

## **Mediation / Conciliation**

Under Rule 1.2 of the Arbitration Rules of the MMTA, parties considering arbitration are urged to try and first settle their differences by an alternative dispute resolution (ADR) such as conciliation or as it is usually termed mediation.

This requires the assistance of a Mediator, who preferably has both a knowledge of the trade and training in arbitral procedures, and whose task is to endeavour to help bring the parties to an amicable settlement of the dispute.

Experience has shown that MMTA disputes usually turn on the practicalities of trading in physical metals, and complex legal arguments are rarely involved. Hence the mediation process, which is informal, is intentionally very flexible and draws on the willingness of both parties to settle the dispute as quickly and agreeably as possible. This is a very sensible course for parties to seriously consider taking, especially as it is designed to be simpler, speedier and more cost-effective than the arbitration procedure.

The Mediator is chosen by agreement of both parties to the dispute who should have confidence in his integrity and impartiality.

Clearly the success of the mediation process hinges on the parties desire to maintain good trading relations with each other, to appreciate that the settlement they reach will almost certainly require some 'give and take' and that the custom of the trade is an important factor.

It is envisaged that the Mediator would most likely be chosen from the MMTA Arbitration Panel or maybe from one of the MMTA member companies. The role of the Mediator is to try and generate a conciliatory atmosphere, to focus the parties on the crux issues and to try and suggest remedies acceptable to both parties. Thus obviating the need for more prolonged arbitral proceedings.

Generally his first step would be to meet jointly with the parties to learn the nature of the dispute, subsequently he would separate the parties to speak with them individually. By this time he would have perceived the issues on which the parties differ, and have ideas as to the points the parties might be prepared to concede. He can then bring them together and encourage concessions on both sides so that they can reach an amicable settlement. It may be possible to do this without face to face meetings, but experience has shown that it is this meeting together with an impartial and experienced mediator that can often yield a quick and friendly resolution.

Mediated agreements are not legally enforceable, as the Mediator has no direct authority to rule over the parties, but are confidential. If an agreement cannot be reached or subsequently fails then the time and costs involved should not have been excessive. The parties will then have to decide on the next step that they wish to pursue. The Mediator may not take part in any further proceedings.

## **Mediation Procedure**

MMTA mediations shall be governed by the following procedure ("the Mediation Procedure"), as amended by MMTA from time to time, and the parties shall be taken to have agreed that the mediation shall be conducted in accordance with the Mediation Procedure.

### **1. Mediation Procedure**

- 1.1 The parties to a dispute will attempt to settle it by mediation. Representatives of the parties including their advisers (legal representatives) and the mediator will attend the

mediation sessions. Any and all communications relating to, and at, the mediation are private and confidential and will be without prejudice.

- 1.2 The representatives of the parties must have the necessary authority to settle the dispute. If a party is not represented at the mediation session by an officer or employee with full authority to make binding agreements settling the dispute, he or she must disclose this information to the mediator prior to the mediation.
- 1.3 The procedure at the mediation will be determined by the mediator.
- 1.4 The parties will agree to the appointment of an MMTA accredited mediator. MMTA will provide to the parties, in advance of the mediation, details of recommended mediators drawn from MMTA's panel of mediators. If the parties are unable to agree to the appointment of a mediator, MMTA will appoint a mediator if requested to do so.

## 2. Mediation Agreement

- 2.1 The parties and MMTA will enter into a sign an agreement ("Agreement to Mediate") in advance of the mediation and which agreement shall govern the relationship between the parties before, during and after the mediation.
- 2.2 Each party, in signing the Agreement to Mediate, will be deemed to be agreeing on behalf of both itself and all such other persons to be bound by the confidentiality provisions of the Mediation Procedure.

## 3. The Mediator

- 3.1 The mediator will:
  - a. prior to the commencement of the mediation read and familiarise him/herself with each party's Position Statement and any documents provided in accordance with paragraph 6.1 below;
  - b. determine the procedure (see paragraph 1.3 above);
  - c. assist the parties in drawing up any written settlement agreement;
  - d. abide by the terms of the Mediation Procedure and the Agreement to Mediate.
- 3.2 The mediator will not:
  - a. impose a settlement on the parties;
  - b. offer legal advice or act as legal adviser to any party;
  - c. analyse a party's legal position or rights.
- 3.3 The parties and mediator acknowledge that the mediator is an independent contractor and is not appointed as an agent or employee of any of the parties or the MMTA. Neither the mediator nor a member of his or her firm will act, or have acted, as a professional adviser, or in any other capacity, for any of the parties individually in connection with the dispute during the currency of the mediation.

## 4. Mediation arrangements

- 4.1 MMTA will in consultation with the parties and the mediator, make the necessary arrangement for the mediation including, as appropriate:
  - a. recommend mediators with regard to, inter alia, nature of the dispute, degree of complexity, location of parties etc and drawing up the Agreement to Mediate;
  - b. liaise between the parties to agree suitable date and venue;
  - c. assist the parties in preparing their Position Statement (see paragraph 6) and supporting documentation;

- d. discuss or meet with any or all of the parties or their representatives (and the mediator if appropriate), either together or separately, on any administrative matter pursuant to the proposed mediation;
- e. general administration in relation to the mediation.

## 5. Representation

- 5.1 Parties do not require legal representation to attend the mediation.
- 5.2 Where a party is un-represented, MMTA encourages such party to obtain independent legal advice pursuant to the mediation.
- 5.3 Each party is required to notify MMTA and other parties involved in the mediation to the names of those people intended to be present on its behalf at the mediation at least one week before the date of the mediation.

## 6. Position Statement & Documentation

- 6.1 Each party will be required to prepare and deliver to the mediator, within seven (7) days of the mediation, a concise summary ("Position Statement") of the case in dispute and copies of any and all documents referred to in the position Statement and which it will be seeking to refer to during the mediation.
- 6.2 MMTA does not impose any obligation on the parties to exchange Position Statements, but parties are free to agree to the simultaneous exchange of the Position Statements, if so agreed or if considered appropriate.
- 6.3 The Position Statement is private and confidential and will not be disclosed (by the mediator) to any other third party unless expressly authorised to do so. MMTA will provide to the parties, upon request, a guide to position statement preparation.
- 6.4 Parties are encouraged to prepare and agree a joint bundle of documents where appropriate.

## 7. The Mediation

- 7.1 No formal record or transcript of the mediation will be made.
- 7.2 The mediation session is for the purpose of attempting to achieve a negotiated settlement and all information provided during the mediation session is without prejudice and will be inadmissible in any litigation or arbitration of the dispute. Evidence, which is otherwise admissible, shall not be rendered inadmissible as a result of its use in the mediation session.
- 7.3 If the parties are unable to reach a settlement during the mediation, the mediator may, if requested to do so, facilitate further negotiation after the mediation session itself has ended.

## 8. Settlement Agreement

Any settlement reached in the mediation will not be legally binding until it has been recorded in writing and is signed by, or on behalf of, the parties.

## 9. Termination

- 9.1 Any of the parties may withdraw from the mediation at any time and shall immediately inform the mediator and the other representatives either orally or in writing. The mediation will terminate when:
  - a. a party voluntarily withdraws from the mediation; or

- b. a written settlement agreement is concluded; or
- c. the mediator elects, in his/her sole discretion, that continuing the mediation is unlikely to result in a settlement, or
- d. the mediator decided that he/she should retire for any of the reasons set out in the Code of Practice.

## 10. Effect on legal proceedings

Where the dispute has been referred to mediation by the Court, or where the Court has ordered that the parties consider mediation (under the current civil procedure legislation (as amended from time to time), and the mediation does not achieve settlement, the current litigation or arbitration in relation to the dispute may be commenced or continued, notwithstanding the mediation, unless the parties agree otherwise.

## 11. Confidentiality

- 11.1 Every person involved in the mediation will keep confidential and not use for any collateral or ulterior purpose:
- a. the fact that the mediation is to take place or has taken place; and
  - b. all information, (whether given orally or in writing or otherwise), produced for, or arising pursuant to, the mediation including the settlement agreement (if any) arising out of it. Except in so far as is necessary to implement and enforce any such settlement agreement.
- 11.2 All documents (which include anything upon which evidence is recorded including tapes or computer discs) or other information produced for, or arising in relation to, the mediation will be privileged and not admissible as evidence or discoverable in any litigation or arbitration connected with the dispute (see paragraph 11.1 (b) above). This does not apply to any information, which would in any event have been admissible or discloseable in any such proceedings.
- 11.3 The parties will not subpoena or otherwise require the mediator, MMTA (or any employee, consultant, director or representative of the MMTA) or any other person attending the mediation under the auspices of MMTA to testify or produce records, notes or any other information or material whatsoever in any future of continuing proceedings.

## 12. Mediation Costs

- 12.1 It is usual that the costs of the mediation are borne equally between the parties.
- 12.2 Payment of these costs will be made to MMTA in accordance with its fee schedule and terms and conditions of business (as amended from time to time).
- 12.3 Each party attending the mediation is to bear its own costs and expenses of its participation in the mediation (including legal representative costs) and unless agreed otherwise, such costs will be costs in the cause.

## 13. Waiver of Liability

Neither the mediator nor MMTA shall be liable to the parties for any act or omission in connection with the services provided by them in, or in relation to, the mediation, unless the act or omission is fraudulent or involves wilful misconduct.

## 14. Human Rights

The referral of a dispute to mediation does not affect any rights that may exist under Article 6 of the European Convention of Human

Rights. Should the dispute not settle through the process of mediation, the parties' right to a fair trial shall remain unaffected.

## **Code Of Practice**

### **1. Objectives of Civil/ Commercial Mediation**

Civil / commercial mediation is a process in which: two or more parties in dispute, whether or not they are legally represented, and at any time, whether or not there are or have been legal proceedings, agree to the appointment of a neutral third party (the mediator) who is impartial, who has no authority to make any decision with regard to their issues which may relate to all or any part of a dispute of a civil or commercial nature, but who helps them reach their own decisions by negotiation without adjudication.

### **2. Qualifications and Appointment of Mediator**

- 2.1 Every mediator must comply with the criteria and requirements for mediators as outlined in this Code of Practice.
- 2.2 Save where appointed by or through the court, a mediator may only accept appointment if both or all the parties to the mediation so request, or agree.
- 2.3 Whether a mediator is appointed by the parties or through the court, he or she may only continue to act as such so long as both or all parties to the mediation wish him or her to do so. If any party does not wish to continue with the mediation, the mediator must discontinue the process as regards that party and may discontinue the process as regards all parties. Also, if the mediator considers that it would be inappropriate to continue the mediation, the mediator shall bring it to an end, and may, subject to the terms of the mediation agreement, decline to give reasons.

### **3. Conflicts of interest, confidential information and the impartiality of the mediator**

- 3.1 The impartiality of mediator is a fundamental principle of mediation.
- 3.2 Impartiality means that:
  - 3.2.1 the mediator does not have any significant personal interest in the outcome of the mediation
  - 3.2.2 the mediator will conduct the process fairly and even-handedly, and will not favour any part over the other
- 3.3 Save as set out in 3.2 above, a mediator with an insignificant interest in the personal outcome of the mediation may act if, full disclosure is made to all of the parties as soon as it is known, and they consent.
- 3.4 The mediator must not act, or, having started to do so, continue to act:
  - 3.4.1 in relation to issues on which he or she or a member of his firm has any act for any party
  - 3.4.2 if any of the circumstances exist which may constitute an actual or potential conflict of interest
  - 3.4.3 if the mediator or a member of his or her firm has acted for any of the parties in issues not relating to the mediation, unless that has been disclosed to the parties as soon as it is known and they consent.
- 3.5 Where a mediator has acted as such in relation to a dispute, neither he or she nor any member of his or her firm may subsequently for any party in relation to the subject matter of the mediation.

#### 4. Mediation Procedures

- 4.1 The mediator must ensure that the parties agree the terms and conditions regulating the mediation before dealing with the substantive issues. This should be in written agreement which should reflect the main principles of this code. Such agreement should also contain the remuneration of the mediator.
- 4.2 The procedure for the conduct of the mediation is a matter for the decision of the mediator. Insofar as the mediator establishes an agenda of matters to be covered in the mediation, the mediator shall be guided by the needs, wishes and priorities of the parties in doing so.
- 4.3 In establishing any procedures for the conduct of the mediation, the mediator must be guided by a commitment to procedural fairness and a high quality of process.

#### 5. The decision making process

- 5.1 The primary aim of the mediation is to help the parties to arrive at their own decisions regarding the disputed issues.
- 5.2 The parties should be helped to reach such resolution of such issues which they feel are appropriate to their particular circumstances. Such resolution may not necessarily be the same as that which may be arrived at in the event of adjudication by the court, that allows the parties to explore and agree upon a wider range of options for settlement than might otherwise be the case.
- 5.3 The mediator may meet the parties individually and/or together. Solicitors, barristers or other professional advisers acting for the individual parties may, but need not necessarily, participate in the mediation process if the parties so wish. Such solicitors and/ or advisers may take part in discussions and meetings, with or without the parties, and in other communication and representation, in such manner as the mediator may consider useful and appropriate.
- 5.4 Parties are free to consult with the individual professional advisers as the mediation progresses. The mediator may make suggestions to the parties as to the appropriateness of seeking further assistance from professional advisers such as lawyers, accountants, expert valuers or others.
- 5.5 The Mediator must not seek to impose his or her preferred outcome on the parties.
- 5.6 The mediator shall be free to make management decisions with regard to the conduct of the mediation process.
- 5.7 The mediator may suggest possible solutions and help the parties to explore these, where he or she thinks this would be helpful to them.
- 5.8 The mediator must recognise that the parties can reach decisions on any issues at any stage of the mediation.
- 5.9 Agreements reached in mediation fall into three categories:
  - 5.9.1 non-binding agreement
  - 5.9.2 binding agreements (which would be enforceable by a court)
  - 5.9.2 binding agreements (which would be enforceable by a court)
  - 5.9.3 binding agreements enshrined in court or arbitration orderThe mediator should ascertain how the parties wish their agreement to be treated. Where the parties do not wish to have a legally binding solution (for example where they have resolved personal rather than legal issues), their wishes should be respected.
- 5.10 At the end of the mediation or at any interim stage, the mediator and/or the parties or their representatives may prepare a written memorandum or summary or any agreements reached by the parties, which may, where considered by the mediator to be appropriate, compromise draft heads of such agreements for formalisation by the legal advisers acting for the parties.

- 5.11 If the parties wish to consult their respective individual legal advisers before entering into any binding agreement, then any terms which they may provisionally propose as the basis for resolution will not be binding on them until they have each had the opportunity of taking advice from such legal advisers and have thereafter agreed, in writing, to be bound.
- 5.12 Mediation does not provide for the disclosure and inspection of documents in the same way or to the same extent as required by court rules. The parties may voluntarily agree to provide such documentation, or any lesser form of disclosure considered by them to be sufficient. This should be considered in advance of the mediation. The mediator may indicate any particular documents that he or she considers should be brought to the mediation.
- 5.13 The mediator may assist the parties, so far as appropriate and practicable, to identify what information and documents will help the resolution of any issue(s), and how best such information and documents should be obtained. However, the mediator has no obligation to make independent enquiries or undertake verification in relation to any information or documents sought or provided in the mediation.
- 5.14 If, in cases where one or more parties is unrepresented at the mediation and the parties are proposing a resolution which appears to the mediator to be unconscionable, having regard to the circumstances, then the mediator must inform the parties accordingly and may terminate the mediation and/or refer the parties to their legal advisers.

## **6. Dealing with power imbalances**

- 6.1 The mediator should be alive to power imbalances existing between the parties. If such imbalances seem likely to cause the mediation process to become unfair or ineffective, the mediator must take reasonable steps to try to prevent this.
- 6.2 The mediator must seek, in particular, to prevent abusive or intimidating behaviour by any of the parties.
- 6.3 If the mediator believes that, because of power imbalances, the mediation would not be able to be fairly and effectively conducted, he or she may discuss this with the parties, recognising that the mediation may have been brought to any end and/or the parties referred to their lawyers.

## **7. Confidentiality and privilege**

- 7.1 Before the mediation commences, the parties should agree in writing as to the provisions concerning confidentiality and privilege that will apply to the mediation process itself and any resultant mediation agreement, save as otherwise agreed in the mediation settlement agreement.
- 7.2 The mediator must maintain confidentiality in relation to all matters dealt with in the mediation. The mediator may disclose:
- 7.2.1 matter which the parties and the mediator agree may be disclosed
  - 7.2.2 matters which are already public
  - 7.2.3 matter which the mediator considers appropriate where he or she believes that if the life or safety of any person is or may be at serious risk
  - 7.2.4 matters where the law imposes an overriding obligation of disclosure on the mediator.
- 7.3 Subject to paragraph 7.2 above, where the mediator meets the parties separately and obtains information from any party which is confidential to that party, the mediator must maintain the confidentiality of that information for all other parties, except to the extent that the mediator has been authorised to disclose any such information.

- 7.4 Mediators should note that the mediation privilege will not ordinarily apply in relation to communications indicating that a person is suffering or likely to suffer serious bodily harm, or where other public policy considerations prevail, or where for any other reason, the rules of evidence render privilege inapplicable.
- 7.5 The mediator should remind the parties that (unless the mediation agreement provides otherwise) the confidentiality and privilege attaching to the mediation process may not extend to the provisions of any settlement agreement which results. The mediator should suggest to the parties that they consider the extent to which they wish the terms of the resulting settlement to be disclosed – and to provide accordingly in the agreement itself.

## 8. Professional indemnity cover

All mediators are covered by MMTA's professional indemnity cover.

### 1. Agreement To Mediate

THE FOLLOWING PARTIES namely

- 1.....
- 2.....

(collectively the “parties”) hereby agree to have MMTA administer the mediation of their dispute on the following terms and conditions:

#### 1. Mediation Procedures

- 1.1 The mediation shall be held and conducted according to this Agreement to Mediate (“agreement”).
- 1.2 The mediation meeting itself shall be referred to throughout this agreement as the mediation (“mediation”).
- 1.3 Any settlement reached in the mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, each of the parties.

#### 2. Mediator

- 2.1 The parties agree that Mr/s..... will be the Mediator.
- 2.2 The parties recognise that the Mediator is acting as an independent person.

#### 3. Mediation Fees

- 3.1 The mediation has been scheduled for a single day of 8 hours: 0900-1100 and 1400 – 1800 hours.
- 3.2 The mediation fee (“mediation fee”) shall consist of:
- i. the deposit payable for the scheduled period in the sum of £..... plus VAT;
  - ii. the additional sum of £..... plus VAT for each hour (or part thereof) the mediation exceeds the scheduled period;
  - iii. the mediator preparation time is included in the mediation fee.
- 3.3 The mediation fee shall be borne equally between the parties, unless as a result of mediated settlement, it is agreed otherwise.
- 3.4 The parties are required to pay the deposit (see 3.2.(i) above) in advance of the mediation. The amount payable by each party is set out in the invoice accompanying this agreement.
- 3.5 In the event the mediation exceeds the scheduled period, the parties acknowledge and agree that any additional time incurred is not inclusive in the deposit amount (see 3.2.(i) above), that such additional time will be charged for.

- 3.6 The parties are required to inform the Mediator, either before or during the course of the mediation session, if they do not wish to exceed the scheduled period.
- 3.7 The Mediator’s incidental expenses, travel costs, refreshments etc and disbursement will be charged at cost.
- 3.8 Hire of rooms are administrative expenses to be borne equally by the parties.

**4. Consulting with Legal Advisers**

- 4.1 A party does not require legal representation to attend the mediation.
- 4.2 Where a party is not legally represented, such party is advised to obtain independent legal advice before, during and after the mediation and prior to finalising any agreement reached pursuant to the mediation.
- 4.3 The parties recognise that neither the MMTA nor the Mediator offer legal advice or act as a legal adviser for any of the parties of the mediation nor will they analyse or protect any party’s legal position or rights

**5. Private Sessions**

- 5.1 The Mediator may hold private sessions with one party at a time. These private sessions are designed to improve the Mediator’s understanding of the party’s position and to facilitate the Mediator in expressing each party’s viewpoint to the other side.
- 5.2 Information gained by the Mediator through such a session is confidential unless (a) it is in any event publicly available or (b) the Mediator is specifically authorised by that party to disclose it.

**6. Confidentiality**

- 6.1 The parties recognise that the mediation is for the purpose of attempting to achieve a negotiated settlement and as such all information provided during the mediation is without prejudice and will be inadmissible in any litigation or arbitration of the dispute.
- 6.2 Evidence which is otherwise admissible shall not be rendered inadmissible as a result of its use in the mediation.
- 6.3 The parties will not subpoena or otherwise require the MMTA or any officer of the MMTA, the Mediator or any other person attending the mediation under the auspices of the MMTA to testify or produce records, notes or any other information or material whatsoever in any future or continuing proceedings.
- 6.4 All documents, statements, information and other material produced prior to or during the course of the mediation, save to the extent that these documents have been disclosed already and are in the domain of the litigation, whether in writing or orally, shall be held in confidence by the parties and shall be used solely for the purposes of the mediation.
- 6.5 At the termination of the mediation all such material shall be returned to the origination party or forthwith destroyed at their option.

**7. Termination of the Mediation**

Either of the parties or the Mediator shall be entitled, in their absolute discretion, to terminate the mediation at any time without giving reason therefore.

**8. Signature of this agreement**

This agreement is to be signed by the parties or by their instructed legal representative attending the mediation (if represented) on behalf of that party.

Party:.....

Signed.....

Signed.....

2. only one authorised signature is required

Name.....

Name.....

Party:.....

Signed.....

Signed.....

3. only one authorised signature is required

Name.....

Name.....

4.

Date.....

Accepted to administer the mediation as provided for:--

Date.....

Signed..... (Secretary to the MMTA)

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