

NAIROBI
CENTRE FOR
INTERNATIONAL ARBITRATION

MEDIATION RULES, 2015



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**THE NAIROBI CENTRE
FOR INTERNATIONAL
ARBITRATION
(MEDIATION) RULES, 2015**
Effective from 18th December 2015

**THE NAIROBI CENTRE
FOR INTERNATIONAL
ARBITRATION
(MEDIATION) RULES, 2015**

RULE 1

Citation.

1. These Rules may be cited as the Nairobi Centre for International Arbitration (mediation) Rules, 2015.

RULE 2

Application of the Rules.

(1) These Rules apply to any dispute that had arisen prior to commencement of these Rules and all disputes arising upon the enactment of these Rules, where the parties have agreed to its application.

(2) Where any of these Rules is in conflict with a provision of another law from which the parties cannot derogate, that provision of that other law shall prevail.

RULE 3

Interpretation.

In these Rules, unless the context otherwise requires—

“Act” means the Nairobi Centre for International Arbitration Act, 2013;

“Centre” means the Nairobi Centre for International Arbitration established under section 2 of the Act; and

“Registrar” means the Registrar of the Centre appointed under section 9 of the Act.

RULE 4

Domestic mediation.

(1) A mediation is a domestic mediation if—

(a) the mediation agreement provides that the mediation is to be conducted in Kenya;

(b) the mediation is between bodies corporate

that are incorporated in Kenya or whose central management and control is exercised in Kenya;
(c) the mediation is between an individual and a body corporate and—

(i) the individual is a national of Kenya or is habitually resident in Kenya;

(ii) the body corporate is incorporated in Kenya or its central management and control is exercised in Kenya;

(iii) the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place in which the subject-matter of the dispute is closely connected, is in Kenya; or

(d) is not an international mediation.

(2) This regulation applies to a domestic mediation either at the time when the mediation commences or when the mediation agreement is entered into.

RULE 5

International mediation.

A mediation is an international mediation if—

(a) the parties to a mediation agreement have their places of business in countries other than Kenya at the time of the conclusion of the mediation agreement;

(b) one of the parties to the mediation has its place of business in a country other than Kenya;

(c) a place where a substantial part of the commercial obligation or other relationship is to be performed, or the place where the subject matter of the dispute is closely connected, is in a country other than Kenya; or

(d) the parties have agreed in writing that the subject matter of the mediation relates to more than one country.

RULE 6

Commencement of mediation proceedings.

(1) A person shall commence mediation proceedings by submitting a written request to the Registrar in Form A set out in Part B of the First Schedule.

(2) The request under paragraph (1) shall contain the following information—

(a) the names, addresses, e-mail addresses and telephone numbers of the parties or their representatives;

(b) a reference to a mediation clause in the manner specified in Part A set out in the First Schedule or a copy of the separate mediation agreement;

(c) a reference to the contract or other legal relationship out of or in relation to which the dispute arises;

(d) a brief explanation of the nature of dispute, the amount involved, if any, and the specific relief sought by a party; and

(e) shall be accompanied by the registration fee set out in the Second Schedule.

(3) Upon receipt of the request under paragraph (1), the Registrar shall forward a copy of the request for mediation together with a list of the Centre's panel of Accredited Mediators to all the parties, including the initiating party.

(4) The respondent shall reply to the request for mediation under paragraph (3) through a written notice to the Registrar indicating whether the party accepts or rejects the request for mediation.

(5) When the Registrar receives the notice under paragraph (4) communicating the respondent's acceptance of the request for mediation, the mediation shall be considered to have commenced.

(6) If the respondent does not reply to the request

for mediation within ten days from the date of receipt of the notice under paragraph (4), the Centre may regard it as a rejection of the request and inform the initiating party.

RULE 7

Appointment of a mediator.

(1) There shall be one mediator in a dispute unless the parties agree otherwise.

(2) The mediator shall be jointly appointed by the parties to the dispute within—

(a) five days of receipt by the Centre of the written notice of acceptance of the request for mediation; or

(b) such other additional time as may be allowed by the Registrar, on request by either party to the dispute.

RULE 8

Appointment of mediator where parties disagree.

(1) Where the parties disagree on the selection of a mediator and the time specified under rule 7 has lapsed, the Registrar shall, within five days after the time specified under rule 7 has lapsed, propose a mediator by providing the parties with the names of three mediators from the Centre's panel of Accredited Mediators.

(2) The parties shall, within seven days of receipt of the proposed names of mediators, jointly select a mediator and inform the Registrar in writing of their selection.

(3) The Registrar shall notify the proposed mediator selected by the parties and shall require the mediator to, within three days of receipt of the notice from the Registrar, confirm his acceptance or otherwise, to act as a mediator in the dispute.

(4) The proposed mediator shall confirm, in writing

to the Registrar and to the parties of his decision under paragraph (3).

(5) If the parties do not agree on a mediator from the names proposed under paragraph (1), each party shall reply to the Registrar, within seven days of receipt of the list of proposed mediators, indicating their order of preference for the proposed mediators and which of the proposed mediator is unacceptable.

(6) The Registrar shall appoint a mediator in accordance with the order of preference submitted by the parties.

(7) Where a party does not reply to the Registrar as required under paragraph (1), the list of proposed mediators shall be considered as accepted by all parties, in accordance with the order of preference indicated in the returned list.

(8) The Registrar shall notify the listed mediator of the proposal to appoint him as mediator.

(9) Where a mediator is not appointed under the foregoing paragraphs, a mediator may be appointed at the sole discretion of the Registrar and the parties shall be presumed to have accepted the appointment made by the Registrar.

RULE 9

Limitations of a mediator.

(1) No person shall act as mediator in a dispute if that person has a conflict of interest that may affect or be perceived by the Centre or parties to affect the independence or impartiality of the Mediator, unless the parties are notified in writing of the conflict of interest and they consent in writing to the appointment of that mediator.

(2) Where a mediator is appointed and that mediator realises a circumstance that may create a perception of bias, the Mediator shall immediately inform the parties and the Registrar.

(3) Where a party objects to the continued service of a mediator, the Mediator shall be disqualified from acting in the dispute.

(4) The parties shall, within seven days of the disqualification, appoint a new mediator from the Centre's panel of accredited Mediators and if the parties disagree on the appointment of a substitute mediator, the Registrar shall appoint a substitute Mediator.

(5) Where the parties reject a mediator appointed by the Registrar under rule 8, and rule 9(4)—

(a) the Centre may consider the rejection as a failure of the request and shall inform the parties, accordingly; or

(b) the Registrar shall revoke the appointment and inform the mediator.

RULE 10

Qualifications of a mediator.

Notwithstanding any provision in these Rules, a person shall not act as a mediator unless that person—

(a) is an accredited Mediator on the Centre's panel of Mediators;

(b) is a mediator accredited by an institution recognized by the Centre; or

(c) has been—

(i) a mediator in a mediation conducted under rules of an institution recognized by the Centre;

(ii) in at least five international mediations, to be appointed in the Centre's international mediation; or

(iii) in at least five domestic mediations, to be appointed in the Centre's domestic mediation.

RULE 11

Role of a Mediator.

(1) A Mediator shall be independent and impartial in the discharge of his duties.

(2) The Mediator shall conduct a mediation in a manner that he or she considers appropriate, while taking into consideration—

(a) the circumstances of the dispute;

(b) the wishes of the parties; and

(c) any practical considerations that may be relevant in the prompt resolution of the dispute.

(3) Prior to or during the mediation, the Mediator may communicate with the parties—

(a) jointly or separately;

(b) either directly or through their representatives; or

(c) directly, by telephone, videoconference or electronically as the Mediator considers it fit and just.

RULE 12

Preliminary conference.

(1) Prior to the commencement of the mediation, the parties may participate in a preliminary conference with the assistance of the Mediator.

(2) The purpose of the preliminary conference is to enable the parties, in accordance with the Mediator's directions—

(a) to identify the issues in dispute;

(b) to decide on the service and exchange of documentary material relevant to the mediation, including position papers by all the parties;

(c) to agree, subject to rule 23(2), on the terms of engagement of the Mediator including charges

for cancellation, non-attendance or adjournment of a mediation session; and

(d) to make any other necessary arrangements for the mediation to proceed.

RULE 13

Role of the parties.

A party to mediation has a duty to act in good faith in the mediation and co-operate with the other party in the settlement of the dispute.

RULE 14

Authority and representation.

(1) A party to mediation may be represented by any person and the role and personal details of the representative shall be disclosed to all parties.

(2) The representative selected under paragraph (1) shall sign an undertaking to abide by the directions set by the Mediator, the Centre's Code of Conduct and the Guidelines issued from time to time.

(3) A party to mediation shall have authority to settle a dispute or be represented by a person having full authority to settle the dispute, and where the authority is limited, the limits of authority shall be disclosed to the parties and the Mediator.

(4) The Mediator may require that a party provide the proof of authority granted to his representative in such form as the Mediator may determine.

RULE 15

Confidentiality.

(1) The parties and participants in a mediation shall keep all matters relating to or arising out of the mediation private and confidential unless—

(a) the disclosure is compelled by law;

(b) the disclosure is necessary to give effect to a mediation agreement or to enforce an agreement

reached to settle or resolve the whole or any part of the dispute;

(c) there is a written consent of the parties to the mediation.

(2) The parties and participants in a mediation shall sign a Confidentiality undertaking in the form set out in the Third Schedule.

(3) Any information submitted to the Mediator by a party in caucus or private session shall be considered as confidential information between the party providing the information and the Mediator, unless the party providing the information consents to its disclosure to any other party to the mediation.

RULE 16

Place and language.

(1) The parties shall, in consultation with the Mediator, select the venue for the mediation and ensure that they have the necessary administrative services required for the mediation.

(2) Unless the parties otherwise agree in writing, the mediation shall be in the language of the documents in which the mediation agreement is contained.

(3) Where a document is written in a language other than the language of the mediation agreement and no translation of such document is submitted by the party relying upon the document, the Mediator or the Registrar may require that party to submit a translation in a form to be determined by the Mediator or the Registrar.

RULE 17

Termination of the mediation.

A mediation may be terminated if—

(a) the parties sign a written settlement agreement;

(b) the Mediator, after consultation with the parties, makes a written declaration that further attempts

at mediation are unnecessary;

(c) one of the parties makes a written declaration to the Mediator to terminate the mediation;

(d) on the expiry of three months from the date of the request for mediation under rule 6 unless otherwise agreed by the parties; or

(e) the Registrar orders the termination as some of the monies payable under rule 19 are not paid as required by these Rules.

RULE 18

Termination or withdrawal from mediation.

(1) A Mediator may suspend or terminate the mediation or withdraw as Mediator when he or she reasonably believes the circumstances require it, including when he or she has reasonable grounds to suspect that—

(a) the parties are involved in illegal or fraudulent conduct;

(b) the parties are unable to meaningfully and reasonably participate in negotiations;

(c) the parties have not acted in good faith in the mediation; or

(d) the continuation of the mediation shall cause significant harm to a party or a third party.

(2) Where a Mediator suspends, terminates or withdraws from a mediation, the Mediator shall—

(a) maintain the obligation of confidentiality;

(b) cause the least possible harm to the parties; and

(c) promptly inform the Registrar of the termination, suspension or withdrawal.

RULE 19

Costs.

(1) Unless otherwise agreed or ordered by a court, each party to a mediation shall bear his own costs of the mediation.

(2) The costs of the mediation shall include—

(a) the professional fees of the mediator;

(b) the cost of hiring the venue for the mediation including meeting rooms or breakout rooms;

(c) the administrative costs, including fees for photocopying, internet access, meals and communication expenses;

(d) fees for translation, or in respect of an expert witness who attends the mediation with the consent of the parties; or

(e) any other costs reasonably incurred in respect of the organization or conduct of the mediation.

(3) The costs of the Centre may include—

(a) registration fees payable on the lodging of a request;

(b) appointment fee if a mediator is appointed; and

(c) any administrative costs as specified under rule 19(2).

(4) The parties shall be jointly and severally liable for costs and expenses set out in paragraphs (2) and (3).

RULE 20

Administrative assistance.

Subject to rule 16, the Registrar may, on the request of the Mediator or the parties, arrange for translators, administrative assistance or other facilities in order to facilitate the mediation.

RULE 21

Exclusion of liability.

(1) A mediator shall not be liable for acts or omissions done in good faith in the discharge of his functions as a mediator or arising out of a settlement reached in a mediation conducted under these Rules.

(2) Subject to paragraph (1), a servant or agent of a mediator shall not be liable for an act or omission done, in good faith and with due authority, in the discharge of the functions of the Mediator.

(3) Nothing in this rule shall affect a liability incurred by a mediator by reason of his resignation or withdrawal.

(4) The Centre and the Registrar shall not be liable for acts or omissions done in good faith in the appointment or proposal of a Mediator or for any other purpose, in the discharge of the functions of the Centre or the Registrar in these Rules.

(5) Subject to paragraph (4), a servant or agent of a Centre shall not be liable for an act or omission done in good faith and with authority, in the discharge of the functions of the Centre or the Registrar to appoint or propose a Mediator or for any other purpose in these Rules.

(6) A statement, whether written or oral, made in the course of the mediation shall not be relied upon by any party to institute or maintain an action for defamation or any other related complaint.

RULE 22

Role of Mediator in other proceedings.

(1) The Mediator shall not—

(a) act as a representative or counsel of a party to a mediation;

(b) appear as a witness in any arbitral or judicial proceedings; or

(c) advise a person on a dispute that is the subject of the mediation.

(2) The parties and the mediator shall agree that they shall not—

(a) present the mediator as a witness in any judicial proceedings;

(b) summon the mediator as a witness; or

(c) compel the mediator to give evidence or to produce documents in any subsequent judicial proceedings or arbitration.

RULE 23

Fees.

(1) The fees for international mediation or domestic mediations shall be as set out in the Second Schedule.

(2) Unless otherwise agreed by the parties and the mediator, the mediator may charge a per centum rate of the fee for cancellation, non-attendance or adjournment of the mediation, which fee shall be specified in the terms of engagement of the mediator.

(3) Prior to the commencement of the mediation, each party shall pay the registration fees, appointment fees, if any, and deposit the mediator's fees and administration costs with the Centre in accordance with the Schedule of fees set out in the Second Schedule.

(4) During the mediation, the Registrar may require additional deposits to be paid by the parties for the costs referred to in rule 19.

(5) Any additional monies requested by the Registrar for the costs referred to in rule 19 shall be payable fifteen days after the receipt of the request for additional deposits.

(6) Where the monies under paragraph (5) are not paid by the parties within the specified period—

(a) the Registrar shall inform the parties so that either of the parties may make the required payment; or

(b) the mediator may, after consultation with the Registrar, order the suspension or termination of the mediation.

(7) The Registrar may use the deposit to pay the fees and disbursements incurred by the Centre and the mediator for the mediation.

(8) Upon termination of the mediation, the Registrar shall provide a statement of the deposits to the parties and shall specify in the statement the amount received, expended and in case of a surplus he shall return any unexpended balance to the parties.

RULE 24

Amendment.

(1) These Rules may be amended by the Centre from time to time.

(2) The Rules applicable to the mediation shall be those in force at the time of commencement of the mediation, unless the parties have agreed otherwise.

SCHEDULES

FIRST SCHEDULE

Part A

Model mediation Clause

“Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by mediation, the mediation shall take place in accordance with the Nairobi Centre for International Arbitration (mediation) Rules, 2015 currently in force.”

Part B

FORM A

Request for Mediation

Date: <i>(insert date of request)</i>	
PART 1:	
To: <i>Name (Insert name of the party/parties to be served)</i>	
Address: <i>(Insert address(es) of the party/parties to be served)</i>	
City/Town:	
Other:	
Postal Code:	
Email:	
Telephone:	
PART 2:	
Give a brief description of the agreement/contract/document containing the provision for mediation under the NCIA mediation Rules: (i.e. date & Clause where applicable)	

Give a brief description of the nature of the dispute for mediation:

To: *Name (Insert name of the party/parties making the request)*

Address:
(Insert address(es) of the party/parties making the request)

City/Town:

Other:

Postal Code:

Email:

Telephone:

PART 3

I/We hereby (the above-named requesting party/parties) notify you of this request for mediation to be commenced under the NCIA mediation Rules. I/We have submitted a copy of this request and the mediation agreement for filing with the Registrar NCIA with a request that the mediation commences under the Rules.

Signed:

Date:

SECOND SCHEDULE

(r.6(2)(e),23(1)&(3))

FEES

DOMESTIC MEDIATION

(a) Registration Fee:

A non-refundable registration fee to be advised by the Centre at the time of filing the request with a maximum of Kenya Shillings (KES) 1,000 is payable by the party initiating mediation pursuant to rule 6(2)(e) of the Rules.

(b) Administrative Costs:

The Administrative Costs for mediation to be advised by the Centre at the time of filing the request with a maximum of Kenya Shillings (KES) 10,000 is payable by the party initiating mediation pursuant to rule 6(2)(e) of the Rules.

(c) Mediator's Fee

(i) Sum of Kenya Shillings (KES) 5,000/= for any time spent in mediation below and up to one (1) hour;

(ii) Sum of Kenya Shillings (KES) 15,000/= *per mediation session. (a mediation session is equivalent to time spent in mediation above one hour and not exceeding three (3) hours); and*

(iii) Sum of Kenya Shillings (KES). 1000/= per hour for review of documents and related works.

NOTE:

The sum to be charged on mediator's fee for time spent in mediation above three (3) hours in a day shall be on a pro rata hourly basis at the rate of KES 5,000/= per hour.

INTERNATIONAL MEDIATION

(a) Registration Fee

A non-refundable registration fee of US Dollars (USD) 50 is payable by the party initiating mediation pursuant to rule 6(2)(e) of these Rules.

(b) Administrative Costs

The administrative costs for mediation shall be fixed at US Dollars (USD) 250.

(c) Mediator's Fee

(i) Sum of US Dollar (USD) 300 for any time spent in mediation below and up to one (1) hour;

(ii) Sum of US Dollar (USD) 600 per mediation session. *(a mediation session is equivalent to time spent in mediation above one hour and not exceeding to three (3) hours);* and

(iii) Sum of US Dollar (USD) 300 per hour for review of documents and related works.

NOTE:

The sum to be charged on mediator's fee for time spent in mediation above three (3) hours in a day shall be on a pro rata hourly basis at the rate of USD 200 per hour.

Confidentiality Agreement and Undertaking

Parties:

.....
.....

And

.....
.....

And

.....
.....

(“The Mediator”)

(Have entered into a mediation Agreement dated the.....day of.....in accordance with which the Mediator will conduct a mediation.)

1. The undersigned acknowledge by their signatures that they attend the mediation on the basis of their agreement to the terms of clause 2 and 3 below.

2. Each of the undersigned undertakes to the parties and the Mediator—

(a) to keep confidential to themselves and any persons to whom by reason of the terms of their employment or any contract of insurance they may properly communicate it, all information disclosed during the mediation including the preliminary steps (“confidential information”);

(b) not to act contrary to the undertaking in subparagraph (a) unless compelled by law to do so or with the consent of the party who disclosed the confidential information;

(c) not to use confidential information for a purpose other than the mediation.

3. Each of the undersigned undertakes to the parties and the Mediator that the following will be privileged and will not be disclosed in or relied upon or be the subject of any subpoena to give evidence or to produce documents in any arbitral or judicial proceedings between the parties to the mediation—

(a) any settlement proposal whether made by a party or the Mediator;

(b) the willingness of a party to consider any such proposal;

(c) any admission or concession made by a party

(d) any statement or document made by the Mediator.

4. The parties acknowledge that the mediator may disclose information obtained during or in connection with the mediation in any one or more of the following circumstances—

(a) with the consent of the person from whom the information was obtained;

(b) in connection with the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement;

(c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to any person or damage to any property;

(d) if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organization, or other body and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner;

(e) in accordance with a requirement imposed by or under a law of a country or a state.

ARTHUR IGERIA,
Chairperson,
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