

## ATTACHMENT 2

### A Proposed Mediation Checklist for Online Sports Mediation

#### Introduction

In sports disputes, there are often significant characteristics that differ from other kinds of disputes. For example, time and the passage of time are often important factors in resolving a dispute. There are often no monetary issues at play, only relief similar to declaratory, injunctive relief or specific performance, or simply providing access to certain benefits, resources, rights, or enforcement of certain obligations or responsibilities. In addition, in sports the participants in disputes often have to deal with each other again, no matter the outcome of the dispute at issue, so preserving relationships is often important and has to be recognised in the mediation process and the outcome.

This checklist seeks to provide suggestions, best practices, and views on how to most effectively conduct online mediations in this new environment. It is not intended to be even remotely binding or mandatory; mediation is a flexible process that the parties to a dispute are able to define with their mediator.

Mediation is very much dependent on the styles and approaches of the mediator and the party representatives, and there is no “correct” or common approach to mediation; mediators around the world obtain settlements using a wide range of techniques and approaches. This protocol seeks to maximise this flexibility in an online mediation environment rather than curtail it in any way. It would be more appropriate to consider this document as providing merely suggestions that may be considered when mediating in an online or remote format.

This checklist assumes some general familiarity with the process of mediation and it assumes that the parties are proceeding under some form of mediation rules or procedures they have already selected. This document does not endeavour to provide a new form of rules or procedures but it seeks merely to provide the suggestions contained herein to ensure a successful online mediation.

#### The Checklist

1. Preparation is Key. In sports cases, often the participants are not sophisticated or repeat users of mediation, so sufficient time and opportunity has to be allowed for the mediator and the party representatives to ensure that all participants are comfortable with the process and its online conduct. In addition, submission of brief written pre-mediation statements outlining important legal and factual issues, requested relief, and an outline of any prior efforts at resolution assist in expediting the process and ensuring that the mediator is sufficiently familiar with the dispute and with any unique aspects of the sport in which the dispute arose so as to maximise effectiveness. Agreements to mediate, signed by the parties and the mediator or institution, will need to be revised to ensure that they capture the various issues that arise from an online mediation, including protecting confidentiality, prohibiting recording, and setting limitations on access to mediation session login information.

2. Confidentiality. Confidentiality of the mediation proceedings is a defining characteristic of the process. The parties should ensure that confidentiality is emphasized in all aspects of the online mediation process.
  - a. Recording of the online mediation, in any manner, should be prohibited. The parties' mediation agreement should, as an express condition of participating in the mediation, prohibit recording of the online mediation session(s) by anyone, whether party, party representative or mediator.
  - b. In addition, the access credentials for the mediation session must be protected from disclosure beyond the participants, and the mediation agreement should address this. Additionally, passwords should be required and a waiting room feature should be enabled so that only those who should be in the mediation are in it. Preferably, each layer of access credential for the mediation session should be sent to the parties by separate email. The mediation agreement should outline this process and make it a condition of participation that the online access credentials are maintained as confidential.
  - c. The participants should be advised that they should participate in the mediation in a confidential space, avoiding public areas and publicly accessible WiFi. This should also be included in the mediation agreement.
3. Management of the Mediation Process Online. The mediator should be the host of any online mediation session, and able to control the various aspects to ensure confidentiality. Alternatively, where the mediation is held through an ADR institution, the ADR institution could host the online mediations session. In addition, the mediator should be able to see all necessary individuals for any conversation being undertaken, whether in general session or private caucus. The host should ensure that recording using the platform's recording service, if any, is disabled. The mediator should ensure that all participants in joint sessions, or in private sessions with many individual participants, mute their microphones except when speaking. In sports cases, at times it is important that provision be made to permit parties who often have to work with each other again to speak directly to each other about various issues, though if possible that should be managed by the mediator unless or until significant issues are resolved; this can be facilitated using various combinations of virtual breakout rooms.
4. Pre-Mediation Practice Session. The mediator should endeavour to conduct a pre-mediation practice session with parties or their representatives to ensure everyone has familiarity with the process; this practice session could provide a basis for a pre-mediation call between the mediator and the parties (if that is the mediator's practice) or it could provide an opportunity for the mediator to use this pre-session to explain general ground rules of the mediation that might otherwise have to be given at the start of the formal mediation session (such as explaining how the process works, emphasising the confidential nature of the mediation session, discussing how joint sessions and private online caucuses work, ensuring the mediation agreements have all

been signed, etc.). In any event, the practice session should ensure that the parties and their representatives have working familiarity with the online platform so that the formal mediation session can be as productive as possible. The practice session should also be used to ensure that all participants have sufficient Internet connectivity at the location where they will participate in the mediation.

5. Effective Mediation Presentation Online. All participants in the mediation should be able to clearly see and hear each other throughout the process. This is particularly important given the emotion element to mediation. Empathy, candour, regret and commitment are much better conveyed through video than through voice only. The video arrangements for each participant should be set for maximum effectiveness. In other words, the participants should not be backlit, their faces should be clearly visible, the video frame should include primarily their upper torso and face with minimal presentation of ceiling or background images, and the video camera should be set at eye level, not above or below.
6. Mediator Movement Online. The mediator should arrange with the parties in advance the method by which he or she will announce their presence when entering a virtual room, or caucus, so as not to disturb confidential communication between a party and their representative that might be going on when the mediator enters. Various techniques are possible, including the mediator messaging the parties via the platform to inform them that he or she is coming in and waiting for a response, or simply going into the room but doing so noisily or by announcing the mediator's presence. In any event, the protocol for this should be discussed between the mediator and the parties and their representatives so everyone knows what to expect. Similarly, the mediator should be careful to announce to each side in private their intention to take the sides from private rooms into a joint session or a session with others before actually causing that virtual room change to occur. The key point is that the mediation participants need to know exactly who can hear them at any given time and the mediator needs to ensure that knowledge exists.
7. Backup Plans/Contacts. To prepare for the possibility that there may be technical difficulties, the mediator should have access to the party and party representative's mobile phone numbers so that the problem may be resolved. If technical access or connectivity to the online platform becomes difficult, the mediator and the parties may consider whether to proceed by telephone, either through the same platform or via an alternative, to permit the mediation to continue successfully. Failing that, the participants and the mediator may simply choose to proceed by individual and joint telephone calls. Backup plans are vitally important in sports mediations, where timing of resolution is often a paramount consideration of the dispute itself.
8. Finalising Agreement and Closing the Mediation Session. To the extent that an agreement is reached during the mediation, the parties and their representatives should endeavour to finalise an agreement before breaking away from the mediation session. This may require party representatives and the mediator to engage in various aspects of drafting and suggesting language, perhaps out of the presence of each other or their

clients, or perhaps in the presence of only the party representatives and the mediator. Accommodation should be made for this on the virtual platform and the mediator should discuss this possibility with all participants at the start of the mediation session. To prepare fully for this, in appropriate cases, the parties should come prepared with as much of an agreed settlement agreement as possible, subject perhaps to modifying an attachment or certain terms; this has the effect of focusing the parties on the issues and it also speeds up, simplifies, and avoids further disputes over finalising the wording of a final agreement if one is reached. In addition, to the extent the mediation does not resolve the dispute fully, but certain issues are resolved, the mediator should have the parties confirm those resolved issues in written form upon which they agree before the virtual mediation session concludes.