

THE AIRROC MEDIATION PROCEDURE

September 2014 Edition



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The AIRROC Mediation Procedure (the “Procedure”) was developed in 2014 as an additional cost effective dispute resolution tool. The Procedure is designed to be of interest and serve as a valuable tool to parties able to agree on a more expedited dispute resolution method. The parties must agree on what specific disputes will be submitted for resolution under these rules.

Below is the September 2014 Edition of the Procedure, which will be amended from time to time via resolution by the AIRROC Board of Directors.

I. Mediator List

- A. AIRROC shall maintain and periodically update a list of mediators (the “List”), which together with mediator resumes will be available on its website. To be considered for inclusion, an applicant must complete a AIRROC’s *Arbitrator and Mediator Application* (Form 1) and submit it to AIRROC’s Executive Director, along with a current resume. The required qualifications are: (1) to be a member in good standing on ARIAS-US’s list of qualified mediators; or (2) at least ten years’ employment by one or more insurance or reinsurance companies or other entities in an insurance group, including companies in run-off or receivership and risk-bearing syndicates. ARIAS-qualified mediators will be designated with an asterisk on the List.
- B. AIRROC reserves the right at any time to: (1) approve or disapprove a candidate’s application for inclusion on the List; (2) remove a mediator’s name from the List; or (3) amend the criteria for inclusion (including retroactive application to persons who qualified under previous criteria).
- C. Notwithstanding the above, AIRROC relies on the information provided by applicants and makes no representations whatsoever regarding the accuracy or completeness thereof.
- D. AIRROC will periodically contact all of its approved mediators to certify/update contact information. As part of that process, mediators will be asked to state how many times in the last calendar year he/she was appointed as a mediator pursuant to the Procedures.

II. Initiation of Mediation

- A. To initiate use of the Procedure, the parties must jointly complete an *Initiation of Proceedings Form* (“IOP”) (Form 2). The IOP requires the parties, among other things, to identify the contract or contracts at issue in the mediation; to stipulate to the claim(s) and any counterclaim(s) to be mediated; and to state the principal amount sought in respect of each claim and any counterclaim to the extent possible. The IOP will thus define the parameters of the dispute and the subject matter of the mediation. In

agreeing to be bound by the Procedure, the parties stipulate that the mediation will be strictly limited to the subject matter identified in the IOP, absent their written agreement to an extension or change, or their voluntary agreement to expand the scope to facilitate settlement at any time during the mediation process.

- B. The parties are encouraged to discuss at the outset their respective views and expectations on significant issues, including: (1) the substantive issues in dispute; (2) the contemplated need for an informal exchange of documents necessary to facilitate the mediation (especially important given the consensual nature of mediation under these rules); (3) whether any party expects to have in-house or outside counsel attend the mediation; and (4) the need for, length, and form of any mediation statements with exhibits and confidential settlement information to be exchanged or sent solely to the mediator before the mediation session. It is recommended that the parties shall have discussed each of these points *before* agreeing to use the Procedure.
- C. To initiate the mediator selection process administered by AIRROC and described in Section III of the Procedure, the parties must jointly submit to AIRROC's Executive Director: (1) the completed IOP; and (2) the ***Referral & Disclosure Form ("RDF Form")*** (Form 3) with Part I completed. (Part II of the latter form is for prospective mediators to complete and shall be left blank by the parties.) Mediator selection will then proceed in accordance with Section III of the Procedure.
- D. Alternatively, the parties are encouraged to reach agreement on the mediator *without* AIRROC's involvement. Where the parties can agree on the mediator at the outset of the matter, they should proceed with mediation under the Procedure without informing AIRROC or submitting the documents described in Paragraph C, above. An alternative ***RDF Form*** designed to assist the parties in selecting a mediator by consent is attached as Form 3B. Any communications with a prospective mediator regarding selection pursuant to this Section II shall occur jointly; no individual *ex parte* communications with any prospective mediator are allowed prior to mediation selection pursuant to this Section.
- E. The parties shall send the completed IOP to the mediator no later than the time of his or her selection.

III. Mediator Selection Administered by AIRROC

- A. AIRROC is available to assist in mediator selection when requested by the parties. The parties must indicate on the IOP whether they prefer AIRROC to select prospective mediators from the entire List or, alternatively, only from the ARIAS-qualified mediators designated on the List. After receiving the IOP and applicable Referral & Disclosure Form submitted by the parties (*see* Section II.C.), AIRROC will select 5 names at random and inform the persons selected, by email, that they are in contention to serve as a mediator of the parties' dispute. AIRROC will attach the RDF Form to its email and request each prospective mediator to complete and return Part II (Availability & Disclosure Statement) by email within one week. (AIRROC shall have no responsibility to verify the accuracy or completeness of the disclosures received.) After

identifying the timely-submitted responses of prospective mediators indicating availability to serve, AIRROC will notify the parties simultaneously of the candidates remaining in contention and provide copies of such candidates' completed statements and resumes.

- B. Next, not later than one week after the above notification from AIRROC, the parties will simultaneously exchange their respective choices of just over half of the remaining names as acceptable mediator candidates. For example, if all five of the original 5 candidates remain in contention, each party will select 3 names. This process will result in at least one match among the parties' selections. If there is just one match, then that person shall be the mediator. If there is more than one match, then the parties will notify AIRROC's Executive Director, and AIRROC will have the mediator chosen by lot from the parties' matched selections.
- C. Notwithstanding the commencement of the mediator selection process described in this section, the parties are free to reach agreement on the mediator at any time before its completion. (Where AIRROC is continuing to play a role in administration, the parties should inform AIRROC of any such agreement as soon as possible.) The parties should then proceed with mediation as provided below.
- D. No party shall have *ex parte* communications with any prospective mediator during the selection process described herein.

IV. Procedural Rules

- A. **Agreement:** No later than 7 days before the Initial Organizational Conference call the mediator shall provide the parties with a written mediation agreement, setting forth the terms and conditions of their retention of the mediator.
- B. **Initial Organizational Conference Call:** Not later than 21 days after the mediator is notified of his or her selection, the parties and the mediator will conduct an Initial Organizational Conference by telephone, unless the parties agree to postpone/reschedule the call or meet in person. At the conference, the mediator will make further disclosures to the parties as appropriate. Unless there is a clear, fundamental conflict precluding the mediator's engagement, the parties will indicate their acceptance of the mediator. The parties will further describe the factual background and salient issues to the mediator, and a schedule for all activities will be established, including deadlines for any informal exchange of documents, preparation and submission of mediation statements/exhibits to the mediator and other side, preparation and submission of a confidential settlement statement to the mediator alone, and date/time/location of the mediation session. The schedule will be followed absent the parties' agreement to change it or the occurrence of exigent and unanticipated circumstances to be determined at the discretion of the mediator.
- C. **Document Exchange:** During the Initial Organizational Call the mediator will work with the parties to establish a deadline for their informal exchange of documents necessary to

conduct the mediation. Additionally, nothing shall preclude the mediator, *sua sponte*, from asking the parties to produce specified documents that the mediator considers necessary for the proper resolution of the dispute.

- D. ***Presentation of Issues:*** The dispute shall be submitted to the mediator in mediation statements and exhibits and a confidential settlement statement, the latter provided to the mediator only and setting forth the history and endpoint of any prior settlement negotiations, the reason(s) why the negotiations failed, any creative ideas each party might have to resolve the dispute and their own range or ideas of acceptable settlement values, unless the parties agree otherwise. Opening statements or presentations on the statements and documents submitted may be directed by the mediator in his or her discretion, or when requested jointly by the parties. The duration of any presentations shall not exceed 30 minutes per side, unless the parties agree otherwise.
- E. ***Communications:*** Following the mediator's selection, both parties shall be allowed *ex parte* communications with the mediator concerning any aspect of the proceeding, including caucuses at the mediation session, at the discretion of the mediator. Offers and counteroffers must be reduced to writing to be held by the mediator until the end of the mediation. Once the mediation has concluded, the mediator shall destroy any offers and/or counteroffers in his or her possession.

V. Fees

- A. ***Mediator Fees:*** The mediator shall charge an hourly rate of \$150 which will be apportioned equally among the parties. In addition, each party shall bear an equal share of the mediator's reasonable expenses. The Mediator retainer shall be a total of \$2,000. Upon the mediator's initial selection, each party shall pay \$1,000 of the retainer to the mediator. Half of each party's retainer (\$500) will be non-refundable to the parties and kept by the mediator as minimum compensation regardless of the length of the mediation. The retainer will be applied to the mediator's final statement for services rendered at the conclusion of the mediation, with any balance returned at that time, subject to the above minimum. All fees of the mediator will be paid directly to the mediator.
- B. ***AIRROC Service Fee:*** Regardless of whether AIRROC administers mediator selection, AIRROC will not charge any service fee to member companies for use of the Procedure. If a member company has a dispute with a non-member company(ies) and the parties agree to use AIRROC to administer mediator selection, AIRROC will charge the non-member company(ies) a total service fee of \$1,000. If none of the companies in a dispute is a member of AIRROC but the non-members agree to use AIRROC to administer mediator selection, AIRROC will charge the non-members a total service fee of \$2,000. Any fee due shall be paid in full to AIRROC simultaneously with the submission of documents described in Section II.C. AIRROC shall have no obligation to refund payment under any circumstances (*e.g.*, even if settlement occurs or the parties agree on the mediator without AIRROC having rendered service).

VI. Confidentiality

- A. Unless the parties agree otherwise in writing, the parties and the mediator (including all prospective mediators) agree to maintain the confidentiality of all papers, communications, statements, submissions, materials, and processes, (“Information”) in connection with the mediation. Confidentiality of the Information will remain in effect after conclusion of the mediation. Disclosure of any Information may be made only to the extent necessary:
- (i) to enforce, confirm, vacate, or modify an agreement of the parties;
 - (ii) in communications with auditors, consultants or third party administrators retained by a party or with regulatory authorities or their agents;
 - (iii) to seek recovery from reinsurers or retrocessionaires regarding the subject matter of the mediation; or
 - (iv) to comply with lawful subpoenas or orders of any court or arbitration panel.
- B. The parties will make good faith efforts to limit the extent of any disclosure of the Information and will cooperate with each other in resisting or limiting disclosure to the extent reasonable and appropriate.

VII. Hold Harmless and Indemnification

- A. The parties agree that they shall not assert any claim, file any suit, or initiate any action of any kind against the mediator or AIRROC concerning any matter arising from a mediation under the Procedure. Each party further agrees jointly and severally to release, protect, defend, indemnify, and hold harmless the mediator, AIRROC, and its officers, principals, directors, employees, agents, representatives, and affiliates from and against any and all claims, liabilities, judgments, losses, damages, demands, causes of action, attorney’s fees, expert fees, expenses, and the like, in law or in equity, directly or indirectly arising from a mediation under the Procedure, including for any alleged non-performance of services. Each party further agrees jointly and severally to reimburse the mediator and AIRROC for all reasonable expenses (including attorney’s fees) as they are incurred in connection with the investigation of, preparation for, or defense against any pending or threatened claim arising from a mediation under the Procedure.
- B. The mediator agrees not to assert any claim, file any suit, or initiate any action of any kind against AIRROC or its officers, principals, directors, employees, agents, representatives, and affiliates concerning any matter arising from the Procedure or a mediation there under, including any derivative claim for a suit or action brought against the mediator or any claim by the mediator to collect unpaid fees.
- C. Paragraphs A and B are non-cancellable and of unlimited duration.

- D. Nothing in this section shall abridge any right that a party may have with respect to another party to seek to enforce, confirm, vacate, or modify any agreement of the parties, or any right of the mediator to collect fees due from a party.

VIII. Absence of Precedential or Preclusive Effect

Unless the parties agree otherwise in writing, it is stipulated by the parties that any mediation conducted under the Procedure is solely for the purpose of resolving the specific dispute or disputes that the parties have designated as constituting the subject matter of the mediation; and, to the fullest extent permitted by law, it is further stipulated that any agreement will not be subject to collateral estoppel or *res judicata* or have any other precedential or preclusive effect beyond the strict confines of the subject matter.