

# **MEDIATION RULES OF NORDIC OFFSHORE AND MARITIME ARBITRATION ASSOCIATION (NOMA)**

The Rules are aligned with UNCITRAL's Mediation Rules 2021.

## **SECTION I INTRODUCTORY PROVISIONS**

### **Article 1 Definitions**

In these mediation rules the following definitions shall apply:

- (a) “MMC” means Mediation Management Conference;
- (b) “NOMA” means the Nordic Offshore and Maritime Arbitration Association;
- (c) “NOMA's Arbitration Rules” means the NOMA Arbitration Rules or the NOMA Fast Track Arbitration Rules;
- (d) “NOMA Arbitration” means arbitration to be performed in accordance with NOMA's Arbitration Rules;
- (e) “NOMA Mediation” means mediation to be performed in accordance with the NOMA Mediation Rules; and
- (f) “NOMA Mediation Rules” means these mediation rules adopted by NOMA.

### **Article 2 Application**

- 2.1 The NOMA Mediation Rules apply whenever the parties have agreed to refer their dispute to NOMA Mediation or mediation in accordance with the NOMA Mediation Rules.
- 2.2 The NOMA Mediation Rules in force at the time of commencement of the NOMA Mediation shall apply.
- 2.3 The NOMA Mediation Rules shall apply as set out herein to the extent not otherwise agreed in the agreement to mediate or by any other instrument in writing by the parties.

### **Article 3 The purpose of the NOMA Mediation**

- 3.1 The purpose of the NOMA Mediation is to facilitate amicable solutions and settlements of specific disputes between two or more parties through a process based on these NOMA Mediation Rules.
- 3.2 Mediation may take place under the NOMA Mediation Rules at any time regardless of whether arbitral, judicial, or other dispute resolution proceedings have been already initiated.
- 3.3 Where the parties have agreed to mediate and have also expressly undertaken not to initiate, during a specified period of time or until a specified event has occurred, arbitral, judicial or

other dispute resolution proceedings with respect to an existing or future dispute, such an undertaking shall be complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as waiver of the agreement to mediate or as a termination of the mediation

## **SECTION II COMMENCING MEDIATION**

### **Article 4 Request for NOMA Mediation**

- 4.1 Any party who seeks such an amicable solution and settlement may initiate NOMA Mediation by submitting to the other party or parties a written request for NOMA Mediation. The party or parties receiving the request shall normally be given no less than 14 calendar days to respond to the request in writing.
- 4.2 If the other party or parties accept the request, NOMA Mediation shall be deemed to have commenced when the request is accepted in writing. Should the request be accepted by some, but not by all the requested parties, NOMA Mediation shall be deemed to have commenced only with the written consent of the requesting and the accepting parties.
- 4.3 If a party that invited another party to mediate does not receive an acceptance of the invitation within 30 days from the day on which the invitation was sent by any means that provides for a record of its transmission, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediate.
- 4.4 The parties may alternatively, without a preceding request and acceptance, agree in writing to commence NOMA Mediation. In such a case, NOMA Mediation shall be deemed to have commenced at the time this agreement is binding.
- 4.5 If an arbitral tribunal has been appointed at the time mediation commences, the parties shall without undue delay submit a joint notice to the arbitral tribunal also addressing the consequences thereof to the arbitration proceedings, if any.

### **Article 5 Number of Mediators and the Mediation Assistant**

- 5.1 To facilitate the process and assist the parties reaching amicable solutions and settlements of the disputes in question there shall be appointed one or more mediators as well as a possible mediation assistant. The parties should pay due attention to the factors listed in Article 5.2 below before deciding the number of mediators to be appointed. One mediator shall be appointed unless otherwise agreed between the parties.
- 5.2 The number of mediators and/or a mediation assistant might be advantageous due to:
  - (a) the complexity of the dispute
  - (b) the scope and duration of the mediation; and/or
  - (c) the need for complementary experience and expertise.

- 5.3 If more than one mediator is appointed, one of the mediators shall be appointed as the lead mediator. The lead mediator will be responsible for managing the mediation, and other mediators will act as a co-mediator. The lead mediator and the co-mediator will hereinafter be referred to as the mediator unless otherwise stated.
- 5.4 A mediation assistant may be appointed in addition to the mediator. If a mediation assistant is appointed, the role of the assistant will be decided in accordance with Article 12 below.

## **Article 6 Appointment of the Mediator and the Mediation Assistant**

- 6.1 To the extent possible, the parties shall appoint mediator(s) jointly, including the lead mediator if more than one mediator is appointed.
- 6.2 If the parties are unable to appoint the mediator within 14 calendar days after commencement of the mediation in accordance with Article 4, the mediator and on lead mediator, if any, shall at the request of either party be appointed by NOMA. Generally, NOMA shall appoint the mediator as promptly as possible.
- 6.3 In recommending or selecting individuals to act as mediator, one shall have regard to:
- (a) The professional expertise and qualifications of the prospective mediator, experience as a mediator and ability to conduct the mediation
  - (b) Any relevant accreditation and/or certification awarded to the prospective mediator by a recognized professional mediation standard body
  - (c) The availability of the mediator, and
  - (d) Such considerations as are likely to secure the appointment of an independent and impartial mediation.
- 6.4 Upon the request from the parties or NOMA, a mediator considered for appointment shall issue an initial confirmation of availability and impartiality in accordance with Article 7, as well as his or her terms of engagement.
- 6.5 Upon appointment by the parties or by NOMA, the mediator and the parties shall enter into a mediation agreement addressing the relevant formalities of the mediation. A model mediation agreement has been prepared for this purpose by NOMA and made available on the website of NOMA.
- 6.6 If a mediation assistant is to be appointed, the parties and the mediator shall record the terms for the appointment in the mediation agreement and the sole or lead mediator will select the mediation assistant after consultation with the parties.

## **Article 7 Impartiality and Independence**

- 7.1 The mediator and a mediation assistant must be impartial and independent of the parties.
- 7.2 Before being appointed, the mediator shall disclose to the parties any circumstances that might be relevant as to the mediator's impartiality and independence. This includes any past or present relationship, direct or indirect, with any of the parties, their related entities, their

lawyers or other representatives, whether financial, professional or of any other kind. Any doubts regarding the relevance of such information shall be resolved in favour of disclosure. Furthermore, should any such circumstances arise after the mediator is appointed, the mediator shall disclose the same without undue delay.

- 7.3 The parties are, based on such full disclosure, free to agree and select any mediator that otherwise could be considered as conflicted, and the same applies to a continuation of the appointment despite new circumstances being disclosed.

### **SECTION III PREPARATION OF THE MEDIATION**

#### **Article 8 Mediation Management Conference (MMC)**

- 8.1 The mediation shall be well prepared and planned to be as effective as possible, and both mediator and the parties must contribute to this.
- 8.2 To ensure this, the mediator shall invite the parties to a MMC as soon as possible after the mediation agreement is entered into or as set out in the mediation agreement. The mediator may arrange the MMC as an in-person meeting or as a phone- or videoconference.

The purpose of the MMC is to clarify and agree on the practical aspects of the mediation, including the preparation thereof. The parties will endeavor to agree on the manner in which the mediation is to be conducted. Otherwise, the mediator may determine the conduct of the mediation in consultation with the parties, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

- 8.3 The mediator shall chair the MMC and shall in particular address and seek agreement on the following items to the extent not already agreed and/or specified in the mediation agreement:
- (a) Scope of the mediation, including the main elements of the dispute;
  - (b) The persons representing the parties in the mediation and their individual mandates to resolve and settle the dispute;
  - (c) Date(s) and tentative schedule for the mediation meeting(s);
  - (d) Location of the mediation;
  - (e) Preparations for the mediation and a schedule for such, including the dates for submissions addressed in Article 9 below as well as presentation of help-documents and other material to be presented during the mediation;
  - (f) The conduct of the mediation and the need for deviations from and/or supplements to Section IV below;
  - (g) The use of witnesses and/or experts, if any;
  - (h) Any other persons attending the mediation, their role and participation in the mediation;
  - (i) The language of the mediation and any need for translations;

- (j) Confirmation of and, if required, adjustments to the provisions of the mediation agreement; and
- (k) Dates for potential further MMCs.

8.4 The mediator shall record the clarifications and the agreements reached in the MMCs, and the parties and the mediator shall sign the meeting minutes from the MMCs.

## **Article 9 Submissions**

9.1 Unless otherwise agreed in the MMC, the parties shall:

- (a) prepare a joint summary of the dispute and/or a joint set of documentation (joint mediation submissions), and submit these to the mediator within 14 calendar days of the MMC; or no later than any date set for this in the MMC, or
- (b) if the parties are unable to agree on joint mediation submissions, the parties shall prepare and submit individual mediation submissions to the mediator within 21 calendar days of the MMC, or no later than any date set for this in the MMC.

9.2 The mediation submissions, whether joint or individual, shall outline the issues in dispute between the parties, and describe the key facts and key legal arguments. Copies of referenced documents shall accompany each written submission.

9.3 If arbitration or other legal proceedings has already commenced, the parties and the mediator may in the MMC agree to use the statement of claim, the statement of defence and later pleadings, if any, as mediation submissions. If agreed, these submissions shall be submitted to the mediator within 14 calendar days of the MMC, or such other date as agreed in the MMC.

9.4 Either party may, within dates set in MMC or at a reasonable time prior to the (first) mediation meeting, provide additional documentation and/or information and material to the mediator as part of the preparation for the mediation, or to be used during the mediation provided the party also submit the same documentation and/or information to all other parties.

## **Article 10 The Mediator's Preparations and the Parties Duty to Co-operate**

10.1 The mediator shall review all mediation submissions and properly prepare for the mediation.

10.2 The mediator may request from the parties additional documentation and information not included in the mediation submissions.

10.3 The parties shall co-operate with the mediator and in good faith comply with any reasonable request for additional documentation and/or information from the mediator.

10.4 Any additional documentation and/or information submitted to the mediator shall at the same time also be submitted to all other parties.

## **SECTION IV CONDUCT OF THE MEDIATION**

### **Article 11 The Purpose of this Section IV**

The purpose of Section IV is to set out the main principles for how NOMA Mediation is conducted unless otherwise agreed between the parties and the mediator.

### **Article 12 The Role of the Parties and their Counsels**

- 12.1 The parties shall in good faith throughout the mediation seek to find an amicable solution to the dispute, and shall for this purpose actively and constructively engage in discussions with each other and the mediator to find alternative approaches and ways of solving the dispute, in full or in part.
- 12.2 The parties' counsels, if any, shall advise the parties throughout the mediation and assist their clients in finding acceptable solutions to the dispute.

### **Article 13 The Role of the Mediator and the Mediation Assistant**

- 13.1 The mediator shall facilitate the mediation and shall use the mediator's expertise and experience to assist the parties in finding an amicable solution to the dispute.
- 13.2 The mediator shall conduct the mediation in a fair manner, treat the parties with equality and remain neutral and impartial at all times. The mediator shall throughout the mediation cooperate with the parties in defining the most optimal process, seek agreement on all aspects of the process and shall ensure that the process is fully transparent throughout the mediation.
- 13.3 Within this framework, and with the purpose of assisting the parties in finding an amicable solution to the dispute, the mediator may inter alia:
- (a) Discuss and identify the underlying reasons for the dispute and what the parties consider to be most important to achieve and/or avoid from the dispute;
  - (b) Assist the parties in focusing on the reasons for the dispute and their priorities with the purpose to challenge and move positions and finding possible common ground and ways forward;
  - (c) Through both open and more specific questions, challenge the parties' understanding of their positions and stimulate constructive dialogue and thinking; and
  - (d) When required, normally late in the mediation and upon the parties' request or with the parties' consent, provide advice on positions and/or potential solutions.
- 13.4 The mediator shall not act in a manner that may place his or her neutrality and impartiality in doubt.

The mediator may challenge the view and arguments of the parties, and share his or her view on the merits of the dispute primarily in separate meetings with the party.

- 13.5 If a party discloses information to the mediator in confidence, before, during or after the mediation, cfr. Article 14.1(c), the mediator shall not disclose the information to any other party without the consent of the disclosing party.
- 13.6 If the parties are unable to reach a settlement agreement, and the parties and the mediator agree, the mediator may provide a recommendation for the terms of the settlement upon conclusion of the mediation. Such recommendation shall not be used as evidence in any concurrent or subsequent arbitration or judicial proceedings, cfr. Section VI.
- 13.7 If a mediation assistant is appointed, the role of the mediation assistant will be decided by the mediator after consultation with the parties.
- 13.8 Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of the dispute that was or is the subject of the mediation and of a dispute that has arisen from the same or a related contract or legal relationship.

The mediator shall not act as a representative or counsel of a party in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that was or is the subject of the mediation and of a dispute that has arisen from the same or a related contract or legal relationship.

#### **Article 14 The Mediation Meeting(s)**

- 14.1 Within the framework stated herein, the mediator may, in close co-operation with the parties, conduct the mediation meeting(s) in such a manner as the mediator deems optimal. This will typically entail:
- (a) One or more joint meeting(s) with all members of the parties' teams in order to share information and conduct discussions efficiently;
  - (b) One or more joint meeting(s) with selected members of the parties' teams only, typically limited to one or a few members from each team with similar positions (the leaders, the lawyers, the engineers etc.), to share information and conduct discussions more efficiently;
  - (c) One or more separate meeting(s) between the mediator and each party's team, or parts thereof, for the mediator to in confidence work with the parties separately to discuss elements of the dispute and develop possible solutions and to challenge positions;
  - (d) One or more separate meeting(s) with only members of each party's team for discussions and reflections; and
  - (e) Certain assignments between the meetings, in particular in multi-day mediations, to increase the likeliness of progress in the further meeting.
- 14.2 Witnesses and/or experts (not including the parties) shall not be heard or participate in the mediation meeting(s) unless otherwise agreed between the parties, cfr. Article 8.3(g).

## **SECTION V CONCLUSION OF MEDIATION**

### **Article 15 Termination**

15.1 NOMA Mediation shall terminate upon:

- (a) The signing by the parties of a settlement agreement;
- (b) The written declaration made to the mediator by any party, at any time, that such party has decided no longer to pursue mediation;
- (c) The joint written declaration made to the mediator that the parties have mutually decided to terminate the mediation;
- (d) The written declaration from the mediator to the parties that it is, in the opinion of the mediator, not appropriate or serves no reasonable purpose to continue the mediation;
- (e) The written declaration by the mediator to the parties that there has been a failure to provide the requested deposit for the mediators' fees, c.f. Article 20.

15.2 A party is under no obligation to state any reason for the decision to terminate the mediation.

### **Article 16 The Settlement Agreement**

16.1 No terms of settlement are legally binding until set out in writing and signed by or on behalf of each of the parties.

16.2 If the parties reach a settlement, the parties and their counsels are responsible for drafting the settlement agreement unless otherwise agreed with the mediator. The draft shall if the parties so require, be reviewed by the mediator. The parties shall sign the settlement agreement prior to the end of the (final) mediation meeting.

16.3 The settlement agreement shall be executed in three originals, of which one shall be retained by the lead or sole mediator unless otherwise agreed.

16.4 The requirement that a settlement agreement shall be signed by the parties is met in relation to an electronic communication if:

- (a) A method is used to identify the parties and to indicate the parties' intention in respect of the information contained in the electronic communication;
- (b) The method is used either:
  - (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
  - (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

16.5 By signing the settlement agreement, the parties agree that the settlement agreement can be used as evidence that it results from mediation, and that it can be relied upon for seeking relief under the applicable law.

### **Article 17 Enforceability**

17.1 If NOMA arbitration has commenced prior to the settlement agreement, the parties may request the arbitral tribunal to issue an award to affirm the parties' agreement.

17.2 In case of settlement, the parties may, subject to the consent of the Mediator, agree to appoint the Mediator as an arbitrator and request him or her to confirm the settlement agreement in an arbitral award.

## **SECTION VI CONFIDENTIALITY**

### **Article 18 Confidentiality**

18.1 Unless otherwise specifically agreed between the parties or required by law, neither the mediator, the mediation assistant, the parties nor any other person taking part in the mediation shall disclose to any third party any information about the mediation, including but not limited to;

- (a) Any statements and documents specifically prepared for and exchanged as part of the mediation;
- (b) Any views, admissions, or proposals expressed by the parties or by the mediator during the course of the mediation; and
- (c) The settlement agreement or any of the terms thereof.

18.2 The parties shall not present information about or from the mediation, as set out in Article 18.1 above, as evidence in any concurrent or subsequent arbitration or judicial proceeding, nor may the mediator or the mediation assistant be called upon by any of the parties in any concurrent or subsequent arbitration or judicial proceeding to testify about the same.

## **SECTION VII FEES AND EXPENSES**

### **Article 19 Fees and Expenses**

19.1 The parties pay their own expenses regarding the mediation.

19.2 The mediator shall determine the fees and expenses of the mediation to be paid to the mediator and the mediation assistant upon the termination of the mediation. This shall be based on the rates agreed in the mediation agreement, and the mediator shall simultaneously submit a detailed statement of fees and expenses to the parties. The parties shall pay the fees and expenses within 14 calendar days of receipt of the statement.

- 19.3 The parties are jointly and severally liable for the fees and expenses of the mediation unless otherwise agreed in writing between the parties and the mediator. The parties are inter partes liable for equal parts of the fees and expenses unless otherwise agreed between the parties.
- 19.4 If deposits have been made in accordance with Article 21, the statement from the mediator shall include an account setting out how the deposits have been expended to settle the fees and expenses of the mediation. If the fees and expenses of the mediation exceed the deposits received, the parties shall pay the exceeding amount in accordance with this Article 19. If the deposits received exceed the fees and expenses of the mediation, the mediator shall return any unexpended balance to the parties within 14 calendar days of the statement.
- 19.5 If the mediation is unsuccessful and the matter is referred to NOMA Arbitration, the fees and expenses of the mediation constitute legal costs in accordance with NOMA's Arbitration Rules.

### **Article 20 NOMA assessment of Fees and Expenses**

- 20.1 If NOMA has appointed the mediator, either party may within 14 calendar days of receiving the mediator's statement in accordance with Article 19, refer such statement to NOMA for review. If NOMA finds the mediator's statement to be inconsistent with the mediation agreement or otherwise manifestly excessive, NOMA may, within 45 calendar days of receiving such a referral, make any adjustment to the mediator's statement that it deems reasonable. The decision shall take into account the amount in dispute, the complexity of the subject matter, the time spent by the mediator and any other relevant circumstances.

If either party refer the mediator's statement to NOMA for review, the parties' obligation to pay in accordance with Article 19 is suspended until NOMA has informed the parties and the mediator of its decision.

### **Article 21 Deposit**

- 21.1 The mediator may, upon commencement of the mediation, request the parties to deposit equal amounts as an advance for the fees and expenses referred to in Article 19.
- 21.2 During the course of the mediation, the mediator may request supplementary deposits from the parties to the extent the deposit received is insufficient to cover the fees and expenses referred to in Article 19.
- 21.3 If the required deposits are not paid in full within 7 calendar days after a request, or such other date as agreed with the mediator, the mediator may order the suspension or termination of the mediation.

## **SECTION VIII LIABILITY**

### **Article 22 Exclusion of Liability**

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the mediator, the mediation assistant or NOMA based on any act or omission in connection with the mediation and the preparation thereof.

**3 APRIL 2023**