

OHADAC Facilitation Rules

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Presentation of the role of the CARO Centre and its bodies

- The OHADAC Regional Centre for Arbitration (“CARO Centre”) is authorised to manage procedures as part of the implementation of alternative dispute resolution methods such as arbitration, mediation or facilitation. This mission involves drafting and regularly updating rules of procedure; monitoring procedures; appointing and potentially replacing “neutral third parties” acting as arbitrators, mediators and facilitators; and setting and managing the costs of procedures.
- The CARO Centre is led by a Secretary-General, who is in charge of ensuring that the CARO Centre performs its missions properly; and of developing the activities of the CARO Centre in the Caribbean region and beyond. The Secretary-General is also in charge of nominating and appointing “neutral third parties” to act as facilitators, mediators or arbitrators, depending on the procedure chosen by the parties.
- The Secretariat of the CARO Centre is comprised of specialised lawyers and support staff. It reports directly to the Secretary-General of the institution. It is responsible for day-to-day management of ongoing procedures entrusted to the CARO Centre.
- The CARO Centre is placed under the authority of its Board of Directors, made up of leading Caribbean personalities; internationally recognised specialists in alternative dispute resolution methods; and long-standing supporters of the OHADAC project.

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Article 1: General provisions

1.1. The OHADAC Facilitation Rules (the “Rules”) organize facilitation processes referred at the request of parties, which seize the CARO Centre for the purposes of requesting the involvement of a “neutral third party”. This “neutral third party” shall be tasked with assisting them in negotiating a contract or setting up a project. The objective is to allow the parties to optimize the business relationship that they are putting in place, taking into consideration the environment in which they operate and their constraints. The parties may also appoint or request the appointment by the CARO Centre of one or more facilitators if the circumstances so warrant.

1.2. When a facilitation request is referred to the Centre under the OHADAC Facilitation Rules, its bodies are competent to manage the facilitation process.

1.3. The CARO Centre shall communicate with the parties to the facilitation via electronic mail, fax or regular post if the parties so wish or it is more appropriate given the circumstances, or by courier.

1.4. The parties are free to modify the provisions of these Rules but the CARO Centre reserves the right to refuse to administer the facilitation if such modifications are likely to distort the terms thereof.

1.5. All documents forwarded by the parties to the CARO Centre by post or courier must be sent in as many copies as there are parties concerned by the procedure and facilitator(s), plus one for the CARO Centre.

Article 2: Agreement by the parties to have recourse to facilitation subject to the OHADAC Facilitation Rules

2.1. Parties wishing to forge a legal relationship of any nature, when negotiating a contract or setting up a project for example, may at any time have recourse to a facilitator by submitting a Request to the CARO Centre to open a facilitation process (the “Request”).

2.2. Where the parties have recourse to an OHADAC facilitation process, they may also, on the proposal of the facilitator or with his or her agreement, request the appointment of an expert to the CARO Centre if the contract negotiations or project set-up raise complex issues,

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particularly legal issues. In this scenario, the facilitator shall adjust the facilitation schedule in accordance with the expert determination procedure and *vice versa*.

Article 3: Introduction to facilitation: filing the Facilitation Request

3.1. OHADAC facilitation can be initiated by one of the parties involved in negotiating or setting up a project by filing a facilitation request in writing (the “Request”). It can also be initiated by all parties involved in negotiating or setting up a project by filing a joint facilitation request in writing (the “Joint Request”).

3.2. The Request or Joint Request shall be sent to the CARO Centre via the following means:

- electronic mail; or
- regular post; or
- courier.

3.3. The party or parties seeking to initiate a facilitation process shall include the following with their Request or Joint Request:

- a) The identity and contact details (name(s), address(es), email address(es), telephone number(s)) for all parties to the negotiations or involved in setting up the project and, where applicable, all persons representing the parties;
- b) A summary description of the planned transaction or project and any difficulties that may arise, including if possible an estimate of the amount at stake in the planned contract or project;
- c) Any joint designation of one or more facilitator(s) or, failing this, any agreement or proposal relating to the powers of the facilitator(s) to be appointed by the CARO Centre;
- d) Any relevant information on the conduct of the facilitation process by the facilitator(s) (lead times; place and organisation of facilitation meetings; frequency of meeting(s); conduct of meeting(s) – face-to-face or remotely, via video-conferencing, *etc.*);
- e) Any agreement relating to the language of the facilitation or, failing this, any proposal in this regard.

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This information shall be sent to the CARO Centre via email, regular post or courier.

3.4. The Request or Joint Request shall only be recorded if it is accompanied by payment of the registration fee, as defined using the Schedule of Costs in force appended hereto.

3.5. In the case of a Joint Request, the date on which the facilitation process is initiated shall be deemed to be the date on which the Joint Request is received by the CARO Centre. This date shall be mentioned by the CARO Centre in its letter confirming receipt of the Joint Request.

3.6. In the case of a Request, the date on which the facilitation process is initiated shall be deemed to be the date of the letter from the CARO Centre recording the agreement between all concerned parties, on the basis of the information contained in the file. This agreement shall be recorded by the CARO Centre following implementation of the procedure under Articles 4.2 to 4.4 hereof.

Article 4: Notification to parties of the filing of a Request

4.1. If all the parties to the contract negotiations or project set-up seize the CARO Centre via a Joint Request, the CARO Centre shall directly proceed to the appointment or confirmation of the facilitator(s) under the terms provided for in Article 6 of these Rules.

4.2. Where a Request is filed, all parties concerned shall be informed of the filing of a Facilitation Request by the CARO Centre within two (2) days following receipt of the Request. The Centre shall use, where applicable, the contact details provided in the Request by the party initiating the facilitation or any other correspondence from that party to the CARO Centre.

4.3. The CARO Centre shall request confirmation of the agreement of all parties concerned within fifteen (15) days of receipt of this correspondence from the CARO Centre. This agreement may be communicated to the CARO Centre by regular post or email. The CARO Centre may assist them to arrive at an agreement on using facilitation under the auspices of these Rules, including calling a meeting, which can be face-to-face, via video-conference or by telephone between the Secretariat, the party initiating the facilitation and the concerned party or parties.

4.4. If all concerned parties confirm that they agree to take part in facilitation within fifteen (15) days of the date the Request is received or after any other reasonable time limit set by

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the parties, the facilitation shall start, and the party or parties mentioned shall have, if they so wish, another fifteen (15) days from receipt of the letter from the CARO Centre to make any observations in addition to those already included in the Request. If the parties do not come to an agreement within fifteen (15) days of the date the Request is received or any other reasonable deadline set by the parties, the facilitation process cannot commence and the parties remain free to file another facilitation request at a later date.

4.5. The time limits stipulated in this article shall begin to run on the day following the day on which the communication is received. Regarding official holidays:

- If the day after which communication is deemed to have been received is an official holiday or a bank holiday in the place of destination of the communication, or a non-working day, the time limit shall start to run from the next working day;
- Official holidays, bank holidays and non-working days in general that occur during the time limit are included when calculating the time limit;
- If the time limit expires on an official holiday, a bank holiday or a non-working day in the place of destination of the communication, this time limit is extended to the next working day in that location.

Article 5: Organisational meeting initiated by the CARO Centre

The Secretariat may, at any time, organize an organisational meeting between the parties prior to the appointment or confirmation of the facilitator that can take place face-to-face, via video-conference or by telephone. This meeting will aim to encourage communication between the parties; and to ensure that their wishes and specific requirements are both understood and taken into consideration when appointing a facilitator and more generally in the administration of the facilitation process. During this meeting, the Secretariat may also suggest that the parties engage in another alternative dispute resolution procedure such as mediation or arbitration, if it believes that this dispute resolution method would be more appropriate in the circumstances and in particular in view of the parties' specific requirements and objectives. This type of procedure shall be set up by the CARO Centre if both parties expressly agree to it in writing.

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Article 6: Appointment or confirmation of the facilitator(s)

6.1. Within three (3) days of receipt of the observations in response to the Request, or upon receipt of the Joint Request, the CARO Centre shall proceed to appoint a facilitator, according to the contents of the Request or Joint Request, and of any additional observations from all parties involved, unless an organizational meeting as provided for in Article 5 of the Rules takes place. In this case, the CARO Centre shall appoint a facilitator within three (3) days after the meeting, unless the parties decide to use another alternative dispute resolution procedure suggested by the CARO Centre.

6.2. If the parties so wish or, alternatively, on the proposal of the CARO Centre and with the written agreement of all parties, the CARO Centre may appoint several facilitators if the circumstances, particularly the complexity of issues raised, so warrant. Such additional facilitator(s) may be appointed at any stage of the facilitation process, subject to the agreement of the parties.

6.3. If the parties have agreed on the choice of facilitator(s), the Centre shall confirm them.

6.4. Failing agreement between the parties, the CARO Centre shall proceed directly to the appointment of the facilitator(s). When appointing facilitator(s), the CARO Centre shall take account of criteria such as the language of the facilitation, the expertise of the facilitator and/or his or her availability to conduct the facilitation process within the time limits set out in these Rules.

Article 7: Independence and impartiality

7.1. The facilitator must meet the requirements of independence and impartiality. Prior to being appointed, the CARO Centre shall ask the facilitator to fill out a statement of independence and impartiality (the “Statement of independence and impartiality”), which shall be forwarded to the parties for their observations.

7.2. If, prior to accepting the facilitator’s appointment, there are any circumstances likely to cast doubts in the parties’ minds as to his or her independence and/or impartiality; or that are liable to delay the early progress of the facilitation process as provided for herein, the

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facilitator must disclose these circumstances in this statement of independence and impartiality. These circumstances may include for example:

- (i) any personal or business relationship with one of the parties;
- (ii) any financial or other interests, direct or indirect, in the planned project or transaction, and more generally, in the outcome of the facilitation process; or
- (iii) the fact that the facilitator, or a member of his or her governing structure, has acted in any capacity other than facilitator for one of the parties (such as adviser, arbitrator, expert or other).

7.3. This obligation shall apply throughout the facilitation process in the event that new circumstances arise that could affect the independence and/or impartiality of the facilitator.

7.4. Upon receipt of this information in the Statement of independence and impartiality and/or any other subsequent communication from the facilitator, the CARO Centre shall immediately forward it to the parties, inviting them to comment.

If the parties expressly agree that the facilitator can start or continue his or her mission despite these circumstances being present, the facilitator shall be appointed or confirmed by the CARO Centre or, alternatively, if the facilitation process is already under way, the facilitator shall continue to conduct the facilitation if s/he is certain that s/he can do so with complete independence and impartiality.

If both parties do not expressly agree, the CARO Centre may, if the facilitator has not yet been confirmed or appointed, refuse to confirm or appoint him or her. If the facilitator has already been confirmed or appointed and such circumstances come to light during the facilitation process, the CARO Centre may replace the facilitator and appoint a new one, in accordance with Article 10 of these Rules.

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Article 8: Steps and time limits of the facilitation process

8.1. Once appointed or confirmed by the CARO Centre, the facilitator shall contact the parties within two (2) days in order to agree on the date of an initial meeting to precisely define the mission of the facilitator(s); plan the main steps of the facilitation process and its time limits. This meeting may be held face-to-face or remotely, via video-conference or by any other means that is appropriate and effective in terms of time and costs.

8.2. Within seven (7) days following the holding of this initial meeting, the facilitator(s) shall draw up a roadmap (the “Roadmap”) detailing the objective of the mission, its main implementation steps and its duration. In this Roadmap, the facilitator(s) shall also determine the language of the facilitation and the location(s) of the facilitation meetings, the arrangements for these meetings and their frequency. If several facilitators are appointed, the mission of each one, their objectives and the duration of their involvement shall be specified. This Roadmap shall be sent to the parties and the CARO Centre within the time limit stated in this paragraph. The facilitator(s) must respect the terms of the Roadmap throughout the facilitation process, unless the parties expressly agree to deviate from it. In this case, the amendments to the Roadmap must be set down in writing.

8.3. The facilitation process must be completed within the time limits stipulated in the Roadmap by the parties and the facilitator(s) or any subsequent amendments thereto, under the terms provided for in Article 8.2. The CARO Centre may extend this time limit for a period of one month on two (2) occasions if it considers that the circumstances so warrant.

8.4. Upon the expiry of the period provided for in the Roadmap or any subsequent written amendment thereto under the terms provided for in Article 8.2, where no additional period has been granted by the CARO Centre; or, alternatively, upon the expiry of the additional period granted by the CARO Centre on the basis of the above paragraph, the CARO Centre may close the file.

Article 9: Role of the facilitator

9.1. The facilitator shall support parties in negotiating a contract or setting up a project by identifying joint proposals for action and finding solutions to the difficulties that could hinder their project, in order to maximize the added value of the planned project or agreement for the parties involved. The facilitation process must be respectful of the parties’ interests;

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parties shall be given equal opportunity to state their positions, to compare these and to make free and informed choices throughout the process.

9.2. The facilitator shall decide how best to execute his or her mission and shall define this mission taking into account the circumstances of the case and the wishes of the parties, in accordance with the principles laid down in Article 7 and the provisions of Article 8 of these Rules in relation to the steps and time limits of the facilitation process. In this context, the facilitator is encouraged to prescribe any measure(s) aimed at improving the effectiveness of the process in terms of time limits and costs using any appropriate technological means.

9.3. The facilitator is authorized to conduct meetings and to hold discussions with one party to the facilitation process outside joint meetings. Such discussions can take place in writing, by email, in person or by any other means. The facilitator shall inform the other parties and/or their legal counsel in advance.

9.4. The facilitator does not have authority to make decisions on behalf of the parties or to impose his or her ideas, suggestions or recommendations on the parties. His/her mission is to support them in setting up and structuring a legal relationship that best serves their interests. S/he therefore has full discretion to make recommendations verbally or in writing directly to one party or to both parties.

Article 10: Replacement of the facilitator

10.1. When a facilitator can no longer or no longer wishes to perform his or her tasks as covered by these Rules, the CARO Centre shall appoint another facilitator.

10.2. If the facilitator does not comply with the provisions of these Rules and/or those provided for in the Roadmap, or in any other subsequent agreement under the terms of Article 8(2), the CARO Centre may appoint another facilitator after inviting the parties to submit their observations, unless all the parties object.

10.3. Any party to facilitation can ask for the facilitator to be replaced by the CARO Centre, giving reasons for its request. Replacement is at the discretion of the CARO Centre, which shall decide after seeking input from the other parties to the facilitation process, as well as the facilitator, and potentially after hearing the parties at a meeting, which can take place face-to-face, via video-conference or by telephone without the facilitator being present. The CARO Centre shall forward its decision within five (5) days of receipt of the latest

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observations sought by the CARO Centre following this request. If all parties to the facilitation process request a replacement, the CARO Centre shall replace the facilitator.

Article 11: Fees and expenses

11.1. The fees and expenses of the facilitation (the “Fees and Expenses”) shall include the administrative costs incurred by the CARO Centre to administer facilitations (“Administrative Costs”), as well as the costs of the facilitator(s), comprising of the fees of the facilitator(s) and any disbursements relating to facilitation meetings (“Remuneration of the Facilitator”).

11.2. The Fees and Expenses shall be set, as appropriate, according to the scale, appended hereto (the “Schedule of Costs”), that is in force on the date of referral to the Centre. The amount of the Fees and Expenses shall be increased during the procedure if the parties request a higher number of hours than that envisaged upon referral to the CARO Centre, for example, during the first meeting provided for in Article 8(1), once the facilitator has been appointed or confirmed, or at any later stage in the procedure. These additional facilitation hours shall be invoiced based on the Schedule of Costs in force on the date of referral to the CARO Centre.

11.3. Unless otherwise agreed by the parties, the Fees and Expenses shall be split equally between the parties. One party to the facilitation may decide to take on the share of Fees and Expenses by another party to the facilitation.

11.4. All other expenses incurred by the parties (specifically counsel) shall remain payable by them, unless otherwise agreed by the parties.

11.5. The registration fees are paid when the Request or Joint Request is filed, as stipulated in Article 3 of these Rules. These fees are not reimbursable, regardless of whether the mediation proceeds or not.

11.6. The CARO Centre shall request payment of all Fees and Expenses as set out in the Schedule of Costs appended hereto when the facilitator(s) is/are appointed. These fees must be paid prior to the facilitator implementing his or her mission as defined herein.

11.7. Failing payment of the Fees and Expenses of the facilitation process further to payment requests from the CARO Centre, the CARO Centre may suspend and then terminate the facilitation process.

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11.8. The CARO Centre shall determine the total cost of the facilitation at the end of the process. It may make reimbursements if the total cost is lower than the fees and expenses already paid by the parties. This could happen for example if the parties terminate the facilitation process earlier than planned or alternatively if they decide not to continue with the facilitation according to the terms initially agreed.

Article 12: Confidentiality

12.1. Parties that opt to have recourse to facilitation undertake to keep confidential everything that is said, written or done within the framework of this facilitation process, unless otherwise provided for by law and/or any agreement in writing between the parties.

12.2. Facilitation sessions are private and confidential and shall only remain accessible to the parties and their representatives. Other persons may only participate in these sessions with the approval of both the parties and the facilitator.

12.3. Any document or information communicated during the facilitation is strictly confidential and shall be treated as such by the facilitator. Unless otherwise provided for by law and/or unless otherwise agreed by the parties and the facilitator, the facilitator shall not provide any testimony regarding any aspect of the process governed by the Rules in any judicial, arbitration, administrative proceedings or any other proceedings, in relation to the subject-matter of the facilitation process or otherwise.

12.4. In particular, both the facilitator and the participants in the facilitation process undertake not to rely on or use for evidential purposes the following in any subsequent mediation, arbitration, judicial proceedings or any other proceedings:

- (i) A proposal or filing of a Facilitation Request by one of the parties to the negotiation process or project set-up;
- (ii) Any document prepared for the purposes of the facilitation process;
- (iii) Any document or evidence provided outside the facilitation process but obtained from the other participants or the facilitator during this process unless the document is accessible independently of the facilitation process or is already in the possession of the other party;
- (iv) The opinions expressed or the suggestions made by one or other party during the facilitation process;

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- (v) Admissions given or made by one or other participant in the facilitation during the facilitation process;
- (vi) Any comments or opinions expressed by the facilitator(s) during the facilitation process;
- (vii) Any non-public information obtained during the facilitation process by one of the parties to the process, including regarding its commercial practices and strategy, its financial position, any trade secrets, *etc*;
- (viii) The fact that one of the parties to the facilitation has refused some of the proposals made by the facilitator(s).

Article 13: End of the facilitation

The facilitation process shall end:

- (i) If the parties fail to pay the Fees and Expenses of the facilitation in accordance with the provisions of Article 11 of these Rules;
- (ii) Upon the expiry of the time limit provided for the facilitation process in the Roadmap, or in any other subsequent agreement between the parties, if the circumstances do not warrant an extension under the terms of provided for in Article 8 of these Rules;
- (iii) Once the objective defined in the Roadmap or in any subsequent document modifying the Roadmap under the terms of Article 8.2 has been reached;
- (iv) If one or other party informs the facilitator in writing that it no longer intends to continue with facilitation and/or that it is terminating the facilitation process unless the parties still involved in the process signal their intention to continue to the CARO Centre in writing and the facilitator(s) and the CARO Centre agree;
- (v) If all facilitators make a written statement that continuing the facilitation will not result in reaching the objective defined in the Roadmap or any other document modifying this Roadmap with the agreement of the parties.

Article 14: Non-liability and non-compellability clause

Neither the CARO Centre nor the facilitator shall be liable to any person for any acts or omissions in relation to the OHADAC facilitation process and may not be called on to testify

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in judicial or arbitration proceedings in relation to facts surrounding the facilitator's mission or the information obtained or exchanged between them.

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