

Practice Note 28

Mediation on a Building Contract or Sub-Contract Dispute

Example A: Mediation Agreement

Example B: Agreement appointing a Mediator

Example C: Agreement following the resolution of a dispute
after a Mediation

JCT

The Joint Contracts Tribunal for the
Standard Form of Building Contract

Mediation on a Building Contract or Sub-Contract Dispute

- 1 Disputes can be resolved **either** by obtaining a court order (litigation) or an arbitration award or, if the Contract so provides, by adjudication; **or** by an agreement between the parties involved. Mediation is a way in which the negotiation of such an agreement may be facilitated. It involves the appointment by the parties of an independent person. The qualifications required from such person will depend on the nature of the dispute. He is not appointed to impose a solution but to try and steer the parties themselves towards a settlement.
- 2 While the use of a Mediation should always be considered it may not be suitable if one or more of the following factors are present: the dispute is one on which a legal precedent is being sought; either party needs an injunction to preserve the status quo pending a legal decision on the dispute; one or other party wants a public hearing; one or other party is not genuine in wanting to reach an agreed, as distinct from an imposed, settlement.
- 3 If the parties consider that a Mediator could assist in achieving a settlement it is advisable to draw up a simple agreement on the conduct of the Mediation; an example of such an agreement is annexed to this Note:
Example A. The main matters which should be covered in such an agreement are:
 - a clear and precise statement of the issues in the dispute;
 - a declaration of the parties' wish to resolve the dispute with the help of a Mediator;
 - the period during which the Mediation is to take place but leaving either party free to withdraw without giving any reasons and so bringing the Mediation to an end; or for the parties to extend the period;
 - the name and qualifications of the Mediator;
 - a provision that the Mediation is to be conducted on a confidential and on a without prejudice basis unless and until, and to the extent that, the parties otherwise agree: and that no party will in any legal proceedings on the dispute or on any related matters call the Mediator to give evidence;
 - a date for meeting the Mediator to discuss *inter alia* the method by which the Mediation is to be conducted;
 - the question of how the costs of the Mediation are to be dealt with; that which is generally accepted (and is included in the annexed example of a Mediation Agreement) is that each party bears its own costs but with the fee of the Mediator being shared equally;
 - a provision that, if the Mediation results in a settlement of some or all of the issues, the parties will execute a binding agreement setting out the terms of the settlement.
- 4 The effect on the progress of the work of agreeing to a Mediation should be considered and agreement reached on how that effect is to be dealt with; and it may be that if a rapid, binding, decision is required, bearing in mind that Mediation may not necessarily end in an agreement between the parties, an arbitration under Rule 7 of the JCT Arbitration Rules (short procedure with a hearing) might be considered to be more appropriate. The application of Rule 7 does however require the agreement of both parties.

- 5 The agreement for Mediation does not prevent any party commencing or, if commenced, continuing arbitration, litigation or other proceedings.
- 6 It is recommended that, unless and until agreement is reached with the assistance of a Mediator, the parties should proceed with the contract as if there were no dispute.
- 7 If a dispute involves more than two contracting parties, that is more than the Employer and Contractor or the Contractor and a sub-contractor, the parties will have to adapt the arrangements suggested in this Practice Note which are intended for a dispute between two parties.
- 8 The Architect, Quantity Surveyor or other appointed consultant will usually need to be involved in the Mediation so that their comments are available to the parties.
- 9 If the settlement of a dispute between the Employer and the Contractor varies or negates a decision of the Architect or the Quantity Surveyor or other appointed consultant they should be given a copy by the Employer of the terms of settlement. Such terms might affect or be considered by them to affect their professional responsibilities under their agreements with the Employer.
- 10 Examples of the following documentation relevant to a Mediation are annexed to this Practice Note:
 - A: Mediation Agreement;
 - B: Agreement appointing a Mediator;
 - C: Agreement following the resolution of a dispute after a Mediation.
- 11 Lists of Mediators are maintained by the Royal Institute of British Architects, the Royal Institution of Chartered Surveyors, the Association of Consulting Engineers, the Centre for Dispute Resolution and the Chartered Institute of Arbitrators.
- 12 The following is being included in JCT Forms as a footnote to the provisions setting out the arbitration agreement: "It is open to the Employer and the Contractor/to the Contractor and the sub-contractor to resolve disputes by the process of Mediation: see Practice Note 28 'Mediation on a Building Contract or Sub-Contract Dispute'."
- 13 This Practice Note is not applicable to Scotland. As and when the Scottish Building Contract Committee introduces mediation in Scotland it would make the necessary appointments.

Example A Mediation Agreement

- 1 **This Agreement** made on _____ 199 ____ is between (_____) who are the parties ("the Parties") to a building contract/sub-contract for the carrying out of *(brief description identifying the main or sub-contract works)*.
- 2 The following dispute has arisen between the Parties *(set out brief description of the dispute e.g. a valuation of a Variation, length of an extension of time, whether the Contractor has met a performance specification)*.
- 3 The Parties wish to attempt to resolve the dispute by mediation with the assistance of *(insert name and address and qualifications)* whom they have appointed as Mediator.
- 4 The mediation will commence on _____ and shall terminate either (a) by agreement between the Parties on the terms of settlement of the dispute
or (b) by a written notice of termination by either party to the other
or (c) by *(insert date)*
whichever is the earlier; provided that by further agreement the Parties may fix a later date of termination than that stated in clause 4(c).
- 5 The venue for the Mediation is (_____) or such other venue as the Parties and the Mediator may agree.
- 6 The conduct of the Mediation, including the extent of the documentation required to be submitted, will be decided by the Mediator after consulting the Parties.
- 7 Each party will send to the other and to the Mediator a written summary of his case together with the supporting documentation.
- 8 Neither Party will in any arbitration or litigation or other proceedings on this dispute or on any related matter call the Mediator to give evidence.
- 9 If a settlement is reached between the Parties it shall be set out in a written agreement signed or executed by or on behalf of the Parties.

An example of such written agreement is given: see Example C.
- 10 The Mediation is to be conducted on a confidential and on a without prejudice basis unless and until, and to the extent that, the parties otherwise jointly agree.

11 The fee and expenses of the Mediator will be borne by the Parties in equal shares.

12 Each party will meet its own costs incurred pursuant to the Mediation.

As witness the hands of the Parties hereto:

**Signed by or on behalf of
the Employer/Contractor**

in the presence of

**Signed by or on behalf of
the Contractor/Sub-Contractor**

in the presence of

This Agreement

is made the _____ day of _____ 19 _____

BETWEEN _____

(insert names and addresses, or registered offices, of the Employer/Contractor and Contractor/Sub-Contractor)

hereinafter called 'the Parties' or 'a Party'

AND _____

(insert the name, qualifications and address of the proposed Mediator)

hereinafter called the 'Mediator'

Whereas

the Parties have entered into an agreement (the "Mediation Agreement") in respect of the dispute (the 'Dispute') identified in the Mediation Agreement; and have therein stated that they wish to attempt to resolve the Dispute by Mediation with the assistance of the Mediator;

Now it is hereby agreed that

- 1 The Parties and the Mediator will conduct the Mediation in accordance with the provisions of the Mediation Agreement.
- 2 The Mediator will treat the Mediation as confidential and to be conducted on a without prejudice basis between the Parties unless and until, and to the extent that, the parties otherwise jointly agree.
- 3 Neither Party will in any arbitration or litigation or other proceedings on the Dispute or any related matter call the Mediator to give evidence.
- 4 The Parties will be jointly and severally liable to the Mediator for his fee of

_____ and for all expenses reasonably incurred pursuant to the Mediation by the Mediator.

continued

As witness the hands of the Parties and of the Mediator hereto:

**Signed by or on behalf of
the Employer/Contractor**

in the presence of

**Signed by or on behalf of
the Contractor/Sub-Contractor**

in the presence of

Signed by the Mediator

in the presence of

This Agreement

is made the _____ day of _____ 19 _____

BETWEEN _____

of/whose registered office is situated at _____

("the Employer" "the Contractor")

AND _____

of/whose registered office is situated at _____

("the Contractor" "the Sub-Contractor")

Footnote [B]

pursuant and supplemental to an agreement made on _____ 19 _____

("the Building Contract", "the Sub-Contract") _____

between the Employer and the Contractor/the Contractor and the Sub-Contractor ("the Parties") for the carrying out and completion of Works ("the Works") described therein

at _____

(address)

Whereas

a dispute or difference ('dispute') between the parties has arisen under the Building Contract/the Sub-Contract covering

(set out a brief summary of the dispute)

continued

Now it is hereby agreed

that the Parties have resolved the dispute in the following terms:

Footnote [A]

1 (set out the terms of the settlement)

Footnote [B]

2 The Building Contract/Sub-Contract shall have effect subject to the terms of settlement set out in clause 1 which are from the date hereof incorporated into and form part of the Building Contract/Sub-Contract.

Footnote [B]

3 If there is any conflict between the terms of the Building Contract/the Sub-Contract and the terms of settlement set out in clause 1 those terms of settlement shall prevail.

Footnote [B]

Attestation

Footnotes

[A] In drafting clause 1 consideration should be given to the effect of the agreed terms on any related contracts, sub-contracts, warranties etc.

[B] Where the Agreement does not simply resolve a past dispute but affects or may affect the future operation of the Building Contract/Sub-Contract it is necessary that the Agreement is a supplemental agreement to the Building Contract/Sub-Contract and includes words of similar effect to those in clauses 2 and 3; and is executed under hand or as a deed as the Building Contract/Sub-Contract.

Standard Forms of Building Contract

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Specialist Engineering Contractors' Group
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Association of Consulting Engineers
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