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EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ)

Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation

Standard mediation forms

As adopted at the 31st plenary meeting of the CEPEJ, Strasbourg, 3 - 4 December 2018

This tool has been developed in reference to point 1. Availability of the CEPEJ Guidelines on mediation.

The following forms have been developed to help mediation providers and member states by providing standard mediation forms to be used by parties when starting a mediation process,

agreeing on its settlement, collecting feedback and assessing the parties' satisfaction through a questionnaire. A model contract clause for Dispute resolution through mediation is also provided.

Names and concepts used in model forms and various provisions might be adapted considering national legislation in practice.

The following forms are included in this tool:

- Agreement to Mediate
- Model Mediation Settlement Agreement
- Model Mediation Feedback Questionnaire
- Model contract clause for Dispute Resolution

This tool may expand and evolve in the future. With a view to improving the present document, the CEPEJ-GT-MED invites mediation providers which commit to use this document to bring their feedback to the Secretariat of the CEPEJ.

Model Agreement to Mediate

This agreement dated

is made between

Party A

.....

of (*name of company or entity*).....

Party B

.....

of (*name of company or entity*).....

(together referred to as '**the Parties**')

and

The Mediator / Mediation provider¹

.....

of (*name of mediation provider*).....

in relation to a mediation to be held

on (*date and time*)

at (*place*).....

(**'the Mediation'**)

¹ The agreement to mediate could be signed between the parties and an individual mediator (or co-mediators) or mediation provider according to applicable rules.

it is agreed by those signing this Agreement that:²

The Mediation

1. The Parties agree to attempt in good faith to settle their dispute at the Mediation. The Mediator agrees to conduct and the Parties to participate in the Mediation in accordance with this Agreement to Mediate.

Authority and status

2. The person signing this Agreement on behalf of each Party warrants having authority to bind that Party and all other persons present on that Party's behalf at the Mediation, [or any part thereof], to observe the terms of this Agreement, and also having authority to bind that Party to the terms of any settlement.
3. The Mediator will not be liable to the Parties for any act or omission in relation to the Mediation unless the act or omission is proved to have been fraudulent or involved wilful misconduct.

Confidentiality and without prejudice status

4. Every person involved in the Mediation:
 - 4.1 will keep confidential all information arising out of or in connection with the Mediation, including the terms of any settlement, unless otherwise agreed by the Parties in writing (including or not including the fact that the Mediation is to take place or has taken place) or where disclosure is required by law, or to implement or to enforce terms of settlement or to notify their insurers, insurance brokers and/or accountants; and
 - 4.2 acknowledges that all such information passing between the Parties and the Mediator, however communicated, is agreed to be without prejudice to any Party's legal position and may not be produced as evidence or disclosed to any judge, arbitrator or other decision-maker in any legal or other formal process, except where otherwise disclosable in law.
5. Where a Party privately discloses to the Mediator any information in confidence before, during or after the Mediation process, the Mediator will not disclose that information to any other Party or person without the consent of the Party disclosing it.
6. The Parties understand that the Mediator does not give legal or any other professional advice, and agree that they will not make any claim against the Mediator in connection with this Mediation. The Parties will not make an application to call the Mediator as a witness, nor require them to produce in evidence any records or notes relating to the Mediation, in any litigation, arbitration or other formal process arising out of or in connection with their dispute and the Mediation; nor will the Mediator agree to act as a witness, expert, arbitrator or consultant in any such process. If any Party does make such an application, that Party will fully indemnify the Mediator in respect of any costs they incur in resisting and/or responding to such an application, including reimbursement at the Mediator's standard hourly rate for the Mediator's time spent in resisting and/or responding to such an application.

² This is a model document and it may be considered to add when necessary other provisions such as: the language(s) of the mediation process, the place of the mediation process, the presence of the lawyers and other third persons in the mediation process, the deadline of the mediation process, the ethics binding the mediator.

Settlement formalities

7. No terms of settlement reached at the Mediation will be legally binding until set out in writing and signed by or on behalf of each of the Parties.

Fees and costs of the Mediation

8. The Parties will be responsible for the fees and expenses of the Mediator / Mediation provider ('the Mediation Fees') as set out in [the Mediator's Terms and Conditions of Business] current at the date of this Agreement (including any provision for additional hours if the mediation process extends beyond the allocated hours).
9. Unless otherwise agreed by the Parties and the Mediator in writing, each Party agrees to share the Mediation Fees equally and also to bear its own legal and other costs and expenses of preparing for and attending the Mediation ('each Party's Legal Costs'). However, each Party further agrees that any court or tribunal may treat both the Mediation Fees and each Party's Legal Costs as costs in the case in relation to any litigation or arbitration where that court or tribunal has power to assess or make orders as to costs, whether or not the Mediation results in settlement of their dispute.

Legal status and effect of the Mediation

10. This Agreement is governed by the law of [the Member State] and the courts of [the Member State] shall have exclusive jurisdiction to decide any matters arising out of or in connection with this Agreement and the Mediation.³
11. The referral of the dispute to the Mediation does not affect any rights that exist under Article 6 of the European Convention of Human Rights, and if their dispute does not settle through the Mediation, the Parties' right to a fair trial remains unaffected.

³ Subject to the possibility of using the enforceable authentic instrument (*acte authentique exécutoire*) where the law of the State so provides and allows.

Changes to this Agreement

Agreed changes to this Agreement are set out below

Signed

Party A

.....
[Sign and Print Name]

Party B

.....
[Sign and Print Name]

Mediator

.....

Model Mediation Settlement¹

Date

Parties

Party A

.....

of (*name of company or entity*).....

Party B

.....

of (*name of company or entity*).....
(jointly '**the Parties**')
.....

Party C, etc.

Background

- The Parties have been in a dispute in relation to [set out brief details] ('the Dispute')² [which is being litigated/arbitrated [court/arbitration reference] ('the Action')]³
- The Dispute has been the subject of a mediation ('the Mediation') conducted under an agreement ('the Agreement to Mediate') between the Parties and
[.....] ('the Mediator');
- The Parties have agreed to settle the Dispute on the terms set out below ('the Settlement Agreement');
- [see footnote 1 and set out any key facts or representations]

¹ This Model Agreement (and accompanying consent order) is for guidance only. Any agreement based on it will need to be adapted to the particular circumstances and legal requirements of the settlement to which it relates. Wherever possible any such agreement should be drafted/approved by each party's lawyer. Although the mediator may occasionally be involved in helping the parties to draft acceptable terms, the mediator is not responsible for the drafting of the agreement and should never be a party to it. This agreement does not exempt the parties from complying with the special form requested by the national legislation including but not limited to specific requirements for an notarization and/or registration of specific types of agreements.

² While it is not essential for the factual background to be recited, any facts and representations the truth of which form the crucial foundation for the terms of settlement should be set out here to eliminate or at least minimise any later allegations of misrepresentation.

³ Omit this wording and paragraph 4 if there are no court or arbitration proceedings.

Terms of the Settlement Agreement

It is agreed as follows:

1. A will deliver
to B at
by not later than [date & time].....⁴
2. B will payto A by not later than
[date & time]
by direct bank transfer to
[bank sort code].....
[account number].....
3. [Any other terms]
4.
 - a. The Action will be stayed and the parties will consent to an order in the terms of the attached Order [see attached form of order⁵].
 - b. **OR** [A/B] will discontinue the Action on [B/A]'s undertaking not to claim [B/A]'s costs of the Action against [A/B].
 - c. **OR** Judgment will be entered for [A/B] on their [counter] claim with an order that [B/A] pay [A/B]'s costs on the standard/indemnity basis subject to detailed assessment if not agreed.
 - d. **OR** The Action will be dismissed with no order as to costs.
5. This Agreement is in full and final settlement of any causes of action whatsoever which the Parties [and any subsidiaries of the Parties]
.....
have against each other [*it is important that such a clause is only included after a careful check has been made as to whether there are any other possible outstanding causes of action between the Parties which can safely be compromised (or ought not to be compromised) in this way*].
6. This agreement supersedes all previous agreements between the parties [in respect of all matters relevant to the Dispute] except for those terms of the Agreement to Mediate of continuing effect including the confidentiality of the mediation process, the Parties' undertaking not to call the mediator to give evidence and the liability of the Mediator.⁶

⁴ Be as specific as possible, for example, how, by when, etc.

⁵ This is the commonest method of implementing a settlement where proceedings already exist: where there are no proceedings, the settlement agreement stands as an actionable contract where all parties intend that it should be legally enforceable: if a cross-border dispute, and all parties agree, application can be made to the Court for a mediation settlement enforcement order.

⁶ Only necessary if there have been previous agreements.

- 7. If any dispute arises out of this Agreement, the Parties will attempt to settle it by mediation before resorting to any other means of dispute resolution. To initiate any such mediation a Party must give notice in writing to the Mediator. Insofar as possible the terms of the Agreement to Mediate will apply to any such further mediation. If no legally binding settlement of such a dispute is reached within [28] days from the date of the notice to the Mediator, either party may [institute court proceedings/refer the dispute to arbitration].
- 8. The Parties will keep confidential and not use for any collateral or ulterior purpose the terms of this Agreement except insofar as is necessary to implement and enforce any of its terms or as otherwise agreed in writing by the Parties.
- 9. This Agreement shall be governed by, construed and take effect in accordance with the law of [the Member State]. The courts of [the Member State] shall have exclusive jurisdiction to decide any claim, dispute or matter of difference which may arise out of, or in connection with this agreement.⁷

Signed

.....

for and on behalf of ⁸.....

.....

for and on behalf of ⁹.....

⁷ Usually not necessary where parties are located in same country and subject matter of agreement relates to one country.
⁸ Not necessary where the party signing is an individual.
⁹ Not necessary where the party signing is an individual.

Model Mediation Feedback Questionnaire

Dear Customer,

This questionnaire is designed to help us evaluate the effectiveness of our mediation services. We want to hear your views and we very much appreciate you helping us by answering the questions below. All responses are confidential and your answers will help us improve the service for all our customers.

1. What was your role in this case:
 - [Claimant] - I brought the case to court
 - [Defendant] - the case was brought against me
 - Legal adviser for the [claimant]
 - Legal adviser for the [defendant]
 - Other (please specify):

2. How did you find out about the mediation service?
 - From my legal adviser
 - From a judge or court staff
 - From the other party to the dispute
 - From a leaflet or poster
 - Legal advice centre
 - From advertisements on TV, radio or social networks
 - From a friend or relative
 - Other (please specify):

3. How satisfied or dissatisfied were you with the following aspects of your contact with the mediator/mediation service?

	Very satisfied	Satisfied	Neither satisfied nor dissatisfied	Dissatisfied	Very Dissatisfied
Written information received about the service					
How easy was it to get in touch with the service					
Explanation of how the service could help me out					
Helpfulness of the mediator in arranging the mediation					

4. How satisfied were you with the following aspects of the mediation?

	Very satisfied	Satisfied	Neither satisfied nor dissatisfied	Dissatisfied	Very Dissatisfied
Your opportunity to participate and express your views					
The time allowed for the mediation					
The professionalism of the mediator					
Facilities for the mediation					

5. Did the case settle at mediation?
- Yes – a full settlement was reached.
 - No - the case was not settled
 - Partial - some issues were settled

6. Have you met difficulties with the execution of your mediation settlement?
- Yes
 - No
 - Don't know (or is not executed yet)

7. Would you be prepared to use mediation again?
- Yes
 - No
 - Don't know

8. Do you have any other comments on the mediation service?

.....

.....

9. It would help us to have some additional information about you for diversity monitoring purposes. All information is confidential.

[Include questions, as required, in order to collect information about the customer's gender, age, educational background, ethnicity and disability.]

10. Thank you for completing this survey. Your views are very important to us. The responses will be analysed and used to promote good practice across all areas and to make the service better for all our customers.

11. Once again, thank you for your assistance in completing this survey.

Model contract clause on mediation

The Parties agree that any dispute, controversy or claim arising out of, or relating to this contract, shall be submitted to a mediation process for an attempt to reach an amicable settlement with the assistance of a mediator. Either Party may commence mediation by providing a written request for mediation ("Request for Mediation") to the other party, setting forth the subject matter of the dispute, the relief requested and suggestion as to the mediation provider or mediator.

Parties will jointly agree on a recognised mediation provider or mediator. If the Parties fail to reach an agreement on the mediation provider or mediator within 15 days from the date of the Request for Mediation, either Party can submit a request to [a specified mediation provider or representative mediation body within a Member State] to appoint a recognised mediator.

The mediation will be held on a confidential and without prejudice basis and each party will support the mediation fees in equal shares and cover its own expenses.

The applicable Mediation Rules for the mediation process will be those of the agreed mediator or mediation provider.

If the dispute has not been settled within 90 days following dispatch of the Request for Mediation to the other Party, or within such other time period as the parties may agree in process of mediation, the dispute shall be referred to the competent court.¹³

¹³ Commercial Arbitration Clause might be put instead of referral to Courts when applicable.