



## **Compilation of Sample Mediation Clauses**

Alternative Dispute Resolution Committee of the  
New York City Bar Association

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## Introduction

This Compilation of Sample Mediation Clauses was created by a subcommittee of the Alternative Dispute Resolution (“ADR”) Committee of the New York City Bar Association, with the goal of providing practitioners with useful language to incorporate into contracts if they wish to provide for mediation as a dispute resolution mechanism.<sup>1</sup> The samples have been collected from a number of legal subject matter areas, but are by no means exhaustive; nor are they intended as models to be incorporated without review or modification. Rather, they should be viewed as starting points, to be adapted by counsel as appropriate to fit the specific needs and circumstances of each situation.

**Note to Drafter:** It is important to note that many of the clause provisions are relatively interchangeable and can be used in multiple subject matter areas. Also, because the clauses in this compilation are samples, they may be either over-inclusive or under-inclusive for your specific situation. For example, not all clauses in this compilation contain comprehensive provisions on the method of appointing a mediator, tolling the statute of limitations, or determining the location of a subsequent arbitration proceeding should mediation fail. Conversely, they may contain provisions that are not necessary or appropriate for certain situations. You should work with a lawyer who is experienced in drafting dispute resolution clauses in your industry to review and adapt the best sample clause or clauses that fit your circumstances. In addition, it is a good idea to review your dispute resolution clauses periodically and any provider rules they reference (which change frequently) to be sure they continue to meet your needs.

This compilation is divided into a number of legal subject matter areas that commonly utilize mediation. It also includes a “General Mediation Sample Clause” and a “Mediation-Arbitration Sample Clause” (often referred to as “Med-Arb”). These two clauses can be applied in many subject matter areas.

Many of the sample clauses have similarities and overlaps. In particular, many set forth steps to be taken in the event that mediation does not lead to resolution of the dispute. And some set forth a specific order of possible dispute resolution alternatives, commencing with negotiation, then mediation, and then arbitration.<sup>2</sup>

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<sup>1</sup> The members of the subcommittee are attorneys who practice in different fields and frequently utilize mediation in their practices. The Construction Law Committee endorses this compilation.

<sup>2</sup> ADR processes may not be appropriate in all circumstances and, in particular, binding arbitration may not be appropriate in circumstances where there is an imbalance of power between the parties.

## General Mediation Sample Clause

The parties may wish to require mediation before submitting their dispute to other resolution mechanisms. This can be accomplished by including a mediation provision (which specifies that mediation shall last for at least a one-day session) in the remedies or dispute resolution section of the contract. The mediation provision may refer to a specific ADR provider's rules under which the mediation shall be conducted. Such administrative agencies typically assist the parties regarding selection of the mediator, scheduling, pre-mediation information exchange and attendance of appropriate parties at the mediation conference.

The following is a sample general mediation clause:

*If a dispute arises out of or relates to this contract, or the alleged breach thereof, and if the dispute is not settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation within 30 days administered under (name Rules) before resorting to arbitration, litigation, or some other dispute resolution procedure. In the event that parties are unable to agree on a mediator, a mediator shall be appointed by the named administrator.*

*The process shall be confidential based on terms acceptable to the mediator and/or mediation service provider.*

## Mediation-Arbitration Sample Clause

A clause may provide, first, that the parties attempt to resolve disputes through mediation under (name rules or administrative provider) mediation procedures; then, if the mediation is unsuccessful, the mediator could be authorized to resolve the dispute under the (name rules or administrative provider) arbitration rules. This process is sometimes referred to as "Med-Arb".

**Note to Drafter:** Except with the consent of the parties and the agreement of the mediator, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended because it could inhibit the candor which should characterize the mediation process and/or could convey evidence, legal points or settlement positions ex parte and in a manner that improperly influences the arbitrator.

A sample of a Med-Arb clause follows:

*If a dispute arises from or relates to this contract or the alleged breach thereof, and if the dispute cannot be settled through negotiations within 30 days, the parties agree to endeavor first to settle the dispute by mediation administered by the (name administrative provider) under its Commercial Mediation Procedures before resorting to arbitration.*

*Any dispute arising from or relating to this contract or alleged breach thereof shall be resolved by arbitration administered by the (name administrative provider) in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator.*

## Construction Sample Clause

1. Any claim, dispute, or other matter in question arising out of or related to this Agreement, if not resolved within 14 days following the notice of claim through discussions among the parties' officers having authority to resolve the claim, dispute, or other matter, shall be subject to mediation as a condition precedent to other dispute resolution. If such matter relates to or is the subject of a lien arising out of the Architect's (General Contractor's or Subcontractor's) services, the Architect (General Contractor or Subcontractor) may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or an appropriate demand for arbitration, litigation or other dispute resolution.
2. The Owner and Architect [or Initial Decision Maker] (General Contractor or Subcontractor) shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be administered by the (name an ADR provider) in accordance with its current Construction Industry Mediation Procedures. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of a complaint or other appropriate demand for dispute resolution but, in such event, mediation shall proceed first and the arbitration, litigation or other dispute resolution proceeding shall be stayed pending mediation for a period of 45 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration proceeding is stayed pursuant to this section, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.
3. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon and the parties shall be obligated to submit to at least one seven-hour (including lunch) mediation session, unless they mutually agree to continue their participation beyond this time period. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.
4. If the parties do not resolve a dispute through mediation pursuant to this Section \_\_\_\_\_, the method of subsequent dispute resolution shall be the following:

(Check the appropriate box. If the Owner and Architect [or General Contractor or Subcontractor] do not select a method of dispute resolution below, or do not subsequently agree in writing to a dispute resolution method other than litigation, the dispute will be resolved in a court of competent jurisdiction.)

Arbitration pursuant to Section \_\_\_\_\_ of this Agreement

Litigation in a court of competent jurisdiction

Other (Specify)

The parties understand and agree that if they agree to arbitration they are waiving their rights to

maintain other available resolution processes, such as a court action or administrative proceeding, to settle their dispute.

The mediation process shall be voluntary and confidential based on terms acceptable to the mediator and/or mediation service provider.

### **Commercial Law Sample Clause**

Any dispute arising out of or relating to this Agreement, including the alleged breach, termination, validity, interpretation and performance thereof (“Dispute”) shall be resolved with the following procedures:

#### **A. Negotiation**

Upon written notice of any Dispute, the parties shall attempt to resolve it promptly by negotiation between executives who have authority to settle the Dispute and this process should be completed within 30 days (the “Negotiation”).

#### **B. Mediation**

If the dispute has not been resolved by negotiation in accordance with paragraph A, then the parties shall proceed to mediation unless the parties at the time of the dispute agree to a different timeframe. A “Notice of Mediation” shall be served, signifying that the Negotiation was not successful and to commence the mediation process. The parties shall agree on a mediator; however, if they cannot agree within 14 days then [then a local mediation service provider] shall appoint a mediator. The mediation session shall be held within 45 days of the retention of the mediator, and last for at least one full mediation day, before any party has the option to withdraw from the process. The parties may agree to continue the mediation process beyond one day, until there is a settlement agreement, or one party [or the mediator] states that there is no reason to continue because of an impasse that cannot be overcome and sends a “notice of termination of mediation.” All reasonable efforts will be made to complete the mediation within 30 days of the first mediation session.

During the course of the mediation, no party can assert the failure to fully comply with paragraph A, as a reason not to proceed or to delay the mediation. The service of the Notice of Mediation shall stay the running of any applicable statute of limitations regarding the Dispute until 30 days after the parties agree that the mediation is concluded or the mediator issues a Notice of Impasse. Each side shall bear an equal share of the mediation costs unless the parties agree otherwise.

All communications, both written and oral, during Phases A and B are confidential and shall be treated as settlement negotiations for purposes of applicable rules of evidence; however, documents generated in the ordinary course of business prior to the Dispute, that would otherwise be discoverable, do not become confidential simply because they are used in the Negotiation and/or Mediation process.

The process shall be confidential based on terms acceptable to the mediator and/or mediation service provider.

#### **C. Arbitration**

Any Dispute not resolved through negotiation or mediation in accordance with paragraphs A and B shall be resolved by final and binding arbitration in accordance with the rules of \_\_\_\_\_. The arbitration will be held [location] using one arbitrator, unless the Dispute exceeds one million dollars (USA) in which case there shall be three neutral arbitrators, as a panel. The arbitrators may award costs and/or attorneys' fees to the prevailing party. The parties understand that arbitration is final and binding and that they are waiving their rights to other resolution processes (such as court action or administrative proceeding).

## **Employment Law Sample Clause**

### **Step One—Negotiation**

Upon written notice of any dispute that arises out of or relates to an employee's employment with [Company] (the "Dispute"), the parties shall attempt to resolve it promptly by negotiation between the parties who have authority to settle the Dispute. This process should be completed within 30 days ("Negotiation").

### **Step Two—Mediation**

If the Dispute cannot be settled through Negotiation, the parties agree first to try in good faith to settle the Dispute by mediation lasting at least one day, (the clause may also provide for the qualifications of the mediator, method of payment, locale of meetings and any other item of concern to the parties) before resorting to arbitration, litigation or some other dispute resolution procedure.

The process shall be confidential based on terms acceptable to the mediator.

### **Step Three—Arbitration (Negotiated Contract, not Employment Plan)**

Any Dispute not resolved through Negotiation or Mediation in accordance with Steps 1 and 2 shall be resolved by final and binding arbitration in accordance with the rules of \_\_\_\_\_. The arbitration will be held [location] using one arbitrator. The parties understand that arbitration is final and binding and that they are waiving their rights to other resolution processes such as court action, which may provide a right to a jury trial and the opportunity to take witness testimony prior to such a proceeding, or administrative proceeding.

## **Insurance Law Sample Clause**

In the event of a dispute in connection with this Policy, the Insurer and the Insured (individually “party” and collectively “parties”) shall, in the first instance, try to resolve such dispute through mediation. The mediation will be commenced by either party providing written notice to the other party requesting such mediation (“the Mediation Request”). The parties will select a mediator by their mutual agreement, within 30 days. If there can be no such agreement, each party will submit a list of five mediator choices to the other, rank ordered by preference. The mediator will then be selected based on a further discussion, unless an individual is on both lists and then that person would have preference. If the process does not result in the selection of the mediator, then the parties agree to let the named provider select the mediator. Subject to mutual agreement of the parties, the mediation will be held at a location within 100 miles of where the insured resides, not later than 60 days after the date of the Mediation Request and shall last for at least a one day session. Any settlement agreement reached at mediation and fully executed by all parties, however, will be binding on all parties.

If the Mediation does not resolve the dispute within 60 days of the first mediation session or when the mediator declares an impasse, the parties agree that the Coverage Dispute shall be resolved by final and binding arbitration in accordance with the Commercial Rules of (i.e., AAA or JAMS) before a single Arbitrator, unless the amount of coverage in dispute exceeds five million dollars, in which case the parties may choose to have the arbitration before a panel of three arbitrators chosen pursuant to the rules of \_\_\_\_\_. The arbitration panel will all be neutral. The arbitration will be held within 100 miles of where the insured resides or at an agreed upon location in the United States. The arbitrator[s] may award the prevailing party costs and/or attorneys’ fees for the Arbitration. Any State’s law invalidating this paragraph shall not affect the validity of the first paragraph herein. The parties understand that arbitration is final and binding and that they are waiving their rights to other resolution processes (such as court action or administrative proceeding).

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