

OHADAC Mediation Rules

Applicable from 27 September 2021

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Presentation of the role of the CARO Centre and its bodies

- The OHADAC Regional Centre for Arbitration (“CARO Centre”) is authorized to administer 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 arbitrator, mediator and facilitator; and setting and managing the costs of procedures.
- The CARO Centre is led by a Secretary-General, 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 facilitator, mediator or arbitrator, depending on which procedure is chosen by the parties.
- The Secretariat of the CARO Centre is made up of specialized lawyers and support staff. It reports directly to the Secretary-General of the institution. It is responsible for the 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 recognized 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 Mediation Rules (the “Rules”) govern mediation procedures for disputes referred to the Centre by parties seeking to have these settled amicably through a mediator, a neutral third party who will help them to find a solution to their issue(s).

1.2. When a Request for mediation is referred to the Centre under the OHADAC Mediation Rules, its bodies are competent to administer the procedure.

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

1.4. The CARO Centre is the only institution authorized to administer procedures under the OHADAC Mediation Rules.

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 to the procedure and mediator(s), plus one for the CARO Centre.

Article 2: Communication between CARO Centre and parties

2.1. The CARO Centre communicates with the parties to the mediation procedure via electronic mail, fax or regular post if the parties so wish or if this is more appropriate given the circumstances, or by courier.

2.2. The time limits granted to parties by the CARO Centre on the basis of these Rules may be extended by a reasonable period by the CARO Centre if the circumstances so warrant, in which case the CARO Centre does not have to provide reasons for its decision.

2.3. If the CARO Centre grants the parties a time limit as part of its administration of the mediation procedure, this time limit shall start to run the day after receipt of this communication. 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;

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- 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 3: Recourse to mediation subject to OHADAC Mediation Rules

3.1. Any party to a contract containing a mediation clause referring to these Rules (the “Mediation Clause”) may initiate OHADAC mediation by applying to the CARO Centre as set out in Article 4. The mediation shall be conducted on the basis of these Rules.

3.2. If there is no Mediation Clause, parties that have forged any type of legal relationship may also initiate mediation by filing a Request with the CARO Centre. In this case, the agreement of all parties mentioned in the Request is required before the procedure can commence, as provided for under Article 6(2) of these Rules.

3.3. Mediation may also be initiated on the proposal of the CARO Centre further to a Request for arbitration filed with the CARO Centre and following the meeting provided for in Article 3(4) of the OHADAC Institutional Arbitration Rules. In this case, the provisions of Article 3(6) of these Rules shall apply.

3.4. Cases may also be referred to the CARO Centre by a judge for court-ordered mediation in accordance with the relevant provisions of the French Code of Civil Procedure or any other texts applicable abroad. The CARO Centre may adapt some provisions of these Rules if these prove incompatible with national legislations. It may also adjust the rates set out in the schedule of costs appended hereto.

3.5. Where the parties have recourse to OHADAC mediation, they may also, with the mediator’s agreement, ask for an expert to be appointed to the CARO Centre if the conduct of the mediation raises complex issues and if expert advice on these issues is likely to help the parties reach agreement. The mediator shall adjust the mediation schedule in accordance with the procedural timetable of the expert proceedings and *vice versa*.

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Article 4: Initiating mediation: Filing a Request for Mediation (the “Request”)

4.1. Any party may initiate an OHADAC Mediation procedure by sending a written request using either of the following means:

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

4.2. A party wishing to initiate mediation shall enclose the following with their Request:

- a) The identity and contact details (names, address(es), e-mail address(es), telephone number(s)) for all parties to the dispute and, where applicable, all persons representing the parties;
- b) A summary description of the dispute, including if possible a financial estimate of their claims(s) against the other party or parties mentioned in the Request for Mediation;
- c) Any joint designation of Mediator or, failing this, any agreement or proposal relating to the powers of the Mediator to be nominated by the CARO Centre;
- d) Any relevant information on the conduct of the mediation by the mediator (time limits; place and organization of mediation 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 mediation or, failing this, any proposal to this effect;
- f) Reference to and a copy of the clause whereby the parties agree to avail of mediation in the event of a dispute (the “Mediation Clause”). If there is no such clause, the Request for Mediation shall be considered a mediation proposal and shall be forwarded to the other parties as laid down in Article 6(2) below.

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

4.3. The Request shall only be recorded if accompanied by payment of the registration fee, as determined using the schedule of costs in force appended hereto.

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4.4. Where there is a Mediation Clause in the contract binding the parties, the mediation commencement date shall be the date on which the CARO Centre receives the Request. This date shall be mentioned by the CARO Centre in its letter confirming receipt of the Request.

4.5. Where there is no Mediation Clause in the contract binding the parties, the mediation commencement date shall be the date of the letter in which the CARO Centre confirms that the parties have reached an agreement to have recourse to mediation. This agreement shall be recorded by the CARO Centre following implementation of the procedure under Article 6(2) hereof.

4.6. If the procedure is initiated by the CARO Centre, after the meeting provided for in Article 3(4) of the OHADAC Institutional Arbitration Rules, the Request for Arbitration shall be deemed the Request for the purposes of this Article and the Response shall be deemed the responding observations provided for in Article 6 of these Rules. The CARO Centre may then appoint a mediator directly as laid down in Article 8 of these Rules. The mediation costs shall be offset against any costs already paid to initiate the arbitration procedure.

Article 5: Notification to parties of the filing of a Request for Mediation

5.1. The party or parties mentioned in the Request shall be informed by the CARO Centre of the filing of a Request for Mediation within two (2) days following receipt of the Request.

5.2. The CARO Centre shall use the contact details provided in the Request by the party initiating the mediation or in any other correspondence from that party to the CARO Centre.

Article 6: Observations in response by the parties mentioned in the Request

6.1. Where there is a Mediation Clause whereby the two parties have agreed to use mediation:

The party or parties mentioned in the Request shall have fifteen (15) days to submit their observations in response to the Request for Mediation. In its observations, each party shall indicate its position on the current dispute and shall also clarify the amount at stake between the parties.

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6.2. Where there is no Mediation Clause:

Upon receipt of the Request for Mediation, the CARO Centre shall inform all parties mentioned in the Request of the proposal to settle the current dispute via OHADAC mediation. The CARO Centre may assist them to arrive at an agreement regarding the use of mediation 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 mediation and the party or parties mentioned in the Request. This agreement must then be forwarded in writing to the CARO Centre by regular post or electronic mail.

If the parties agree to submit their dispute to mediation within fifteen (15) days of the date the Request is received or any other reasonable time limit set by the parties, the Mediation Procedure shall commence. The party or parties mentioned in the Request shall then have another fifteen (15) days from the date of receipt of the letter of confirmation issued by the CARO Centre to submit their observations on the Request for Mediation, in order to clarify their position on the substance of the dispute. If the parties do not come to an agreement within fifteen (15) days of the date the Request for Mediation is received or any other reasonable time limit set by the parties, the Mediation Procedure cannot commence and the parties are free to file another request for mediation at a later date.

Article 7: Organizational meeting initiated by the CARO Centre

7.1. Before appointing a mediator, the Secretariat may call a meeting between the parties to organize the procedure. This meeting may be face-to-face, via video-conference or by telephone. The meeting shall 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 mediator and more generally in the administration of the procedure.

7.2. During this meeting, the Secretariat may also suggest that the parties engage in another dispute resolution procedure such as facilitation 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 8: Appointing a mediator

8.1. Within three (3) days of receipt of the observations in response to the Request, the CARO Centre shall acknowledge receipt and appoint a mediator, unless a meeting to organise the procedure as provided for in Article 7 hereof is held. In this case, the CARO Centre shall appoint a mediator within three (3) days after the meeting, unless the parties decide to use another alternative dispute resolution procedure suggested by the CARO Centre, such as facilitation or arbitration.

8.2. If the parties have agreed on the choice of mediator, the Centre shall confirm this appointment.

8.3. Failing agreement between the parties, the Centre shall appoint a mediator, taking into account criteria such as the mediator's experience; fields of specialization; availability to conduct the mediation within the time limits set out herein; the language of the mediation or, if this has not yet been determined, the language(s) suggested by the parties; and any other circumstances likely to influence the proper conduct of his/her mission.

8.4. 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 mediators if the circumstances, particularly the complexity of issues raised, so warrant.

Article 9: Independence and impartiality

9.1. The mediator must meet the requirements of independence and impartiality. Prior to being appointed, the CARO Centre shall ask the mediator to fill out a statement of independence and impartiality (the "Statement of independence and impartiality"), which shall be forwarded to the parties for their comments.

9.2. If, prior to accepting the mediator's appointment, there are any circumstances likely to cast doubts in the parties' minds as to the mediator's independence and/or impartiality, or that are liable to delay the early progress of the mediation procedure as provided for herein, the mediator must disclose these circumstances in the statement of independence and impartiality. These circumstances may include for example:

- any personal or business relationship with one of the parties;
- any direct or indirect financial or other interest in the outcome of the mediation; or

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- the fact that the mediator or a member of his or her governing structure, has acted in any capacity other than mediator for one of the parties (such as counsel, adviser, arbitrator, expert or other).

9.3. This obligation shall apply throughout the procedure in the event that new circumstances arise that could affect the independence and/or impartiality of the mediator.

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

If the parties expressly agree that the mediator can start or continue his or her mission despite the circumstances, the mediator shall be appointed or confirmed by the CARO Centre or, alternatively, if the procedure is already ongoing, the mediator shall continue to conduct the mediation if s/he is certain that s/he can do so with complete independence and impartiality.

Failing express agreement by both parties, the CARO Centre may, if the mediator has not yet been confirmed or appointed, refuse to confirm or appoint him or her. If the mediator has already been confirmed or appointed and such circumstances come to light during the procedure, the CARO Centre may replace the mediator and appoint a new one, in accordance with Article 10 of these Rules.

Article 10: Replacing the mediator

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

10.2. If the mediator does not comply with the provisions of these Rules regarding the conduct of the mediation procedure, particularly those relating to the mediation time limits, the CARO Centre may appoint another mediator after inviting the parties to submit their observations, unless all the parties object.

10.3. Any party to mediation can ask for the mediator 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 the observations of the other parties to mediation, as well as the mediator, and potentially after hearing the parties at a meeting, which can take place face-to-face, via video-conference or by telephone without the mediator being present. The CARO Centre shall forward its decision within three (3) days of receipt of the latest observations sought by the CARO Centre following this request. The CARO Centre does not have to provide

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reasons for its decision. If all parties to mediation request a replacement, the CARO Centre shall replace the mediator.

Article 11: Time limits of the mediation procedure

11.1. Once appointed or confirmed by the CARO Centre, the mediator shall contact the parties within two (2) days in order to agree on the date of an initial meeting to plan the main stages of the mediation process. This meeting can take place face-to-face, via video-conference or by telephone.

11.2. The mediation procedure must be completed within two (2) months from the date the mediator is appointed or confirmed by the CARO Centre, unless otherwise agreed between the parties. The CARO Centre may extend this time limit two (2) times if the circumstances so warrant. Alternatively, it may modify the time limit subject to agreement by the parties and the mediator. In the event of court-ordered mediation, the court which ordered the mediation shall have sole jurisdiction to grant any extension to the time limit of the mediation procedure.

Article 12: Role of mediator

12.1. The mediator shall assist the parties to reach a negotiated solution to their dispute through the implementation of a process that allows them to state their positions, to compare these and to work toward an agreement via free and informed choices.

12.2. The mediator 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 9 and the time limits provided for under Article 11 of these Rules. In particular, the mediator shall choose the language of the mediation, as well as the location(s) of, arrangements for and frequency of meetings. S/he shall communicate these arrangements to the parties in writing prior to holding mediation meetings and shall also communicate in writing any change to the organization of the mediation. In this context, the mediator is encouraged to prescribe any measure(s) aimed at improving the effectiveness of the procedure in terms of time limits and costs, and using any appropriate technological means.

12.3. The mediator is authorized to conduct meetings and to hold discussions with one party to the mediation before, during and/or after any mediation session. Such discussions can take place in writing, by email, in person, via video-conference or by any other means. The mediator shall inform the other party or parties and/or their legal counsel(s) in advance.

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12.4. The mediator does not have the authority to make decisions on behalf of the parties or to impose an agreement on the parties. The mediator shall support them in finding a satisfactory resolution to their dispute. S/he therefore has full discretion to make recommendations verbally or in writing directly to one party or both parties in order to arrive at an agreement between the parties.

12.5. In a case where the parties do not reach agreement, the mediator may continue to communicate with one of the parties with the express agreement of both parties, notwithstanding the application of Article 14.

Article 13: Fees and expenses

13.1. The fees and expenses of the mediation (the “Fees and Expenses”) shall include the administrative costs incurred by the CARO Centre to administer mediations (“Administrative Costs”), as well as the costs of the mediator(s), comprising of the fees of the mediator(s) and any disbursements relating to mediation meetings (“Remuneration of the Mediator”).

13.2. The Fees and Expenses of the mediation (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 11(1), once the mediator has been appointed or confirmed, or at any later stage in the procedure. These additional mediation hours shall be invoiced based on the Schedule of Costs in force on the date of referral to the CARO Centre.

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

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

13.5. The registration fees are paid when the Request for Mediation is filed, as stipulated in Article 4.3 of these Rules. These fees are not reimbursable, regardless of whether the mediation proceeds or not.

13.6. The CARO Centre shall request payment of all Fees and Expenses as set out in the Schedule of costs appended hereto when the mediator is appointed. These fees must be paid

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prior to the mediator implementing his or her mission as defined herein. If at a later stage of the procedure, the parties request additional mediation hours and the mediator agrees, these additional hours shall be invoiced by the Centre before they are provided by the mediator.

13.7. In the event of non-payment of the Fees and Expenses further to the issuance of an invoice by the CARO Centre, the CARO Centre may suspend and then terminate the mediation procedure.

13.8. The CARO Centre shall determine the total cost of the mediation at the end of the procedure. The CARO Centre 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 reach agreement sooner than anticipated or alternatively if they decide not to continue with the mediation according to the terms initially agreed.

Article 14: Confidentiality

14.1. Parties opting to settle their dispute via mediation shall undertake to keep confidential everything that is said, written or done within the framework of this mediation procedure, unless otherwise provided for by law and/or any agreement in writing between the parties.

14.2. Mediation sessions are private and confidential and shall only remain accessible to the parties and their representatives. Any other person may only participate in these sessions subject to approval by the parties and the mediator.

14.3. Any document or information communicated during the mediation process shall be strictly confidential and shall be treated as such by the mediator. Unless otherwise provided for by the applicable law and/or unless otherwise agreed by the parties and the mediator, the mediator shall not provide any testimony regarding any aspect of the procedure governed by the Rules in any judicial, arbitration, administrative proceedings or any other proceedings, in relation to the dispute or otherwise.

14.4. Any agreement between the parties reached during the mediation procedure shall also be considered confidential unless disclosure is required by law or necessary to ensure its approval or execution.

14.5. In particular, both the mediator and the parties undertake not to rely on or use for evidential purposes in any judicial, arbitration, administrative proceedings or any other proceedings, in relation to the dispute or otherwise, anything that is said or that has come to its knowledge during the mediation procedure and in particular:

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- (i) An invitation to mediation or any other indication that one of the parties was willing to settle the dispute amicably;
- (ii) Any document drawn up in the context of the mediation procedure;
- (iii) Any document or evidence originating outside the mediation procedure but obtained in the course of the mediation from the mediator or the other parties, unless the document can be obtained independently from the mediation procedure or when the document is already in possession of the other party;
- (iv) Opinions expressed or suggestions made by the opposing party in the context of prior negotiations with a view to reaching an amicable settlement to the dispute;
- (v) Any admission made by one of the participants in the mediation procedure during the mediation procedure;
- (vi) Any non-public information obtained during the mediation procedure on one of the parties to the procedure, concerning its commercial practices and strategy, financial health, industrial secrets *etc.*
- (vii) Any comments or opinions expressed by the mediator during the mediation procedure;
- (viii) The fact that one of the parties has or has not expressed its intention to accept a proposal by the mediator to settle the dispute; or
- (ix) The terms of the agreement bringing an end to the mediation or any other agreement reached by the parties during the mediation procedure.

Article 15: End of mediation

15.1. The CARO Centre shall terminate the mediation procedure in any one of the following scenarios:

- (i) If the parties fail to pay the Fees and Expenses of the mediation as provided for under Article 13.7 of these Rules;
- (ii) Upon the expiry of the time limit provided for in Article 11.2, as appropriate;
- (iii) Once the agreement has been signed by the parties, if the parties reach agreement after one or more mediation meetings;
- (iv) If one or other party informs the mediator in writing that it no longer intends to continue mediation and/or that it is terminating the mediation;

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- (v) In the event of a written statement by the mediator that continuing the mediation will not help the parties reach an amicable settlement to their dispute.

15.2. If agreement is reached during the mediation meeting(s), neither party shall be bound by the terms thereof until it is signed by both parties. A copy of the agreement or of any other document explaining the termination of the mediation under the terms provided for under Article 15.1 shall be forwarded by the mediator to the CARO Centre as soon as possible. At the request of either party, the CARO Centre may also provide the attestation provided for under Article 4(1) of the United Nations Convention on International Settlement Agreements Resulting from Mediation to establish that the agreement is the result of mediation under the terms provided for in this provision.

Article 16: Non-liability and non-compellability clause

Neither the CARO Centre nor the mediator shall be liable to any person for any acts or omissions in relation to the OHADAC mediation procedure and may not be called on to testify in judicial or arbitration proceedings in relation to facts surrounding the mediator's mission or the information obtained or exchanged between them.

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