

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.

End Notes

Stay of Proceedings

Since 1992 in NSW the Courts have been willing to stay proceedings on foot until the parties have complied with a mediation clause

Hooper Bailie Associated Limited v Natcon Group Pty Limited & Anor (1992) 28 NSWLR 194

Conduct at Mediation

Obstructive or unco-operative behaviour at mediation may be considered by the Court when deciding an award of costs for an unnecessary extension of the trial of proceedings.

Capolingua v Phylum Pty Limited (1991) 5 WAR 137.

Compulsory Mediation

Factors relevant to discretion not to order mediation

Harrison v Schipp [2002] NSWCA 27

Estate of Olga Bartle, Bryson J, unreported 5 April 2001

Judicial perceived benefits of mediation

Durmatt v Railtrack UK

Idoport v National Australia Bank Limited [2001] NSWSC 427

Stay refused as Court sceptical of benefit from this mediation
Chinadotcom Corp.v Marrow [2001] NSWCA 82

Imbalance of bargaining power
ACCC v Lux P/L [2001] FCA 600

Court may order without application
Estate of Olga Bartle, Bryson J, unreported 5 April 2001

Good faith obligations recognised

Criteria for good faith

AitonAustralia P/L v Transfield (1999) 153 FLR 236

WA v Njamal People (1996) 134 FLR 211

see also *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709

Exceptions to Confidentiality

see *AWA Limited v George Richard Daniels t/a Deloitte Haskins & Sells & Ors*, Rogers, J. SCNSW, unreported, 24 February 1992

see 'Cases for Mediation', G Raftersath & S Thaler editors, LBC Information Services, 1999, article by Lynne Harman p. 29

see 'Cases for Mediation', G Raftersath & S Thaler editors, LBC Information Services, 1999, article by John Pollard p. 79

Enforcement of Settlement Agreements reached

see 'Cases for Mediation', G Raftersath & S Thaler editors, LBC Information Services, 1999, article by Sylvia Emmett at p 10

Clauses and Guidelines to be certain

see *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd (supra)* and *The Heart Research Institute Limited and Anor v Psiron Limited* [2002] NSWSC 646.

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.

End Notes

Stay of Proceedings

Since 1992 in NSW the Courts have been willing to stay proceedings on foot until the parties have complied with a dispute resolution clause

Hooper Bailie Associated Limited v Natcon Group Pty Limited & Anor (1992) 28 NSWLR 194

Conduct at Conciliation

Obstructive or unco-operative behaviour may be considered by the Court when deciding an award of costs for an unnecessary extension of the trial of proceedings.

Capolingua v Phylum Pty Limited (1991) 5 WAR 137.

Compulsory Mediation

Factors relevant to discretion not to order alternative dispute resolution

Harrison v Schipp [2002] NSWCA 27

Estate of Olga Bartle, Bryson J, unreported 5 April 2001

Judicial perceived benefits of alternative dispute resolution *Durmatt v Railtrack UK*

Idoport v National Bank [2001] NSWSC 427

Stay refused as Court sceptical of benefit of alternative dispute resolution

Marrow v Chinadotcom [2001] NSWCA 82

Imbalance of bargaining power

ACCC v Lux [2001] FCA 600

Court may order without application

Estate of Olga Bartle, Bryson J, unreported 5 April 2001

Good faith obligations recognised

Criteria for good faith

Aiton Australia P/L v Transfield (1999) 153 FLR 236

WA v Njamal People r (1996) 134 FLR 211

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Exceptions to Confidentiality

see *AWA Limited v George Richard Daniels t/a Deloitte Haskins & Sells & Ors, Rogers, J. SCNSW, unreported, 24 February 1992*

see 'Cases for Mediation', G Raftersath & S Thaler editors, LBC Information Services, 1999, article by Lynne Harman p. 29

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Clauses and Guidelines to be certain

see *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (supra) and *The Heart Research Institute Limited and Anor v Psiron Limited* [2002] NSWSC 646.

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.

End Notes:

Final and Binding Determination

Mistakes by the expert which are "not in accordance with the contract".
Legal & General Life of Australia v Hudson (1985) 1 NSWLR 314, 335
Fletcher v M P N Group [1977] NSWSC unreported

Certainty

An expert determination clause must be sufficiently certain.
Heart Research Institute v Psiron [2002] NSW SC 646
Aiton Australia P/L v Transfield [1999] NSWSC 996

Stay of Proceedings

CB Systems v Granshaw [2002] VSC 233

General References

see also

Bradken v ANI [2002] NSWSC 463
Karenlee Nominees v Gollin & Co. (1983) VR 657
R & A Dalley v GIEX 1991 ANZ ConvR 132
Savcor v State of NSW (2001) 52 NSWLR 587
Boulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd (1997) 14 BCL 277
Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194
Badgin Nominees Pty Ltd v Oneida Ltd & Anor [1998] VSC 188
Triarno v Triden Contractors unreported NSWSC 22 July 1992.

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.

End Notes:

Statutory Regulation

Many aspects of arbitration are regulated by *Commercial Arbitration Acts* which have been enacted in jurisdictions throughout Australia.

Arbitration Generally

For a discussion of the scope of arbitration agreements generally see Jacobs, M [Commercial Arbitration](#), Chapter 7.

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