

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 a private setting. Only the mediator, the parties and any representatives and advisers they may have will be present at the mediation sessions. The parties must give their consent for any other people to be involved in the mediation. This implies that it is possible for a party to refuse consent for the involvement of another person in the mediation. If the parties do grant their consent for this, if desired the mediator will ensure that all people involved in the mediation sign a declaration of confidentiality. In many cases this requirement is already met with respect to the mediator and the parties through their signing of the mediation agreement.

It is generally acknowledged that a mediation is more likely to succeed if at least one representative of each party is authorised to legally represent that party and is also authorised to sign a binding agreement as referred to in article 10.1.

Article 7 – Confidentiality

The mediation agreement, the agreement referred to in article 10.1 (insofar as the parties have agreed in accordance with article 10.3 that this should be confidential) and digital files in any form whatsoever are confidential (articles 7.2 and 7.3).

According to paragraph 6, the provisions set out in articles 7.1 up to and including 7.5 lose their validity in specific exceptional cases. In these exceptional situations other factors come into play that carry more weight than the confidentiality of mediation. For example, the confidentiality obligation for all people concerned ceases to apply in the case of complaints proceedings or disciplinary or liability proceedings against the mediator, insofar as is necessary to process the complaint. The mediator is entitled to defend himself against the claims in such 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 of the outcome of the mediation

The mediator is responsible for ensuring that the agreements reached by the parties are properly recorded in an agreement. What exactly is meant by proper recording depends on the circumstances of the case and on the parties, among other things. In any case, proper recording can be understood to mean clearly formulated and unambiguous. The parties themselves are responsible for the content of the agreement. The mediator will ensure that all points that are relevant to the issue in hand are dealt with in the final agreements.

The term “settlement agreement” is no longer used in the mediation rules. This is intentional, as not all recorded agreements have the form of a settlement agreement.

The mediator can call in an expert to help him with the recording of the outcome in an agreement. This is intended primarily for mediators who possess insufficient legal or technical knowhow to define specific problems. The parties are also entitled to request assistance from an external expert. As a result of the inclusion of this provision in the mediation rules, parties can no longer complain at a later stage that they did not understand the consequences or text of the agreements reached.

Article 11 – Limitation of liability

Partly due to consumer law requirements, complete exclusion from liability has been replaced with a new liability regulation. This new regulation relating to the liability of mediators is in line with the regulations that apply to other professional service providers. As a consequence it is very important for the mediator to take out professional liability insurance. Without such insurance the mediator would have to make good any damage himself in the case 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.