

Explanatory note to accompany the MfN-Mediation rules

Article 1 – Definitions

In the definitions the word “dispute” has been replaced with “issue”. This is because a mediation does not always involve a dispute. A mediation may also be aimed towards establishing a relationship rather than restoring a relationship (article 1a).

The definition of “mediation agreement” now explicitly states that this must be a written agreement (article 1d).

Article 2 – Appointment of the mediator

The basic principle is that the parties themselves should appoint a mediator. If desired the MfN can help them to choose a mediator. For this the parties must submit a request in writing to the secretariat. The secretariat will then send the parties a list of eligible mediators from which the parties can select a mediator together. They can then contact this mediator. If the parties fail to reach agreement on the chosen mediator, the parties can ask the secretariat to propose a mediator to be appointed by the parties.

Article 3 – Commencement of mediation

The mediation officially commences once the mediation agreement has been signed by the parties and by the mediator. It is possible to deviate from this rule if this is agreed in writing by the parties and the mediator in the mediation agreement. The moment of commencement of the mediation is important as the mediation rules take effect from that moment onwards.

Article 4 – Activities of the mediator and process supervision

The mediation rules contain a clause concerning the activities of the mediator and process supervision. In practice it has emerged that parties are not always aware of the activities that belong to the work of a mediator. In order to clarify this matter, a clause relating to the (possible) activities of the mediator has been included. The question of which activities belong to the work of a mediator is relevant in relation to the mediator’s time budgeting and consequently the fee charged (article 4.1).

The mediator decides how the mediation should be conducted after consulting with the parties. This consultation may take place before or after the mediation agreement has been concluded (article 4.2).

Paragraph 3 states that it is possible for the mediator to communicate with the parties separately and confidentially.

According to paragraph 4, both the parties and the mediator must do their best to ensure that the mediation proceeds in an expeditious manner. This means that the process should run smoothly and show progression. Both the mediator and the parties are responsible for preventing stagnation in the mediation process.

Article 5 – Voluntariness

The mediation takes place on a voluntary basis. Both the parties and the mediator have the right to terminate the mediation at any time.

As indicated in paragraph 2, mediation is not free of obligation. If the parties agree to resolve an issue via mediation, that agreement must in principle be considered as binding and enforceable. Mediation is in that respect not free of obligation.

Article 6 – Privacy

The Mediation takes place in private: in principle, only the Mediator, Parties and any representatives and advisers are involved in a Mediation. If other persons (other than those mentioned above) are involved in the Mediation, the consent of the Parties is required. It is generally acknowledged that in order to increase the chance that a Mediation will be successful, at least one representative of each Party must be authorized to legally represent the Party and also to sign a binding agreement as referred to in 10.1.

Although every participant in the Mediation is entitled to representation during the Mediation, it is important that there is agreement between the Mediator and the Parties at all times about the persons who are involved in the Mediation. An important guiding principle of mediation is voluntariness; see article 5 of the Rules.

The Mediator ensures that all persons involved in the Mediation sign a confidentiality agreement. With regard to the Mediator and the Parties, this requirement is in many cases already met by their signature of the mediation agreement. In addition, it is recommended that any lawyers of the Parties also sign a confidentiality agreement. The Mediator does not require the consent of the Parties for the Mediator's secretarial support as referred to in paragraph 1 of this article.

Article 7 – Confidentiality

The mediation agreement, the agreement referred to in article 10.1 and digital files in any form whatsoever are confidential (articles 7.2 and 7.3).

Paragraph 6 stipulates that the provisions of articles 7.1 to 7.5 lose their applicability in a number of specific exceptional cases. In these situations, an even higher interest than the confidentiality of mediation is at stake. The obligation of confidentiality lapses for all persons involved in the event of a complaint, disciplinary or liability proceeding against the Mediator, insofar as necessary to handle the complaint. The Mediator may defend himself against the claims in these proceedings.

Article 8 – End of the mediation

The moment of termination of a mediation is relevant with respect to the moment of instigation of possible legal proceedings or the period during which a complaint can be lodged in accordance with the SKM complaints scheme. For example, during the mediation parties are not permitted to instigate proceedings against one another, but after termination of the mediation this is allowed (article 8.1).

As laid down in paragraph 2, the confidentiality and payment obligations of the parties continue to apply even after termination of the mediation. Anything discussed during the mediation sessions must be treated confidentially by the parties after the mediation has ended.

Article 9 – Other proceedings

If any legal proceedings are already taking place before the mediation commences, these will be suspended for the duration of the mediation. During the mediation the parties will not instigate any proceedings against one another. However, measures aimed at safeguarding rights (such as the seizure of assets or the lodging of an appeal) may be taken via legal proceedings.

Article 10 – Recording the result of the Mediation

It is the Mediator's task to properly record the parties' arrangements in an agreement. The precise meaning of "proper recording" depends, among other things, on the circumstances of the case and on the parties. A proper recording is in any case formulated clearly and unambiguously. The parties themselves are responsible for the content of their arrangements. The Mediator ensures that all important points for the Issue are discussed in the final arrangements, including the confidential status of the agreement. The Parties jointly determine to what extent (the content of) the agreement is confidential. This must be recorded in writing. If (for any reason whatsoever) no arrangements are made regarding the confidential status of the agreement, then the agreement is in principle confidential. In any case, the content of the concluded agreement may be submitted to the court if this is necessary in order to demand compliance.

The Rules deliberately do not speak of a "settlement agreement". This is because not all recorded arrangements take the form of a settlement agreement.

The Mediator can engage an expert to assist him with recording the arrangements in an agreement. This is particularly intended for mediators who do not have sufficient legal or technical knowledge to record specific topics. The Parties also have the right to be assisted by an external expert. Now that this has been recorded, the Parties can no longer complain retrospectively that they did not understand the consequences or wordings of the agreed arrangements.

Article 11 – Limitation of liability

Due to the requirements of consumer law, the complete exclusion of liability has been partly replaced with a new liability regulation. The new liability regulation for mediators is in line with the regulations for other professional service providers. As a result, it is very important for the Mediator to take out professional liability insurance. Without this insurance, the Mediator will have to compensate the damage himself in the event of culpable conduct.

Article 12 – Rules of conduct and complaints

The mediator must act in accordance with the Code of Conduct for MfN-registered mediators. The MfN mediation agreement model is based on the assumption that the parties have received a copy of the Code of Conduct before commencement of the mediation. If a party has a complaint, it is important for this to be lodged as soon as possible so that the relevant facts are still fresh in everyone's memory. A period of twelve months is considered reasonable for this.

Article 13 – Cases not provided for by these rules

The mediation rules provide the mediator and the parties with a framework within which the mediation process can be conducted. A conscious choice has been made not to regulate and specify everything in these rules. In cases that are not provided for by the rules, the mediator decides. In doing so he will act in accordance with the purport of the mediation rules. He is further expected to deal with the mediation expeditiously and ensure continued progression.

Article 14 – Amendments to the rules and/or deviations from the rules

It is possible for the parties and the mediator to deviate from the mediation rules. However, there are certain preconditions that have to be observed by the mediator in this regard, as may be specified in the Code of Conduct. For example, if the parties agree in a contractual mediation clause to deviate from certain provisions in the mediation rules, the mediator can expressly grant his permission for this through the acceptance of the assignment by signing the mediation agreement.

Article 15 – Applicable law

Dutch law applies to the mediation rules and also to the agreement referred to in article 10.1.