

MEDIATION CLAUSES



ICC MEDIATION CLAUSES

Parties wishing to use proceedings under the ICC Mediation Rules should consider choosing one of the clauses below, which cover different situations and needs. Parties are free to adapt the chosen clause to their particular circumstances. For instance, they may wish to specify the use of a settlement procedure other than mediation. Further, they may wish to stipulate the language and place of any mediation and/or arbitration proceedings.

The notes below each clause are intended to help parties select the clause that best meets their specific requirements.

At all times, care must be taken to avoid any risk of ambiguity in the drafting of the clause. Unclear wording causes uncertainty and delay and can hinder or even compromise the dispute resolution process.

When incorporating any of these clauses in their contracts, parties are advised to take account of any factors that may affect their enforceability under applicable law.

Clause A: Option to Use the ICC Mediation Rules

The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules.

Notes: By including this clause, the parties acknowledge that proceedings under the ICC Mediation Rules are available to them at any time. This clause does not commit the parties to do anything, but the presence of the clause is designed to remind them of the possibility of using mediation or some other settlement procedure at any time. In addition, it can provide a basis for one party to propose mediation to the other party. One or more parties may also ask the ICC International Centre for ADR for its assistance in this process.

Clause B: Obligation to Consider the ICC Mediation Rules

In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider referring the dispute to the ICC Mediation Rules.

Notes: This clause goes a step further than Clause A and requires the parties, when a dispute arises, to discuss and consider together referring the dispute to proceedings under the ICC Mediation Rules. One or more parties may ask the ICC International Centre for ADR for its assistance in this process.

This clause may be appropriate where the parties do not wish to commit to referring a dispute to proceedings under the Rules at the outset but prefer to retain flexibility as to whether to use mediation to try and settle a dispute.

Clause C: Obligation to Refer Dispute to the ICC Mediation Rules While Permitting Parallel Arbitration Proceedings if Required

(x) In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall not prevent any party from commencing arbitration in accordance with sub-clause y below.

(y) All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Notes: This clause creates an obligation to refer a dispute to proceedings under the ICC Mediation Rules. It is designed to ensure that when a dispute arises, the parties will attempt to settle the dispute using proceedings under the Rules.

The clause also makes it clear that the parties do not need to conclude the proceedings under the ICC Mediation Rules, or wait for an agreed period of time, before commencing arbitration proceedings. This is also the default position under Article 10(2) of the Rules.

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The clause provides for ICC arbitration as the forum for final determination of the dispute. If desired, the clause can be adapted to provide instead for a different form of arbitration, or for judicial or other similar proceedings.

Clause D: Obligation to Refer Dispute to the ICC Mediation Rules, Followed by Arbitration if Required

In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

Notes: Like Clause C, this clause creates an obligation to refer a dispute to proceedings under the ICC Mediation Rules.

Unlike Clause C, this clause provides that arbitration proceedings may not be commenced until an agreed period has elapsed following the filing of a Request for Mediation. The lapse of time suggested in the model clause is 45 days, but parties should select a period that they consider to be appropriate for the contract in question.

Clause D changes the default position under Article 10(2) of the ICC Mediation Rules allowing judicial, arbitral or similar proceedings to be commenced in parallel with proceedings under the ICC Mediation Rules.

Like Clause C, Clause D provides for ICC arbitration as the forum for final determination of the dispute. If desired, the clause can be adapted to provide instead for a different form of arbitration, or for judicial or other similar proceedings.

Specific Issues Concerning the Emergency Arbitrator Provisions

The parties should determine whether they wish to have recourse to the Emergency Arbitrator Provisions under Clauses C and D.

Clauses C and D

If the parties wish to exclude any recourse to the Emergency Arbitrator Provisions, the following wording should be added to Clause C or D as applicable:

The Emergency Arbitrator Provisions shall not apply.

Clause D

- 1 If the parties wish to have recourse to the Emergency Arbitrator Provisions, and want that recourse expressly to be available prior to expiry of the 45-day or other agreed period following filing of the Request for Mediation, the following wording should be added to Clause D:

The requirement to wait [45] days, or any other agreed period, following the filing of a Request for Mediation, before referring a dispute to arbitration shall not prevent the parties from making an application, prior to expiry of those [45] days or other agreed period, for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce.

- 2 If the parties wish to have recourse to the Emergency Arbitrator Provisions, but only after expiry of the 45-day or other agreed period following filing of the Request for Mediation, the following wording should be added to Clause D:

The parties shall not have the right to make an application for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce prior to expiry of the [45] days or other agreed period following the filing of a Request for Mediation.