



MEDIATION GUIDELINES

1. What is Mediation?

Mediation is a dispute/ conflict resolution mechanism based on voluntary participation of parties in which a neutral intermediary who has no adjudicatory powers systematically facilitates communication and negotiation between the parties with the aim of enabling the parties to take responsibility for resolving the dispute.

The key features of mediation are that it:

- involves a neutral third party to facilitate communication and negotiations;
- is quick and inexpensive
- is without prejudice and confidential;
- is flexible and enables the Parties to devise solutions which are not possible in an adjudicative process, such as litigation or arbitration, and may be to the benefit of both/all Parties, particularly if there is a continuing business relationship;
- puts the parties in control (unlike litigation/arbitration)
- Involves only representatives of or the actual Parties who have sufficient authority to settle.
- can be used to resolve past disputes or to come to agreement on the terms of a future relationship or interaction

The Constitution of Kenya 2010 and various other laws encourage the use of mediation to settle disputes. While mediation is essentially flexible, the Model Procedure set out in this document, taken with the SDRC Agreement to Mediate give sufficient certainty to enable the process to be set up and used effectively by parties.

2. Referral to mediation

Referral of a dispute to SDRC for mediation may be as a result of;

- voluntary referral by all parties;
- referral by one party who asks SDRC to secure the involvement of other parties into a mediation;
- responding to a statutory requirement, Court Rules, a Court Order or a recommendation by a judge before trial or appeal;
- the provisions of an ADR clause in a commercial or government contract requiring the use of mediation as a step in the parties' agreed dispute resolution process;

- the provisions for use of mediation within an industry or public sector policy framework.

3. Agreement to Mediate

The parties ("the Parties") to the dispute in question ("the Dispute"), the Mediator and the Strathmore Dispute Resolution Centre ("SDRC") will enter into an agreement ("the Agreement to Mediate") in relation to the conduct of the Mediation. These Guidelines ("the Guidelines") will be incorporated into, form part of, and may be varied by the Agreement to Mediate.

4. The Mediator

4.1 SDRC will, subject to the agreement of the Parties, party preferences, nature of dispute and any court order, nominate an independent third party (ies) ("the Mediator"). The Mediator, after consultation with the Parties where appropriate, will:

- attend any meetings with any or all of the Parties preceding the mediation, if requested or if the Mediator decides this is appropriate and the Parties agree;
- read before the Mediation each Case Summary and all the Documents sent to him/her by each of the parties (see paragraph 7 below);
- chair, and determine the procedure for, the Mediation;
- facilitate drawing up any written settlement agreement; and
- abide by the terms of the Agreement to Mediate and the SDRC Code of Conduct.

4.2 The Mediator (and any member of the Mediator's firm or company) will not act for any of the Parties individually in connection with the Dispute in any capacity either during the currency of the Agreement to Mediate or at any time thereafter. The Parties and the mediator accept that in relation to the Dispute neither the Mediator nor SDRC is an agent of, or acting in any capacity for, any of the parties. The parties and the Mediator accept that the Mediator (unless an employee of SDRC) is acting as an independent contractor and not as an agent or employee of SDRC.

5. Mediation Arrangements

5.1 SDRC, in conjunction with the Mediator, will make the arrangements for the Mediation including, as necessary:

- nominating, and obtaining the agreement of the Parties to participating in the mediation;
- drawing up an Agreement to Mediate for signature at commencement of the mediation;
- organising a suitable venue and dates;
- meeting with any or all of the Parties (and the Mediator if appointed), either together or separately, to discuss any matters or concerns relating to the Mediation; and
- general administration in relation to the Mediation.

5.2 If there is any issue about the conduct of the Mediation (including as to the nomination of the Mediator) upon which the Parties cannot agree within a reasonable time, SDRC will, at the request of any party, decide the issue for the Parties, having consulted with them)

6. Participants

Each Party will state in the Agreement to Mediate:

- the names of the person who will have full authority to settle the dispute in question without needing to refer anyone else. If there is any restriction on that authority, this must be discussed with SDRC and/or the Mediator before the Mediation commences;
- any other person(s) (such as professional advisors or colleagues) who will be present and/or participate in the Mediation on that Party's behalf.

7. Exchange of information

7.1 Each Party will prepare for the other Party (ies), Mediator and any co-Mediator sufficient copies of:

- a concise summary ("the Case Summary") of its case in the Dispute; and
- all documents to which the Summary refers and any others to which it may want to refer in the Mediation ("the Documents").

7.2 The Parties will forward the Case Summary and Documents to SDRC before the Mediation or/such date as may be agreed between the Parties and SDRC. On receipt of all sets, SDRC will forward copies directly to each Party, the Mediator (and co-Mediator) on the same date. In addition, each Party may send to the Mediator (through SDRC) and/or bring to the Mediation further documentation which it wishes to disclose in confidence to the Mediator but not to any other Party, clearly stating in writing that such documentation is confidential to the Mediator and to SDRC.

7.3 The parties will agree with SDRC

- the maximum number of pages of each Case Summary; and
- a joint set of Documents or the maximum length of each set of Documents

8. The Mediation

8.1 The Mediation will take place at the arranged place and time stated in the Agreement to Mediate.

8.2 . The Mediator will chair, and determine the procedure at, the Mediation.

8.3 No recording or transcript of the Mediation will be made.

8.4 If the Parties are unable to reach a settlement at the Mediation, and only if all the Parties so request and the Mediator agrees, the Mediator may produce for the Parties a non-binding recommendation on terms of settlement. This will not attempt to anticipate what a court might order but will set out what the Mediator may suggest as appropriate settlement terms in all of the circumstances. Alternatively, the Mediator may arrange a further day or agree appropriate post-mediation contact so that settlement discussions may continue.

9. Mediation Settlement

Any settlement reached in the Mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, the Parties. This document is referred to as the 'Mediation Settlement'.

10. Conclusion of the mediation

10.1 The mediation may be concluded in any of the following ways;

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- a. Any of the Party withdraws from the Mediation and informs the Mediator and other representatives in writing; or
- b. A written Mediation Settlement is concluded; or
- c. An 'in principle settlement' of the dispute with an agreement to draft binding terms after the mediation day;
- d. The Mediator decides, at his or her discretion, to withdraw from the Mediation; or
- e. Party withdraws from the Mediation; or
- f. The Mediator decides s/he should retire for any of the reasons set out in the Code of Conduct

10.2 The Mediator may also adjourn the Mediation in order to allow parties to consider specific proposals and to get further information or for any other reason which the Mediator considers will be helpful in furthering the mediation process. The Mediator will then reconvene with the agreement of the Parties.

11. Stay of proceedings

Any litigation or arbitration in relation to the Dispute may be commenced or continued notwithstanding the Mediation unless the Parties agree otherwise or a court so orders.

12. Confidentiality

12.1 Every person involved in the Mediation will keep confidential and not use for any collateral or ulterior purpose all information (whether given orally, in writing or otherwise) arising out of, or in connection with, the Mediation, including the fact of any settlement and its terms, save for the fact that the mediation is to take place or has taken place.

12.2 The Parties shall maintain the confidentiality of the mediation and in particular shall not rely on, or introduce as evidence in any arbitration or judicial or other proceedings:

- views expressed or suggestions made by another Party with respect to a possible settlement of the matter;
- any admissions made by another Party in the course of the mediation;
- any proposals made or views expressed by the mediator;

- the fact that a Party had indicated willingness, at any stage of the mediation, to accept a proposal for settlement made by the other Party.

12.3 All information (whether in writing or otherwise) arising out of, or in connection with, the Mediation will be without prejudice, privileged and not admissible as evidence or disclosable in any current or subsequent litigation or other proceedings whatsoever in relation to this dispute. This does not apply to any information, which would in any event have been admissible or disclosable in any such proceedings.

12.4 The Mediator will not disclose to any other Party any information given to him by a Party in confidence without the express consent of that Party.

12.5. Paragraphs 12.1 – 12.4 above inclusive shall not apply if and to the extent that:

- all parties consent to the disclosure;
- the Mediator is required under the general law to make disclosure;
- the Mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
- the Mediator reasonably considers that there is a serious risk of his/her being subject to criminal proceedings unless the information in question is disclosed.

12.6 None of the Parties to the Agreement to Mediate will call the Mediator, co-Mediator or SDRC (or any employee, consultant, officer or representative of SDRC) as a witness, consultant, arbitrator or expert in any litigation or other proceedings whatsoever arising from, or in connection with, the dispute in issue in the Mediation. The Mediator and SDRC will not voluntarily act in any such capacity without the written agreement of all the Parties.

12.7 The Mediator and SDRC do not give legal advice and the parties agree that they will not make any claim against the Mediator nor SDRC in connection with this Mediation.

13 Fees, expenses and costs

13.1 The cost of the Mediation shall be agreed in advance with each Party and confirmed in writing.

13.2. SDRC fees (which include Mediator fees) and the other expenses of the Mediation will be borne equally by the Parties unless otherwise agreed by the parties. Payment of these fees and expenses will be made to SDRC.

13.3 Payment of fees in full is due before the mediation date and on the date of the mediation. A supplementary invoice will be issued following the mediation for relevant expenses and additional fees (if any).

13.4 Each Party will bear its own costs and expenses of its participation in the Mediation.

13.5. In the event of a cancellation the following will apply:

- 10% of the total mediation fees will be charged in the event of a cancellation within 10 days of the date set for the mediation;
- 50% of the total mediation fees will be charged in the event of a cancellation within 7 days of the date set for the mediation;
- 100% of the total mediation fees will be charged in the event of a cancellation within 2 hours of the time set for the mediation.

14 Exclusion of liability

Neither the Mediator nor SDRC shall be liable to the Parties for any act or omission in connection with the services provided by them in, or in relation to, the Mediation, unless the act or omission is shown to have been in bad faith.

Strathmore Dispute Resolution Centre