

CAfA
MEDIATION RULES

in force as of 1 January 2019
(NAI Mediation Rules and AiA/NAI Adjunct Mediation
Rules Combined)

TABLE OF CONTENTS

Recommended mediation clause

Article 1 – Applicability

Article 2 – Definitions

Article 3 – Request for Mediation

Article 4 – Appointment of the mediator

Article 5 – The Mediation Agreement; the commencement
of the mediation

Article 6 – Applicable procedural Rules

Article 7 – The end of the mediation

Article 8 – Arbitral award

Article 9 – Mediation Costs

Article 10 – Confidentiality

Article 11 – Limitation of liability

Article 12 – Amendment of these Rules

Article 13 – Extension of terms

Article 14 – Communications

Article 15 – Applicable law and disputes

Explanatory Notes

RECOMMENDED MEDIATION CLAUSE

"For the purpose of resolution of each and any dispute, claim, controversy, and disagreement that has arisen or might arise from the present agreement, or any further agreements resulting from the same, the parties shall – or a party shall – file a request for mediation with the NAI Secretariat in accordance with the CAfA Mediation Rules, consisting of the Mediation Rules of the Netherlands Arbitration Institute supplemented and modified by the AiA/NAI Adjunct Mediation Rules."

CAfA MEDIATION RULES

Article 1 - Applicability

1. These CAfA Mediation Rules shall apply if the parties have referred to mediation in accordance with these Mediation Rules. Such reference shall constitute a reference to the NAI Mediation Rules as well, which are supplemented and modified by the AiA/NAI Adjunct Mediation Rules.
2. The CAfA Mediation Rules shall apply in the form existing on the date upon which the request for Mediation is received.

Article 2 - Definitions

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. All references in the NAI Mediation Rules to “NAI Mediation” shall be replaced by “CAfA Mediation,” which shall mean: mediation in accordance with these CAfA Mediation Rules.
3. “the Mediator Pool”: means the published panel list of approved mediators compiled by the CAfA Board and NAI.
4. “the AiA”: means the Netherlands foundation Authentication in Art, registered in The Hague.
5. “the AiA Board”: means the governing body of the Netherlands foundation Authentication in Art, registered in The Hague.
6. “the NAI”: means the Foundation Netherlands Arbitration Institute, registered in Rotterdam.
7. “the NAI Executive Board”: means the Executive Board of the Netherlands Arbitration Institute, registered in Rotterdam.
8. “the CAfA”: means the Netherlands foundation Court of Arbitration for Art, registered in The Hague.
9. “the CAfA Board”: the governing body of the Netherlands foundation Court of Arbitration for Art, registered in The Hague.
10. “the Expert Pool”: the published list of experts in the fields of forensic science and provenance of an art object compiled by the CAfA Board and the NAI for possible appointments under these Mediation Rules.

CAfA MEDIATION RULES

Article 3 - Request for Mediation

1. Every CAfA Mediation will be preceded by the filing of a Request for Mediation with the Secretariat.
2. A request may be filed by all the parties to the dispute jointly or by one or more of them.
3. Every request shall contain at least the following information:
 - (a) a brief description of the subject of the dispute;
 - (b) the name, the address, the place of residence, the telephone number, the e-mail address and, as applicable, the VAT number 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.
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 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.
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.
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.

Article 4 - Appointment of the mediator

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 CAfA Mediation and the administration costs determined in accordance with Article 9(2) have been paid. The mediator will be drawn from the Mediator Pool. Only in the event of compelling reasons, the administrator in consultation with the CAfA Board, may appoint a mediator from outside the Mediator Pool. The administrator may also deviate from the requirement of the first sentence when employing the list

CAfA MEDIATION RULES

procedure under Article 4(3) of the NAI Mediation Rules.

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.

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.

4. The Secretariat will take into consideration the parties' justified wishes when drawing up the list referred to in Article 4(3) (a). Before appointment or confirmation, a prospective mediator shall sign a statement of acceptance, availability, impartiality and independence. The mediator shall disclose in writing any facts or circumstances that may affect or be perceived to affect his/her impartiality and the Secretariat shall circulate that written document to all parties and shall fix a time limit for all parties to respond with their comments.

CAfA MEDIATION RULES

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.
6. References below to the mediator will be deemed to include references to a panel of mediators.
7. Where appropriate, a mediator may with the prior consent of the parties appoint an expert to provide the Parties neutral third-party advice on specific questions in dispute. On issues of forensic science or the provenance of an art object, experts from within the Expert Pool may be appointed. All such expert advice shall be confidential and non-binding (unless otherwise agreed) and may not be used or referred to outside of the mediation. The mediator shall consult the parties regarding the terms of reference to be issued to the expert. The mediator shall send the parties a copy of the appointment and the terms of reference as soon as possible.

Article 5 - The Mediation Agreement; commencement of the mediation

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 CAfA Mediation. The Mediation Agreement will be signed at that meeting.
2. The mediation will commence when the Mediation Agreement has been signed.
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.
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.

CAfA MEDIATION RULES

Article 6 - Applicable procedural rules

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) and in (written) notifications from the mediator to the parties.

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.

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.

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 and agreed to by all the parties.

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. 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

CAfA MEDIATION RULES

proceedings, without prejudice to the provisions contained in Article 8. To act as mediator in such mediation proceedings, the mediator must also come from the CAfA Arbitrator Pool or be appointed in accordance with Article 11(6) and (7) of the CAfA Arbitration Rules.

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.

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.

Article 7 - The end of the mediation

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.

2. The Secretariat will confirm the termination of the mediation to the parties and the mediator.

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). Termination of the mediation shall not affect the parties' duty of confidentiality and payment obligations pursuant to the Mediation Agreement.

Article 8 - Arbitral award

The parties and the mediator may agree that the settlement agreement referred to in Article 7(1)(a) will be laid down in an

CAfA MEDIATION RULES

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 50 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 The Hague, the Netherlands, will be the place of arbitration.

Article 9 - Mediation Costs

1. The costs related to the mediation consist of (i) NAI's administration costs and (ii) the mediator's costs and fee. Unless agreed otherwise, the costs of counsel, experts and other advisors retained by or for a party in accordance with Article 6(2), shall be borne by that party.

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 as Appendix 2 to the NAI Mediation 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.

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). No refund will be made of any administration costs that have been paid in full or in part.

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. If, after a second reminder from the Secretariat, the administration costs owed by a party are not received by the NAI within fourteen days, the mediation will not take place, unless the administration costs owed are paid by the other party or parties.

5. As soon as the mediator has or the mediators have been

CAfA MEDIATION RULES

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. Any negative interest may be deducted from the deposit by the NAI. If, after a second reminder from the Secretariat, the deposit to be paid by a party is not received by the NAI within fourteen days, that party will be deemed to have given notice of termination of the Mediation Agreement in accordance with Article 7(1)(c).

6. The deposit referred to in this Article 9 shall be calculated to cover all the estimated mediator fees and costs. 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.

Article 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 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) it concerns evidence brought into the mediation for discussion that, without the mediation, would also have been submitted to the court or the arbitrator in court proceedings or arbitration;
- (d) the information relates to actual or impending crimes in respect of which there is a statutory obligation to disclose;
- (e) the information is needed in a grievance procedure,

CAfA MEDIATION RULES

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;

- (f) the information that has become known in the context of the mediation must be revealed in connection with urgent reasons relating to public order; or
- (g) it concerns the settlement agreement, unless the parties have agreed that one or more parts thereof are subject to the confidentiality.

Article 11 - Limitation of liability

The NAI, its board members and staff members, the members of its Advisory Board, the mediator and any secretary that may have been appointed, 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. 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. The foregoing shall apply *mutatis mutandis* to the CAfA, its board members, secretary to the board, officers, staff members, the members of its Advisory Board, members of its committees, and any expert that may have been appointed by the mediator, and any other persons that one or more of them involve in the case. The relationships of the parties with mediators, mediator-appointed experts, the Netherlands Arbitration Institute, the Netherlands foundation Authentication in Art, and the Netherlands foundation Court of Arbitration for Art shall be governed exclusively by Netherlands law and shall be subject to the exclusive jurisdiction of the Rotterdam District Court as are the relationships of mediators and mediator-appointed experts with those three Foundations.

Article 12 - Amendments of these Rules

The NAI Executive Board may amend the NAI Mediation Rules at any time. The AiA/NAI Adjunct Mediation Rules can only be amended jointly by the CAfA Board and the NAI Board. The amendments shall have no effect on mediations already pending.

CAfA MEDIATION RULES

Article 13 - Extension of terms

The terms referred to in Articles 3(4), 4(3), 5(4), 9(4) and 9(5) may be extended by the Secretariat, either at the request of any of the parties or otherwise.

Article 14 - Communications

1. Requests and communications shall be made or confirmed in writing in the manner provided for in this article.

2. Unless the sender is unable to do so, all requests, communications and other documents to the NAI shall only be sent electronically by e-mail to the address cafa@nai-nl.org or to any other address to be specified by the NAI.

3. The time at which a request or communication is received electronically by the NAI shall be the time at which the request or communication has reached a data processing system for which the NAI bears responsibility.

4. The NAI will send a request or communication addressed to one or more addressees electronically by e-mail if the addressee, by providing its e-mail address, has communicated that it may be reached for these purposes by such means.

5. After signing the Mediation Agreement, the parties shall send their requests, communications and other documents directly to the mediator.

6. Unless the mediator decides otherwise, all requests, communications or other instruments in writing between the parties and the mediator shall be sent in electronic form by e-mail if the parties, by providing their e-mail addresses, have communicated that they may be reached for these purposes by such means.

7. The time at which a request, communication or other document is received electronically by the mediator shall be the time at which the request, the communication and/or the other document has reached a data processing system for which the mediator bears responsibility.

8. The time at which a request, communication or other document is sent electronically by the mediator and/or the NAI shall be the time at which the message has reached a data

CAfA MEDIATION RULES

processing system for which the mediator or the NAI does not bear responsibility.

Article 15 - Applicable law and disputes

1. These Rules, and anything done in accordance with them, are governed by Dutch law. The settlement agreement referred to in Article 7(1)(a) will be governed by Dutch law unless the parties agree otherwise.

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 CAfA Mediation Rules.

3. When a dispute has not been resolved by mediation, the dispute shall be referred to arbitration pursuant to the CAfA Arbitration Rules.

EXPLANATION CAfA MEDIATION RULES

EXPLANATORY NOTES

1. The AiA, NAI, and CAfA

1.1 The Foundation Authentication in Art (Stichting Authentication in Art; “AiA”) is an independent non-profit organization founded in December 2012, is based in The Hague, International City of Peace and Justice (the Netherlands) and complies to international non-profit regulations. The AiA Executive Board consists of a group of prominent international art world professionals who have come together to create a forum that can act as a catalyst and promote best practices in the field of art, and art authentication in particular. AiA has been created to provide leadership and shape dialogue, develop sound practice and liaise with the wider art community including international collectors, art historians, art market professionals, financial institutions, legal advisers, trust & estate practitioners and other stakeholders in the international art market.

1.2 The Netherlands Arbitration Institute (Stichting Nederlands Arbitrage Instituut; “NAI”) was founded in 1949. The NAI Executive Board consists of people from the business community, legal profession and science who have extensive experience in the fields of arbitration, binding advice and mediation. The NAI’s mission is to promote dispute resolution in these fields and other legal means for the prevention, limitation and resolution of disputes.

1.3 The NAI has been conducting arbitrations for over seven decades and has developed its Arbitration Rules (most recently revised and updated effective 1 January 2015) to suit the broadest range of commercial disputes.

1.4 To promote its mission, the AiA conceived plans to establish a pool of highly qualified international arbitration professionals coupled with a pool of leading experts in the fields of forensic science and provenance research regarding art objects qualified to resolve disputes in the wider art community, including matters involving international collectors, art historians, art market professionals, financial institutions, and other stakeholders in the international art market.

1.5 The AiA has collaborated with the NAI to establish the Court of Arbitration for Art Foundation and to develop with the NAI Adjunct Arbitration Rules to supplement and tailor the primary NAI Arbitration Rules specifically for disputes within the wider

EXPLANATION CAfA MEDIATION RULES

art community. That collaboration has culminated in the establishment of the AiA/NAI Adjunct Arbitration Rules.

1.6 The AiA/NAI Adjunct Mediation Rules are to be employed together with the NAI Mediation Rules. To better understand the NAI Mediation Rules it is advisable to consult the section of the NAI website on Mediation: https://www.nai-nl.org/en/nai_mediation/what_is_mediation. The following Explanatory Notes address primarily aspects relating to the provisions of the AiA/NAI Adjunct Mediation Rules only.

2. The Mediator Pool and Expert Pool

2.1 The Mediator Pool is composed of international mediators with demonstrated experience in art law disputes and/or international mediation.

2.2 The Expert Pool is composed of international materials analysts/forensic scientists, and art historians/provenance researchers qualified, among other things, to analyze and document art objects, most often for authentication purposes. Art authenticity is typically understood to be evaluated according to standards of connoisseurship, provenance research, and forensic science. While relevant connoisseurs or scholars of a particular artist or a particular type of art objects or collectibles must be approached on a case-by-case basis, experts in the fields of provenance and forensic science can analyze objects of art more generally. As an alternative to having disputing parties retain their own respective experts in these particular fields, with such experts then advocating for their side, the CAfA Mediation Rules shall offer the Expert Pool to provide the exclusive analysis and professional opinion on these subjects.

3. Scope of Application

3.1 These CAfA Mediation Rules shall apply if the parties have referred to mediation in accordance with the CAfA Mediation Rules. Such reference shall constitute a reference to the most recent version of the NAI Mediation Rules as well, which are supplemented and modified by the AiA/NAI Mediation Rules. To the extent the AiA/NAI Adjunct Mediation Rules provide for deviations from the NAI Mediation Rules, the AiA/NAI Adjunct Mediation Rules prevail.

3.2 In order for the CAfA Mediation Rules to apply the parties must refer to them in, for example, a contractual mediation clause,

EXPLANATION CAfA MEDIATION RULES

mediation agreement, or other agreement to mediate. The following mediation clause is recommended:

"For the purpose of resolution of each and any dispute, claim, controversy, and disagreement that has arisen or might arise from the present agreement, or any further agreements resulting from the same, the parties shall – or a party shall – file a request for mediation with the NAI Secretariat in accordance with the CAfA Mediation Rules, consisting of the Mediation Rules of the Netherlands Arbitration Institute supplemented and modified by the AiA/NAI Adjunct Mediation Rules."

4. Impartiality and Independence

4.1 The mediator shall be and must remain impartial and independent of the parties, and shall throughout the course of the mediation disclose any facts or circumstances which might be of such nature as to call into question the mediator's independence in the eyes of any of the parties. Notwithstanding any such disclosure, the parties may agree in writing to authorize the mediator to continue his/her mandate.

4.2 In the event of an objection by any of the parties, or at the mediator's own discretion if the mediator feels there are reasons which may compromise his/her impartiality or otherwise, the mediator shall cease his/her mandate and inform the NAI Secretariat accordingly, whereupon the latter will make arrangements to replace the mediator, after consulting the parties and offering them the possibility to appoint another CAfA mediator.

5. Expert Assistance

5.1 Where appropriate, a mediator may with the prior consent of the parties appoint an expert to provide the Parties neutral third-party advice on specific questions in dispute. On issues of forensic science or the provenance of an art object, only advice from Experts from within the Expert Pool is admissible. All such expert advice shall be confidential and non-binding (unless otherwise agreed) and may not be used or referred to outside of the mediation.

EXPLANATION CAfA MEDIATION RULES