

BURT BRILL & CARDENS : MEDIATION DEPARTMENT

Mediation Agreement Between

Party A

and

Party B

and

& Model Procedure

Third Edition
September 2008

MEDIATION AGREEMENT

THIS AGREEMENT dated _____ **IS MADE BETWEEN**

Party A

.....of

Party B

.....of
(together referred to as "**the Parties**")

The Mediator

.....of

(a term which includes any agreed **Assistant Mediator**)

and

Burt Brill & Cardens of 30 Old Steyne, Brighton, East Sussex, BN1 1FL

in relation to a mediation to be held

on

at
(**"the Mediation"**)

concerning a dispute between the Parties in relation to

.....
.....
.....

(**"the Dispute"**)

IT IS AGREED by those signing this Agreement **THAT:**

The Mediation

1 The Parties agree to attempt in good faith to settle the Dispute at the Mediation. All signing this Agreement agree that the Mediation will be conducted in accordance with its terms and consistent with the Burt Brill & Cardens Model Mediation Procedure and the CEDR Code of Conduct for Mediators current at the date of this Agreement.

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 to observe the terms of this Agreement, and also having authority to bind that Party to the terms of any settlement.

3 The Mediator is an independent contractor, and neither the Mediator nor Burt Brill & Cardens is an agent for any of the Parties in relation to the Dispute or this Agreement.

4 Neither the Mediator nor Burt Brill & Cardens shall 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

5 Every person involved in the Mediation:

5.1 will keep confidential all information arising out of or in connection with the Mediation, including the fact and terms of any settlement, but not including the fact that the Mediation is to take place or has taken place or where disclosure is required by law to implement or to enforce terms of settlement; and

5.2 acknowledges that all such information passing between the Parties, the Mediator and Burt Brill & Cardens, 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.

6 Where a Party privately discloses to the Mediator any information in confidence before, during or after the Mediation, the Mediator will not disclose that information

to any other Party or person without the consent of the Party disclosing it, unless required by law to make disclosure.

7 The Parties will not call the Mediator or any employee or Partner of Burt Brill & Cardens 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 from or in connection with the Dispute and the Mediation; nor will the Mediator nor any Burt Brill & Cardens employee or partner act or agree to act as a witness, expert, arbitrator or consultant in any such process.

8 No verbatim recording or transcript of the Mediation will be made in any form.

Settlement formalities

9 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

10 The Parties will be responsible for the fees and expenses of Burt Brill and Cardens and the Mediator (“**the Mediation Fees**”) in accordance with Burt Brill and Cardens’ Terms and Conditions of Business current at the date of this Agreement.

11 Unless otherwise agreed by the Parties and Burt Brill and Cardens 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**”) prior to the Mediation. 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 the Dispute.

Legal status and effect of the Mediation

12 Any contemplated or existing litigation or arbitration in relation to the Dispute may be started or continued despite the Mediation, unless the Parties agree or a Court orders otherwise.

13 This Agreement is governed by the law of [England and Wales] and the courts of [England and Wales] shall have exclusive jurisdiction to decide any matters arising out of or in connection with this Agreement and the Mediation.

14 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 the Dispute does not settle through the Mediation, the Parties' right to a fair trial remains unaffected.

Changes to this Agreement

15 All agreed changes to this Agreement and/or the Model Procedure are set out as follows:

Signed

Party A _____

Party B _____

Mediator _____

Burt Brill & Cardens _____

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Burt Brill & Cardens' Model Mediation Model Procedure

1 What is mediation?

Mediation is a flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

The principal features of mediation are that it:

- involves a neutral third party to facilitate negotiations;
- is quick to set up and is inexpensive, without prejudice and confidential;
- involves party representatives with sufficient authority to settle;
- is flexible, with no set procedure, enabling the process to be designed and managed by the Mediator to suit the parties, in consultation with them;
- enables the parties to devise solutions which are not possible in an adjudicative process such as litigation or arbitration, and which may benefit all the parties, particularly if there is the possibility of a continuing relationship between them;
- can be used in both domestic and cross-border disputes, two-party and multi-party disputes, and whether or not litigation or arbitration has been commenced.

Many commercial and government contracts now require parties to use mediation. While mediation is essentially flexible, the Model Procedure set out in this document, taken with Burt Brill & Cardens Agreement, will give sufficient certainty to enable the process to be set up and used.

If settlement terms cannot be agreed at a mediation, the parties are free to revert to litigation or arbitration.

2 Referral to mediation

Referral of a dispute to a mediator or to Burt Brill & Cardens for mediation may be as a result of:

- voluntary referral by all parties;
- referral by one party who asks Burt Brill & Cardens to secure the involvement of other parties into a mediation;
- responding to a Pre-action Protocol, the Civil Procedure Rules 1998, a Court Order or a recommendation by a judge before trial or appeal;
- the provisions of a clause in a commercial or government contract requiring the use of mediation as a step in the parties' agreed dispute resolution process.

3 Choosing the mediator

Parties may choose their own mediator directly, or may ask Burt Brill & Cardens to nominate one or more persons to act as mediator for a dispute in accordance with the wishes of the parties or any relevant Court Order (a copy of which must be supplied to Burt Brill & Cardens by the parties as soon as possible after Burt Brill & Cardens has been instructed). If the parties require it, more than one mediator can be appointed to work as co-mediators, or the parties can agree on an independent neutral expert to advise the mediator on technical matters.

Burt Brill & Cardens will only nominate or appoint a mediator who, in their view, possesses the relevant skills and experience to mediate the dispute for the parties effectively, and who will comply with the Burt Brill & Cardens Code of Conduct for Third Party Neutrals (“the Code”). Any nominated mediator will be required to confirm immediately to Burt Brill & Cardens if there is any matter which might prevent the nominated mediator from complying with the Code in relation to the mediation of the dispute, such as a conflict of interest. Burt Brill & Cardens will then notify the parties of any such matter immediately it is disclosed to them.

If required by either the parties or the Court, Burt Brill & Cardens will **appoint** a mediator to be used in relation to a dispute, subject always to that mediator not being prevented from complying with the Code in relation to the mediation of that dispute.

The parties may be asked by Burt Brill & Cardens to approve the appointment by them of an assistant mediator (who will be a an Accredited Mediator) or an observer to attend a mediation at no cost to the parties, provided that they too comply with the Code in respect of the mediation of that dispute. The identity of any assistant mediator or observer proposed to attend the mediation will be made known in advance of the mediation to the parties, who are free to object to any such nomination or decline any such appointment. The mediator’s signature of the mediation agreement binds any assistant mediator or observer to its terms.

4 Preparation for the mediation

Either Burt Brill & Cardens or the mediator when agreed or appointed, will make the necessary arrangements for the mediation as required or agreed by the parties or under the terms of any scheme, including:

- drafting the agreement, submitting it for approval by the parties and preparing the final form for signature, incorporating any agreed amendments;
- facilitating agreement as to the date, venue and start time for the mediation;
- organising exchange of case summaries and document bundles between the parties and the mediator;
- setting up any pre-mediation meetings agreed by the parties and the mediator.

The parties will:

- agree the appointment of the mediator or a process to select or appoint the mediator;
- agree with Burt Brill & Cardens the date, venue and start time for the mediation;

- pay Burt Brill & Cardens's fees and expenses as agreed under Burt Brill & Cardens's Terms and Conditions of business;
- each prepare and exchange a case summary in respect of their approach to the dispute at the mediation and endeavour to agree with all other parties what documents are needed for the mediation;
- send to the mediator (through Burt Brill & Cardens) a copy of their case summary and two copies of the document bundles no less than two weeks before the date set for the mediation, making clear whether case summaries have or have not yet been exchanged, whether or not and when Burt Brill & Cardens is to effect exchange, and whether all or any part of any case summary or documentation is intended to be confidential for the mediator only;
- notify the mediator direct or through Burt Brill & Cardens of the names and roles of all those attending the mediation on their behalf, so that Burt Brill & Cardens can inform all Parties and the mediator in advance of the mediation;
- ensure that a lead negotiator with full authority to settle the dispute (or not) attends the mediation to sign the mediation agreement;
- alternatively notify the mediator, Burt Brill & Cardens and (unless very good reason exists to the contrary) the other parties of any limitation on authority to settle, for instance lack of legal capacity, or the need for ministerial committee or board ratification, in which case the lead negotiator will need to have power to recommend acceptance of any settlement. Late disclosure of limited authority to settle can call into question that party's good faith involvement in the mediation process, and have detrimental effects on the prospects of success of any mediation.

The mediator will:

- ensure at all times that the Code is complied with in respect of the mediation of the dispute, reporting any conflict of interest or other relevant matter, if any, to Burt Brill & Cardens and (subject to any question of confidentiality or privilege) the parties immediately it emerges;
- attend any pre-mediation meetings on terms and agenda agreed by the parties;
- read each case summary and document bundle submitted in advance of the mediation by the parties;
- make contact with a representative of each of the parties before the mediation to assist in preparation for the mediation.

5 Documentation

Documentation intended to be treated as confidential by the mediator or Burt Brill & Cardens (such as a counsel's opinion, an undisclosed expert report, a draft proof of evidence or a confidential briefing for the mediator) must be clearly marked as such, and will not be circulated further without express authority.

One of the advantages of mediation is that its success is not dependent on exhaustive disclosure of documents. Bundles can usually be relatively limited in size, containing only key documents, and case summaries can be quite brief, and can to advantage be prepared jointly by the parties. The parties can ask Burt Brill & Cardens to effect simultaneous exchange of case summaries if required.

While documents brought into existence for the purpose of the mediation, such as case summaries, are clearly privileged from later production in those or other proceedings, the fact that a document which is otherwise disclosable in proceedings is produced for the first time during the mediation does not normally confer privileged status on it. The parties must take legal advice on such matters if they arise.

6 The mediation agreement

The agreement to mediate provides the essential legal basis for the mediation. Its signatories (the parties to the dispute, the mediator and Burt Brill & Cardens) all agree by signing it that the mediation is to be conducted consistent with both this Burt Brill & Cardens Model Procedure and the Code.

A draft mediation agreement will be sent for approval to the parties as part of the preparation process for the mediation, and any proposed amendments can then be discussed and inserted if agreed. The mediation agreement will normally be signed at the beginning of the mediation day on behalf of each of the parties and the mediator, having been pre-signed on behalf of Burt Brill & Cardens. In any pre-mediation contact with the parties, Burt Brill & Cardens staff and mediator once appointed will observe its terms as to confidentiality, even though the agreement has not yet been signed.

7 The mediation

It is normal for each of the parties to have a private room for confidential consultations on their own and with the mediator during the mediation. There should also be a further room large enough for all parties to meet with the mediator jointly.

The mediator will chair and take responsibility for determining the procedure at the mediation, in consultation with the parties.

The likely procedure will comprise:

- preliminary meetings with each of the parties when they arrive at the venue;
- a joint meeting of all attending the mediation, at which each of the parties will normally be invited to make an oral presentation;
- a mix of further private meetings and joint meetings (which may involve all or some of each party's team), as proposed by the mediator and agreed by the parties.

Professional advisers, particularly lawyers, can and usually do attend the mediation. Such advisers play an important role in the exchange of information and opinion on fact, evidence and law; in supporting their clients (particularly individuals) in the negotiations; in advising clients on the implications of settlement; and in drawing up the settlement agreement and any consent order.

Although the agreement provides that no verbatim recording or transcript will be made of the whole mediation by the parties or the mediator, they can make their own private notes which will be undisclosed to anyone else, including in any subsequent litigation or arbitration.

Mediations can last beyond a normal working day and it is important that the key people present for each of the parties remain present or at worst available by telephone for so long as the mediation continues. Any time constraints should be reported to Burt Brill & Cardens or the mediator as soon as known, as any unexpected departure can be detrimental to the progress of the mediation and perceived as disrespectful by other parties.

8 Confidentiality in relation to the mediation

The Burt Brill & Cardens standard agreement provides that what happens at the mediation is to be treated as confidential by the parties, the mediator and Burt Brill & Cardens, including the fact and terms of settlement. However, the fact that the mediation is to take place or has taken place is not normally made confidential, as either or both of the parties may wish to claim credit for agreeing to engage in the process. If it is desired to make the fact that the mediation is taking place confidential also, the agreement can be amended.

Apart from where the parties agree in writing to consent to disclosure of what would normally be confidential, there may be rare circumstances in which the confidentiality of the mediation process cannot be preserved, such as where:

- the mediator or any party or their representative is required by law to make disclosure;
- the mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
- the mediator reasonably considers that there is a serious risk of being personally subject to criminal proceedings unless the information in question is disclosed.

Such questions might arise in relation to duties under the Proceeds of Crime Act 2002 or related legislation or under any other legislation. Legal representatives (who may themselves be under a comparable duty of disclosure in their own capacity) must take full responsibility for advising their clients of the implications of disclosure in relation to any such matters at a mediation.

9 Conclusion of the Mediation

The mediation may end in a number of ways:

- by settlement of the dispute in whole or part, when all agreed matters must be written down and signed by the parties to be binding;
- by one or more parties leaving the mediation before settlement is achieved;
- by an agreed adjournment for such time and on such terms as the parties and the mediator agree;
- by withdrawal of the mediator in accordance with the mandatory and optional circumstances set out in the Code.

The mediator will facilitate the drawing up of any settlement agreement, though the drafting is normally done by the lawyers representing each of the parties. Where proceedings **have not** been started in respect of the dispute, the settlement agreement will (if so intended and drafted) be a contract enforceable by legal action. Where proceedings **have** been issued in relation to the dispute, it is normal for a Consent Order to be agreed either at or after the mediation and later lodged to end the proceedings on the terms agreed.

Where the mediation does not end in complete settlement, the Mediator may make contact with the parties thereafter to see whether further progress might be possible. Many disputes which do not settle at the mediation settle later, usually as a result of what occurred or was learned at the mediation.

Burt Brill & Cardens endeavours to make contact with all the parties after every mediation to obtain their feedback on both the process itself and, in particular, the mediator. Any feedback obtained regarding the mediator will be given in full to the mediator as part of the mediator's continuing learning and development.

10 Complaints

Any formal complaint about Burt Brill & Cardens or any mediator nominated by Burt Brill & Cardens should be notified in writing to its Managing Partner