



Nairobi Centre  
for International  
Arbitration

where disputes meet resolution

# Simplified User Guidelines for Mediation.

[www.ncia.or.ke](http://www.ncia.or.ke)



Co-operative Bank House,  
8th Floor, Haile Selassie Ave  
P.O Box 548-00200, Nairobi, Kenya  
Tel: +254 020-222 4029  
Mob: +254 771 293 055  
Email: [info@ncia.co.ke](mailto:info@ncia.co.ke)  
[www.ncia.or.ke](http://www.ncia.or.ke)

We are social.

    @NCIAKenya





## **SIMPLIFIED USER GUIDELINES FOR MEDIATION**

March 2021

## 1. INTRODUCTION

The purpose of this note is to provide guidance to parties, and their representatives, on the conduct of Mediation under the Nairobi Centre for International Arbitration (Mediation) Rules, 2015 (“the Rules”). It addresses, amongst other things; types of mediation; commencement of mediation proceedings; appointment, role of a mediator, limitations and qualifications of a mediator; roles of parties, mediation sessions and proceedings; termination of mediation; and the relationship between mediation and arbitration proceedings. This note is NOT supplementary to the Rules nor does it form part of the Rules. It is merely a guide to the processes described within the Rules. For further information about NCIA and its services please visit the website [www.ncia.or.ke](http://www.ncia.or.ke) or email [info@ncia.or.ke](mailto:info@ncia.or.ke). The Rules came into force on 24<sup>th</sup> December 2015 and may be amended from time to time. The Rules, whenever adopted by parties in an agreement, provide a framework for dispute resolution through Mediation.

### What is Mediation?

For the purpose of the Rules, Mediation is an alternative dispute resolution process conducted privately and confidentially by a mediator who is a neutral facilitator and helps the parties arrive at a mutually acceptable settlement.

**“Mediation Agreement”** means a contract clause within a written contract or a separate written agreement entered into by the parties agreeing to submit to mediation a dispute which has arisen or which may arise between them in respect of a defined legal relationship.

**“Mediation Process”** means all the steps taken to resolve a dispute by mediation from the time a written request for mediation is submitted to the Registrar up to the time the mediation report is drawn up.

**“Centre”** means the Nairobi Centre for International Arbitration established under section 2 of the Nairobi Centre for International Arbitration Act, No. 26 of 2013 (“NCIA Act”); and

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

## 2. THE RULES

### SCOPE OF APPLICATION

For Parties to rely on Mediation as a dispute settlement mechanism, they must incorporate a clause within the agreement referring any dispute that may arise to Mediation. The agreement to refer a dispute to mediation can be drafted before a dispute arises when preparing the contract or later, once a dispute has arisen.

NCIA recommends adoption of its Mediation clauses contained in the Notes to the Rules and re-stated below;

#### 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.”

In drafting the mediation clause, parties are requested to ensure that the clause provides the following relevant information:

#### MED-ARB CLAUSE:

Parties who wish to pursue both mediation and arbitration under the Rules are encouraged to adopt the following Med-Arb clause when preparing the agreement or later, once a dispute has arisen.

“In the event of a dispute, controversy or claim arising out of or in connection to this contract or breach, termination or invalidity thereof shall first refer the dispute to mediation under the Nairobi Centre for International Arbitration (Mediation) Rules. If the dispute has not been settled pursuant to the said Rules within thirty days following the filing of the request for mediation or within such other period as the parties may agree in writing. Such dispute will be referred to and finally resolved by arbitration administered by the Nairobi Centre for International Arbitration (NCIA) under the NCIA Arbitration Rules in force.”

Note: Relationship between Mediation and Arbitration on **Note 18**

---

### 3. TYPES OF MEDIATION

- 3.1 Under the Rules, there are two types of mediation: Domestic Mediation as described under Rule 4 and International Mediation as described under Rule 5 of the Rules.

### 4. COMMENCEMENT OF MEDIATION SESSIONS

- 4.1 A person commencing mediation proceedings under the Rules is required to submit a written request to the Registrar. The request should be in the style and format as prescribed by the Rules under Part B of the first schedule and should contain:
- 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.

## 5. APPOINTMENT OF A MEDIATOR

- 5.1 The Rules require that one mediator is jointly appointed by the parties to a dispute unless the parties agree otherwise.
- 5.2 Where the parties disagree on the selection of a mediator within the stipulated time, parties will be provided with a list of names of three mediators from the Centre's panel of Accredited Mediators and shall be required to jointly select a mediator and inform the Registrar in writing of their selection within 7 days. The Registrar shall then notify the proposed mediator selected by the parties and shall require the mediator to confirm his acceptance or otherwise, to act as a mediator in the dispute.
- 5.3 The Registrar has the sole discretion of appointing a mediator where the parties do not agree or comply with directions from the Registrar. In this circumstance, the parties shall be presumed to have accepted the appointment made by the Registrar.

## 6. LIMITATIONS OF A MEDIATOR

- 6.1 A person will not be allowed to act as a mediator if;
  - a. the person has a conflict of interest that may affect or be perceived by the parties to affect their impartiality.
  - b. The person realizes the presence of a circumstance that may create a perception of bias.
  - c. a party objects to the continued service of a mediator.
- 6.2 Where a mediator is disqualified on the above provisions, a new mediator shall be appointed in accordance with the Rules.

## 7. QUALIFICATIONS OF A MEDIATOR

- 7.1 A Mediator shall be qualified to conduct mediation under the Rules if they:
- a. are accredited Mediators on the Centre's panel of Mediators;
  - b. are a mediator accredited by an institution recognized by the Centre; or
  - c. have 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.

## 8. ROLE OF A MEDIATOR

- 8.1 A Mediator shall be independent and impartial in the discharge of their duties and shall conduct a mediation in a profession taking into account the circumstances of the dispute; wishes of the parties; and practical considerations that may be relevant in the prompt resolution of the dispute.
- 8.2 A mediator has duty, at any time during the mediation process, to communicate with the parties, their representatives and using any appropriate means.

## 9. 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.

## 10. AUTHORITY AND REPRESENTATION

- 10.1 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.
- 10.2 The representative selected is required to 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.



- 10.3 A party or a representative selected shall be have the authority to settle a dispute and where the authority is limited, the limits of authority shall be disclosed to the parties and the Mediator.
- 10.4 In certain circumstances, a Mediator may require that a party provide the proof of authority granted to his representative in such form as the they may determine.

## 11. MEDIATION SESSIONS

- 11.1 The parties and the mediator are required to discuss the way the mediation is to be conducted but shall always be in conformance to the Rules.
- 11.2 The mediation sessions are to be attended by all parties, their representatives (if any) and the mediator. Any other person's attendance must be approved by the mediator in consultation with the parties to safeguard confidentiality in the process.
- 11.3 In each case, the parties, their representatives and the mediator should consider what type of mediation sessions will be most useful in achieving a successful and efficient resolution of the dispute.
- 11.4 During all meetings, the mediator will seek to create an environment conducive for negotiations and discussion of all relevant matter as provided for in the Rules.

## 12. CONFIDENTIALITY

The parties and participants in a mediation shall keep all matters relating to or arising out of the mediation private and confidential as prescribed under the Rules and the Centre's Mediators Code of Conduct as may be amended from time to time.

## 13. PLACE AND LANGUAGE

- 13.1 The parties shall, in consultation with the Mediator, agree on the venue and language of the Mediation in accordance with the Rules and/or mediation agreement.
- 13.2 The Centre shall provide administrative assistance to the mediator and the parties at their venue of choice.

## 14. SUSPENSION OR WITHDRAWAL FROM MEDIATION

- 14.1 A Mediator may suspend 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.
- 14.2 Where a Mediator suspends 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.

## 15. TERMINATION OF THE MEDIATION

- 15.1 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 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.

## 16. MEDIATION SETTLEMENT

Without imposing terms of settlement on the parties, the mediator may, if requested by the parties, recommend terms of settlement for their consideration. The parties and the mediator may agree that in certain circumstances (e.g. where a settlement agreement has not been arrived at after a certain period of time) the parties may jointly request the mediator to provide a non-binding evaluation of the merits of the dispute in order to assist them in reaching a negotiated settlement agreement.

## 17. COSTS

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

17.2 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.

17.3 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 maybe specified.

17.4 The parties shall be jointly and severally liable for costs and expenses set out.

## 18. RELATIONSHIP BETWEEN MEDIATION AND ARBITRATION PROCEEDINGS

- 18.1 Mediation may take place before arbitration – where parties decide to have their conflict resolved through mediation.
- 18.2 Parties during arbitration may decide to abandon arbitration and have their conflict resolved through mediation. Where mediation takes place during arbitration proceedings, it may be appropriate for the arbitration to be stayed to allow time for conducting the mediation. The parties may prefer to conduct the mediation without requiring a stay or pause in the arbitral proceedings.
- 18.3 The suggestion that mediation be used during the arbitration proceedings may be made by one of the parties. The suggestion should be considered and may be discussed between the parties and the arbitral tribunal.
- 18.4 Where mediation takes place before arbitration (or litigation) proceedings have been commenced, the parties may agree that the expiry of limitation or prescription periods during the mediation process shall not prevent a party from initiating arbitration or litigation proceedings in relation to the dispute. Applicable law may also contain provisions to this effect or may provide that limitation periods will not expire whilst mediation proceedings are pending.
- 18.5 During arbitration, the parties may agree to have a sole arbitrator, or a member of the arbitral tribunal assist the parties in negotiating a settlement of their dispute by acting as a mediator. The parties may further agree that if the mediation does not produce a settlement of all issues in dispute in the arbitration, then the mediator may return to the role of arbitrator and proceed to make or participate in the making of an award in the arbitration.
- 18.6 Where the parties agree terms of settlement through mediation proceedings conducted during arbitration proceedings, they may be able to record the terms of settlement and enforce the settlement agreement as an arbitral award.



## FREQUENTLY ASKED QUESTIONS

## 1. What are the NCIA Mediation Rules and for which type of disputes can they apply?

The NCIA Mediation Rules are procedural rules for conduct of Mediation proceedings for Mediations administered by the NCIA. The NCIA Mediation Rules are available for use in a wide range of contracts including construction, shipping, insurance, manufacturing, purchasing, and service provision etc.

## 2. How can you make the NCIA Rules apply to a contract/agreement?

The NCIA Mediation Rules can be applied to a contract/agreement by incorporating the NCIA Mediation Model Clause set out in the Notes to the published Rules or a modification of the Clause with an appropriate clause to cater for the specific requirements of a party. It is recommended that a party obtain legal advice before modification of the Model Clause. The NCIA secretariat will be at hand to advise parties on the Clauses.

## 3. Where can you find the NCIA Mediation Rules?

The NCIA Mediation Rules will be published in the Kenya Gazette from time to time. However, the published version will be available on the official website of NCIA [www.ncia.or.ke](http://www.ncia.or.ke).

The NCIA secretariat will be at hand to provide copies of the NCIA Mediation Rules on request.

## 4. Do you have a model mediation clause for the NCIA Rules?

**YES:** The NCIA Mediation Model Clause is set out in the Notes to the published Rules. The Model Clause is reproduced here:

*“In the event of a dispute, controversy or claim arising out of or in connection to this contract, or breach, termination or invalidity thereof shall first refer the dispute to mediation under the Nairobi Centre for International Arbitration (Mediation) Rules.”*

## 5. Can parties commence mediation followed by arbitration under the NCIA Rules?

**YES:** A party who intends to refer a dispute to mediation under the Centre's Mediation Rules in the first instance followed by arbitration under the Centre's Arbitration Rules, if required, may use the following model clause-

*"In the event of a dispute, controversy or claim arising out of or in connection to this contract, or breach, termination or invalidity thereof shall first refer the dispute to mediation under the Nairobi Centre for International Arbitration (Mediation) Rules. If the dispute had not been settled pursuant to the said rules within thirty days following the filling of the request for mediation or within such other period as the parties may agree in writing, such dispute shall be settled by arbitration in accordance with the Nairobi Centre for International Arbitration Rules."*

## 6. Does the Centre have Mediation Hearing Rooms?

**YES:** The Centre has state of the art hearing rooms that provide a serene environment to facilitate the mediation process at a favourable cost. The hearing rooms are located at the Centre's offices on the located at the Cooperative Bank House, Haile Selassie Avenue, Nairobi on the 8th Floor.



Co-operative Bank House,  
8th Floor, Haile Selassie Ave  
P.O Box 548-00200, Nairobi, Kenya  
Tel: +254 020-222 4029  
Mob: +254 771 293 055  
Email: [info@ncia.co.ke](mailto:info@ncia.co.ke)  
[www.ncia.or.ke](http://www.ncia.or.ke)

We are social.

    @NCIAKenya