

ADR FORUM MEDIATION RULES

Model Dispute Resolution Clause

Parties who agree to resolve their disputes by mediation and arbitration under the rules of ADR Forum (Pty) Ltd (“ADR Forum”) may use this clause in their agreement:

If any dispute, controversy or claim arising out of or relating to the existence, interpretation, validity, application, breach or termination of this agreement occurs between the parties, they agree to attempt resolving such dispute, controversy or claim through mediation with ADR Forum before pursuing any other proceedings. Any party to such dispute, controversy or claim may serve written notice on the other or others of its desire to resolve a particular dispute, controversy or claim by mediation. The mediator shall be appointed by ADR Forum and conducted in Namibia at a place to be determined by the mediator in English according to the mediation rules of ADR Forum. If such dispute, controversy or claim has not been resolved within thirty days of the notice of desire to mediate, any party may terminate the mediation and proceed to arbitration according to the arbitration rules of ADR Forum. Nothing herein shall preclude any party from seeking interim relief in a court pending such mediation and/or arbitration.

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1. Definitions

In the Rules:

“**Day**” means a calendar day of 24 hours but does not include Saturday, Sunday, or public holiday in Namibia.

“**ADR Forum**” means the ADR Forum (Pty) Ltd.

“**Mediation**” means the use of an impartial third party to assist the parties to resolve a dispute, but does not include an arbitration.

“**Mediation agreement**” means a written agreement between the parties and the mediator containing specific provisions for submitting a dispute to mediation.

“**Mediator**” means the impartial person or persons engaged to assist the parties to resolve a dispute, but does not include an arbitrator, unless the arbitrator is acting as a mediator by consent of the parties;

“**Rules**” means the ADR Forum mediation rules including the schedules thereto.

2. Application

- 2.1. The rules shall apply where:
 - 2.1.1. the parties have agreed that the rules apply;
 - 2.1.2. the parties have agreed to a mediation to be administered by ADR Forum with or without reference to the ADR Forum mediation rules.
- 2.2. If the parties have by contract or by mutual agreement provided for the mediation of their dispute(s) in accordance with the rules, they shall be deemed to have incorporated the rules into their mediation agreement.
- 2.3. If the rules are amended by the ADR Forum, the rules applicable to any dispute shall be the rules as amended as of the date the mediation is commenced.
- 2.4. To the extent that the rules conflict with the Act the rules shall apply except to the extent that the parties may not lawfully contract out of the provisions of the Act.
- 2.5. A failure to comply with the rules is an irregularity and does not render the mediation or a step, document, or settlement agreement a nullity.

3. Variation of rules

The parties may vary the rules, excluding Schedules "A" hereto, in terms of a written agreement signed by them.

4. Commencing Mediation

- 4.1. Where the resolution of a dispute is governed by the rules in terms of a mediation clause or agreement any party may submit that dispute to mediation.
- 4.2. If one or more of the parties to a dispute wish to submit that dispute to mediation under the rules, the mediation shall be commenced by one or more parties to the dispute by delivering a written request for mediation to every other party to the dispute and ADR Forum.

5. Appointment of mediator

- 5.1. A mediator shall be appointed only by a process that is:
 - 5.1.1. in accordance with any nomination to which the parties have agreed;
 - 5.1.2. in accordance with any appointment procedure to which the parties have agreed; or
 - 5.1.3. in accordance with the procedure set out in rule 5.2.
- 5.2. If the parties have not agreed to any nomination or appointment procedure ADR Forum shall appoint the mediator.

6. Independence and impartiality

- 6.1. The mediator shall not act as a representative for any party to the mediation and shall be and shall remain at all times during the mediation:
 - 6.1.1. wholly independent;
 - 6.1.2. wholly impartial; and
 - 6.1.3. free of any personal interest or other conflict of interest in respect of the mediation.
- 6.2. The parties agree that the mediator is not providing legal or professional advice to any of the parties. The parties agree that the mediator may express views or opinions on the matters at issue, and may identify evaluative approaches, and where the mediator does so it shall not be construed as either advocacy on behalf of a party or as legal or professional advice to a party. The parties shall at all times rely exclusively on their own advisors for legal and professional advice. The parties agree that:
 - 6.2.1. the ADR Forum is not an agent of, or acting in any capacity for, any of the parties; and
 - 6.2.2. the mediator is acting as an independent contractor and is not an agent or employee of ADR Forum.

7. Disclosure of potential disqualifications

- 7.1. Before accepting an appointment and at all times after accepting an appointment, a mediator shall disclose to ADR Forum and the parties in writing any circumstance that could potentially give rise to a reasonable apprehension of a lack of independence or impartiality or conflict of interest in the mediation of a dispute. Should any such circumstance be so disclosed, ADR Forum shall immediately notify the parties of it. If any party objects, in writing, to the mediator based on any such disclosure, the mediator shall immediately withdraw from the mediation and another mediator shall be appointed by ADR Forum.
- 7.2. No mediator shall be disqualified or subject to objection by reason of one or more of the mediator, counsel, party or representative of a party being a member, director, officer or employer of ADR Forum.

8. Waiver of potential disqualification

- 8.1. A mediator who makes disclosure of any circumstance under rule 7 shall continue to serve as mediator if all parties to the dispute waive, in writing, the right to object to any reasonable apprehension of a lack of independence or impartiality or conflict of interest that arises as a consequence of that disclosure.
- 8.2. Any party that:
- 8.2.1. knows, or reasonably ought to know, of any circumstance that could give rise to a reasonable apprehension of a lack of independence or impartiality or conflict of interest on the part of a mediator (whether or not that circumstance is disclosed under rule 7); and
- 8.2.2. proceeds with the mediation without promptly stating an objection to that circumstance in writing, shall be deemed to have waived the right to object to any reasonable apprehension of a lack of independence or impartiality or conflict of interest that arises as a consequence of that circumstance and to have complied with the requirements of rule 8.1.

9. Pre-mediation session

- 9.1. Unless otherwise agreed by the parties, the mediator shall, expeditiously after being appointed, arrange a session or conference call with the appropriate representatives or lawyers of all parties to discuss the matters set out in these rules and all arrangements relating to the mediation, including, without limitation:
- 9.1.1. the return of written material provided to the mediator;
- 9.1.2. disclosure of offers or counter-offers made in the course of the mediation; and
- 9.1.3. whether or not any settlement agreement is required to be in writing and executed by the parties before it is binding on the parties.

10. Mediation agreement

- 10.1. The mediator, together with the parties, shall prepare and execute a mediation agreement setting out;
- 10.1.1. the terms and conditions under which the parties are engaging the mediator;
- 10.1.2. any of the rules that the parties agree shall not apply to the mediation or are amended as agreed by the parties; and
- 10.1.3. any additional rules that the parties agree shall apply to the meditation.
- 10.2. If the parties are unable to agree on a mediation agreement, the standard form mediation agreement of ADR Forum set out in Schedule "B" shall be used with such modifications as the parties may agree.

11. Time and place

- 11.1. The mediator shall, following consultation with the parties, fix the time of each mediation session. All sessions shall be held at either:
- 11.1.1. Windhoek; or
- 11.1.2. Swakopmund; or
- 11.1.3. a location agreed upon by the parties and the mediator.

12. Authority of the mediator

- 12.1. The mediator shall attempt to assist the parties to reach a satisfactory resolution of their dispute but has no authority to impose a settlement. The mediator is authorised to conduct joint and separate sessions with the parties at the discretion of the mediator.
- 12.2. If the parties are unable to reach a settlement in the mediation process, and if all parties and the mediator agree, the mediator may produce for the parties a non-binding recommendation for terms of settlement. This recommendation shall be the mediator's reasonable attempt to find acceptable settlement terms.
- 12.3. The mediator may retain experts or consultants if the parties so agree and the parties agree to pay for the expenses of such experts or consultants, in equal amounts unless otherwise agreed by the parties.

13. Representation

- 13.1. Each party must attend the mediation. The name and address of any legal representative or agent who intends to attend the mediation must be communicated, in writing, to the mediator and to the other parties at least three days before the first mediation session. If any party intends to have any other individuals, such as experts, advisors, or any other persons, attend the mediation, the name(s) and capacity of such individuals must be communicated to the mediator and the other parties at least three days before the first mediation session.
- 13.2. Parties who attend the mediation must provide proof to the satisfaction of the mediator that they have authority to settle the dispute.

14. Privacy

- 14.1. The mediation shall be held in private. Only those persons authorised by rule 13 may attend, unless otherwise agreed by the parties.

15. Confidentiality and disclosure

- 15.1. The parties and the mediator shall agree on the extent of documentary disclosure required for an effective mediation, but the mediator shall not have the power to compel the disclosure of any document.
- 15.2. The mediator shall inform the parties of the confidential nature of mediation.
- 15.3. The mediator, the parties, their experts and advisors, and any other persons who accompany the parties to the mediation shall keep confidential and shall not disclose to any non-party any information, documents, and communications that are created, disclosed, received, or made available in connection with the mediation except:
 - 15.3.1. with the parties' written consent;
 - 15.3.2. when ordered to do so by a court of competent jurisdiction or otherwise required to do so by law;
 - 15.3.3. when the information or documents disclose an actual or potential threat to human life, health or bodily injury;
 - 15.3.4. in respect of any report or summary that is required to be prepared by the mediator;
 - 15.3.5. where the data about the mediation is for research and education purposes, and where the parties and the dispute are not, and may not reasonably be anticipated to be, identified by any such disclosure; or
 - 15.3.6. where the information is, or the documents are, otherwise available to the public.
- 15.4. Within 30 days after the conclusion of the mediation, the mediator shall destroy all information, documents and communications created by, disclosed to, received by, or made available to the mediator in connection with the meditation unless otherwise agreed by the parties.
- 15.5. The mediator shall obtain, in writing, from all experts and consultants engaged by the mediator and any other person who accompanies the parties, commitments to similar obligations of confidentiality as are provided for in this rule.

- 15.6. The mediator shall maintain confidentiality in the storage and disposal of mediation notes, records, files, information, documents, and communications.
- 15.7. If the mediator holds private sessions (including breakout sessions and caucuses) with one or more parties, he or she shall discuss the nature of such sessions with all parties before commencing such sessions. In particular, the mediator shall inform the parties of any limits to confidentiality applicable to information disclosed during private sessions.
- 15.8. The parties agree that mediation sessions are without prejudice settlement negotiations and disclosures are inadmissible in any further litigation or arbitration except to the extent required by law. The parties agree not to subpoena or otherwise require the mediator to testify or produce records or notes in any future proceedings. No transcripts shall be kept of the proceedings.
- 15.9. The parties agree that they shall not rely on or introduce as evidence in subsequent arbitral or judicial proceedings any of the following, with the exception of information otherwise produced through the discovery process:
- 15.9.1. any views expressed, suggestions made, or offers made to or received from any other party in respect of the possible settlement of the dispute;
- 15.9.2. any admissions made by any other party in the course of the mediation;
- 15.9.3. the fact that any other party had indicated a willingness to accept a proposal or recommendation for settlement made by the mediator; or
- 15.9.4. proposals made or views expressed by the mediator.
- 16. Suspension or termination of mediation**
- 16.1. The mediator may suspend the mediation:
- 16.1.1. upon written request by one or more of the parties; or
- 16.1.2. by issuing a written declaration that further efforts at mediation would not be useful at this time and that the mediation is suspended.
- 16.2. The mediation is terminated:
- 16.2.1. by the execution of a settlement agreement by the parties;
- 16.2.2. by the issuance of a written declaration of one or more parties that the mediation is terminated; or
- 16.2.3. by the issuance of a written declaration by the mediator that further efforts at mediation would not be useful at this time and that the mediation is terminated.
- 17. Exclusion of liability**
- 17.1. ADR Forum is not liable to any party for any act or omission in connection with a mediation conducted under the rules. In any event, ADR Forum is not responsible for any loss or damage incurred by any party or any other person arising from negligence or any other cause whatsoever.
- 18. Fees and expenses**
- 18.1. The parties shall bear equally and pay the mediator's fee and all expenses, including travel and the rental of premises, and the costs and expenses of any expert or consultant engaged by the mediator in accordance with rule 12.3, unless otherwise agreed by the parties.
- 18.2. The fees and expenses mentioned in rule 18.1 shall be paid to ADR Forum.
- 18.3. The parties shall pay to ADR Forum the administration fees provided in Schedule "A".
- 18.4. The mediator may require the parties to pay an initial deposit and further deposit or deposits, including proportionate shares of the costs of the mediation.
- 18.5. Each party shall bear its own costs and expenses for participating in the mediation, unless otherwise agreed by the parties.

19. Deposits against costs

- 19.1. The mediator must on written request by ADR Forum require the parties to make cash deposits to ADR Forum to cover the anticipated costs and expenses of the mediation, including the fees and expenses mentioned in rules 18.1 and 18.3.
- 19.2. If the required deposits are not made within 10 days after receipt by the parties of the request of the mediator, the mediator shall terminate the mediation.

20. Payment out of deposits

- 20.1. ADR Forum may, from time to time, pay to the mediator from any deposit it holds, any amount it considers reasonable and appropriate for fees earned or expenses incurred by the mediator.
- 21. After the mediation has terminated, ADR Forum shall apply any deposits it holds to the costs of the mediation, including any unpaid fees of the mediator and administration fees, render an accounting to the parties of the deposits received and applied and return any unexpended balance to the parties in proportion of their contributions.

22. Educational purposes

- 22.1. The mediator and ADR Forum may disclose information and data about the mediation for research and educational purposes only if the parties and the dispute are not, nor may reasonably be anticipated to be, identified by such disclosure.

SCHEDULE "A"

Mediation administration fee

N\$ 5 000

Mediator's fee

The mediator's fee must be negotiated and agreed with the mediator

SCHEDULE "B"

**ADR FORUM
STANDARD FORM AGREEMENT TO MEDIATE**

The parties

Party 1: Address, Phone, Fax, and E-mail;

Party 2: Address, Phone, Fax, and E-mail;

Party 3: Address, Phone, Fax, and E-mail;

Party 4: Address, Phone, Fax, and E-mail;

Mediator: Address, Phone, Fax, and E-mail:

Brief description of the dispute

Mediation

The parties shall attempt to settle the dispute by mediation, according to the ADR Forum mediation rules, (“the rules”), which are incorporated as part of this agreement to mediate. Variations to the rules are noted below:

The mediator

The mediator shall be bound by the ADR Forum code of conduct for mediators.
The mediator shall discuss and arrange for the implementation of the exchange of information and briefs at least 2 weeks before the date of mediation, unless otherwise agreed by the parties.
The mediator’s fees are as follows:

Cancellation or delay

It is agreed that any party causing either cancellation of the mediation or a postponement within 30 business days preceding the mediation shall be responsible for all costs incurred by the mediator, along with any cancellation fees.

Date: _____

Signed: _____

Party 1

Party 2

Party 3

Party 4

Mediator
