; and
- f) clear procedures for what happens if the parties fail to agree on a process, e.g. how a mediator is selected if the parties fail to agree on a mediator.

## Model clauses

### 1. Simple core mediation clause

#### CORE WORDING

'If any dispute arises in connection with this agreement, the parties agree to enter into mediation in good faith to settle such a dispute and will do so in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties within 14 days of notice of the dispute, the mediator will be nominated by CEDR.'

#### NOTES

This clause by itself should be sufficient to give the parties the opportunity to attempt to settle any dispute by mediation. The CEDR Model Mediation Procedure provides clear guidelines on the conduct of the mediation and requires the parties to enter into an agreement based on the CEDR Model Mediation Agreement in relation to its conduct. This will deal with points such as the nature of the dispute, the identity of the mediator and where and when the mediation is to take place. If an ADR/mediation clause is sufficiently certain and clear as to the process to be used it should be enforceable. The reference in the clause to a recognised model mediation procedure should give it that necessary certainty: *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC Ch 2059.

### 2. Simple core mediation clause including time and notification

#### CORE WORDING

'If any dispute arises in connection with this agreement, the parties agree to enter into mediation in good faith to settle such a dispute and will do so in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties, within 14 [working] days of notice of the dispute, the mediator will be nominated by CEDR. To initiate the mediation a party must give notice in writing ('ADR notice') to the other party[ies] to the dispute, referring the dispute to mediation. A copy of the referral should be sent to CEDR.

[If there is any point on the logistical arrangements of the mediation, other than the nomination of the mediator, upon which the parties cannot agree within 14 [working] days from the date of the ADR Notice, where appropriate, in conjunction with the mediator, CEDR will be requested to decide that point for the parties having consulted with them.]

Unless otherwise agreed, the mediation will start not later than [28] [working] days after the date of the ADR notice.'

## NOTES

This wording is to address the concern that mediation should provide a quick solution rather than delay an outcome. It evidences intention that mediation should happen quickly and provides a trigger for commencement of the mediation with the service of the ADR Notice, including a copy to CEDR so that it can assist the parties to move the process as quickly as possible.

When deciding on the logistical arrangements of the mediation, parties now have the option to request CEDR to decide on these matters following a consultation with them. What constitutes logistical arrangements is not an exhaustive list, but may include: choice of venue (including location), start time, date of the mediation and deadlines for documentary disclosure.

### 3. Simple core mediation clause including time, plus reference to court proceedings in parallel

#### CORE WORDING

'If any dispute arises in connection with this agreement, the parties agree to enter into mediation in good faith to settle such a dispute and will do so in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties within 14 [working] days of notice of the dispute, the mediator will be nominated by CEDR. To initiate the mediation a party must give notice in writing ('ADR Notice') to the other party[ies] to the dispute, referring the dispute to mediation. A copy of the referral should be sent to CEDR.

[If there is any point on the logistical arrangements of the mediation, other than the nomination of the mediator, upon which the parties cannot agree within 14 [working] days from the date of the ADR Notice, where appropriate, in conjunction with the mediator, CEDR will be requested to decide that point for the parties having consulted with them.]

Unless otherwise agreed, the mediation will start not later than [28] [working] days after the date of the ADR Notice. The commencement of mediation will not prevent the parties commencing or continuing court proceedings/arbitration.'

## NOTES

Strictly this wording is not necessary as nothing in the core mediation wording prevents the issuance of court proceedings. Further, CEDR's Model Mediation Procedure, Section 1, provides that litigation or arbitration may commence or continue unless the parties are otherwise agreed. The inclusion of this wording in the contract clause may however allay the concern more explicitly if a party wishes to retain the ability to resort to court proceedings/arbitration.



When deciding on the logistical arrangements of the mediation, parties now have the option to request CEDR to decide on these matters following a consultation with them. What constitutes logistical arrangements is not an exhaustive list, but may include: choice of venue (including location), start time, date of the mediation and deadlines for documentary disclosure.

#### **4. Simple core mediation clause including time, plus reference to no court or arbitration proceedings until mediation terminated**

##### **CORE WORDING**

'If any dispute arises in connection with this agreement, the parties agree to enter into mediation in good faith to settle such a dispute and will do so in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties within 14 [working] days of notice of the dispute, the mediator will be nominated by CEDR. To initiate the mediation a party must give notice in writing ('ADR Notice') to the other party[ies] to the dispute, referring the dispute to mediation. A copy of the referral should be sent to CEDR.

[If there is any point on the logistical arrangements of the mediation, other than the nomination of the mediator, upon which the parties cannot agree within 14 [working] days from the date of the ADR Notice, where appropriate, in conjunction with the mediator, CEDR will be requested to decide that point for the parties having consulted with them.]

Unless otherwise agreed, the mediation will start not later than [28] [working] days after the date of the ADR Notice. No party may commence any court proceedings/arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay.'

##### **NOTES**

The rationale for this wording is that an ADR contract clause is intended to curtail court proceedings, etc, and that for them to run in parallel may not be conducive to any attempt to settle. The prospects of settlement may be higher before the lines of battle have been drawn by the hostile steps of commencing court proceedings/arbitration. Bear in mind that, under the jurisdiction of England and Wales, the courts always retain the ability to issue interim relief but they will stay proceedings to allow parties to honour an agreement to mediate.

When deciding on the logistical arrangements of the mediation, parties now have the option to request CEDR to decide on these matters following a consultation with them. What constitutes logistical arrangements is not an exhaustive list, but may include: choice of venue (including location), start time, date of the mediation and deadlines for documentary disclosure.

## 5. Multi-tiered process:

### Negotiation – Mediation – Arbitration or Litigation

#### CORE WORDING

'If any dispute arises in connection with this agreement, a director [or other senior representatives of the parties with authority to settle the dispute] will, within [14] [working] days of a written request from one party to the other, meet in a good faith effort to resolve the dispute.

If the dispute is not wholly resolved at that meeting, the parties agree to enter into mediation in good faith to settle such a dispute and will do so in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties within 14 [working] days of notice of the dispute, the mediator will be nominated by CEDR. To initiate the mediation a party must give notice in writing ('ADR Notice') to the other party[ies] to the dispute, referring the dispute to mediation. A copy of the referral should be sent to CEDR.

[If there is any point on the logistical arrangements of the mediation, other than the nomination of the mediator, upon which the parties cannot agree within 14 [working] days from the date of the ADR Notice, where appropriate, in conjunction with the mediator, CEDR will be requested to decide that point for the parties having consulted with them.]

Unless otherwise agreed, the mediation will start not later than [28] [working] days after the date of the ADR Notice.'

**Version 1:** 'The commencement of mediation will not prevent the parties commencing or continuing court proceedings/arbitration.'

**Version 2:** 'No party may commence any court proceedings/arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay.'

#### NOTES

This adds an extra step providing for negotiations before mediation and the choice is then to have arbitration or litigation in parallel with the mediation, or deferred until after the mediation has effectively terminated.

When deciding on the logistical arrangements of the mediation, parties now have the option to request CEDR to decide on these matters following a consultation with them. What constitutes logistical arrangements is not an exhaustive list, but may include: choice of venue (including location), start time, date of the mediation and deadlines for documentary disclosure.

The draftsman has the choice to add Version 1, referring to court proceedings in parallel, or Version 2, no court proceedings until the mediation is completed.

## 6. International core mediation clause

### CORE WORDING

'If any dispute arises in connection with this agreement, the parties will attempt to settle it by mediation in good faith in accordance with the CEDR Model Mediation Procedure and the mediation will start, unless otherwise agreed by the parties, within 28 days of one party issuing a request to mediate to the other. Unless otherwise agreed between the parties, the mediator will be nominated by CEDR.

The mediation will take place in [named city/country; city/country of either/none of the parties] and the language of the mediation will be [English]. The Mediation Agreement referred to in the Model Procedure shall be governed by, and construed and take effect in accordance with the substantive law of [England and Wales].

If the dispute is not settled by mediation within [14] days of commencement of the mediation or within such further period as the parties may agree in writing, the dispute shall be referred to and finally resolved by arbitration. CEDR shall be the appointing body and administer the arbitration. CEDR shall apply the UNCITRAL rules in force at the time arbitration is initiated. In any arbitration commenced pursuant to this clause, the number of arbitrators shall be [1-3] and the seat or legal place of arbitration shall be [London, England].'

### NOTES

This model clause should be suitable for international contracts, i.e. contracts between parties in different jurisdictions, but consideration should be given to including provisions relating to the location/ language of the mediation, as well as the governing law and jurisdiction applicable to the mediation agreement along the lines of this paragraph. The clause refers to arbitration under CEDR's auspices if mediation does not resolve the dispute, but another arbitral institution and its rules may be identified where parties agree.

The clause can be amended to refer to 'CEDR, London' if the draftsman believes this will specify more clearly where to find CEDR for international parties.

The appointment of a mediator by CEDR within 14 days' notice of the dispute has been omitted from this clause, recognising that practical difficulties may occasionally occur when arranging cross-border mediations.

For further information, please refer to the CEDR Model ADR Clauses at <https://www.cedr.com/foundation/currentprojects/mediationcontractclause/>