What is an example of a good dispute resolution clause and why?

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Introduction

Consideration should be given in every arrangement to the potential for disagreement over issues arising from a contract (such as performance, time, cost, delivery and other unforeseen problems). Where such potential exists, a dispute resolution clause (DR Clause) could save time, money, unnecessary litigation and could avoid destroying the relationship between the parties to the dispute.\(^1\)

The Macquarie Dictionary defines 'good' as: "in quality, quantity, or degree; excellent; restorative or beneficial; genuine; sound or valid; and satisfactory for the purpose; advantageous."\(^2\) Therefore, what constitutes a good DR Clause, in a general sense, is contingent upon what the parties hope to achieve from the inclusion of such a clause in their agreement. The DR Clause should anticipate future problems and effectively contain provisions that satisfactorily resolve the problem in a manner that is beneficial to both parties. Put simply, the parties want a good outcome from a dispute resolution process that will solve potential disputes relating to their agreement. In this context, what constitutes a good DR Clause will depend on a number of variables including: the interests and relationship of the parties; the subject matter and nature of the contract and the parties’ respective bargaining power. Thus, DR Clauses should be drafted deliberately, rather than routinely, with customisation for each contract so as to achieve the desired result of the parties.

It follows that no one DR Clause can cater for every agreement, however, this paper explores a good DR Clause generally, by referring to the NADRAC Model ADR Clause\(^3\) (Model Clause) as a basis in Appendix A and the ACDC Dispute Resolution Sample Clauses (ACDC Sample Clause) as a further example in Appendix B.\(^4\) Through this analysis, it is apparent that a good DR Clause will: (1) be enforceable; (2) be a condition precedent to litigation; (3) be clear and certain as to the mechanism and process to be followed; (4)

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\(^1\) Australian Encyclopedia of Forms & Precedents. *Commentary to Boilerplate Clauses - Dispute Resolution.* November 2012 at 63.


\(^3\) NADRAC, *The Resolve to Resolve - Embracing ADR to improve access to justice in the Federal Jurisdiction - A Report to the Attorney-General.* September 2009 available at: http://www.nadrac.gov.au/publications/PublicationsByDate/Documents/TheResolveToResolve.pdf [Accessed 20 August 2013]. The Model Clause was based on the precedent prepared by the NSW Law Society which is available on their webpage.

\(^4\) The ACDC Dispute Resolution Sample Clauses can be downloaded from the ACDC website at https://www.acdcltd.com.au/adr-clauses-guidelines/clauses
anticipate, as far as possible, problems that may arise; and (5) preserve the relationship of the parties to the dispute.

1. **Enforceability**

Unlike arbitration, there is generally no legislative basis for the enforcement of an agreement to mediate. Therefore, a good DR Clause that includes dispute resolution processes such as mediation, will be drafted to meet the enforceability requirements, otherwise the insertion of such a clause is rather purposeless. Enforceability of the DR Clause ensures the parties (at the very least) attempt to carry out their obligations under the DR Clause before resorting to litigation, thus reflecting their intentions when agreeing on the DR Clause. The possible consequences from breaching obligations under the DR Clause provides incentive to attempt to resolve a dispute without litigation (for example, the consequences found in clause 6 of the Model Clause). This is important, as the circumstances surrounding the time when the parties agree to the DR Clause are very different to those surrounding the time when the parties are in dispute (in terms of emotions, trust between the parties, financial situations etc. which can all impact on the conduct of the parties in resolving the dispute). Therefore, it is important to require the parties to adhere to their intentions when entering into the agreement so as to assist in avoiding unnecessary expenses, time, and energy that may be endured in litigation.

As a general rule, a court will give effect to a contractual term that is clear, certain and not void for public policy reasons. These general rules apply to the interpretation of DR Clauses, however, Australian case law has dealt with DR Clauses more specifically. Einstein J in *Aiton Australia Pty Ltd v Transfield Pty Ltd* considered a DR Clause that was agreed upon between the parties. His Honour cited with apparent approval the view of commentators such as L Boulle and R Angyal as to current Australian case law, noting that, for a DR Clause to be enforceable, it must satisfy the following minimum requirements:

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6. And where necessary the court will imply terms applying the Codelfa principles - *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 The following criteria must be satisfied before a term will be implied: It must be reasonable and equitable; (1) It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (2) It must be so obvious that “it goes without saying”; (3) It must be capable of clear expression; and (4) It must not contradict any express term of the contract.


1. It must be in the form described in *Scott v Avery*. That is, it should operate to make completion of the mediation a condition precedent to commencement of court proceedings;

2. The process established by the clause must be certain. There cannot be stages in the process where agreement is needed on some course of action before the process can proceed because if the parties cannot agree, the clause will amount to an agreement to agree and will not be enforceable due to this inherent uncertainty;

3. The administrative process for selecting a mediator and in determining the mediator's remuneration should be included in the clause and, in the event that the parties do not reach agreement, a mechanism for a third party to make the selection will be necessary; and

4. The clause should also set out in detail the process of mediation to be followed - or incorporate these rules by reference. These rules will also need to state with particularity the mediation model that will be used.

These requirements are discussed further below with reference to the Model Clause and ACDC Sample Clauses.

2. **Condition precedent to litigation**

A good (and enforceable) DR Clause must not oust the jurisdiction of the courts, but rather provide that the dispute resolution process is a condition precedent to litigation. In *Scott v Avery* the House of Lords reviewed the judicial treatment of an arbitration clause that made arbitration a condition precedent to any court action. Through a review of the history of the judicial treatment of such a clause there was some concern that such a clause would be against public policy i.e. an attempt to avoid the courts of law and the rule of law. However, it was held that "it is a principle of law that parties cannot by contract oust the courts of their

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9 [1843-60] All ER Rep 1; (1856) 5 HL Cas 811; 2 Jur NS 815; 10 ER 1121.


11 [1843-60] All ER Rep 1; (1856) 5 HL Cas 811; 2 Jur NS 815; 1- ER 1121.
jurisdiction; but any person may covenant that no right of action shall accrue till a third
person has decided on any difference that may arise between himself and the other party to
the covenant.” Lord Campbell stated\textsuperscript{12} “..where it is expressly, directly and unequivocally
agreed upon between the parties that there shall be no right of action whatever till the
arbitrators have decided, it is a bar to the action that there has been no such arbitration”. Such
a clause is commonly referred to as a \textit{Scott v Avery clause}.

In \textit{Borowski v Heinrich Fieldler},\textsuperscript{13} it was argued that there was a \textit{Scott v Avery clause}. The
importance of drafting a DR Clause correctly was emphasised by Murray J of the Alberta
Court of Queen's Bench:

"at common law an agreement to oust the jurisdiction of the courts was invalid. However, if
the parties agreed that their rights were to be determined by arbitration as a condition
precedent to the accrual of a complete cause of action and therefore to the Courts having
jurisdiction, such an agreement was valid... \textbf{The wording of the clause is the key}. If the
covenant is framed so there will be no cause of action until after arbitration, then the parties
must arbitrate before seeking a remedy in the courts of law, if the wording is such that the
arbitration will only arise after a cause of action has arisen, then the courts are not excluded.
(emphasis added)\textsuperscript{14}

The importance of appropriate drafting is further seen in \textit{Aiton Australia Pty Ltd v Transfield
Pty Ltd}, where Einstein J stated that DR Clauses generally do not offend the rule against
ousting the jurisdiction of the court if they \textit{merely postpone} a party's right to commence
proceedings. This requirement is evident in clause 1 of the Model Clause which provides that
"the parties must not commence court or arbitration proceedings relating to the dispute \textit{unless}
the party has participated in a mediation in accordance with the clause" (emphasis added). Had
the clause provided that the parties must not commence court or arbitration proceedings
and \textit{only} participate in mediation, this clause would be void and unenforceable as it would
oust the jurisdiction of the court. Clauses 5 and 6 of the Model Clause further specifically
include the jurisdiction of the courts in the event that a party does not adhere to the dispute
resolution obligations in the Model Clause.

\textsuperscript{12} At para 854 – 1139.  
\textsuperscript{13} 29 CPC 3d 264 (1994), ABQB.  
\textsuperscript{14} 29 CPC 3d 264 (1994), ABQB at 16-17.
3. **Clear and certain**

The second, third and fourth requirements stated by Einstein J above may be viewed to all require certainty. That is, a good (and enforceable) DR Clause will be clear as to the process to be followed and any third parties (or other factors) to be selected to assist in the process. Where a DR Clause provides that the parties must resolve the dispute, but fails to provide a clear mechanism that can lead to finalisation of the dispute (such as where the parties are required to "agree upon" a course of action), the clause could be rendered void for uncertainty. A good DR Clause will therefore avoid becoming an "agreement to agree" and will provide parties with the necessary amount of certainty concerning the process. In this sense, the National Alternative Dispute Resolution Advisory Council (NADRAC) noted that DR Clauses "that lack clarity can create barriers to the use of ADR. Disputes relating to the interpretation of such clauses may result in litigation, and such clauses may be found to be void for uncertainty."[17]

This issue of uncertainty is somewhat evident in subclauses 3(a)-(c) of the Model Clause as the parties agree to agree upon the procedures to be adopted and the timetable and the mediator. This uncertainty, however, is alleviated by the inclusion of the path that will be taken should the parties not agree on those factors i.e. the appointment of a mediator in subclause 3(d). Further certainty is provided through the inclusion of a seven day timeframe from the time of receipt of Notice. This prevents the "agreement to agree" from lasting any longer than seven days and promotes certainty that the process will continue by having an independent appointment body to appoint a mediator and the mediator will conduct the mediation in accordance with the Practice Standards articulated in the National Mediator Accreditation System (clause 4). This leaves no room for uncertainty as to the process and conduct of the dispute resolution process and the initial uncertainty can be viewed as a form of flexibility for the parties to tailor the dispute resolution process to their own needs (within the seven days). From this, it is clear that time frames and alternative dispute resolution processes and selection methods should be considered when drafting a good DR Clause to promote certainty.

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15. See *May & Butcher Ltd v R* [1929] All ER Rep 679; [1934] 2 KB 17; (1934) 103 LJKB 556; 151 LT 246.
It is important that the DR Clause is clear as to when the parties are in dispute and when the DR Clause is to apply. Clause 2 expressly provides that the mediation process will be triggered once a party gives written notice to the other party specifying the nature of the dispute. There is therefore no uncertainty as to whether the parties are in dispute or not. Clause 2 then provides that once this notice is given, the parties must participate in mediation in accordance with the Model Clause. Therefore there is no uncertainty as to the first step in solving the dispute. As stated above, a possible issue with the Model Clause is the process of mediation to be followed is not specifically set out and it does not incorporate rules by reference. The parties are given the flexibility to agree upon the process to be followed. However, parties may wish to provide (depending on the circumstances) that the dispute resolution process will be conducted in accordance with certain rules. For example, in a commercial dispute, the ACDC Sample Clause provides:

a) "The mediation shall be conducted in accordance with the ACDC Guidelines for Commercial Mediation which are operating at the time the matter is referred to ACDC.

b) The Guidelines set out the procedures to be adopted, the process of selection of the mediator and the costs involved.

c) The terms of the Guidelines are hereby deemed incorporated into this agreement."

This example clearly satisfies the fourth requirement stated by Einstein J. To incorporate this concept into the Model Clause, the words "and [insert reference to rules]" may be added to the end of the sentence in clause 2.

4. **Anticipate problems that may arise**

A good DR Clause will "anticipate, as far as possible, problems that may arise" and cater for the resolution of potential disputes and parties that may potentially be involved. The problems and the drafting of the DR Clause to suit the anticipated problems will depend on the interests of the parties requiring representation and protection and the agreement in

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18 ACDC Dispute Resolution Sample Clause - see Appendix B.
Clause 1 of the Model Clause provides that the Model Clause will apply "if a dispute arises from or in connection with this contract". This is a very broad scope which anticipates any possible issues such as breach of contract, termination, validity or subject matter relating to the agreement. Therefore, the Model Clause anticipates a wide variety of disputes that may arise. If the scope of the application of the Model Clause were limited to, for example, disputes arising from breach of contract, this may not be a clear reflection of the intention of the parties to require the DR Clause to apply to all possible disputes. This will, however, depend on the intention of the parties when entering into the agreement and it may very well be the case that the parties only wish the DR Clause to apply in certain circumstances. A good DR Clause, in this sense, will therefore reflect the intention of the parties to narrow or broaden the scope of the DR Clause.

By excluding the application of the DR Clause from urgent interlocutory relief, clause 1 anticipates that some disputes may not be solved quickly and that in some circumstances there is an element of urgency that may ultimately require urgent interlocutory relief from the courts. This is an important concept to include when drafting a good DR Clause because if it is not included, the parties would be required to participate in mediation before resorting to involving the courts and this may delay an outcome that is required urgently.

A good DR Clause will anticipate what happens should the chosen dispute resolution process be unsuccessful or not properly followed. This is evident in the Model Clause in clauses 5 and 6 whereby the parties can clearly identify the consequences of not adhering to the DR Clause. Another concept to consider is whereby the outcome is not satisfactory to a party but the dispute is for a monetary amount or damages not more than a set amount.

The following considerations are not necessarily apparent in the Model Clause but may be relevant when drafting a good DR Clause that anticipates future problems. Consideration should be given to whether there are any third or outside parties who may need to be involved in the dispute resolution process and whether the process will affect other and related contracts. The Model Clause does not expressly provide for the process to be adopted when third parties are involved in the dispute, and therefore some uncertainty or room for further dispute may arise as to their involvement. However, this issue may be extinguished by
allowing the parties to agree on the process to be adopted (subclause 3(a)) in that the parties may provide for the process to include the third party once the dispute arises. An example of a clause that expressly includes third parties in the DR Clause is subclause 1(a) of the ACDC Sample Clause which anticipates potential parties involved in the dispute i.e. parties not necessarily party to the contract. Subclause 1(a) binds "the parties to the agreement and the dispute" to endeavour to settle the dispute by mediation.

The Model Clause does not specify whether it survives termination of the agreement, therefore it may be advisable to add this to the Model Clause so as to require the dispute resolution process provided in the Model Clause to be followed in the future even if the contract has come to an end. The words "This clause shall survive termination of this agreement" may be added to the Model Clause.

Furthermore, the Model Clause does not anticipate agreements following mediation (or other dispute resolution processes that may be adopted in a DR Clause) as it does not specify the enforcement of any settlement agreements, however, these may be agreed upon in an agreement before mediation.

5. **Preservation of relationships**

A good DR Clause will promote the maintenance and preservation of the relationship of the parties to the contract. Structuring the progress of a dispute through a good DR Clause may help the parties preserve a relationship more valuable than the disputed matter.

In addition to the above considerations (which all assist in the preservation of relationships) a DR Clause may provide for a single-tiered approach or multi-tiered approach to resolving the dispute depending on the interests of the parties. In order to preserve the relationship of the parties, DR Clauses often chain escalating responses to unresolved issues and guide the parties to move from direct informal discussion, through formal written exchanges, to mediation and then to arbitration or court.\(^\text{20}\)

The Model Clause only refers to mediation. Therefore, if mediation is unsuccessful the

\(^{20}\) Michael Wigley. 2003. *What to do when IT contracts are going wrong (and what to do to reduce risk).* Available at http://www.negotiateit.co.nz/When_IT_Goes_Wrong.htm [Accessed 22 August 2013].
parties may directly resort to litigation, instead of exploring other alternatives or another attempt at mediation. An escalation path may see, for example, the parties to try to resolve with the project managers first, then, if unsuccessful, the DR Clause escalates the problems to someone higher or another dispute resolution process. This escalation path encourages all types of dispute resolution processes before resorting to litigation and therefore gives the parties the best opportunity to solve the dispute and preserve their relationship through effective communication and involvement in a clear and thorough dispute resolution process.

Another example of a process that could be included in the DR Clause is that of expert determination. In the ACDC Sample Clause "Mediation followed by Expert Determination", should the parties be unsuccessful in resolving the dispute by mediation within 28 days after appointment of the mediator, the dispute shall be submitted to expert determination. This provides for another avenue to resolve the dispute and further promotes the interests of the parties. Again, this escalation path may not be suitable in every given scenario and will therefore depend on the interests and intentions of the parties to the contract.

The respective bargaining powers of the parties should also be considered when drafting a good DR Clause. "Parties should be careful not to abuse any bargaining power they might have.. as this can lead to litigation". The Model Clause, prima facie, reflects a neutral bargaining process as both parties are given the power to write to the other should they think a dispute has arisen and the dispute is then referred to mediation. If the DR Clause is drafted in a way that reflects a power imbalance, the party that has a weaker position is more likely to consider the dispute resolution process and the DR Clause to be unfair, thus, opening the possibility to further disputes. An ineffective dispute resolution process leading to a breakdown in the relationship between the parties will make it more difficult to resolve the dispute without litigation.

Furthermore, consideration should be given to whether obligations concerning the parties' conduct during the selected dispute resolution process, such as "good faith" or genuine effort requirements should be included. A widely approved, general summary of a good faith obligation was given by Sir Anthony Mason in 1993 at Cambridge University. The concept of good faith was described as:

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1. An obligation on the parties to co-operate in achieving the contractual objects (loyalty to the promise itself);

2. Compliance with honest standards of conduct; and

3. Compliance with standards of conduct which are reasonable having regard to the interests of the parties.  

Prima facie, this obligation appears to promote the relationship between the parties, however, the effect of such an obligation may have negative and unforeseen consequences. Great care should be taken when considering the inclusion of such an obligation as the area of good faith is not settled in Australia and there remains a great deal of inconsistency between various judges and jurisdictions. The inclusion of "good faith" or similar obligation may have unforeseen consequences such as a loss of confidentiality as the enforcement of such an obligation may require the involvement of the courts to look into the conduct of the parties. The obligation may also "create tension between the parties' self-interest rather than the interests of the other party, and the maintenance of good faith" thus creating the potential for further conflict and uncertainty.

The New South Wales Court of Appeal recently considered the issue of good faith in detail, in its decision of United Group Rail Services Limited v Rail Corporation New South Wales. The DR Clause in question required the dispute to be referred to a senior representative of each of the parties, who were required to "meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference". If the parties could not resolve the dispute within a fixed period of time, the contract provided that the dispute would be referred for mediation. It was held that a promise to negotiate genuinely and in good faith is not vague or uncertain when it respects the contractual rights of the parties and allows for honest and genuinely held views about those pre-existing rights.

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22 See for example Alcatel Australia Limited v Scarcella & Ors (1998) 44 NSWLR 349 per Sheller JA (Powell and Beazley JJA agreeing) at 367.


25 The court considered whether the clause requiring the parties to undertake good faith negotiations was enforceable. The President of the Court of Appeal, Justice Allsop, noted that the status of a clause purporting to create a legal obligation to negotiate genuinely and in good faith, and whether or not such a clause is enforceable, had been the subject of debate in the common law world for some time. After reviewing Australian, English and New Zealand authorities in detail, Justice Allsop noted that the law in Australia is not settled as to the place of good faith in the law of contracts.
In light of the above, and depending on the circumstances of the agreement, the following obligations may be included in the Model Clause:

"The parties must participate in the mediation [or insert selected dispute resolution process] from the basis of an honest and genuine assessment of their rights and entitlements in respect of the dispute."

Although the courts are likely to enforce a contractual obligation to negotiate genuinely and in good faith, uncertainty still remains as to what conduct counts as acting in good faith.\textsuperscript{26} Thus, an alternative to the above inclusion to the Model Clause, may be an obligation for the parties to:

1. Not act arbitrarily or capriciously;
2. Not act with an intention to cause harm; and
3. To act with due respect for the intent of the bargain.

\textsuperscript{26} Justice Allsop noted in \textit{United Group Rail Services Limited v Rail Corporation New South Wales} [2009] NSWCA 177 that in some circumstances, it may be difficult to conclude that a party has not undertaken an honest and genuine attempt to settle a dispute. In other cases however, such a conclusion might be “blindly obvious”.

\textsuperscript{26}
Conclusion

From the above discussion it is clear that what constitutes a good DR Clause will depend on the intention and interests of the parties and their expectations of the outcome they wish to achieve from a dispute resolution process given the potential disputes that may arise from the agreement in question. The Model Clause and ACDC Sample Clauses are examples of a good DR Clause, however, care should be taken when drafting a DR Clause to tailor the DR Clause to prevent, as far as possible, unforeseen consequences should a dispute arise. The bottom line is that a good DR Clause may require thorough advanced planning. In light of the discussion above, the following (non-exhaustive) checklist may be used as a guidance when drafting a good DR Clause:

- In terms of structure and procedure:
  - Does the clause operate in a way that makes completion of any stage a condition precedent to the commencement of court proceedings?
  - Where the clause seeks to select a third party (e.g. mediator), does the clause contain a clear mechanism for selecting the person?
  - Does each stage allow for a method to ascertain the point of failure of one step (e.g. time periods)?
  - Does the clause allow for the parties to determine when the entire dispute resolution procedure has come to an end so that the parties are free to resort to litigation (e.g. time periods)?
  - Does the clause anticipate, as far as possible, future problems that may arise?

- In terms of language:
  - Is the clause clear as to the rights and obligations of the parties?
  - Is there an "agreement to agree" at any stage of the clause?
  - If there is a requirement to act in "good faith" or something equivalent, does the clause contain some readily ascertainable standard?
  - Does the clause detail the process to be followed or incorporate relevant rules by reference?
  - Does the clause reflect the interests and intentions of the parties?
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**APPENDIX A - NADRAC Model ADR Clause**

**Dispute Resolution**

1. If a dispute arises from or in connection with this contract, a party to the contract must not commence court or arbitration proceedings relating to the dispute unless that party has participated in a mediation in accordance with paragraphs 2, 3 and 4 of this clause. This paragraph does not apply to an application for urgent interlocutory relief.

2. A party to this contract claiming that a dispute has arisen from the contract (“the Dispute”) must give a written notice specifying the nature of the Dispute (“the Notice”) to the other party or parties to the contract. The parties must then participate in mediation in accordance with this clause.

3. If the parties do not agree, within seven days of receipt of the Notice (or within a longer period agreed in writing by them) on:
   a. the procedures to be adopted in a mediation of the Dispute; and
   b. the timetable for all the steps in those procedures; and
   c. the identity and fees of the mediator; then,
   d. the [independent appointment body or person] will appoint a mediator accredited under the National Mediator Accreditation System, determine the mediator’s fees and the parties will pay those fees equally.

4. If the mediator is appointed by [independent appointment body or person] in accordance with paragraph 3, the parties must assist the mediator to mediate the Dispute in accordance with the Practice Standards articulated in the National Mediator Accreditation System.

5. If a party commences proceedings relating to the Dispute other than for urgent interlocutory relief, that party must consent to orders by the Court in which the proceedings are commenced that:
   a. the proceedings relating to the Dispute be referred to mediation by a mediator; and
   b. if the parties do not agree on a mediator within seven days of the order referred to in paragraph 5(a), the mediator appointed by the [independent appointment body or person] will be deemed to have been appointed by the Court.

6. If a party:
   a. refuses to participate in a mediation of the Dispute to which it earlier agreed; or
   b. refuses to comply with paragraph 5 of this clause, a notice having been served in accordance with paragraph 2; then,
      i. that party shall not take any steps to recover its costs whether by way of obtaining or enforcing any order for costs, and,
      ii. that party shall consent to an order of a Court of competent jurisdiction that it will specifically perform and carry into execution paragraph 3 and 4 of this clause.
APPENDIX B - ACDC Dispute Resolution Sample Clauses

1. Mediation

(a) If a dispute arises out of or relates to this agreement, or the breach, termination, validity or subject matter thereof, or as to any related claim in restitution or at law, in equity or pursuant to any statute, the parties to the agreement and the dispute expressly agree to endeavour to settle the dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC) before having recourse to arbitration or litigation.

(b) The mediation shall be conducted in accordance with the ACDC Guidelines for Commercial Mediation which are operating at the time the matter is referred to ACDC.

(c) The Guidelines set out the procedures to be adopted, the process of selection of the mediator and the costs involved.

(d) The terms of the Guidelines are hereby deemed incorporated into this agreement.

(e) This clause shall survive termination of this agreement.

2. Conciliation

(a) If a dispute arises out of or relates to this agreement, or the breach, termination, validity or subject matter thereof, or as to any related claim at law, in equity or pursuant to any statute, the parties to the agreement and the dispute expressly agree to endeavour to settle the dispute by conciliation administered by the Australian Commercial Disputes Centre (ACDC) before having recourse to arbitration or litigation.

(b) The conciliation shall be conducted in accordance with the ACDC Guidelines for Commercial Conciliation which are operating at the time the matter is referred to ACDC.

(c) The Guidelines set out the procedures to be adopted, the process of selection of the conciliator and the costs involved.

(d) The terms of the Guidelines are hereby deemed incorporated into this agreement.

(e) This clause shall survive termination of this agreement.

3. Expert Determination (Binding)

If a dispute arises out of or relates to this agreement, or the breach, termination, validity or subject matter thereof, or as to any related claim in restitution or at law, in equity or pursuant to any statute, the parties to the agreement and the dispute expressly agree to settle the dispute by expert determination administered by the Australian Commercial Disputes Centre (ACDC).

(a) The expert determination shall be conducted in [insert location of expert determination] in accordance with the ACDC Rules for Expert Determination operating at the time the dispute is referred to ACDC.

(b) The Rules set out the procedures to be adopted, the process of selection of the expert and the costs involved.

(c) The terms of the Rules are hereby deemed incorporated into this agreement.

(d) This clause shall survive termination of this agreement.

4. Arbitration (Australian – only Contract)

If a dispute arises out of, or in any way in connection with, or otherwise relates to this agreement, or the breach, termination, validity or subject matter thereof, or as to any related claim at law, in equity or pursuant to any statute, the parties agree to refer their dispute to Arbitration administered by the Australian Commercial Disputes Centre (ACDC).
(a) The Arbitration shall be conducted in [insert location of arbitration] in accordance with the ACDC Rules for Arbitration which are operating at the time the dispute is referred to ACDC and which terms are hereby deemed incorporated into this agreement.

(b) This clause shall survive termination of this agreement.

5. Mediation followed by Expert Determination

If a dispute arises out of or relates to this agreement, or the breach, termination, validity or subject matter thereof, or as to any related claim in restitution or at law, in equity or pursuant to any statute, the parties to the agreement and the dispute expressly agree to endeavour to settle the dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC) and in the event that the mediation is unsuccessful to submit the dispute to expert determination.

(a) The mediation shall be conducted in accordance with the ACDC Guidelines for Commercial Mediation which are operating at the time the dispute is referred to ACDC. The Guidelines set out the procedures to be adopted, the process of selection of the mediator and the costs involved. The terms of the Guidelines are hereby deemed incorporated into this agreement. The terms of the Guidelines are hereby deemed incorporated into this agreement.

(b) In the event that the dispute has not settled within twenty-eight (28) days after appointment of the mediator, or such other period as agreed to in writing between the parties, the dispute shall be submitted to expert determination in [insert location of the expert determination] administered by ACDC conducted in accordance with the ACDC Rules for Expert Determination, which are operating at the time the dispute is referred to ACDC. The Rules set out the procedures to be adopted, the process of selection of the expert and the costs involved. The terms of the Rules are hereby deemed incorporated into this agreement.

(c) The expert shall not be the same person as the mediator.

(d) This clause shall survive termination of this agreement.

6. Mediation followed by Arbitration (Australian –only Contract)

If a dispute arises out of or relates to this agreement, or the breach, termination, validity or subject matter thereof, or as to any related claim in restitution or at law, in equity or pursuant to any domestic or international statute or law, the parties to the agreement and the dispute expressly agree to endeavour in good faith to settle the dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC) and in the event that the mediation is unsuccessful to submit the dispute to arbitration.

(a) The mediation shall be conducted in accordance with the ACDC Guidelines for Commercial Mediation which are operating at the time the dispute is referred to ACDC. The Guidelines set out the procedures to be adopted, the process of selection of the mediator and the costs involved. The terms of the Guidelines are hereby deemed incorporated into the agreement.

(b) In the event that the dispute has not settled within twenty-eight (28) days after the appointment of the mediator, or such further period as agreed to in writing by the parties, the dispute shall be submitted to arbitration in [insert location of the arbitration] administered by ACDC in accordance with the ACDC Rules for Arbitration operating at the time the dispute is referred to arbitration which are hereby deemed incorporated into this agreement.

(c) The arbitrator shall not be the same person as the mediator.

(d) This clause shall survive termination of this agreement.