

CPR Model Clause for Concurrent Mediation-Arbitration Clause and Protocol

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CPR MODEL CLAUSE FOR CONCURRENT MEDIATION-ARBITRATION

CPR MODEL CLAUSE-BACKGROUND

The International Institute for Conflict Prevention & Resolution (“the CPR Institute”) Model Clause for Concurrent Mediation-Arbitration (“CMA”) allows the parties to agree they will attempt to settle any dispute that is the subject of arbitration by confidential mediation conducted during the pendency of the arbitration. The mediation will be pursuant to the CPR Mediation Procedure and in accordance with the CPR Protocol for Concurrent Mediation-Arbitration. CPR has prepared a Commentary that should be consulted in applying these Clauses.

CPR MODEL CLAUSE

“Following the commencement of any arbitration, the parties shall endeavor to settle the dispute by confidential mediation under the CPR Mediation Procedure in effect on the date of this Agreement (the “CPR Mediation Procedure”). Unless they otherwise agree, the parties shall select a mediator from the CPR Panels of Distinguished Neutrals. If a mediation has already been initiated prior to the commencement of the arbitration pursuant to a CPR Mediation Model Clause, and if all parties consent, the previously appointed mediator may serve as the mediator under this Concurrent Mediation-Arbitration Clause. The mediation initiated under this Clause will continue until a written settlement agreement is reached, an award is delivered to the parties, or the procedure is terminated by agreement of the parties. Notwithstanding the foregoing, any party may withdraw at any time after attending the first substantive mediation conference, as provided in paragraph 3(b) of the CPR Mediation Procedure. The mediation shall be conducted in accordance with the CPR Protocol for Concurrent Mediation-Arbitration (CMA) I [currently in effect OR in effect on the date of this Agreement] (the “CMA Protocol”) and the CPR Mediation Procedure, to the extent that Procedure is not inconsistent with this Clause or the CMA Protocol. Any settlement reached in the course of the mediation and before an award is made, shall be referred to the Arbitral Tribunal and, if the parties so agree, may be reflected in a consent award under Rule 21.5 of the CPR Rules for Administered Arbitration.”

OPTIONAL CLAUSE FOR USE WITH CPR NEGOTIATION-MEDIATION CLAUSE:

“In the event the parties have also adopted the CPR Negotiation-Mediation Clause, and if the dispute has not been resolved by negotiation within the period specified therein, the parties shall confer to determine whether they consent to conducting a mediation prior to the commencement of the arbitration. Absent the consent of all parties within 7 days after the end of the period specified for negotiation, the mediation shall occur after, and not before, the commencement of the arbitration.”

CPR PROTOCOL FOR CONCURRENT MEDIATION-ARBITRATION ("CMA PROTOCOL")

1. This Protocol shall apply to any disputes submitted for resolution under CPR's Rules for Administered Arbitration or CPR's Rules for Non-Administered Arbitration where the parties have adopted the CPR Clause for Concurrent Mediation-Arbitration (CMA Clause). Under this Clause, the parties agree that they will endeavor to settle any dispute that is a subject of the arbitration by confidential mediation under the CPR Mediation Procedure and that the mediation will proceed simultaneously with the arbitration and in accordance with this CMA Protocol. The objective of this Protocol is to allow the mediation to be conducted efficiently and economically, avoiding unnecessary duplication of cost and effort in the two proceedings. It enables the mediator to schedule presentations, meetings, and substantive mediation conferences at times that maximize the opportunity for a settlement informed by the procedural timetable adopted in the arbitration and further orders and directions by the Arbitral Tribunal.
2. Following the commencement of the arbitration, the parties shall promptly notify CPR that the arbitration is subject to the CMA Clause, and CPR shall so inform the Arbitral Tribunal once constituted. The parties shall attempt to agree on a mediator within 30 days following commencement of the arbitration. In the absence of such timely agreement, CPR will select the mediator in accordance with paragraph 2 of the CPR Mediation Procedure.
3. The mediator and the Arbitral Tribunal may confer with each other regarding scheduling to facilitate a timely and efficient mediation under this Protocol. The Tribunal will not be informed of any settlement offers or other statements made during the settlement negotiations or mediation unless both parties consent. The parties will provide the mediator with the procedural timetable adopted in the arbitration and will inform the mediator of any material developments in the arbitration, including further orders and directions by the Arbitral Tribunal, that are likely to affect the opportunity for a negotiated settlement.
4. In determining the date(s) for and scope of the exchange of information under paragraph 4 of the CPR Mediation Procedure, the mediator will consult with the parties and consider the procedural timetable of the arbitration and any relevant orders and directions by the Tribunal that the parties may call to the mediator's attention.
5. In determining the date(s) and place of the substantive mediation conference(s) (see paragraph 5 of the CPR Mediation Procedure), the mediator will likewise consult with the parties and consider the procedural timetable of the arbitration and other procedural developments in the arbitration. In setting these date(s), the mediator shall consider which stages of the arbitral process are most likely to be conducive to successful settlement negotiations.

6. The mediation shall be conducted concurrently with the arbitration. Absent extraordinary circumstances, or the consent of all parties, the mediation shall not be a basis for delaying the issuance of an award. The Tribunal may in its discretion, however, modify the procedural timetable to accommodate the mediation.
7. In the event the mediation results in a settlement of the dispute, the parties shall inform the Tribunal and, if both parties so request, the Tribunal may enter a consent award on the terms agreed to by the parties in accordance with Rule 21.5 of the CPR Rules for Administered Arbitration.

GENERAL COMMENTARY FOR CPR MODEL CLAUSE FOR CONCURRENT MEDIATION-ARBITRATION

One of the greatest benefits of mediation is the flexibility that it offers parties. There is flexibility in the mediator selection process, how the parties work with the mediator to pursue productive negotiations, and in creating mutually agreeable solutions. There is also flexibility relating to the timeframe within which parties wish to mediate, insofar as mediation may be initiated at a time most appropriate to the dispute at hand and may proceed on a schedule as agreed to by the parties.

However, the timing of mediation is often rendered somewhat inflexible when parties contract for multi-step dispute resolution, where the timeframe within which mediation must be initiated and finalized is prescribed beforehand, outside the context of a specific dispute. While tiered dispute resolution clauses may achieve the objective of getting parties to the mediation table, these provisions may not assist parties in achieving this goal at an ideal time in the life of their dispute. Further, requiring mediation as a prelude to arbitration can prolong the dispute resolution process if the mediation fails, and the parties believe that their only recourse is to pursue the arbitration to a final award.

The CPR Model Clause for Concurrent Mediation-Arbitration (“CMA Clause”) was developed to encourage the availability of mediation to parties in a more flexible manner than is provided under standard multi-step dispute resolution provisions.¹ The CMA Clause offers an alternative to the multi-step provisions that require mediation to occur before arbitration. Instead, the CMA Clause allows parties to pursue arbitration and mediation simultaneously. This, in turn, creates a system in which parties may begin to explore settlement options from the outset of the arbitration, while also avoiding any delays to the arbitration proceeding.

The CPR Protocol for Concurrent Mediation-Arbitration (“CMA Protocol”) outlines the manner in which parties can act on the CMA Clause if they have included this language as part of their dispute resolution provision. The CMA Protocol explains how to initiate mediation under the CMA Clause, the role of the mediator, allowable interactions among the mediator and the arbitrator or tribunal, and how to conclude the process. Further, the CMA Clause and Protocols rely heavily on the CPR Mediation Procedure, a time-tested method for guiding parties through mediation seamlessly - from selecting a mediator to structuring the negotiation process and considerations for settlement.

1. Parties can incorporate the CMA language into the dispute resolution provision of their contract, or by agreement after a dispute arises.

THE CMA MODEL CLAUSE OFFERS SEVERAL ADVANTAGES FOR PARTIES, INCLUDING:

1. ENHANCED EFFICIENCY OF PROCESS.

The CMA Clause avoids duplication of effort and lost time as the mediation and arbitration proceed simultaneously.

By building mediation into the arbitration process through the CMA Clause, there is no delay in exploring settlement options and no need for concern by either party that proposing mediation might be some showing of weakness. Instead, the parties contract to ensure that mediation is a necessary part of the process and will commence at the inception of the arbitration.²

The CMA Clause provides that mediation will run alongside the arbitration as a parallel process that does not interfere with the arbitration.³ This also optimizes the efficiency of the arbitration as there is no need to stay the arbitration while mediation efforts proceed – there is no delay in the arbitral process or in the rendering of the award, as needed.

With the goals of flexibility and efficiency in mind, the CMA Clause does allow parties to opt out after the first substantive mediation conference takes place, to the extent time and effort would be better spent in pursuing the arbitration to hearing and an award.

2. MAXIMIZED OPPORTUNITY FOR SETTLEMENT.

The CMA Clause leverages mediation as an ongoing dialogue about settlement opportunities while the arbitration proceeds concurrently. Although most multi-step dispute resolution provisions place an artificial and relatively short deadline around mediation, the CMA Clause removes these barriers.

To the extent mediation does not immediately result in settlement, the CMA Clause envisions that the mediator will remain engaged in negotiations with the parties, helping to continue settlement discussions while the arbitration proceeds separately. As the information exchange process develops, for example, parties attain a better understanding of their opponent's case and their own position. This, in turn, optimizes the opportunity for settlement prior to award because the mediator will know the procedural timetable of the arbitration and can strategically schedule mediation sessions with an eye to the critical stages of the arbitral process.

Moreover, the CMA Clause creates a framework for mediators to confer with the tribunal in order to structure ongoing negotiations at times most conducive to settlement.

² The CMA Clause also allows parties to pursue mediation prior to commencement of the arbitration by specifically providing that “[i]f a mediation had already been initiated prior to the commencement of the arbitration pursuant to a CPR Mediation Model Clause, and if all parties consent, the previously appointed mediator may serve as the mediator under this Concurrent Mediation-Arbitration Clause.”

³ The process outlined here is not to be confused with “med-arb” as the CMA Clause envisions the appointment of an independent mediator, who will act separate and apart from the tribunal.

3. FINALITY AND ENFORCEABILITY.

Certainty, enforceability, and finality are also paramount concerns of the CMA Clause, which clearly provides that any settlement produced by mediation may be entered as a consent award, thus following Rule 21.5 of the CPR Rules for Administered Arbitration. Whereas, the CPR Mediation Procedure calls for parties to draft a memorandum of understanding followed by settlement agreement, the CMA Clause offers an additional measure of assurance in the enforceability of the mediated settlement because it is attached to an arbitration process and may therefore be converted to a consent award. As the clause plainly states, “mediation initiated under this Clause will continue until a written settlement agreement is reached, an award is delivered to the parties, or the procedure is terminated by agreement of the parties.”

In conclusion, the CMA Clause allows parties to avail themselves of the benefits of mediation while simultaneously pursuing arbitration. To bypass mediation during the arbitration is a missed opportunity. The CMA Clause seeks to allow parties that chance in a more flexible and efficient process than is often provided in standard multi-step dispute resolution provisions.