About Ciarb

The Chartered Institute of Arbitrators (Ciarb) is an independent, charitable membership and professional body organisation committed to supporting the effective resolution of disputes. From local disagreements to international disputes, Ciarb champions all aspects of constructive resolution across arbitration, mediation and adjudication, raising the profile of alternative dispute resolution (ADR) across the world and empowering best practice. As a professional body, with a Royal Charter, CIArb sets robust ethical standards for ADR to which all its members must adhere. Ciarb's inclusive membership spans a diverse range of geographies, backgrounds and professional disciplines. All with one thing in common – a desire to advance successful dispute resolution.

As a professional body bound by a Royal Charter, Ciarb is committed to the promotion of all forms of ADR. Ciarb's membership is growing and our 17,900 members around the world, approximately 4810 are Mediators, making up more than 25% of our total membership. In England & Wales, approximately 1100 Ciarb members are qualified, practicing Mediators. With our international membership and knowledge of mediation globally, we believe we can bring a unique perspective to the issues surrounding the implementation of mandated mediation in England and Wales.

Executive Summary

Ciarb's position can be summarised as follows:

- Ciarb is supportive of the 1-hour telephone sessions, as there is considerable evidence, including the settlement rate of 55%, that many parties are served well by this system – particularly in cases where a brief exploration followed by trading of offers arrives at an acceptable settlement. However, free 1-hour telephone sessions must not be confused with the wide-ranging reforms necessary if the potential of mediation is to be fully realised across the justice system. Therefore, consideration must be given if the case is not resolved as a consequence of the call, as to how parties can be sign posted and encouraged

to use mediation as a tool to resolve their ongoing dispute. This should include, where appropriate, support and guidance for the parties steering them to mediation. Ciarb therefore would recommend a review of how these telephone sessions are designed and interface with mandated mediation if the call fails to resolve the claim.

- The introduction of mandatory mediation will benefit the justice system provided that those undertaking the mediations are trained and public has access to redress in the event of a concern. Mediation should not be seen as the cheap option (although it can save costs). For mandated mediation to be successful it should be appropriately funded. Additionally, it will be important to gather data about the success of mandated mediation processes so that the system can be continuously improved. Ciarb supports a system of self-regulation, which already exists, but which can be strengthened. This to ensure that mediators are trained, and that redress is available to the public in the event of a concern.
- We are opposed to the establishment of a single mediator regulator in England and Wales. We believe this would be costly to those practising as mediators and would not necessarily result in better protection for those seeking the services of a mediator. Additionally, it could lead to duplication of regulation for those who are regulated by other regulators.
- All mediators carrying out mandated mediation should be trained as mediators and accredited.
- Mandated mediation should be carried out in line with minimum standards set by professional bodies currently self-regulating mediators in England and Wales and these standards should be presented to the Ministry of Justice for approval.
- A single list of approved mediators, who are accredited and meet the agreed minimum standards, should be made available to the public. The list could be held by one body, but we do not support the need for all mediators to register with that body if they are already accredited with another professional body which holds them to account for complying with required minimum standards and has a process for redress available to the public in the event of a concern. For example, it could be the responsibility of each professional body responsible for self- regulating its registered mediators to supply names of approved mediators to a central list.
- There is a need for greater data capture and analysis to ensure that lessons can

be learned from a mandated system to ensure continuous learning, that success can be measured accurately, and any necessary reforms can be based on evidence. This should include whether the mediation was successful as well as other information such as the type of claim, its value, whether the parties were represented, and the point in the proceedings (or pre-proceedings, if possible), when the mediation took place.

- Whatever form the future of mediation takes in England and Wales, it must be inclusive and caters to diverse needs. This means that the mediators should reflect the diversity of the public they are seeking to serve.

Questions

1. We propose to introduce automatic referral to mediation for all small claims (those valued under £10,000). Do you think any case types should be exempt from the requirement to attend a mediation appointment? If so, which case types and why?

We suggest that exemptions should be limited and only available if the parties apply to the court. Then it will be solely at the court's discretion to accept the exemption as an extreme, but valid, circumstance. For example, the court may grant an exemption where there is a need to safeguard an individual. However, this does not mean that mediation should not take place if one of the parties is vulnerable. Hence, the necessity of the parties to demonstrate to the court that an exemption is appropriate.

Additionally, it will be important to ensure that the mediator undertaking a mediation with a vulnerable party is trained in the management of vulnerable parties.

The Ontario model, Canada demonstrates that mediation can be applied even where issues surrounding capacity exist.

"The Ontario Mandatory Mediation Program is designed to help people settle their cases early in the legal process to save time and money. The Mandatory Mediation Program applies in Toronto, Ottawa and Windsor. In these areas or jurisdictions, certain civil lawsuits under rule 24.1 of the Rules of Civil Procedure must go to mandatory mediation. Under rule 75.1 of the Rules of Civil Procedure, certain civil

lawsuits about estates, trusts and substitute decision matters, where someone is not mentally capable of making certain decisions about their property or personal care, are also referred to mediation." [1]

2. Do you think that parties should be able to apply for individual exemptions from the requirement to attend mediation, assessed on a case-by-case basis by a judge? If so, why? And what factors do you think should be taken into consideration?

The Ontario scheme is widely recognized as a successful example of mandated mediation. This scheme has minimal exemptions and there needs to be a court ruling to say that an individual is exempt from mediation. It has been suggested that a core tenet of the scheme's success is due to the tight exemptions list. In Ottawa, the parties have to demonstrate that they understood the mediation process, can explain why the case was not appropriate for mediation and suggest an alternative, cost-effective form of dispute resolution. If however, the decision of whether an exemption should apply is at the discretion of the court, the criteria to be applied by the court should be outlined. This will avoid some of the difficulties which arose after the case of Halsey v Milton Keynes General NHS Trust, which arguably enabled some parties to avoid mediation.

To discourage the parties filing an application to the court without good grounds also depends on providing useful information to the parties, in the right place, time and in the form they need.

Other factors include the need for added assurance and explanation to the end-user that mediation is not a legal tool. Therefore, to some end-users, the use of a judge to achieve exemption could potentially be viewed as particularly confusing. This can be, once again, overcome if there is clear and well-signposted information which explains the demarcation of the use of a judge assessing mediation exemptions on a case-by-case basis, and thus we do not view the involvement of a judge to approve exemptions as an issue.

1 https://www.ontario.ca/page/mandatory-mediation-civil-cases

3. How do you think we should assess whether a party who is required to mediate has adequately engaged with the mediation process?

Firstly, to appropriately evaluate the success of a mediation there needs to be good data records as set in our consultation response in April 2022:

"Ciarb would like to call for greater data recording capabilities within the mediation sector in the UK. When considering the impact of becoming Party to the Convention, it served as a stark reminder that it would be difficult to comment on any significant change that joining the convention would have, whilst alongside numerical proof or statistics to back up the comment. A centralised data recording mechanism within the Ministry of Justice for mediation would benefit the sector and future decisions on mediation treatise significantly." (p2)

We reiterate that a centralised, public and easily accessible data set on mediations would be the most appropriate way to garner greater understanding and true knowledge of mediations in general. This would then enable researchers, civil servants, various sector stakeholders the raw data to deduce the success rate of the mediation in all forms.

In a paradoxical sense, we believe that using settlement rates of mediations should not be the sole way to understand whether the parties have engaged with the mediation process. Using settlements as a success marker of mediations in a vacuum is problematic as it ignores the various other ways in which a mediation can end positively without a settlement. Settlements are a good indicator of the success of mediation, but they should not be the only measure.

Secondly, as mediations are the exception rather than the rule in people's everyday lives, it is difficult to access return and/or repeat users. Additionally, to this, even if an individual had a positive experience with a mediation in one instance, this does not strictly guarantee them a positive experience in the second mediation and vice versa. Thirdly, even if a case which had been to mediation ended up in litigation, but both/or all parties ended up with a positive view on mediation and had engaged with it fully but ultimately litigation was necessary to settle the dispute, it would be very hard to quantitively document their impression and engagement with mediation.

There may be qualitative ways around this, whereby at the end of a mediation, a survey could be given to the users to document their experience. However, given the mediation is only an hour it would be difficult to guarantee users would participate in a survey that takes any amount of time.

Lastly, there may be virtue in a longer-term study of people's opinions of mediations.

4. The proposed consequences where parties are non-compliant with the requirement to mediate without a valid exemption are an adverse costs order (being required to pay part or all of the other party's litigation costs) or the striking out of a claim or defence. Do you consider these proposed sanctions proportionate and why?

Ensuring that sanctions are proportionate and well-considered, would be beneficial to ensuring the parties take mandatory mediation seriously. This will help secure the success of the new scheme. The Civil Justice Council (CJC) report on Compulsory Alternative Dispute Resolution[2] (ADR) discusses non-compliance and sanctions thoroughly.

It is important to note that there is currently an inconsistent approach applied by the courts in relation to sanctions. There might be several reasons for this, including pro or anti-mediation judges, lack of clear guidance, (which is not directive enough), or there is a training requirement for judges.

If parties arrive at a court hearing, there should be significant and enough information available to a judge as to whether a mediation has taken place. The need for confidentiality should not impact on the judge's decision to apply an appropriate sanction. There should be evidence that reasonable attempts were made to settle without lifting the veil of mediation confidentiality, (which should be considered of utmost importance in mediation).

The primary point should not be how one of the parties behaved within this hour, but how they engaged with the entire process and how effectively they tried to resolve such, (by the time the matter is placed before a judge). If the substance and

[2] https://www.judiciary.uk/wp-content/uploads/2022/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf

correspondence indicate that there has been refusal to do any further mediation other than the free hour in a situation where more engagement would be needed, such should still lead to a sanction. This is already the case with judges who are strong advocates of ADR and partly responsible for the outcome. In this, 'reasonable' behaviour should be considered in line with the principle of proportionality.

5. Please tell us if you have any further comments on the proposal for automatic referral to mediation for small claims.

Fundamentally, Ciarb are supportive of automatic referral to mediation for small claims. As outlined above in Questions 1 and 2, exemptions should be limited, and it would be up to the court's discretion by way of application. Currently, there is limited data captured and recorded throughout this process and this should be changed where possible. It would be helpful to capture other data too, such as enforceability, the nature of the claim, legal representation (both, neither or one), and settlement. On settlement, we argue that this data should be recorded in a trackable nature so that statistics can be collected on whether the parties go back to the court for enforcement. This should be done both by being able to tie settlements achieved and lodged at the court as consent orders and by enquiring on entry to the system whether the claim is in relation to a formal mediation settlement agreement which has previously been breached.

We acknowledge that there are other elements that would benefit from being recorded, and the above examples are key elements we wish to see tracked but are not exhaustive.

We reiterate that the scheme needs to be appropriately funded with sufficiently trained staff. The existing HMCTS team has a small number of experienced staff that deal with a currently opt-in scheme. As such, more extensive staff training will be necessary to deal with non-voluntary participation. We believe there needs to be a recognition from the HMCTS team that cases that cannot always be resolved successfully in an hour, and in order to ensure the time is used efficiently and to leave a positive impression of mediation, these cases should be referred on to a full mediation.

Training needs to correspond to decisions on exemptions and cases need to be allocated to specifically trained staff where there are safeguarding concerns, (these

could include, but would not be limited to threats, violence, coercive control, questions surrounding capacity, etc.).

The scheme should be accessible, supportive of the parties and have sufficient information available to explain the process. Wider public availability to mediation should be made clear, and we foresee that this could be achieve by including Chamber of Commerce's, the Confederation of British Industry (CBI), various business organisations, Citizen Advice groups and a plethora of other organisations that would benefit the end- user of being a champion of mediation.

There needs to be a clear 'what next,' both for the mediators and especially for the end- users, if the claimant does not settle. This is inextricably tied with Question 4, and the question of penalties if the parties have not participated fully in the mediation. For example, there is a question whether this automatically means the case move on to a full mediation that is longer than an hour. We believe this should be considered thoroughly.

It is important to highlight that when mediation becomes mandatory, that it does not mean that either party are forced to settle, nor do they lose ownership of the process. There might be questions surrounding the efficiency of mediation when it is mandated, but examples from around the world prove that once compulsory, mediation settlement rates remain high. An example we mentioned is the Ontario model in Questions 1 and 2, but other examples are New York[3], Australia[4], and Italy.

6. Do you have experience of the Small Claims Mediation Service?

As an organisation, we do not have direct experience of SCMS. However, many of our members do. We have had positive feedback on the experience of the SCMS.

One of our members spoke to us as an end-user of the SCMS before the pandemic. The feedback was that the documents sent via post were good and clear; however, they questioned whether the documents would be accessible to someone without a prior understanding of mediation and not from a professional background. They suggested

[3] https://www.pbwt.com/content/uploads/2019/05/PR19_09.pdf

[4] https://www.fedcourt.gov.au/__data/assets/pdf_file/0017/80117/AR2019-20.pdf

that there should be greater emphasis on explaining the process of mediation from start to finish to ensure that the end-user would know what to expect. A potential option around this would be a video explainer or an audio option, which would also enhance accessibility to the information. Whilst postal documents worked well in this specific instance, it might be easier for some to have the information available online too.

It was noted that the individual from the SCMS behaved professionally and was extremely helpful in their role. The 1-hour session was just enough time in this case; however, our member wanted us to stress that this specific mediation example was a

very straight forward, transactional mediation and the party was prepared to settle before the hour began. As such, this indicates that SCMS and 1-hour mediations do work well, but within a specific context, and that the SCMS provides a valuable service and alternative means of redress.

7. Did you receive information about the Small Claims Mediation Service? If you received information, how useful was it?

Ciarb is aware of the Small Claims Mediation Service and recognises the important role it has played in helping parties with smaller disputes obtain redress. There is a broader question about the quality of public education and information on how mediation works, how parties can engage with it effectively, and what the benefits are. As the government looks to expand mediation through the new mandatory telephone sessions (and the introduction of mandatory mediation more widely), it is important that new initiatives are supported by a comprehensive programme of public information.

8. How can we improve the information provided to users about this service?

Specifically, on improvement on information provided to the users about the SCMS, we welcome the Gov.uk landing page on the Small Claims Mediation Service as a good entry point for new end-users. However, this landing page could be expanded to be more thorough, for example by having positive human case-studies of individuals who have used the SCMS previously, a Q&A section for frequently asked questions or concerns, and accessible options with audio, video and different language options.

On the wider point of access to information, there has been a movement towards a consensus that information about all alternative dispute resolution options needs to be better, including mediation. This is not necessarily about centralising information, although it would be useful if provided by the Government. However, it is about dissemination to users including Small and Medium Enterprises (SMEs), and the general public. Information should be disseminated to SMEs through trade bodies, unions, online industry bodies, via social media and networking events.

The Civil Procedure Rules (CPR) should also be amended to further support the use of mediation with sanctions if lawyers fail to adequately advise their clients about mediation.

It has been mentioned several times and different roundtables and discussions on this point that that there exists an echo chamber in the mediation world; both mediators and organisations acknowledge that whilst there are copious websites where explanations of mediation to end-users exist, they are not very well sign-posted.

9. What options should be available to help people who are vulnerable or have difficulty accessing information get the guidance they need?

Ciarb has strong inclusion commitments in our strategy and believe that those who are vulnerable or have difficult accessing information should not be excluded from the mediation process, or any other dispute resolution mechanism.

There is a myriad of ways in which mediation can be more inclusive, including: providing technological support, ensuring the use of accessible buildings, using specialist mediators (as mentioned above), creating accessible materials (including large print, Welsh language, using assistive technology where possible.

Access Mediation Services (https://accessmediationservices.co.uk) are a key example whereby they specialise in disability mediation services to help individuals, service providers, employers and employees explore and resolve issues when there is a dispute regarding disability. There should be very clear and transparent signposts for those who need specialists.

10. What else do you think we could do to support parties to participate effectively in mediation offered by the Small Claims Mediation Service?

There are many ways in which Government, with the help of organisations, can support effective participation. A lot of useful information already exists, but as previously

mentioned, there is a greater need to sign-post more effectively. It is important that the right information, comes to the right people, at the right time and that this information comes with good accessibility.

Online disputes filing could be explored as a potential option to help improve this process, as it could potentially allow for greater accessibility options, but also to speed up the process of getting the information at the correct time- rather than waiting for postal services, or delayed calls with service providers.

As mentioned in Question 8, adding in a 'human dimension' to the information and explanation of the Small Claims Mediation Service would be a great way to initially engage individuals. Individuals may have negative or neutral preconceived ideas of what mediation is, how it works and its success rate – so by including positive real-life examples to the information pages may enable new end-users to start the mediation process. This could come in the form of case studies, Q&As, videos, etcetera.

11. Does there need to be stronger accreditation, or new regulation, of the civil mediation sector? If so what – if any – should be the role of government?

Ciarb supports a system of self-regulation through professional bodies which can ensure mediators are trained and meet agreed standards for undertaking mandated mediations.

These standards should be agreed with the Ministry of Justice (Government) and produced by the professional bodies operating in the mediation sector.

All mediators wanting to undertake mandated mediation should be registered with a professional body approved by the Government.

Professional bodies should have accessible systems of redress and a complaint system which can independently deal with concerns from mediator users.

Government will also want to satisfy itself that the systems of complaint and redress are working effectively which will mean Professional bodies working with other regulators if a complaint is made about a professional who is regulated by another

regulator, in order to avoid duplication.

Ciarb is not supportive of the creation of a single regulator for mediators. We believe this would be costly and would not lead to a better outcome for the public.

We are supportive of self-regulation. The current system of self-regulation should be strengthened as it does not apply to all mediators. Some mediators have not been trained and/or accredited and are not members of professional bodies, meaning that there is not a level playing field and the public would not know whether there is redress in the event of the concern.

Any mediator undertaking mandated mediation should be trained and a member of a professional body and the subject to operating in line with agreed standards.

Ciarb holds its membership to ethical standards, and there are active methods of redress. As an Royal Charter and accrediting body, we welcome working with other organisations to support effective self-regulation within the sector. This could include, the Civil Mediation Council (CMC), Centre for Effective Dispute Resolution (CEDR), Royal Institution of Chartered Surveyors (RICS), and others.

We do not believe that all mediators should have to be a member of one body. However, it is important that the public has access to redress, and therefore mediators undertaking mandated mediation should be a member of a professional body which has a recognised ethical and/or professional standard code and independent complaints process enabling public redress in the event of a concern. Those bodies should be required to ensure that they have adequate professional and ethical standards, EDI policies, ensure mediators undertaking mandated mediation meet agreed standards and that their complaints processes are transparent and accessible.

Sector standardisation: please see our response to Question 13. Our core position is that there needs to be a system of ensuring that those who wish to undertake mandated mediations meet minimum standards. Ciarb is committed to working with the leading bodies to agree how the system could and should work.

We emphatically do not believe that one body should take a regulatory role over others. Such a requirement would be entirely unnecessary, may create potential

conflicts of interest, and would undermine the entire system by requiring many mediation practitioners to unnecessarily duplicate their professional accreditations.

As we set out above, a much more effective approach would be for professional bodies to work together with government to agree minimum standards, and then allow mediators to be a member of anybody that meets or exceeds those standards.

12. Which existing organisation(s) could be formally recognised as the accreditation body for the civil mediation profession and why?

Ciarb's position is that we are opposed to the establishment of a single mediator regulator in England and Wales, as referenced in the above question.

However, we are supportive of ensuring that mediators are appropriately trained, accredited, meet agreed standards and are subject to a professional code of conduct which ensures action can be taken if their practice falls below agreed standards. On this issue, we believe that all major mediation organisations, agree.

Ciarb already operates as a quasi-regulator or self-regulator for dispute resolvers including mediators, globally. We consider dispute resolution holistically and many of our members practice not only as mediators, but also as arbitrators, adjudicators, conciliators, counsel, or professional advisers to the parties in dispute. This being the case, we focus on the complementarity of different mechanisms for resolving disputes seeking to ensure the methods adopted by the parties are appropriate for the dispute and the parties.

We recognise and support the unique role mediators play in resolving disputes and are supportive of and working towards ensuring mediators are recognised as professionals globally. Ciarb's standards address behaviour, integrity and fairness, conflicts of interest,

competence, information, communication, conduct of the process, trust and confidence, fees. For a more detailed explanation of these standards, please see Appendix I.

13. What is your view on the value of a national Standard for mediation? Which groups or individuals should be involved in the development of such a Standard?

As previously mentioned, Ciarb operates as global quasi-regulator and self-regulator in line with our charitable and Royal Chartered status. We believe that all mediators carrying out mandated mediation should be trained and meet agreed standards.

We are therefore supportive of creating an agreed set of standards for mandated mediation. We believe core stakeholders in the mediation field should be involved in ensuring the standards for mandated mediation are appropriate to protect the parties undertaking mandated mediation. These organisations include CMC, CEDR, RICS, as well as other organisations who have an interest in standard setting for mediation.

14. In the context of introducing automatic referral to mediation in civil cases beyond small claims, are there any risks if the government does not intervene in the accreditation or regulation of civil mediators?

It is important to stress that mediation is working successfully as a sector without Government intervention. There are institutions and organisations with a strong focus on supporting and improving the mediation sector, whether that be in a quasi-regulatory, accreditation, or training role. Increasingly over the last several years' collaborative work has taken place between the institutions, and this should continue.

However, we do think that if Government is commissioning the delivery of mandated mediation, it will want to satisfy itself that the standards and processes for redress are appropriate.

15. Some mediators will also be working as legal practitioners, or other professionals and therefore subject to regulation by the relevant approved regulator e.g. solicitors offering mediation will already be regulated by the Solicitors Regulatory Authority. Should mediators who are already working as legal practitioners or other regulated professionals be exempt from some or any additional regulatory or accreditation requirements for their mediation activities?

Many mediators come to mediation as a second career. Some are qualified professionals in other disciplines including many who are legally qualified. The skillsets of a mediator are different to those of a lawyer and other professionals, and even if an individual is extremely well-qualified, experienced and at the top of their respective primary field, (whether this be lawyers, in construction, engineering, or elsewhere), this does not strictly equate to their success as a good mediator.

As such, we believe that anyone wanting to mediate should be trained as a mediator and `be a member of a professional body for their mediation practice particularly, to ensure that ethical standards are met, and the public has redress.

Ciarb on occasions works with other regulators to avoid duplication depending on the nature of the concern raised by the parties. We will on occasion refer to the Bar Standards Board or the SRA, (for example), a complaint and depending on the nature of it, agree who will investigate. Once the investigation is concluded, depending on the outcome, the member may be sanctioned.

16. Are there any measures that the Small Claims Mediation Service could take to ensure equal access for all to their services, considering any specific needs of groups with protected characteristics and vulnerable users?

Please refer to our answers in Questions 8 and 10.

Appendix I – Ciarb ethical standards

The principles established by the Code are as follows:

Rule 1 - Behaviour A member shall not behave in a manner which might reasonably be perceived as conduct unbecoming a member of the Institute.

Rule 2 - Integrity and Fairness A member shall maintain the integrity and fairness of the dispute resolution process and shall withdraw if this is no longer possible.

Rule 3 - Conflicts of Interest Both before and throughout the dispute resolution process, a member shall disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so. Where a member is or becomes aware that he or she is incapable of maintaining the required degree of independence or impartiality, the member shall promptly take such steps as may be required in the circumstances, which may include resignation or withdrawal from the process.

Rule 4 - Competence A member shall accept an appointment or act only if appropriately qualified or experienced. A member shall not make or allow to be made on the member's behalf any representation about the member's experience or expertise which is misleading or deceptive or likely to mislead or deceive.

Rule 5 - Information Where appropriate and having regard to whether the parties are represented by professionals familiar with the dispute resolution process, the member shall ensure that the parties are informed of the procedural aspects of the process.

Rule 6 - Communication A member shall communicate with those involved in the dispute resolution process only in the manner appropriate to the process.

Rule 7 - Conduct of the Process A member shall prepare appropriately for the dispute resolution process concerned. A member shall not be influenced by outside pressure or self-interest. A member shall not delegate any duty to decide to any other person unless permitted to do so by the parties or applicable law. A member shall not unduly delay the completion of the dispute resolution process.

Rule 8 - Trust and Confidence A member shall abide by the relationship of trust which exists between those involved in the dispute and (unless otherwise agreed by all the parties, or permitted or required by applicable law), both during and after completion of the dispute resolution process, shall not disclose or use any confidential information acquired in the course of or for the purposes of the process.

Rule 9 - Fees A member shall charge only reasonable fees and expenses having regard to all the circumstances and shall disclose beforehand and explain to the parties to the dispute resolution process the basis upon which the fees and expenses shall be calculated and charged.

These rules apply whether the member in question has been appointed by the Ciarb, by another institution, or by the parties themselves.

Appendix II – Ciarb mediation rules (January 2018)

Available online as a pdf (https://www.ciarb.org/media/3291/mediation-rules.pdf)

Article 1 – Scope of application

1.1. Where parties have agreed that any disputes between them, whether contractual or not, shall be referred to mediation under the CIArb Mediation Rules ('The Rules') then such disputes shall be mediated in accordance with these Rules, or such amended rules as the CIArb may have adopted as of the date of filing a request for mediation, subject to such modification as the parties may agree.

1.2. These Rules shall come into force on 1 January 2018.

1.3. The parties may at any time agree in writing, as between them, to modify the provisions of the Rules. Any agreement to modify the provisions made after a mediator is appointed shall be subject to the approval of the mediator also in writing.

1.4. All communications with and applications to the CIArb under these Rules shall be in English. The CIArb may request from the parties a translation of any document written in a language other than English, where such a document is required for the CIArb to fulfil its mandate under these Rules.

1.5. In these Rules:

a) mediation' refers to the entire process from the initiation of a mediation in accordance with Article 2 or 3 of these Rules as appropriate until it is terminated in accordance with Article 9 of these Rules;
b) 'CIArb' means the 'Chartered Institute of Arbitrators'. The functions of the CIArb shall be performed in its name by the President or Deputy President of the CIArb;
c) 'DAS' means the 'Dispute Appointment Service' of the CIArb;
d) 'representative' includes any adviser or other authorized representative of a party;
e) words used in the singular shall be construed to include the plural and vice versa, as the context may require.

1.6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or non-business day at the residence or place of business of the addressees, the period is extended until the first business day that follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Article 2 – Initiating mediation: prior agreement to mediate under the Rules

2.1. Where there is a prior agreement to mediate under these Rules, any party may initiate mediation by communicating to all other parties to the dispute, in writing 2

(which includes e-mail) a request for mediation, containing:

a) the date on which the request was communicated to the other parties;
b) the names, addresses (including e-mail addresses), and contact numbers (including telephone and facsimile) of all parties to the dispute and any legal or other representatives involved, so far as known to the requesting party;
c) a brief description of the nature of the dispute and, if possible, its estimated value;
d) a name or names of mediators that the party proposes be appointed; and/ or
e) a proposal for criteria required of a prospective mediator, such as language skills, mediation experience or subject-matter expertise; and
f) a proposal for dates when the parties and the mediator could meet, if a meeting is required.
g) a copy of the prior agreement to mediate.

2.2. Within 21 days from the date on which a request for mediation was received by all of the other parties, each recipient shall respond to the requesting party in writing, with a copy to all other parties, stating whether they accept the request to mediate and whether they accept any of the proposed name(s) or criteria suggested by the requesting party and making any additional suggestions the recipient may have regarding name(s) or criteria for the appointment of a mediator.

2.3. Mediation shall be deemed initiated on the date when a written acceptance of the request to mediate has been received by the requesting party from all of the other parties.

2.4. In the event that some of the other parties accept the request to initiate mediation under these Rules within 21 days then mediation shall be deemed initiated between them and the requesting party from the date of the last acceptance.

2.5. In the event that none of the other parties accept the request to initiate mediation under these Rules within 21 days from the date on which the request was communicated to them there shall be no mediation under these Rules.

Article 3 – Initiating mediation: no prior agreement to mediate under the Rules

3.1. Where there is no prior agreement between the parties to refer a dispute to

mediation under these Rules, any party wishing to initiate mediation under these Rules may offer to do so by communicating a written request inviting all other parties to reply within 21 days in writing (which includes e-mail) whether or not they accept the offer. The written request shall contain the information specified in Article 2.1 (a)-(f). 3

3.2. Mediation shall be deemed initiated on the date when a written acceptance of the offer to mediate has been received by the requesting party from all of the other parties.

3.3. In the event that some of the other parties accept the offer to initiate mediation under these Rules within 21 days then mediation shall be deemed initiated between them and the requesting party from the date of the last acceptance.

3.4. In the event that none of the other parties accept the offer to initiate mediation under these Rules within 21 days from the date on which the offer was communicated to them there shall be no mediation under these Rules.

Article 4 – Mediator Appointment

4.1. Where all parties have agreed who they wish to appoint as mediator they shall jointly appoint the mediator to mediate the matters in dispute in accordance with these Rules.

4.2. If, within 28 days from the initiation of a mediation the parties have not agreed upon who they wish to appoint as mediator, any party may apply to the CIArb to propose a list of potential mediators or to appoint a mediator. The party making the application shall complete the relevant application form available on the CIArb's website and send it to DAS with a copy to the other parties.

4.3. The request to propose a list of potential mediators or to appoint a mediator by the CIArb pursuant to these Rules shall be accompanied by payment of the appropriate application fee specified on the CIArb website. The CIArb shall not proceed until the specified payment has been received. The application fee is not refundable.

4.4. On receipt of an application to appoint a mediator, the CIArb shall make the appointment as promptly as possible, but in any event within 10 days. In making the appointment the CIArb shall have due regard to any agreement in writing between the parties as to the criteria required of a prospective mediator, such as language skills,

mediation experience or subject-matter expertise.

4.5. Mediators are usually selected from the CIArb's Presidential Panel of Mediators. However, the CIArb may appoint a mediator who is not on the CIArb's Presidential Panel of Mediators if it considers, in its sole discretion, that it is appropriate to do so.

4.6. A single mediator will be appointed, unless otherwise agreed by the parties.

Article 5 – Conflict of interest

5.1. The mediator shall inform the CIArb and all parties at the earliest possible time, whether before or during the process, of any perceived conflict of interest and shall withdraw unless the parties explicitly consent to the mediator continuing.

5.2. In the event that a mediator has to be replaced during the course of the mediation, a substitute mediator shall be selected or appointed pursuant to the procedure provided for in Article 4.

Article 6– Confidentiality

6.1. Unless required by law or otherwise agreed between the parties to the mediation in writing:

a) the CIArb, including the President, the Deputy President and its employees, the parties, their representatives, and the mediator shall keep confidential all information, whether given orally, in writing or otherwise, produced for, or arising out of or in connection with the mediation, including the fact that the mediation is taking, or has taken, place;
b) the existence and content of any settlement agreement shall be kept confidential except to the extent that disclosure is necessary for its implementation or enforcement.

6.2. Unless permitted by the party, the mediator shall keep all information given privately by that party confidential from all other parties.

Article 7 – Conduct of the mediation

7.1. The mediator shall conduct the mediation in such manner as the mediator considers appropriate, taking into account the circumstances of the case, the wishes

of the parties and the need to avoid unnecessary delays.

7.2. Meetings may be held face to face, by telephone, by videoconference, or other electronic means. The mediator may communicate with the parties together or with any party separately, with or without its representatives.

7.3. A party may be assisted by any person(s) it chooses and must keep the mediator and each other party informed of the names, contact details and roles of such persons and of any changes that may occur during the mediation.

7.4. Each party will inform the mediator and all other parties to the dispute who has the ultimate authority to settle the dispute on their behalf.

7.5. Throughout the mediation the parties and their representatives shall act in good faith and shall use their best efforts to co-operate with each other and with the mediator to resolve the dispute and enable the mediation to proceed smoothly.

Article 8 – Termination of the mediation

8.1. The mediation shall end:

a) upon the signing by the parties of a written settlement agreement; or

b) upon the mediator, after consultation with the parties, informing them that it is terminated as in the mediator's opinion further attempts at securing an agreed outcome through mediation are no longer appropriate or practically achievable; or

c) upon written notification by any party that the mediation is terminated. No reasons need be stated in any such notice.

Article 9 – Costs

9.1. Unless otherwise agreed by the parties, each party shall bear its own costs and expenses of the mediation.

9.2. Unless otherwise agreed by the parties, each party shall bear equally the costs and expenses of the mediation including but not limited to:

a) the CIArb's application fees, if applicable;

b) the mediator's fees and expenses;
c) the costs of any meeting rooms, meals and refreshments or other reasonable costs relating to the organisation and conduct of the mediation;
d) the fees and expenses of any independent witness or expert who attends the mediation at the request of the mediator and with the consent of the parties.

9.3. The mediator may at any time during the mediation require the parties to make deposits to cover any anticipated fees or expenses related to the mediation and may suspend the mediation until such deposit is paid. Any surplus funds deposited shall be returned to the parties in proportion to their payments at the conclusion of the mediation.

Article 10 – Mediator's role in subsequent proceedings

10.1. The mediator shall not be appointed as representative, counsel or expert witness for any party in any subsequent adjudication, arbitration or judicial proceedings whether arising out of or in connection with either the mediation or the subject matter of the mediation, save as may be expressly agreed in writing by all the parties and the mediator. No party shall be entitled to call the mediator as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of or in connection with the same matter.

10.2. The mediator shall not be appointed as an adjudicator or arbitrator in the same dispute or in any other dispute arising out of or in connection with the same matter, nor shall the mediator accept such additional appointment unless, at the time of the additional appointment, the parties expressly waive in writing any objection arising out of the adjudicator or arbitrator having previously acted as mediator between the parties under these Rules, and the mediator consents to the appointment.

Article 11 – Exclusion of liability

11.1. Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the mediator, the CIArb, including the President, the Deputy President and its employees, and any person appointed by the mediator based on any act or omission in connection with the mediation.

11.2. No communication made during the course of the mediation shall be relied upon

to found or maintain any action for defamation, libel, slander or any related complaint.

Appendix I: Model mediation clauses for contracts

Option 1 – Simple mediation contract clause Any dispute, controversy, or claim arising

out of or in connection with this contract, or the breach, termination or validity thereof,

Arbitrators' Mediation Rules. The initiation of the mediation will not prevent the parties commencing or continuing arbitration, court proceedings or any other form of dispute resolution. Parties may consider the following additional provisions: 1. Language(s) of the mediation The language(s) of the mediation shall be [choose language(s)]. 2. Place of mediation and applicable law The place of the mediation shall be [choose city and country]. The mediation shall be conducted in accordance with mediation law of the place of the mediation.

Option 2 – Multi-tiered contract clause for CIArb mediation followed by a CIArb arbitration Any dispute, controversy, or claim arising out of or in connection with this contract, or the breach, termination or validity thereof, shall first be referred to mediation in accordance with the Chartered Institute of Arbitrators' Mediation Rules. Parties may consider the following additional provisions: 1. Language(s) of the mediation The language(s) of the mediation shall be [choose language(s)]. 2. Place of mediation and applicable law The place of the mediation shall be [choose city and country]. The mediation shall be conducted in accordance with mediation law of the place of the mediation. 3. Arbitration if mediation does not resolve the dispute If the dispute, controversy, or claim or any part of it is not resolved by mediation within [insert number] days from the initiation of the mediation, it shall be referred to the Chartered Institute of Arbitrators (CIArb) and settled by final and binding arbitration in accordance with the CIArb Arbitration Rules. The arbitral tribunal shall be composed of [one or three] arbitrator(s). The language(s) of the arbitration proceedings shall be [choose language(s)]. The place of the arbitration shall be [choose city and country]. The proceedings shall be conducted in accordance with arbitration law of the place of the arbitration.

Option 3 – Agreement to CIArb mediation after a dispute arises, We, the undersigned parties, hereby agree that the dispute concerning [insert a brief and accurate description of the dispute], shall, notwithstanding any other proceedings, be referred to

mediation in accordance with the Chartered Institute of Arbitrators' Mediation Rules. Parties may consider the following additional provisions: 1. Language(s) of the mediation The language(s) of the mediation shall be [choose language(s)]. 2. Place of mediation and

applicable law to the mediation The place of the mediation shall be [choose city and country]. The mediation shall be conducted in accordance with mediation law of the place of the mediation.

Option 4 – Agreement to CIArb mediation after a dispute arises, followed by CIArb arbitration, if the mediation does not resolve the dispute, We, the undersigned parties, hereby agree that the dispute concerning [insert a brief and accurate description of the dispute], shall, notwithstanding any other proceedings, be referred to mediation in accordance with the Chartered Institute of Arbitrators' Mediation Rules. Parties may consider the following additional provisions: 1. Language(s) of the mediation The language(s) of the mediation shall be [choose language(s)]. 2. Place of mediation and applicable law to the mediation The place of the mediation shall be [choose city and country]. The mediation shall be conducted in accordance with mediation law of the place of the mediation. 3. Arbitration if mediation does not resolve the dispute If the dispute, controversy, or claim or any part of it is not resolved by mediation within [insert number] days from the initiation of the mediation, it shall be referred to the Chartered Institute of Arbitrators (CIArb) and settled by final and binding arbitration in accordance with the CIArb Arbitration Rules. 10 The arbitral tribunal shall be composed of [one or three] arbitrator(s). The language(s) of the arbitration proceedings shall be [choose language(s)]. The place of the arbitration shall be [choose city and country]. The proceedings shall be conducted in accordance with arbitration law of the place of the arbitration.

NOTE: The Practice and Standards Committee (PSC) keeps these Rules under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

Contact

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