

NETHERLANDS ARBITRATION INSTITUTE

MEDIATION RULES
in force as from 1 March 2009

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NAI MEDIATION CLAUSE – ENGLISH

‘For the purposes of resolution of each and any dispute that has arisen or might arise further to the present agreement, or any further agreements resulting from the same, the parties shall - or the most diligent party shall – file a Request for Mediation with the NAI Secretariat in accordance with the NAI Mediation Rules. If such request fails to result in a comprehensive resolution of the dispute by means of execution of a settlement agreement as referred to in Article 7(A) of the NAI Mediation Rules, by means of an arbitral award on agreed terms as referred to in Article 8 of said Rules, or by means of a combination of both, the dispute – or at any rate any part thereof not resolved in any of the aforesaid manners – shall be resolved exclusively in accordance with the NAI Arbitration Rules.’*

* If the parties also agree to arbitration in the event that Mediation does not lead to a resolution they may arrange certain matters in respect of that arbitration. In this respect reference is made to the provisions contained in the Article entitled ‘Recommended arbitration clause’ as laid down in the NAI Arbitration Rules.

NAI MEDIATIONBEDING – NEDERLANDS

“Ten behoeve van de oplossing van elk geschil dat is of mocht ontstaan naar aanleiding van de onderhavige overeenkomst, dan wel van nadere overeenkomsten die daarvan het gevolg mochten zijn, zullen de partijen, respectievelijk zal de meest gerede partij, een aanvraag voor mediation indienen bij het secretariaat van het NAI volgens het NAI Mediationreglement. Leidt die aanvraag niet tot een algehele oplossing van het geschil door ondertekening van een vaststellingsovereenkomst als bedoeld in punt 7(A) van het NAI Mediationreglement, door een arbitraal schikkingsvonnis als bedoeld in punt 8 van dat reglement, of door een combinatie van deze beide, dan wordt het geschil, althans dat gedeelte daarvan dat niet op één der zo-even genoemde wijzen is opgelost, uitsluitend beslecht overeenkomstig het NAI Arbitragereglement.” *

* Wanneer partijen ook arbitrage overeenkomen, voor het geval de mediation niet tot een oplossing heeft geleid, kunnen zij met betrekking tot die arbitrage een aantal zaken regelen. Zie hiervoor de bepalingen onder “aanbevolen tekst arbitraal beding”, zoals opgenomen in het NAI Arbitrage Reglement.

CLAUSE DE MÉDIATION DU NAI – FRANÇAIS

« En vue de la solution de tout litige né ou susceptible de naître du présent contrat ou de contrats ultérieurs pouvant en découler, les parties introduiront –ou la partie la plus diligente introduira– une demande de médiation auprès du secrétariat du NAI conformément au Règlement de médiation du NAI. Si ladite demande ne résulte pas dans une solution exhaustive du litige par signature d'un protocole d'accord tel que visé à l'Article 7(A) du Règlement de médiation du NAI, par sentence d'amiable composition telle que visée à l'Article 8 dudit règlement, ou par une combinaison des deux, le litige, du moins sa partie non résolue de l'une des deux manières susvisées, sera exclusivement résolu conformément aux dispositions du Règlement d'arbitrage du NAI. » *

* En ce qui concerne l'arbitrage, qui a été convenu en cas où le médiation ne résulterait pas dans un règlement à l'amiable, d'autres matières peuvent être réglées dans la clause. Voir les dispositions sous le titre "Clause compromissoire recommandée", comme prévues dans le Règlement d'Arbitrage de l'Institute Néerlandais d'Arbitrage (NAI Arbitrage Reglement).

NAI SCHLICHTUNGSKLAUSEL – DEUTSCH

„Zur Lösung aller Streitigkeiten, die sich aus dem vorliegenden Vertrag oder den Nachfolgeverträgen jetzt oder künftig ergeben, stellen die Parteien beziehungsweise stellt die zuerst handelnde Partei einen Schlichtungsantrag beim Sekretariat des NAI gemäß der NAI-Schlichtungsordnung. Führt dieser Antrag nicht zur einvernehmlichen Lösung der Streitigkeit mit der Unterzeichnung eines Feststellungsvertrages gemäß Artikel 7(A) der NAI-Schlichtungsordnung, mit einem Vergleich in Form eines Schiedsspruchs gemäß Artikel 8 dieser Schlichtungsordnung oder mit einer Kombination aus diesen beiden Schlichtungsmöglichkeiten, so ist die Streitigkeit, jedenfalls deren Teil, der nicht auf eine der vorstehenden Weisen beigelegt wurde, ausschließlich gemäß der NAI-Schlichtungsordnung zu schlichten.“ *

* Wird zwischen den Parteien für den Fall ein Mediation nicht zu einem Lösung führt, ebenfalls ein Schiedsverfahren vereinbart, können diese miteinander zusätzlich mehrere Vereinbarungen treffen. Diesbezüglich wird auf das Bestimmte im "empfohlener Text der Schiedsklausel" der Schiedsgerichtsordnung des Niederländischen Instituts für Schiedsgerichtswesen (NAI Arbitrage Reglement) hingewiesen.

INTRODUCTION TO THE NAI MEDIATION RULES **in force as from 1 March 2009**

1. The Netherlands Arbitration Institute; establishment and purpose

1.1 The Netherlands Arbitration Institute (NAI) was established in 1949 and is a non-profit organisation in the form of a foundation (*stichting*) under Dutch law. Its Governing Board consists of representatives from agencies that include the Dutch Central Chamber of Commerce in The Hague (*Centrale Kamer van Koophandel*), the Dutch Organisation of the International Chamber of Commerce (*Nederlandse Organisatie van de Internationale Kamer van Koophandel*) and the Dutch Association for Industry and Trade (*Maatschappij voor Nijverheid en Handel*). The Governing Board also includes a number of representatives from the business community, the legal profession and several universities, all of whom have extensive experience in the field of arbitration. In addition, the Governing Board includes a member who is an expert in the field of mediation, as well as judges from several Dutch courts, including the Presidents of the District Courts of Rotterdam and The Hague and a vice president of the District Court of Amsterdam. The Dutch Institute of Chartered Accountants is also represented.

1.2 The purpose of the NAI is to encourage the use of arbitration, binding advice and other legally regulated ways of preventing, limiting and resolving disputes. Since its establishment the NAI has offered a well regulated arbitration procedure for that purpose, which is governed by the NAI Arbitration Rules. Those rules were most recently amended in 2001. The Arbitration Rules can be consulted at NAI's website: www.nai-nl.org. Hardcopies of the Rules can be obtained from NAI's Secretariat. In 1995 the NAI introduced an alternative method of dispute resolution in addition to arbitration, which it called the 'minitrial'. That method, which was governed by the NAI Minitrial Rules, was intended to help parties amicably resolve their disputes under the supervision of a mediator. In practice it appeared that in some ways the Minitrial Rules were less flexible than had been intended. It was also discovered that although arbitration and mediation are two completely different ways of resolving disputes, the text and content of the Minitrial Rules were similar to the provisions contained in the Arbitration Rules. In order to offer a means of dispute resolution that provides more flexibility than the possibilities offered by the Minitrial Rules and that takes into

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consideration the fact that arbitration and mediation are completely different ways of resolving disputes, the NAI decided to replace the Minitrial Rules with the following Mediation Rules. As is the case with respect to arbitration and as was the case with respect to minitrials, the NAI is once again offering the business sector a method to resolve disputes. The procedure that has been created for that purpose is supervised by NAI's Secretariat.

1.3 The NAI believes that mediation is a method of dispute resolution that has been proven effective, in particular with respect to commercial disputes. In view of its objectives, as outlined above, the NAI has developed the following NAI Mediation Rules in the interest of efficiently resolving commercial disputes.

2. Mediation

2.1 Mediation is a form of dispute resolution that is being used with increasing frequency in the Netherlands. The Dutch government has been stimulating this method of dispute resolution, as have the governments in the Anglo-Saxon countries. The *Mediation naast rechtspraak* ('mediation in addition to legal proceedings') project is one example of this in the Netherlands. The high costs and amount of time involved in conducting legal proceedings – and in some cases arbitration as well – have contributed to the popularity of this form of alternative dispute resolution. The importance of mediation has also been recognised at the European level. On 21 May 2008 a European Directive was published (Directive 2008/52/EC) in which the Member States were ordered to include rules in their national legislation with respect to mediation. At the time at which these rules enter into effect the legislation referred to in the Directive was not yet implemented in the Netherlands.

2.2 The primary characteristic of mediation is that the parties endeavour to resolve their dispute with the aid of a mediator on a voluntary basis. The agreement in which the resolution is embodied is deemed to be a settlement agreement within the meaning of Title 15 of Book 7 of the Dutch Civil Code (*Burgerlijk Wetboek*). See also Article 8.6 below in this respect. It should be noted that mediation does not always lead to the resolution of a dispute. If the parties cannot resolve their dispute it will have to be resolved in arbitral proceedings or legal proceedings. In the event of forced adjudication there is usually a winner and a loser, but that is not the case in alternative dispute resolution. The parties' willingness to find a solution is determinative for the success of mediation.

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2.3 In this context it is important to note that unsuccessful mediation certainly should not be considered a waste of time that involves unnecessary costs and effort in all cases. Experience in the Netherlands and in other countries has shown that sound preparation for mediation and the parties' ability to explain their positions can be extremely useful in any arbitral proceedings or legal proceedings that follow. All the parties involved will be more aware of the strengths and weaknesses of their respective cases.

3. NAI Mediation

3.1 The usefulness of mediation as a means to resolve disputes depends upon the willingness of the parties – even more so than is the case in arbitral proceedings. In arbitration it is essential for the parties to unequivocally choose to have their dispute resolved by an arbitral tribunal. As soon as the arbitral tribunal has been appointed it will determine how the proceedings will progress further, possibly after consulting with the parties. The tribunal gives the parties instructions and if necessary it will order one party to perform on behalf of the other party. In the case of mediation the mediator does not have such powers. Everything that takes place during the mediation must be approved by the parties involved (and the mediator). The same holds true with respect to the final result of the mediation: the settlement agreement. If one of the parties does not accept that agreement, it will not be concluded.

3.2 The parties' willingness to resolve their dispute by means of mediation can appear from (i) a clause in an agreement that they have concluded in which they state that they wish to resolve any disputes that may arise in the context of that agreement by means of NAI Mediation or (ii) an agreement that is concluded especially with a view to a dispute that has already arisen, pursuant to which the dispute will be resolved by means of NAI Mediation. The clause referred to under (i) and the agreement referred to under (ii) will be referred to as 'mediation clauses' below.

3.3 Once a dispute has arisen it is necessary to file a Request for Mediation with the Secretariat of the NAI in preparation for the mediation (Article 3.1 of the Mediation Rules). The request precedes the mediation and may be submitted by all the parties jointly or by one or more of them (Article 3.2 of the Mediation Rules). In the latter case the Secretariat will ask the other party or parties involved to confirm their willingness to resolve the dispute by means of mediation. It will also ask them to do so if the parties

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already agreed in an earlier agreement (see section 3.1 above) to resolve any disputes by means of mediation in the first instance (Article 3.4 of the Mediation Rules).

3.4 After the Secretariat has ascertained – by means of the statements made by the parties involved as referred to in section 3.3 above – that the other party or parties are willing to participate in mediation and after the administration costs have been paid, a mediator will be appointed (Article 4.1 of the Mediation Rules). One or more co-mediators may be appointed if the parties so desire (Article 4.5 of the Mediation Rules). In the first instance the parties will appoint the mediator themselves. If it is not possible for them to appoint the mediator jointly, the Secretariat will do so (Articles 4.2 and 4.3 of the Mediation Rules).

3.5 After the mediator(s) has/have been appointed and the deposit (the amount of which will be determined by the Secretariat) has been paid, the Secretariat will schedule a meeting between the parties and the mediator in order to lay down an agreement between the mediator and the parties in which the parties undertake to resolve their dispute, under the supervision of the mediator and with due observance of the procedural rules to be determined by the parties, by concluding a settlement agreement. The former agreement is called a ‘Mediation Agreement’ (Article 5.1 of the Mediation Rules). The mediation commences when the Mediation Agreement is signed (Article 5.2 of the Mediation Rules). If a settlement agreement is concluded with respect to all or part of the dispute, in principle the mediation will end.

4. The mediation clause and the Mediation Agreement

4.1 As was noted in section 2.2 above, mediation does not always lead to a resolution of a dispute. It is possible that the parties will be utterly unable to reach agreement or that they will be able to resolve their dispute only in part. In view of their interest in resolving their dispute efficiently it would be wise for parties not only to agree that, if appropriate, they will attempt to resolve their disputes by means of mediation but also in what way they will resolve such disputes if the mediation does not lead to a resolution. The model clause provided above, which the NAI recommends, provides that insofar as mediation is unsuccessful the parties will have their dispute resolved in accordance with the NAI Arbitration Rules. If such a clause is not included the regular court will have jurisdiction.

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4.2 There are no formal requirements under Dutch law with respect to the conclusion and content of a mediation clause. Such clauses may also be concluded orally. In order to avoid any uncertainty about whether the parties have made an agreement to subject their dispute or disputes to mediation, Article 3.4 of the NAI Mediation Rules provides that the party or parties that are involved in a dispute but that do not join in filing the Request for Mediation must confirm to the Secretariat that they wish to have the dispute described in the request resolved by means of NAI Mediation.

4.3 The mediation clause embodies an agreement between the parties. That agreement is **different** to the *Mediation Agreement* to be concluded subsequently (Article 5 of the Mediation Rules). The Mediation Agreement is an agreement between the parties *and* the mediator. *That* agreement will not be concluded until after (i) a dispute has arisen; (ii) a request has been filed with the Secretariat with respect to that dispute; (iii) all the parties have stated that they wish to participate in the mediation; and (iv) the mediator has actually been appointed. That agreement will concretely stipulate which disputes may be raised in the mediation, that the mediation will be supervised by the mediator (who will be referred to specifically by name) and what procedural rules the mediator and the parties must observe. A sample mediation agreement is included in Appendix 3.

5. The Request for Mediation (Article 3 of the Mediation Rules)

5.1 Every NAI Mediation will be preceded by the filing of five copies of a Request for Mediation with NAI's Secretariat. Requests may also be filed by e-mail (Article 14.1 of the Mediation Rules) but the Secretariat may request a party that chooses to do so to subsequently send five hardcopies of its request in accordance with Article 3.1 of the Mediation Rules (Article 14.2 of the Mediation Rules). No special form is prescribed. A letter is sufficient.

5.2 Pursuant to Article 3.3(A) to (C) of the Mediation Rules, the request must in any event contain a description of the matter that the applicant wishes to be subject to mediation. That means a short, clear explanation of the dispute and possibly of what the applicant is claiming. Since the mediation will not lead to one or more judgments to be rendered by a body that has the power to grant or reject claims, there is no need to specify a concrete claim. In the initial phase of the mediation the description of the dispute

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and of what the applicant is claiming is intended to inform the other party or parties in that respect and to make it possible for the Secretariat to respond adequately to the request, for example in proposing candidate mediators and calculating the administration costs that will be due. The mediation will take place at NAI's offices in Rotterdam, the Netherlands, unless the parties agree otherwise.

6. Appointment of the mediator (Article 4 of the Mediation Rules)

6.1 After the Secretariat has ascertained that all the parties involved have agreed that the dispute described in the request will be resolved by means of mediation in accordance with the NAI Mediation Rules and the administration costs have been paid, the mediator will be appointed.

6.2 The mediator is the central figure in the mediation. He (or she) must be trusted by all the parties. That is why the NAI Mediation Rules assume as a general rule that the mediator will be appointed by the parties themselves (Article 4.2). However, in some cases the parties are unable to agree on who should act as mediator or prefer to have the mediator appointed by an impartial third party. In order to ensure that a mediator can be appointed in such cases, Article 4.3 of the Mediation Rules provides for the possibility of using the same list procedure that is used for NAI arbitral proceedings. Briefly stated, if the list procedure is used the Secretariat will send each of the parties a list of candidate mediators and request each of the parties to inform it which of those persons are ineligible to be appointed as the mediator. In principle the Secretariat will appoint a mediator from among the candidates who are acceptable to all the parties. In order to prevent the mediation process from reaching an impasse at an early stage as a result of the fact that none of the candidates is acceptable to all the parties, Article 4.3(C) of the Mediation Rules gives the Secretariat the power to appoint a mediator who was not mentioned on any of the lists that were sent to the parties.

6.3 In some sectors - for example, the IT industry - it is customary to have two mediators take part in the mediation. In order to give the parties an opportunity to set up the mediation in such a way that they believe that the chances of success are optimal, Article 4.5 of the Mediation Rules provides for the possibility of appointing two or more mediators.

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6.4 The NAI prefers to appoint mediators who are NMI certified, in order to safeguard the quality of the mediation. The NMI, which has been an advocate of mediation in the Netherlands since 1993, has a system for certifying mediators in order to safeguard their quality.

7. The commencement of the mediation

As was noted in sections 3.5 and 4.3 above, the mediation will commence when the Mediation Agreement has been signed (Article 5 of the Mediation Rules).

8. The procedure

8.1 *General.* The procedural rules that are included in the Mediation Rules will be discussed briefly below insofar as relevant. The parties and the mediator can lay down further procedural rules in the Mediation Agreement, as well as during the mediation procedure.

8.2 *Terms.* Even if the parties participate in the mediation on a voluntary basis, it is nonetheless important for the parties involved to know as quickly as possible whether it will be possible to resolve the dispute and end it by signing a settlement agreement. If it appears that this will not be possible, in the vast majority of cases it will be necessary to adjudicate the dispute; such adjudication will of course entail costs, in addition to the time required. The Mediation Rules therefore provide for a number of terms (which can be extended) in the initial phase of the mediation in order to ensure that the mediation proceeds expeditiously (see Articles 3.4, 4.3, 5.4 and 13 of the Mediation Rules).

8.3 *Suspension of all ongoing proceedings.* In principle it would be inconsistent for parties involved in mediation to continue any legal proceedings or arbitral proceedings that are already underway or to commence such proceedings during the mediation. However, it is possible that it will be necessary to conduct such proceedings in order to prevent any loss of rights. In some cases there may also be other reasons why conducting proceedings in addition to the mediation would be legitimate. Article 6.5 of the Mediation Rules therefore provides that, in principle, ongoing proceedings must be suspended and that no new proceedings may be commenced unless (i) suspension would lead to the expiry of a statutory limitation period or expiry period or (ii) the parties jointly agree otherwise in the presence of the mediator.

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8.4 *Assistance by councillors, experts and other advisors.* During the mediation the parties may be assisted by councillors, experts and other advisors, after notifying the mediator and the other party or parties in advance and provided that each of those councillors, experts and/or other advisors has confirmed to the mediator and the Secretariat that they will comply with the provisions contained in the Mediation Agreement and the provisions contained in these Rules (Article 6.2 of the Mediation Rules).

8.5 *Hearings; communication between the parties and the mediator.* The parties' meetings with the mediator are characterised as closed hearings. The procedure will be determined by the parties and by the mediator jointly to the fullest extent possible. After consulting with all the parties involved the mediator may speak or correspond with each of the parties separately or receive information from one or more of the parties in another manner (Article 6.4 of the Mediation Rules). That power is a typical characteristic of the mediation process. However, in that context the mediator is obliged to observe a strict duty of confidentiality with respect to everything he is told by or on behalf of a party, unless that party has permitted him to pass on that information to the other party or parties.

8.6 *Settlement agreement.* The resolution of a dispute in mediation implies that the parties have reached agreement with respect to their dispute. That agreement must be laid down in writing. If the dispute is governed by Dutch law, the agreement will be deemed to be a settlement agreement within the meaning of Title 15 of Book 7 of the Dutch Civil Code. It is possible that an agreement will put an end to only part of the dispute (see also section 3.5 above).

8.7 *Partial resolution.* In the event that the parties only resolve part of their dispute by means of a settlement agreement, the ordinary court or an arbitral tribunal will have to resolve the part of the dispute that is not governed by the settlement agreement (if that is still necessary). In practice the parties to mediation that does not lead to a complete resolution of the dispute sometimes appoint the mediator as the arbitrator or third party charged with giving binding advice in order to resolve the remaining dispute in one of those capacities. In view of the guiding principle that, in the first instance, the parties themselves determine how the dispute is to be resolved, the NAI takes the position that although the parties are permitted to change the mediator's position into that of an

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arbitrator or ‘binding advisor’, they must be fully aware of the implications of such a change. Unlike mediators, arbitrators and binding advisors have the power to resolve disputes and can impose a resolution on the parties on the basis of the information that is at their disposal and the information provided by the parties. In arbitration in particular, the exchange of information between the parties and the arbitrator must be transparent. Information that one party provides to the arbitrator must also be provided to the other party. In principle, if an arbitrator assesses the dispute on the basis of information that he received from one of the parties and the other party is unaware of that information, the arbitrator would be violating the principle of hearing both sides of the argument (the principle of *audi alteram partem*). That is a ground that could lead to his award being quashed. Mediators, unlike arbitrators, are permitted to speak with any of the parties outside the presence of the other party or parties. By appointing the mediator as the arbitrator or as the binding advisor, the parties run the risk that his award or binding advice will be passed on the ground that certain information was not available to all the parties. If the parties understand that consequence and nonetheless consciously decide to appoint the mediator as the arbitrator or binding advisor, the Mediation Rules will respect the parties’ wishes (Article 6.6). It also appears from the way in which Article 6.6 is worded (‘no, unless’) that as far as the NAI is concerned the choice indicated in that Article should not be made casually.

8.8 *Termination of the mediation.* Article 7.1 of the Mediation Rules refers to the various ways in which the mediation can end. The mediation will end upon execution of a settlement agreement, upon the mediator giving written notice that the mediation has ended without a settlement agreement being signed or upon written notice of termination of the mediation agreement being given by any of the parties to the other party or parties and the mediator. If a settlement agreement is concluded the Secretariat will be notified of the conclusion of that agreement, and in the other cases it will be provided with a copy of the notification in question. The Secretariat will confirm the fact that the mediation has ended to the parties and to the mediator (Article 7.2 of the Mediation Rules).

8.9 *The term of the mediation.* How long the mediation will last generally depends on the nature and complexity of the case and the interests that are at stake. Both the parties’ willingness and the insight and tact of the mediator are very important in this context.

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9. Arbitral award (Article 8 of the Mediation Rules)

Parties that so desire can have their settlement agreement included in an arbitral settlement award within the meaning of Section 1069 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*). The advantage of doing so is that if one of the parties does not comply with the arbitral award, the other party or parties can enforce that award as though it were a judgment rendered by the court, after receiving leave to do so from the court in preliminary relief proceedings. In addition to Section 1069 of the Dutch Code of Civil Procedure, Article 54 of the NAI Arbitration Rules will apply. If the parties wish to have their settlement agreement included in an arbitral settlement award, the mediator must be appointed as arbitrator and must then be asked to pass an arbitral settlement award. If more than one mediator has been appointed, an odd number of them will have to be appointed as arbitrators. Pursuant to Dutch law an arbitral tribunal must consist of an odd number of persons (Section 1026.1 of the Dutch Code of Civil Procedure). Pursuant to Section 1069 of the Dutch Code of Civil Procedure and Article 54 of the NAI Arbitration Rules, arbitral settlement awards must be signed by the arbitrator(s) as well as all the parties. The form and content of the arbitral settlement award within the meaning of Article 8 of the Mediation Rules are governed by Article 54 of the NAI Arbitration Rules, on the understanding that the last sentence of Article 54.1 (*'The arbitral tribunal may deny the request without giving reasons.'*) does not apply. If the parties' settlement agreement is not included in an arbitral settlement agreement, a party that wishes to enforce compliance with the settlement agreement will have to commence proceedings against the other party or parties before the court that has jurisdiction or, if an arbitration clause applies, before an arbitral tribunal.

10. Costs (Article 9 of the Mediation Rules)

There are two types of costs: administration costs and the mediator's fee and costs. The administration costs are charged for the services provided by the NAI. The mediator's fee and costs are paid from the deposit that the Secretariat will request and the parties will pay after the mediator has been appointed. The administration costs will be determined to every extent possible in accordance with the scale contained in Appendix 2.

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11. Confidentiality (Article 10 of the Mediation Rules)

As was noted above, virtually every mediation procedure requires both the parties' willingness to participate and their willingness to make concessions and admit that they are wrong, at least in part. As long as no settlement agreement has been signed, that willingness does not imply any waiver of rights. Unlike legal proceedings, in mediation the mediator has the freedom and power to speak and consult with each of the parties separately. In that context the pros and the cons can be weighed in a way that is very rare in the context of ordinary proceedings. Generally speaking the parties will not be willing to openly exchange their respective points of view if they must take into consideration the possibility that at some point in time the other party or an arbitrator or judge will become aware of them. Therefore, the Mediation Rules provide that the parties, their lawyers or representatives, the mediator, the secretary (if any) and any other parties that are involved in the mediation in any manner whatsoever are obliged to observe a duty of confidentiality. Article 10 of the Mediation Rules explicitly provides that all the persons and officers named in that Article will be deemed to have concluded an agreement as to the burden of proof (*bewijsovereenkomst*), in respect of which compliance can be invoked and enforced if necessary. Such an agreement constitutes a waiver of the right to derive evidence from anything that occurs during the mediation. It is an agreement within the meaning of Section 153 of the Dutch Code of Civil Procedure, and as a result that duty of confidentiality will provide a legal basis whose scope is also stipulated by law. Article 10(A) to (F) of the Mediation Rules provides for a number of exceptions to that duty of confidentiality.

NAI MEDIATION RULES

1. Applicability

These Rules govern Requests for Mediation filed with NAI's Secretariat (the 'Secretariat') and the handling of such requests.

2. Mediation

2.1 'Mediation' is taken to mean a procedure in which two or more parties to a dispute endeavour to resolve their dispute with the aid of a mediator on a voluntary basis.

2.2 'NAI Mediation' is taken to mean: Mediation in accordance with these Rules.

3. Request for Mediation

3.1 Every NAI Mediation will be preceded by the filing of five copies of a Request for Mediation with the Secretariat, unless the applicant chooses to file the request in the manner referred to in Article 14.1 of these Rules. If more than two parties will participate in the mediation, the same number of extra copies of the request must be filed.

3.2 A request may be filed by all the parties to the dispute jointly or by one or more of them.

3.3 Every request shall contain at least the following information:

- (A) a brief description of the subject of the dispute;
- (B) the names and contact details (the address, the domicile, location of the registered office or customary place of residence, and the telephone number, fax number and e-mail address) of each of the parties involved; and
- (C) a brief description of the matters in dispute to be resolved and the related mutual interests of the parties involved.

3.4 If a request is not filed by all the parties involved jointly, the Secretariat will forward copies of the request to the other party or parties involved and will request them to notify the Secretariat in writing within 14 days of receipt whether they are willing to conclude an agreement pertaining to the resolution of the reported dispute by means of mediation in accordance with these Rules.

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3.5 If the other party or parties involved give notice that they are not willing to conclude an agreement as referred to in Article 3.4, the Secretariat will notify the other parties in this respect.

3.6 The Secretariat is authorised to request the applicant and the other parties to make translations available of the documents filed with the Secretariat in a language to be indicated by the Secretariat.

4. Appointment of the mediator

4.1 The mediator will be appointed as soon as all the parties involved have stated that they are willing to have the dispute resolved by means of NAI Mediation and the administration costs determined in accordance with Article 9.2 of these Rules have been paid.

4.2 The mediator will be appointed by the parties jointly unless the parties have agreed otherwise. The parties will immediately inform the Secretariat of such appointment; the Secretariat will then confirm the appointment and the applicable conditions to the mediator and will send a copy of that confirmation to the parties involved.

4.3 If it is not possible to appoint a mediator in the manner referred to in Article 4.2 within a term of 14 days after the Secretariat has received the joint request or after the Secretariat has received the notification or notifications referred to in Article 3.4 within the term stipulated in that Article, the parties may request the Secretariat to appoint the mediator, in which case the following procedure will apply:

- (A) The Secretariat will send all the parties a list containing three names of persons who are eligible to be appointed mediator and will request each of the parties to inform it within two weeks of receiving the list which of the persons named in the list they would not accept as the mediator; the Secretariat will then appoint a mediator from the remaining persons;
- (B) If none of the persons named in the list is acceptable to all the parties as the mediator, the process indicated under (A) will be repeated;
- (C) If it once again appears that none of the persons named in the list is acceptable to all the parties as the mediator, the Secretariat will appoint a person whose name was not contained in any of the above-mentioned lists as the mediator.

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4.4 The Secretariat will take into consideration the parties' justified wishes when drawing up the list referred to in Article 4.3(A). The list will preferably contain the names of mediators who have been certified by the NMI.

4.5 Two or more mediators may be appointed if all the parties so desire. In such cases the provisions contained in Articles 4.2, 4.3 and 4.4 will apply correspondingly in respect of the appointment of each of the mediators.

4.6 References below to the mediator will be deemed to include references to a panel of mediators.

5. The Mediation Agreement; commencement of the mediation

5.1 After the mediator has been appointed and the deposit referred to in Article 9 below has been determined and paid, the Secretariat will schedule a meeting between the mediator and the parties in the shortest possible term for the purpose of laying down a contract for services between the mediator and each of the parties (the 'Mediation Agreement'), pursuant to which the mediator will conduct the NAI Mediation. The Mediation Agreement will be signed at that meeting.

5.2 The mediation will commence when the Mediation Agreement has been signed.

5.3 Immediately after the meeting the mediator will notify the Secretariat whether the Mediation Agreement has been concluded. If the Mediation Agreement has been concluded the mediator will send a copy of the Agreement to the Secretariat.

5.4 If the Mediation Agreement is not signed at the meeting referred to in Article 5.1 and as a result no Mediation Agreement is concluded, the Secretariat will confirm to the parties and the mediator that the request cannot lead to mediation.

6. The applicable procedural rules

6.1 The applicable procedural rules will be laid down by the mediator in consultation with the parties at the meeting referred to in Article 5.1 and thereafter. They will be laid down in the Agreement referred to in Article 5.1 of these Rules and in written notifications from the mediator to the parties.

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6.2 The parties may be assisted by counsel, experts and other advisors during the mediation, in each case after notifying the mediator and the other party or parties in advance and provided that each of them has confirmed to the mediator and the Secretariat that they will comply with the provisions contained in the Mediation Agreement and the provisions contained in these Rules, in particular the provisions governing confidentiality contained in Article 10 of these Rules.

6.3 Unless any of the parties objects no later than the time at which the Mediation Agreement is signed, the mediator may be assisted by a secretary during the mediation, provided that the secretary has confirmed in writing to the mediator and the Secretariat that he or she will comply with the provisions contained in the Mediation Agreement and the provisions contained in these Rules, in particular the provisions governing confidentiality contained in Article 10 of these Rules.

6.4 The mediator will be permitted to speak with or correspond with each of the parties separately or to receive information from one or more of the parties in another manner, after the proposal for that purpose has been discussed with all the parties.

6.5 The parties will suspend any ongoing proceedings between them, will continue to suspend such proceedings and will not commence any new proceedings unless suspension would lead to the expiry of a statutory limitation period or expiry period, new proceedings are necessary to prevent such expiration or they jointly agree otherwise in the presence of the mediator.

6.6 If the parties wish to terminate ongoing mediation in whole or in part in order to have all or part of their dispute resolved by means of arbitration or binding advice, the mediator will not be permitted to act as the arbitrator, the binding advisor or the secretary in such arbitral proceedings or binding advice proceedings unless all the parties explicitly accept the mediator's intended role in the arbitral proceedings or binding advice proceedings, without prejudice to the provisions contained in Article 8.

6.7 The mediator will keep the Secretariat informed about the progress of the mediation, both on request and unsolicited. The Secretariat will ensure that the mediation proceeds expeditiously.

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6.8 The parties and the mediator will agree on the language in which the mediation will be conducted. If the Secretariat does not understand that language, the Secretariat may request that translations be provided of one or more of the documents that are made available to the Secretariat in the context of the mediation, in a language to be indicated by the Secretariat.

7. The end of the mediation

7.1 The mediation will end in one of the following ways:

- (A) by execution of a settlement agreement, followed by the mediator's notification thereof to the Secretariat;
- (B) by written notification by the mediator to the parties, with a copy to the Secretariat, that the Mediation has been terminated without a settlement agreement being concluded; or
- (C) by any one of the parties giving the other party or parties written notice of termination of the Mediation Agreement, with a copy to the Secretariat.

7.2 In the cases referred to in Article 7.1(A) to (C), the Secretariat will confirm the termination of the mediation to the parties and the mediator.

7.3 At the end of the mediation the Secretariat will determine the mediator's costs and fee and will set them off to the fullest extent possible against the deposit that has been paid in accordance with Article 9.5 of these Rules. Termination of the mediation shall not affect the parties' duty of confidentiality and payment obligations pursuant to the Mediation Agreement.

8. Arbitral award

The parties and the mediator may agree that the settlement agreement referred to in Articles 2 and 7.1(A) will be laid down in an arbitral settlement award within the meaning of Article 1069 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) and with due observance of Article 54 of the NAI Arbitration Rules. The agreement concluded for that purpose will also apply as an arbitration agreement, pursuant to which the mediator or an odd number of members of a panel of mediators will be appointed as the arbitrator(s) and Rotterdam, the Netherlands, will be the place of arbitration. The last sentence of Article 54(1) of NAI's Arbitration Rules will not apply.

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9. The costs

9.1 The costs related to the mediation consist of (i) NAI's administration costs and (ii) the mediator's costs and fee.

9.2 The administration costs will be determined by the Secretariat after the request has been filed. The administration costs will be determined on the basis of the scale that is included in Appendix 2 to these Rules, which forms part of these Rules. The Secretariat will decide on the administration costs if they cannot be calculated on the basis of that scale.

9.3 If the request has been filed jointly by all the parties involved, the administration costs will be charged to the party or parties that filed the request, if necessary taking into consideration each of their shares. If the request was not filed by all the parties involved, the Secretariat will determine the portion of the administration costs to be paid by the applicant or applicants and will charge that party or those parties those costs, if necessary taking into consideration each of their shares. The remainder will be charged to the other party or parties involved, after a notification is received from that party or those parties within the meaning of Article 3.4 of these Rules. No refund will be made of any administration costs that have been paid in full or in part.

9.4 The Secretariat will suspend the performance of its duties as long as any administration costs that are due and payable have not been paid in full.

9.5 As soon as the mediator has or the mediators have been appointed, the Secretariat will determine the amount and each party's share of the deposit that the parties must make available to the Secretariat to secure payment of the fee to be charged by the mediator and his costs. No interest will be paid on any amount that is placed on deposit.

9.6 The Secretariat will be entitled to request a supplementary deposit from one or more of the parties, either at the mediator's request or otherwise.

10. Confidentiality

The parties, the mediator, the Secretariat and any and all other persons who are involved in the mediation in accordance with these Rules are obliged to observe a duty of confidentiality in

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respect of all the documents that are disclosed, exchanged or otherwise made available in the context of the mediation and of any and all other information that becomes known in any other manner in the context of the mediation. In particular they are not entitled to use any information that has come to their attention in the context of the mediation as evidence, either in or out of court, or to call the persons involved in the mediation or have them called as witnesses, except insofar as:

- (A) the information in question was already known to the persons or parties referred to in this provision other than in the context of the mediation;
- (B) all the parties approve the disclosure of the information that has become known in the context of the mediation;
- (C) the information relates to actual or impending crimes in respect of which there is a statutory obligation to disclose;
- (D) the information is needed in a grievance procedure, disciplinary proceedings or liability proceedings against the mediator, either for the benefit of the mediator himself with a view to his defence or for the benefit of another party involved in the mediation in order to substantiate a complaint or claim for liability;
- (E) the information that has become known in the context of the mediation must be revealed in connection with urgent reasons relating to public order;
- (F) the information relates to the settlement agreement that has been concluded as a result of the mediation, such, however, only insofar as it is necessary to perform or enforce that settlement agreement.

11. Exclusion of liability

11.1 The NAI, its board members and staff members, the mediator and his secretary, if any, and any other persons that one or more of them involve in this case are not liable contractually or otherwise for any damage caused by their own or any other person's acts or omissions or as a result of the use of any supporting materials in or in connection with the mediation, unless and only insofar as mandatory rules of Dutch law would preclude exoneration.

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11.2 The NAI, the members of its Governing Board and its staff members are not liable for the payment of any amount that is not covered by the deposit.

12. Amendments to these rules

These Rules may be amended only by the Governing Board of the Netherlands Arbitration Institute Foundation (Stichting Nederlands Arbitrage Instituut). Regardless of the time at which an amendment enters into effect, any particular mediation will be governed only by the version of these Rules that applied at the time at which the Secretariat received the Request for Mediation.

13. Extension of terms

The terms referred to in Articles 3.4, 4.3 and 5.4 may be extended by the Secretariat, either at the request of any of the parties or otherwise.

14. Requirement that documents be set out in writing

14.1 Where these Rules prescribe a unilateral notification to be in writing, a fax or e-mail will also be sufficient.

14.2 If it finds that there is cause to do so, the Secretariat may request the applicant to file with the Secretariat the number of printed copies, on paper, of a request that was notified by fax or by e-mail that are required in accordance with Article 3.1, stating that the request will not be handled until those copies have been received.

15. Applicable law and disputes

15.1 These Rules, and anything done in accordance with them, are governed by Dutch law. The settlement agreement referred to in Article 7.1 will be governed by Dutch law unless the parties agree otherwise.

15.2 In order to resolve any dispute that has arisen or that may arise in the future further to or in connection with these Rules, a Mediation Agreement ensuing therefrom or from further agreements that may be concluded in the context of the mediation or further to these Rules, the parties or the most diligent party, respectively, will file a Request for Mediation with the Secretariat of the NAI in accordance with the NAI Mediation Rules.

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16. Replacement of the NAI Minitrial Rules

16.1 As from the date on which they are adopted by the board of the NAI these Rules shall supersede the NAI Minitrial Rules. As from that date all references to the latter rules shall be deemed to be references to these Rules.

16.2 The NAI Minitrial Rules shall continue to apply with respect to minitrials that are in progress on the date referred to in the first subsection of this Article.

