Avoid Expensive Disputes

Apply The ADR Pledge

Office of Government Commerce

Dispute Resolution Guidance

Manage The Problem

Negotiate a Settlement

Help Preserve Relations

Maintain VFM

OGC

Office of Government Commerce

Dispute Resolution Guidance

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Dispute Resolution Guidance

This supersedes CUP No.50 - Disputes Resolution

Contents

1: INTRODUCTION

1.1 Contractual disputes are time consuming, expensive and unpleasant. They can destroy client / supplier relationships painstakingly built up over a period of time and can impact the supply chain. They can add substantially to the cost of the contract, as well as nullifying some or all of its benefits or advantages. They can also impact on the achievement of value for money. It is in everyone's interest to work at avoiding disputes in the first place and this is mirrored in the Government's emphasis on improving relationships between the client and supplier through teamwork and partnering. Inevitably, however, they do occur and when they do the importance of a fast, efficient and cost effective dispute resolution procedure cannot be overstated.

1.2 This guidance gives an overview of the main options that are available for the resolution of disputes. It is not a self-help guide to dispute management. Good dispute management involves selecting and using the most appropriate resolution procedure available. When contemplating arbitration or ADR clauses/agreements or considering how to reach or enforce settlement it is important to obtain legal advice.

1.3 In general terms the Government's objective is to ensure that relationships between the client and supplier are non-adversarial, that contracts should contain provision for the resolution of disputes which are appropriate having regard to their nature and substance and that such provision should, so far as possible, ensure that relationships with suppliers are maintained. In particular it is Government policy that litigation should usually be treated as the dispute resolution method of last resort. On 23 March 2001 the Lord Chancellor published a formal pledge committing Government Departments and agencies to settle disputes by Alternative Dispute Resolution (ADR) techniques. The full text of the pledge is set out in the next paragraph.

2: THE ADR PLEDGE IN FULL

2.1 Government Departments and agencies have made these commitments on the resolution of disputes involving them:

- Alternative Dispute Resolution will be considered and used in *all* suitable cases wherever the other party accepts it.
- In future, Departments will provide appropriate clauses in their standard procurement contracts on the use of ADR techniques to settle their disputes. The precise method of settlement would be tailored to the details of individual cases.
- Central Government will produce procurement guidance on the different options available for ADR in Government disputes and how they might be best deployed in different circumstances. This will spread best practice and ensure consistency across Government.
- Departments will improve flexibility in reaching agreement on financial compensation, including using an independent assessment of a possible settlement figure.

2.2 There may be cases that are not suitable for settlement through ADR, for example cases involving intentional wrongdoing, abuse of power, public law, Human Rights and vexatious litigants. There will also be disputes where, for example, a legal precedent is needed to clarify the law, or where it would be contrary to the public interest to settle.

3: DISPUTE AVOIDANCE

3.1 Given the expense and disruption caused to any contract when a dispute arises and the damage to client/supplier relationships, the importance of following dispute avoidance techniques cannot be over-emphasised. However, notwithstanding the emphasis on the desire to avoid dispute, officers should not act in a way which compromises Departments' rights.

3.2 The first important step is to have clear wording in the contract that reflects the intentions of the parties. That wording should include provision for the appropriate dispute resolution techniques to be applied in the event of a dispute arising, with suitable arrangements for escalation. Bear in mind however that overly prescriptive provision may reduce the options available to parties if there is a dispute.

3.3 Once the contract is in place good contract management is key. Contract management techniques should include monitoring for the early detection of any problems. In any contract both parties should be required to give the earliest possible warning of any potential dispute and regular discussions between the client and supplier should include reviews of possible areas of conflict.

3.4 When a contract is initially established the importance of bearing in mind how the expiry of the contract is to be managed (especially if there is a need for on-going service delivery, not necessarily by the contractor) should be borne in mind and reflected in the contract.

4: DISPUTE MANAGEMENT

4.1 If a dispute arises, it is important to manage it actively and positively and at the right level in order to encourage early and effective settlement. Unnecessary delays and inefficiency can lead to rapid escalation of costs and further damage the client/supplier relationship.

5: DISPUTE RESOLUTION

5.1 Dispute resolution, in its widest sense, includes any process which can bring about the conclusion of a dispute. Dispute resolution techniques can be seen as a spectrum ranging from the most informal negotiations between the parties themselves, through increasing formality and more directive intervention from external sources, to a full court hearing with strict rules of procedure.

5.2 Alternative Dispute Resolution is a commonly used term to include a range of processes which involve the use of an external third party and which can be regarded as an alternative to litigation. There is some debate as to whether

arbitration is or is not a form of ADR. For the purposes of the Government pledge arbitration is a form of ADR. Negotiation and litigation are not forms of ADR. However, there is now some cross-fertilisation between litigation and ADR in that the Pre-action Protocols recently introduced into litigation, and intended to codify and streamline the pre-action conduct of the parties, emphasise the importance of their taking steps to achieve a settlement where possible before issuing proceedings, whether by ADR or other means. A further example of helpful cross-fertilisation between procedures is that it is now becoming fairly common for parties to arbitration proceedings to agree to mirror relevant provisions of the Pre-action Protocols in those proceedings.

5.3 Dispute resolution techniques include:

Negotiation - the most common form of dispute resolution where the parties themselves attempt to resolve the dispute.

ADR

Mediation - a private and structured form of negotiation assisted by a third party that is initially non-binding. If settlement is reached it can become a legally binding contract.

Conciliation - as mediation, but a conciliator can propose a solution.

Neutral evaluation - a private and non-binding technique whereby a third party, usually legally qualified, gives an opinion on the likely outcome at trial as a basis for settlement discussions.

Expert determination - a private process involving an independent expert with inquisitorial powers who gives a binding decision.

Adjudication - an expert is instructed to rule on a technical issue - primarily used in construction disputes as set out in the Housing Grants, Construction and Regeneration Act 1996 where awards are binding on the parties at least on an interim basis - i.e. until a further process is invoked.

Arbitration - a formal, private and binding process where the dispute is resolved by the decision of a nominated third party, the arbitrator or arbitrators.

Litigation - the formal process whereby claims are taken through the civil courts and conducted in public. The judgments are binding on parties subject to rights of appeal.

5.4 Below is some more information about each method and an indication of its advantages.

6: NEGOTIATION

6.1 Negotiation is by far the most common form of dispute resolution. The objective of sensible dispute management should be to negotiate a settlement as soon as possible. Negotiation can be, and usually is, the most efficient form of dispute resolution in terms of management time, costs and preservation of relationships. It should be seen as the preferred route in most disputes.

Its advantages are:

- speed
- cost saving
- confidentiality
- preservation of relationships
- range of possible solutions
- control of process and outcome

6.2 If you are unable to achieve a settlement through negotiation, you will need to consider what other method or methods of dispute resolution would be suitable. But remember it will still be possible or may be necessary to continue negotiating as part of or alongside other forms of dispute resolution.

7. MEDIATION (INCLUDING CONCILIATION)

7.1 Mediation is negotiation with the assistance of a neutral third party. It is often referred to as "structured negotiation". It has all the advantages of conventional negotiation as set out above but the involvement of the neutral can make the negotiation more effective. It should be seen as the preferred dispute resolution route in most disputes when conventional negotiation has failed or is making slow progress. Mediation is now being used extensively for commercial cases (including cases involving government departments), frequently for multi-party and high value disputes. Over 75% of commercial mediations result in a settlement either at the time of the mediation or within a short time thereafter.

7.2 Use of mediation has increased significantly since the introduction of the Civil Procedure Rules ("CPR") in 1999. The CPR state that "Active case management includes …encouraging the parties to use an ADR procedure if the court considers that appropriate". CPR Part 26 includes specific provisions about using ADR. A number of courts, including the Commercial Court, frequently make ADR orders, even in the face of objections from one or more of the parties.

7.3 ***Format*** - mediation is essentially a flexible process with no fixed procedures, but the format tends to be along the following lines. At an opening joint meeting each party briefly sets out its position. This is followed by a series of private confidential meetings between the mediator and each of the teams present at the mediation. This may lead to joint meetings between some or all members of each of the teams. If a settlement is reached, its terms should be written down and signed.

7.4 ***Timing*** - most commercial mediations last one day, with very few running for more than three days. A considerable number take place within a month of being initiated and this period can be shortened to days where necessary.

7.5 ***The mediator*** - the mediator's role is to facilitate the negotiations. The mediator will not express views on any party's position, although he/she may question the parties on their positions to ensure they are being as objective as possible about the strengths and weaknesses of their own and the other party(ies) legal and commercial stances. The mediator will try to get the parties to focus on looking to the future and their commercial needs rather than analysing past events and trying to establish their legal rights. It is essential that the mediator has mediation training; it is not essential that the mediator has experience, or even knowledge, of the subject matter of the dispute. The most

obvious method of identifying an appropriate mediator is to use the resources of an ADR organisation (see below).

7.6 ***Participants*** - the team attending the mediation should be kept as small as possible but must include somebody ("the lead negotiator"), preferably a senior executive or official within the organisation with full authority to settle on the day without reverting to others not involved in the mediation. The lead negotiator should ideally not have been closely involved in the events relating to the dispute.

7.7 Where it really is not possible for the lead negotiator to have full authority to settle, the person attending must be of sufficient seniority that their recommendation on settlement is likely to be followed by whatever person or body makes the final decision. The fact that a binding settlement agreement cannot be reached on the day of the mediation and the reason for this should be made clear to the other parties in good time before the mediation.

7.8 Most mediation teams include a lawyer but a large legal representation on the team is rarely useful or necessary.

7.9 ***Preparation*** - each party usually prepares a brief summary of its position (not just its legal case) for the mediator and the other party, with the key supporting documents. These are exchanged between the parties, and sent to the mediator, at least a week before the mediation. The parties should enter into a mediation agreement once the details of the mediation (eg place, time, name of mediator) have been agreed.

7.10 ***Approach*** - most mediations go through a stage where it seems unlikely that there will be any useful outcome yet the majority settle, so optimism and determination to solve the problem is essential.

7.11 ***ADR organisations*** - in many cases it is sensible to involve a neutral ADR organisation to assist in setting up a mediation and helping the parties to select a mediator. The advantages of their neutrality and of utilising their experience and advice, and the saving of the parties' own time in dealing with the administration, will usually outweigh the cost. The names and contact details of some leading commercial ADR bodies are set out in the Annex A.

8: NEUTRAL EVALUATION

8.1 The aim of a neutral evaluation is to test the strength of the legal points in the case. It can be particularly useful where the dispute turns on a point of law. Each side submits an outline of their case with an indication of what evidence they would be able to produce at trial. A third party neutral, usually a retired judge or a lawyer, gives a confidential opinion as to what the outcome of a trial would be. This procedure can be carried out entirely on paper, saving the parties the time and expense of an oral hearing. The opinion can then be used as a basis for settlement or for further negotiation.

9: EXPERT DETERMINATION

9.1 In expert determination, the parties agree to be bound by the decision of an expert in the field of dispute. This process can be useful where the dispute is about a technical matter. The expert will commonly be given powers to investigate the background of the dispute himself, rather than just relying on the evidence the parties choose to present.

10: ADJUDICATION

10.1 The term "adjudication" is used almost exclusively for dispute resolution under Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCR) and before the passing of that Act adjudication was not a recognised form of ADR. Under the HGCR Act construction contracts must include a provision for adjudication, with the adjudicator giving a decision within 28 days of referral. The adjudicator's decision is binding until a final determination reached by agreement, arbitration or litigation, or the parties may take the adjudicator's decision as final. For these reasons adjudication is different in kind from other forms of ADR, which are optional and less tied to a single subject area. Like litigation and arbitration, adjudication is an adversarial process.

11: ARBITRATION

11.1 Arbitration is governed by statute, principally the Arbitration Act 1996. It is a process for resolving disputes in which both sides agree to be bound by the decision of a third party, the arbitrator. If court proceedings are begun by one party they will normally be stayed on the application of the other party relying on the arbitration clause. The agreement to arbitrate should be in writing. It can take the form of a clause within the original contract or can be made after a dispute has arisen. It is possible, as long as all parties agree, to amend an arbitration agreement at any stage so that it serves the needs of the parties better. The Arbitration Act gives the widest discretion to the parties to decide between themselves how their dispute is to be resolved but provides a fallback position if agreement cannot be reached. Like litigation and adjudication arbitration is an adversarial process. The grounds for appeal are limited.

Advantages:

- some control of process - parties/arbitrator can tailor procedures
- possible cost saving over litigation
- confidentiality
- parties can choose an arbitrator who is an expert in the relevant field
- resolution is guaranteed
- decisions are legally binding and enforceable

12: LITIGATION

12.1 If the use of a consensual process is not provided for in the contract and cannot otherwise be agreed, the only alternative is litigation. Litigation will involve

preparation for trial before a judge, and may well be a lengthy, drawn out and costly process. Parties often agree a settlement before the case comes to court but in some cases not until months or even years of effort have been spent on expensive preparatory work.

Advantages:

- it is possible to bring an unwilling party into the procedure
- the solution will be enforceable without further agreement

Disadvantages:

- potentially lengthy and costly
- adversarial process likely to damage business relationships
- the outcome is in the hands of a third party, the judge

12.2 Remember the court can now refer parties to mediation or another form of alternative dispute resolution, if appropriate.

13: FACTORS GOVERNING CHOICE OF PROCEDURE

13.1 Sections 6 to 12 of this guidance have described the dispute resolution procedures available including some of their advantages and disadvantages. The purpose of this section is to summarise how in practice the most appropriate procedure or procedures should be selected.

13.2 Dispute resolution procedures are selected either when the contract between the parties is negotiated or when a dispute arises. It should be noted that the contract negotiation stage is of the greatest importance since, if the parties agree in the contract to adopt certain procedures in the event of a dispute arising, one party cannot insist on the use of other procedures, or even other methods of implementing agreed procedures, without the consent of the second party.

13.3 In the fairly recent past most contracts, especially those between parties both based in England and Wales, contained very simple dispute resolution clauses providing for disputes to be settled in the courts or, sometimes, by arbitration. There was no express reference to negotiation and alternative dispute resolution had scarcely been heard of. In practice, of course, the parties frequently did try to negotiate directly before embarking upon the costly process of litigation.

13.4 The current recommended practice for more complex contracts at least, exemplified by the drafting of the dispute resolution machinery of the OGC Model Agreements (see paragraph 14 below), is to provide a full framework for the escalation of disputes beginning with a reference to the project board, followed by negotiation between named representatives of the parties and thereafter, if necessary, recourse to a non-binding ADR procedure (primarily mediation) and, in the event of failure to agree a settlement, ultimate resort to litigation in the courts or, if preferred, arbitration. Arbitration is often the procedure of last resort where confidentiality is required and is regularly adopted in, for example, Ministry of Defence procurement contracts. The other main attraction of arbitration is the possibility of choosing an arbitrator or arbitrators who are experts in the particular field. Expert determination is a less formal alternative procedure to arbitration used primarily for making awards in limited technical areas.

13.5 Although the dispute resolution machinery of the OGC Model Agreements represents a good working model suitable for many applications and not just for IT contracts, the approach adopted may not be appropriate in every detail for every government contract. For example, mandatory use of mediation where negotiation fails may not always be appropriate in contracts for the procurement of smaller value goods and services where it is perhaps more likely that the contractor may elect to use the process in bad faith merely to delay settlement. In such cases it may be preferable to include a provision for mediation which is triggered only where both parties desire it. Departments must exercise discretion in such matters especially since the Government's pledge requires the use of ADR techniques only in all suitable cases.

13.6 The flow chart at Annex C illustrates diagrammatically the principal stages of dispute resolution and the procedures available at the second (largely non-binding) and third (binding) stages. The table at Annex D provides a simple overview of the main features of the various procedures to facilitate comparison. The column headed "cost" gives an indication of the expense of the procedures and shows that the second stage procedures in particular are relatively inexpensive. Litigation, on the other hand, is usually the most expensive option. The Government places great importance on achieving value for money in dispute resolution and procedures should be selected with this in mind.

14: ADR CONTRACT CLAUSES

14.1 Including ADR dispute resolution clauses in contracts allows the settlement process to begin at an early stage and obviates the frequent problem of persuading the other party to the dispute to engage in an ADR process. Model clauses are available in Annex B and the ADR pledge (see above) requires that an appropriate clause be incorporated into all contracts.

15: LAW

15.1 This guidance is drafted on the basis that the law of England and Wales applies and you should consult your legal advisers if the contract is made under the law of Scotland or Northern Ireland. Use of this guidance is not mandatory, but a statement of good professional practice. Departments should consider incorporating it into their purchasing and supply manual.

Annex A:

Providers of Dispute Resolution Services

The organisations listed below can provide further information about the services they offer, including their charges. This list is not exhaustive. Many professional bodies provide dispute resolution services in their field of expertise. There may be local ADR services in the area.
Inclusion in this list does not constitute an endorsement by the Office of Government Commerce

	Services Offered	Contact Details
Academy of Experts Faculty of Mediation and ADR	Mediation Other ADR	Faculty of Mediation & ADR 2 South Square Gray's Inn London WC1R 5HT Tel: 020 7637 0333 Fax: 020 7637 1893 e-mail: admin@academy-experts.org Website: www.academy-experts.org
ACI (Arbitration a Commercial Initiative for dispute resolution)	Arbitration Mediation Early Neutral Evaluation Mini-trials	3 Verulam Buildings, Gray's Inn, London WC1R 5NT e-mail: admin@aci-adr.com Website: www.aci-adr.com
ADR Group	Mediation Early neutral - evaluation	Grove House Grove Road Redland, Bristol, BS6 6UN DX: 99884 Redland Bristol Tel: 0117 946 7180 Fax: 0117 946 7181 e-mail info@adrgroup.co.uk Website: www.adrgroup.co.uk
Association of Consultant Architects (ACA)	Adjudication Mediation	98 Hayes Road Bromley Kent BR2 9AB Tel: 020 8325 1402 Fax: 020 8466 9079 e-mail: office@acarchitects.co.uk Website: www.acarchitects.co.uk
Association of Mediation Solicitors	Mediation	Greenhouse Stirton Solicitors and Mediators 1 - 2 Faulkners' Alley Cowcross Street London EC1M 6DD Tel: 0171 490 3456 Fax: 0171 490 3242 e-mail: info@mediation-adr.co.uk
Association of Northern Mediators	Mediation	Protection House 16 – 17 East Parade Leeds LS1 2BR Tel: 0113 399 3435 Fax: 0113 243 1100 e-mail: postmaster@northernmediators.demon.co.uk Website: www.northernmediators.co.uk

	Services Offered	Contact Details
CEDR Solve (Centre for Effective Dispute Resolution)	Mediation Early Neutral Evaluation Construction Adjudication Expert Determination	Exchange Tower 1 Harbour Exchange Square London E14 9GB Tel: 0207 536 6060 Fax: 0207 536 6061 e-mail: info@cedr-solve.com Website: www.cedr-solve.com
Centre for Business Arbitration	Arbitration Mediation Business - adjudication	11 Old Square Lincoln's Inn London WC2A 3TS e-mail: arbitration@lincolns-inn.com Website: www.arbitration.lincolns-inn.com
Chartered Institute of Arbitrators	Arbitration Mediation Adjudication	International Arbitration & Mediation Centre 12 Bloomsbury Square London WC1A 2LP Tel: 020 7421 7444 Fax: 020 7404 4023 e-mail: ghunt@arbitrators.org Website: www.arbitrators.org
Chartered Institute of Building	Adjudication Arbitration Mediation	Englemere King's Ride Ascot Berkshire SL5 7TB Tel: 01344 630745 Fax: 01344 630713 e-mail: cking@ciob.org.uk Website: www.ciob.org.uk
City Disputes Panel Ltd	Mediation Conciliation Arbitration Expert - determination Review panels	International Dispute Resolution Centre 8 Breams Building Chancery Lane London EC4A 1HP Tel: 0207 440 7373 Fax: 0207 440 7374 e-mail: info@disputespanel.com Website: www.disputespanel.com
Consensus Mediation	Mediation e-mediation (on-line mediation)	York House 89 York Street Norwich NR2 2AP Tel: 01603 665 845 Fax: 01603 633996 e-mail mediate@consensusmediation.com Website: www.consensusmediation.com
Dispute Mediation	Mediation	3 Rowan House 9/31 Victoria Road Park Royal London NW10 6DP Tel: 020 8838 0022 Fax: 020 8965 0229 e-mail: enquiries@disputemediation.co.uk Website: www.disputemediation.co.uk

	Services Offered	Contact Details
Disputes Resolved	Mediation Adjudication Conciliation - management	Fitzroy House 10 High Street Lewes, E Sussex BN7 2AD E-mail: disputes.resolved@freenet.co.uk Website: www.disputes-resolved.co.uk
DRB, Dispute Resolution by Barristers		104 New Walk Leicester LE1 7EA
Global Mediation	Mediation Advice and supply of model contract clauses	Global Mediation 107-111 Fleet Street London EC4A 2AB Tel: 020 7936 9090 Fax: 020 7936 9131 e-mail: info@globalmediation.co.uk . Website: www.globalmediation.co.uk
In Place of Strife	Mediation	212 Piccadilly London W1V 9LD Tel: 020 7917 9449 Fax: 020 7919 9450 e-mail: stops@mediate.co.uk Website: www.mediate.co.uk
Institution of Civil Engineers	Conciliation Dispute Review Boards	Dispute Administration Service The Institution of Civil Engineers One Great George Street London SW1P 3AA Tel: 020 7222 7722 Fax: 020 7222 1403 e-mail: Drick.Vernon@ice.org.uk
InterMediation	Mediation Early Neutral Evaluation Adjudication Expert Determination Project Neutral Conflict management & prevention	The Claims Mediation Centre Gallery 4 The Lloyd's Building 12 Leadenhall Street London EC3V 1LP Tel: 0207 816 3606 Fax: 0207 816 3607 e-mail: support@intermediation.com.uk Website: www.intermediation.com
Northern Dispute Resolutions	Mediation Conciliation	Northern Dispute Resolution 8th Floor Pearl Assurance House 7 New Bridge Street Newcastle Upon Tyne NE1 8AQ e-mail: colin.fitzpatrick@forrestals.co.uk www.ndrnorthern-mediation

	Services Offered	Contact Details
Panel of Independent Mediators	Mediation	The Panel Administrator Ocean House 24 Great Tower Street London EC3R 5AQ Tel: 020 7917 1745 Fax: 020 7917 1746
Royal Institute of British Architects	Adjudication Arbitration Expert - determination Mediation	ADR Officer 66 Portland Place London W1B 1AD Tel: 020 7307 3649 Fax: 020 7307 3793 E-mail: adam.williamson@inst.riba.org Website: www.architecture.com
The Royal Institution of Chartered Surveyors	Mediation Arbitration Expert - determination Adjudication	RICS Dispute Resolution Service Surveyor Court Westwood Way Coventry CV4 8JE Tel; 0207 334 3806 Fax: 0207 334 3802 e-mail: drs@rics.org.uk Website: www.rics.org.uk

ANNEX B: EXTRACT FROM THE OGC MODEL AGREEMENTS

These provisions are only intended to be model provisions and will need to be amended according to the particular circumstances of the procurement and agreement in question. Appropriate legal advice should be sought before applying the information contained in these provisions to specific issues or problems.

1: Dispute Resolution Procedure

[DRAFTING NOTE: Further alternative dispute resolution Clauses are available in the additional Clauses at the end of this document, see Optional Clauses A

1.1 **General**

1.1.1 All disputes between the parties arising out of or relating to this Agreement shall be referred, by either party, to the project board for resolution.

1.1.2 If any dispute cannot be resolved by the project board within a maximum of 14 days after it has been referred under Clause 1.1.1, that dispute shall be referred to the [ ] of the AUTHORITY and the [ ] of the CONTRACTOR for resolution.

1.1.3 Work and activity to be carried out under this Agreement shall not cease or be delayed by this dispute resolution procedure.

1.2 **Mediation**

1.2.1 If any dispute is not resolved within [ ] days of referral to the [ ] of the AUTHORITY and the [ ] of the CONTRACTOR under Clause 1.1.2, then the parties will attempt to settle it by mediation in accordance with the [*Drafting Note: Specify relevant mediation entity*] Model Mediation Procedure]. To initiate the mediation a party must give notice in writing (the "ADR notice") to the other party requesting a mediation in accordance with this clause. The mediation is to take place not later than [28] days after the ADR notice. If there is any issue on the conduct of the mediation upon which the parties cannot agree within [14] days of the ADR notice, then [*Drafting Note: Specify relevant mediation entity*] will, at the request of any party, decide the issue for the parties having consulted with them.

1.2.2 If the dispute is not resolved within [ ] days of the initiation of the mediation, then the parties may litigate the matter in accordance with Clause 2.

[In the light of the Governments' pledge on the use of Alternative Dispute Resolution government parties should give very active consideration to avoiding Litigation as a third stage dispute resolution procedure by opting for Arbitration or Expert Determination as set out in the optional clauses that follow. The same applies to the choice of third stage procedure following Neutral Evaluation or Mediation as contained in those optional clauses.]

2: Law and Jurisdiction

2.1 This Agreement shall be considered as a contract made in England and according to English Law

2.2 Subject to Clause 1, this Agreement shall be subject to the exclusive jurisdiction of the English Courts to which both parties hereby submit.

2.3 This Agreement is binding on the AUTHORITY and its successors and assignees and the CONTRACTOR and the CONTRACTOR's successors and permitted assignees.

OPTIONAL CLAUSES

The following are alternatives and additional clauses which may be added to Clause 1 (Dispute Resolution Procedure). [The parties may wish to insert a Clause either allowing expert determination or arbitration as a means of dispute resolution.] These Clauses should be incorporated into the dispute resolution clause if used. Please consider carefully which clauses are required and consult the main text of this Guidance and any other appropriate guidance).

A: Alternative Dispute Resolution Clauses

A.1 Neutral Evaluation

A1.1 If any dispute is not resolved within [ ] days of referral to the [ ] of the AUTHORITY and the [ ] of the CONTRACTOR under Clause 1.1.2then the parties will attempt to settle it by negotiation [mediation?] following neutral evaluation in accordance with the [[*Drafting Note: Specify relevant mediation entity*] Early Neutral Evaluation Agreement]. To initiate neutral evaluation a party must give notice in writing (the "ENE notice") to the other party requesting a neutral evaluation in accordance with this clause. The parties shall within [7] days of the ENE notice enter into an Early Neutral Evaluation Agreement on the then current [*Drafting Note: Specify relevant mediation entity*] form. The Recommendation is to be given not later than [28] days after the ENE notice. If there is any issue on the conduct of the neutral evaluation upon which the parties cannot agree, then [*Drafting Note: Specify relevant mediation entity*] will, at the request of any party, decide the issue for the parties having consulted with them.

A1.2 If the parties fail to enter into an Early Neutral Evaluation Agreement within [7] days of the ENE notice or if the dispute is not resolved within [56] days of the service of the ENE notice (or such other time as is agreed between the parties), either party may commence litigation in accordance with Clause 2.

A2 Conciliation

A2.1 If any dispute is not resolved within [ ] days of referral to the [ ] of the AUTHORITY and the [ ] of the CONTRACTOR under Clause 1.1.2, then the parties will attempt to settle it by conciliation in accordance with the [*Drafting Note: Specify relevant mediation entity* Model Mediation Procedure amended as set out in Clause A2.2.]

A2.2 The [*Drafting Note: Specify relevant mediation entity* Model Mediation Procedure] shall be amended to permit the mediator to produce non-binding recommendations on terms of settlement at any stage of the process and regardless of whether the parties have requested or agreed to receive such a recommendation

A2.3 To initiate the conciliation a party must give notice in writing (the "ADR notice") to the other party requesting a conciliation in accordance with this clause. The conciliation is to take place not later than [28] days after the ADR notice. If there is any issue on the conduct of the mediation upon which the parties cannot agree within [14] days of the ADR notice, then [*Drafting Note: Specify relevant mediation entity*] will, at the request of any party, decide the issue for the parties having consulted with them.

A2.4 If the dispute is not resolved within [ ] days of the initiation of the conciliation, then the parties may litigate the matter in accordance with Clause 2

A3 Expert Determination

A3.1 If the dispute cannot be resolved by the parties' representatives nominated under Clause 1.1.2 within a maximum of 14 days after it has been referred under Clause 1.1.2 the dispute:

A3.1.1 may, by agreement between the parties be referred for final determination to an expert (the "Expert") who shall be deemed to act as expert and not as arbitrator; and

A3.1.2 in all other aspects it shall be determined pursuant to Clause 2.

A3.2 The Expert shall be selected by mutual agreement or, failing agreement, within 14 days after a request by one party to the other, shall be chosen at the request of either party by the President for the time being of the *[Drafting Note: Specify relevant industry body e.g. for technical disputes Intellect UK or British Computer Society may be approached to see whether it will provide this services]* who shall be requested to choose a suitably qualified and experienced Expert for the dispute in question.

A3.3 Fourteen (14) days after the Expert has accepted the appointment the parties shall submit a written report on the dispute to the Expert and to each other and seven (7) days thereafter shall submit any written replies they wish to make to the Expert and to each other.

A3.4 Both parties will then afford the Expert all necessary assistance which the Expert requires to consider the dispute including but not limited to full access to the System and any documentation or correspondence relating to the System.

A3.5 The Expert shall be instructed to deliver his determination to the parties within 14 days after the submission of the written reports pursuant to Clause A3.3.

A3.6 Decisions of the Expert shall be final and binding and not subject to appeal.

A3.7 The Expert shall have the same powers to require any party to produce any documents or information to him and the other party as an arbitrator and each party shall in any event supply to him such information which it has and is material to the matter to be resolved and which it could be required to produce on discovery.

A3.8 The fees of the Expert shall be borne by the parties in the proportion as shall be determined by the Expert having regard (amongst other things) to the conduct of the parties.

A4 Arbitration

[Drafting note: Clause A4.1 and A4.2 are alternative Arbitration Clauses. Clause A4.1 is an ad hoc arbitration clause. Clause A4.2 is a specimen LCIA clause]

A4.1 Any dispute or difference arising out of or in connection with this contract shall be finally settled under the Arbitration Rules of [the United Nations Commission on International Trade Law] [in force at the date of this Agreement].
It is agreed that:

A4.1.1 The Tribunal shall consist of [three] arbitrators [include any particular qualifications];

A4.1.2 The Appointing Authority for the purposes of those Rules shall be [the London Court of International Arbitration];

A4.1.3 The place of Arbitration shall be [London];

A4.1.4 The language of the arbitration shall be [English];

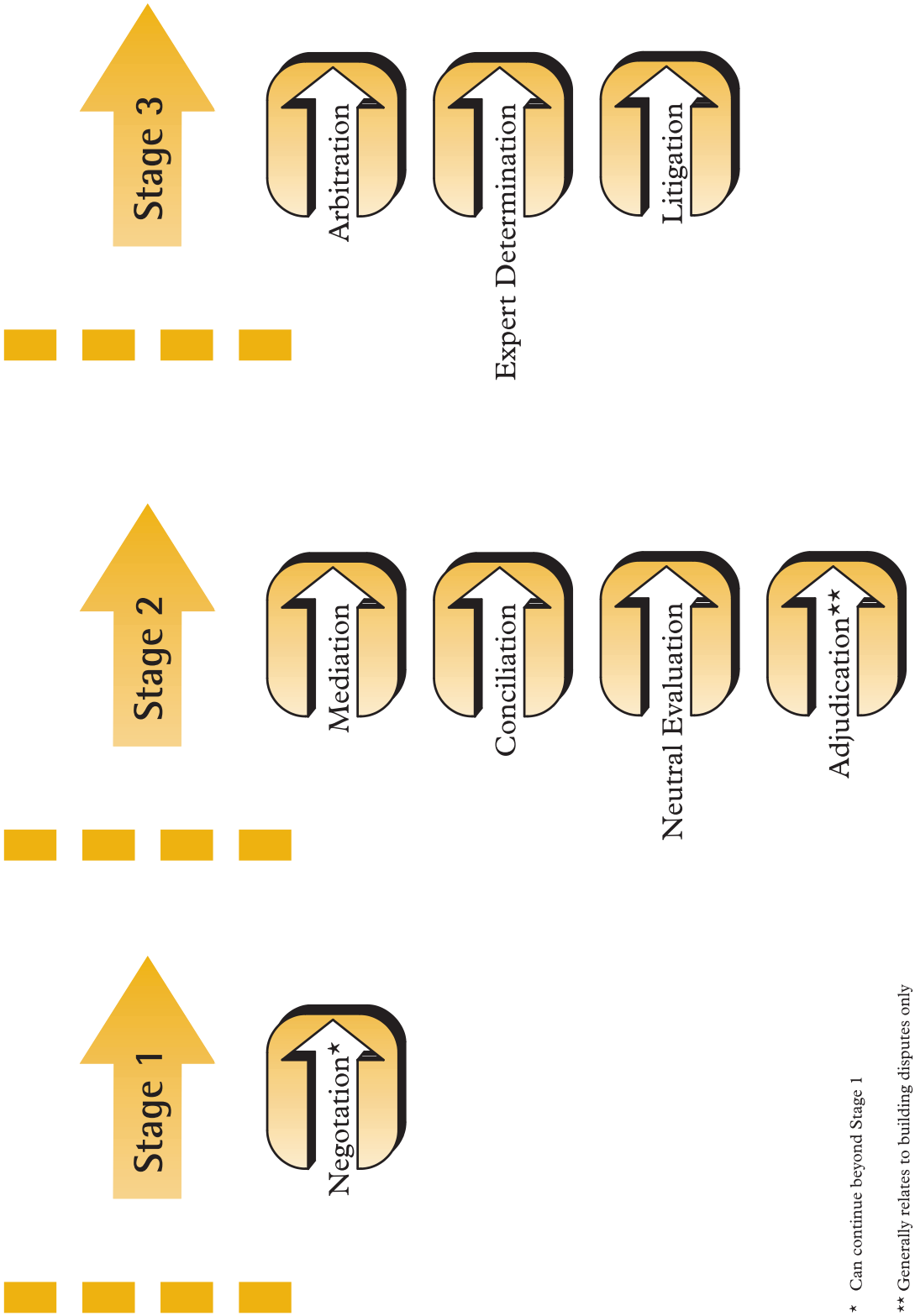
A4.1.5 The chairman of the tribunal, after consulting the other arbitrators, may make procedural rulings alone.

A4.2 Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference to this Clause. *[Drafting Note: Add in any of numbered points from the ad hoc clause in Clause A4.1 as required.]*

[Drafting note: This provision should be used in projects that are of a high technical complexity. It will require review by the parties to select the most appropriate procedure(s) for the project. Note that a number of the procedures could be selected for any project.

[[Drafting Note: If the Arbitration Clause is used, the Clause in the Law and Jurisdiction Clause which deals with jurisdiction should be deleted and the remaining subclause renumbered. An arbitration clause should not be combined with a litigation clause as the two are mutually exclusive. The only occasion where the two clauses could be combined is where the Arbitration Clause is restricted to apply to certain specific issues so that the Litigation Clause catches the balance of the issues.]]

Annex C: PRINCIPAL STAGES OF DISPUTE RESOLUTION



* Can continue beyond Stage 1

** Generally relates to building disputes only

METHOD	Common Law / Statutory Basis	Frequency of use	Speed	Cost	Confidentiality	Binding	Adversarial	Special Features
Stage 1								
NEGOTIATION	No	Very Common	Varies	Low	Yes	No	No	Can continue throughout the dispute
Stage 2								
MEDIATION	No	Common	Fast	Low	Yes	Not unless agreed so	No	
CONCILIATION	No	Fairly Common	Fast	Low	Yes	Not unless agreed so	No	Often bracketed with Mediation
NEUTRAL EVALUATION	No	Infrequent	Fast	Low	Yes	No	No	Evaluator not usually employed as Judge or Arbitrator if case proceeds to Litigation or Arbitration
ADJUDICATION	Yes	Common	Fast	Low	Yes	Yes unless dispute proceeds to Litigation or Arbitration	Yes	Generally relates to building disputes only
Stage 3								
ARBITRATION	Yes	Common	Fairly Slow	Fairly High	Yes	Yes	Yes	
EXPERT DETERMINATION	No	Fairly Common	Quite Fast	Moderate	Yes	Yes	Yes	Expert Determination normally follows directly after negotiation without an intermediate stage
LITIGATION	Yes	Common	Slow	High	No	Yes	Yes	

Further information

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