



A D R I N M A J O R P R O J E C T C O N T R A C T S

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Important: The information in this paper is of a general nature and is not intended to address the circumstances of any particular individual or entity.

ADR processes are alternatives to Judicial determination of disputes. They are designed to provide parties with flexible options, process satisfaction and resolution of disputes mindful of commercial imperatives.

To meet the objectives of ADR, contracts need to clearly and carefully define the framework for use of ADR. This paper examines issues to consider in formulating an ADR clause.

1 What is ADR?

ADR refers to a process other than judicial determination in which an ADR practitioner assists those in dispute to resolve the dispute between them.

ADR is commonly used as an abbreviation for alternative dispute resolution but can also be used to mean assisted or appropriate resolution¹.

2 Do I need an ADR clause?

An ADR clause is often regarded as a "boilerplate provision"; that is one that is placed in a contract without much thought, customisation, or discussion.

¹ NADRAC ADR brochure see www.nadrac.gov.au

It is a mistake to assume that an ADR clause is always appropriate. Where it is used, it is important to think of the commercial objective it may serve and craft it appropriately. An ADR resolution clause that is inserted without careful drafting can lead to delay through protracted legal wrangling. This may be counter-productive especially where what is required commercially is a quick resolution.

There are situations where preconditions to litigation are inadvisable such as in multi-jurisdictional contracts where the clause may not be enforceable in the relevant jurisdiction, or finding dates that suits all parties is likely to cause additional delays. This is especially pertinent as ADR can, if appropriate, be utilised in tandem with litigation once the Court timetable is running.

There are other situations where it is useful. ADR interventions such as mediation and negotiation (see definitions below) can be relationship savers: they are useful and valuable tools in disputes where the parties have an ongoing relationship and in industries such as telecommunications, electricity or other markets where the same players do multiple deals.

Tip: Do not just place an ADR clause in the contract. Consider whether it is worthwhile or whether the court system is preferable.

3 Things to think about in formulation of a clause.

The Courts will not enforce an agreement to agree. They will enforce appropriately drafted ADR clauses. For an ADR clause to be valid and enforceable, parties to the contract should ensure:

- ◆ The clause contains clear machinery for the dispute to be determined. This should not be dependent on the further agreement of the parties. Specifics of this for each process are outlined below and draft clauses are attached as examples. In general terms this requires consideration of:
 - what process(s) and specifically which rules will apply in running the process.
 - who will be the neutral running the process, how will they be chosen, by whom and how will they be paid?
 - Where there is a requirement to “negotiate in good faith” the clause contains some objective yardstick.

4 Processes available

There have been a proliferation of ADR processes over the last 20 years. The National Alternative Dispute Resolution Advisory Council to the Attorney General, (**'NADRAC'**) helpfully, divides them into *facilitative*, *advisory* and *determinative processes*. Within each category I have italicised the ones that will be outlined further.

In *Facilitative processes* an ADR practitioner assists the parties to develop options conduct a risk analysis and reach agreement on options having assessed the risks. This includes *mediation*, facilitation and facilitated negotiation.

In *advisory processes* an ADR practitioner appraises the dispute and provides advice on the facts of the dispute the law, desirable outcomes and how this may be achieved. This can include *expert appraisal*, case appraisal, case presentation, mini trail and early neutral evaluation.

In a *determinative process* an ADR practitioner evaluates the dispute and makes a determination. Examples of ADR processes are *arbitration*, *expert determination* and private judging.

5 A closer look at processes available

In most construction disputes, the boilerplate provisions suggest a combination of processes starting with negotiation and then moving to mediation (a facilitative process) before arbitration (a determinative process).

It is useful to look at each of these element discretely and then consider ways to use them.

5.1 Agree to negotiate

This is not technically an ADR intervention. Negotiation precedes entry into ADR in most commercial disputes. There is some benefit in agreeing in advance about how negotiations will be handled.

It is useful to:

- ◆ Consider who should be at the table. Often an escalation of the issue to senior management can cut through to the core issue at an early stage and avoid unnecessary escalation due to lack of authority- an issue which plagues corporations and government alike.
- ◆ Set strict and relatively short time limits for negotiations so that it does not unduly delay the use of other interventions to move forward.
- ◆ Ensure that the negotiators are skilled (not just experts in the subject matter) or organise capacity building where lacking.
- ◆ Use this stage to contain a dispute and suggest ADR options where it cannot be resolved by the primary players. A good ADR adviser giving an expert evaluation on processes jointly to the senior group is a rare, but useful step.

Negotiation in good faith discussed.

Statutory requirements for good faith negotiations are becoming increasingly common (in contexts ranging from consumer protection to native title) and, particularly in the native title context, the content of the duty is being clarified in a way that is useful for the contractual analysis.

It is clear in New South Wales that the parties may by contract bind themselves, through an enforceable promise, to negotiate in good faith²: “There are very real practical difficulties with this concept. One difficulty lies in identifying breach. Another lies in identifying damages. : see *Western Australia v Taylor* (1996) 134 FLR 211; *Walley v Western Australia* (1996) 67 FCR 366; and *Strickland v Minister for Lands, Western Australia* (1998) 85 FCR 303.

² *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 14 NSWLR 1; *Australis Media Holdings Pty Ltd v Telstra Corporation* (1998) 43 NSWLR 104.

If the content of the duty can be developed, and therefore arguments as to its observance or breach resolved in that context, there would seem no reason in principle why the same could not happen in a contractual context. However, the statutory example gives little guidance on resolution of questions of damage”.³

The use of “in good faith” is too general to be enforceable and is likely to generate provocative disputes about each parties’ attitude at the table. Where used it needs to be defined so it is clear what the parties mean by the term. In my view an attempt to define it more closely in the abstract is likely to waste hours of resources and not hit the mark. It is often best to avoid the term and stick to objective markers such as timeframes.

Mediation

Mediation can be made mandatory by way of a clause to that effect, or be used on an ad-hoc basis. While many litigators feel that it can be used as a delay tactic there are advantages to having a mandatory mediation. Some of the down side can be avoided if the mediation is time limited to avoid delay.

Mediation can also be useful in assisting to obtain agreement on other processes such as an expert determination, timetable, or next steps in the event that it cannot be used for the settlement on the entire matter.

Example – Gas In the wholesale gas market a dispute arose between the market operator and a retailer, on the interpretation of a particular provision of the Gas Rules. It was clear that many players in the market would be effected in the event dispute was resolved in favour of the retailer. The dispute was discussed at a compulsory facilitated conference held under the Gas Market Rules (akin to a contractual mediation). This discussion did not result in resolution of the dispute. It did result in the joinder of the entire market and an agreed timetable for the orderly definition of issues for an arbitral dispute.

³ The implied duty Of good faith in Australian contract Law Robert McDougall. [www.lawlinks/Supreme Court/11_sc.nsf](http://www.lawlinks/SupremeCourt/11_sc.nsf)

If mediation is to be made mandatory it must specify the rules of the mediation. This can be done by reference and incorporation of the rules of a recognised mediation organisation such as ACDC guidelines for Commercial Mediation, NSW Law Society Rules or IAMA. (see appendix)

These organisations make provisions for the selection of the mediator, the payment of the costs and the mediation agreement to be used.

In thinking about the enforceability of the clauses be aware that the courts are willing to stay proceedings until the parties have complied with a mediation clause.⁴

Expert determination

Expert determination results in a binding determination of the issue put to the expert. It can be legal, technical process issues or a combination.

It is often difficult to distinguish between expert determination and arbitration the other commonly used determinative process. The distinction can be important in Australia, as a process that is arbitral in nature will be regulated by the terms of the Commercial Arbitration Act. This regulates a number of procedural issues and the rights of appeal.

Arbitration requires that a decision maker act judicially. Experts are not bound to act judicially, experts may act judicially if doing so is not precluded by the terms of the agreement under which they are retained.

- the label which parties apply to a dispute resolution process does not necessarily determine whether the process is an arbitration or an expert determination; and
- there is no restriction on the nature of the disputes that parties can agree will be the subject of expert determination; for example, questions of law may be referred to an expert.

Given that expert determinations are a creature of contract, parties need to consider the terms of the process and contract accordingly. This includes deciding whether the determination should be binding, subject to an appeal or final and whether any witnesses can be cross examined.

When drafting dispute resolution clauses, parties should carefully consider the powers they wish to grant an expert to ensure that these clauses are not found to be uncertain and that

⁴ Hooper Bailie Associated Limited v Natcon Group Pty Limited & Anor (1992) 28 NSWLR194

they do provide the expert with the powers the parties want the expert to have.⁵

Arbitration

Arbitration is useful when particular aspects of a transaction requires a binding decision to be made by someone with expertise in the area, or when confidentiality is imperative.

Arbitration can be as lengthy, expensive and complex as litigation. There can be issues with joining parties. For instance if a person is affected by the dispute but not a party to the contract containing the arbitration provision they may not be able to be joined except by their consent. The other issue is the finality of the determination. Both the State Commercial Arbitration Acts and the UNCITRAL Rules internationally import certain rights of appeal which may not suit the commercial objectives of the parties.

When contracting to arbitrate, a common mistake is merely referring to the Commercial Arbitration Acts which exist in that State. This is not sufficient to ensure the certainty required for the enforceability of the clause. The Acts provides flexibility on issues and as a result the referral would render the clause as an agreement to agree which is not enforceable. Parties can adopt a clause from ACDC or IAMA incorporating their guidelines. (see Appendix)

In using a set of Rules it is useful for the parties to turn their minds to:

- ◆ **The appointment of the arbitrator** – do you want 1-3 people and what skills.
- ◆ If the parties cannot agree on the arbitrator within a specified period of time then a person or arbitral body should be empowered to make such a determination.
- ◆ **Timing of the determination** - In public projects where deadlines are sensitive there is a temptation to set a mandatory deadline for determination of the dispute. This should be done with care as it can give rise to issues over the arbitrator's discretion to make an award outside the time period. It is difficult to estimate such a period in the

⁵ Focus: Construction – AAR September 2007: When is an expert determination process not an arbitration? in brief: Partner Nick Rudge reviews the Queensland Supreme court's decision in Northbuild construction Pty Ltd v discovery beach project Pty Ltd in relation to issues arising from an expert determination process

absence of information about the dispute. Time is often crucial to ensure parties are accorded natural justice.

- ◆ There is often a provision that provides for continued performance or payment under the contract while a dispute is running. Organisations should carefully consider whether this will be in their best commercial interests if there is a dispute.

6 Choosing between processes

The attractiveness of ADR is its flexibility enabling it to be shaped to fit the dispute. Weighed against this is the need for certainty. Certainty is usually a commercial imperative and this need has been strengthened by the attitude of the court in requiring certainty in enforcing ADR clauses.

There is an advantage in having an expert in ADR consider the matters in dispute, the parties' objectives and the processes available and recommend a road map for the resolution of the matter. This road map can suggest a process, ADR experts and a time line. Ideally this can be done in a facilitative process which incorporates the views of the parties. Such a map can incorporate appropriate dispute resolution processes to match the issues that arise.

A similar approach was outlined by Professor John Uff QC ⁶ [although I note he assumes the task will be undertaken by an arbitrator]:

1. "[Arbitrators] will first inform themselves about the dispute that has arisen, in order to be in a position to decide how to proceed. They may need, at this stage, to take the initiative in ascertaining what the dispute is about, without waiting for a formal process of pleading to be conducted at the usual snail's pace.
2. [Arbitrators] will then discuss with the parties the appropriate procedure to be adopted, where necessary applying different procedures for different parts of the overall dispute. This may entail hiving off issues which are capable of a mediated settlement direct between the parties, with little further involvement of the arbitrator.
3. [Arbitrators] will also be seeking to establish which parts of the overall dispute are likely to require a binding decision, and therefore those which may need an exchange of written submissions/pleadings and a formal hearing with evidence.

⁶ Quoted in -Keeping the wheels of Commerce Turning Drafting Effective ADR clauses- Ian Nosworthy BA LLB FIAMA, FCIArb AIPM, www.nospart.com.au/papers/MalaysiaAustraliaPaper.doc-final

4. Disputes or issues which do not justify a formal hearing, but which cannot be mediated might be more suitable for arbitrators (using their initiative) to give a provisional view, which may then form the basis of a settlement of those issues, leaving only the issues which do require a hearing.
5. Finally, arbitrators will conduct a short evidence hearing to give a binding decision on the issues incapable of being otherwise disposed of."⁷

Certainly, an approach along these lines, or some suitably modified approach has the potential to deal with matters expeditiously and cost effectively. The only modification I would suggest is for parties to consider whether the evaluation of process should be conducted by an arbitrator. Arbitrators often see the world through an arbitration lense with arbitration of part of the issue being a foregone conclusion. It may be that an independent ADR practitioner can be given such a task. That person can be precluded from taking any part of the process that they design in order to avoid a conscious or unconscious bias towards a particular process. In some industries such as the wholesale electricity market an Adviser is appointed under a Code to undertake such a task.⁸

It would be possible to draft an appropriate clause appointing someone to this role and giving them appropriate powers. The provisions above would provide a good base for such a clause.

Skill in handling conflict.

The insertion of ADR clauses imports a range of processes which require skill to use effectively. Interest based negotiation and even mediation are more effective when used by participants who have skill and experience.

Where the relationship has broken down and large amounts of money are involved disputes tend to escalate. Parties in dispute will often revert to their legal rights. Protection of legal rights is not always purposive in resolving the commercial issues in dispute. The legal

⁷Journal of the Chartered Institute of Arbitrators , November 2001, "*New look Dispute Resolution*" 327 at 329 – 30.

⁸ See Chapter 8 of the National Electricity Rules.

process is useful in protecting parties rights and clarifying the issues to be decided using a legal framework. In practice in a high conflict environment negotiation can carry substantial legal risk (albeit commercially worthwhile). Legal advisers are often briefed to protect against the legal risks creating a tension with an interest based or ADR approach.

An early intervention by an ADR practitioner can be useful in assisting the parties to explore commercial resolution creatively and early without compromising the legal case. This can be important in salvaging relationships, saving time and minimising costs..

The presentation will focus further on some of the skill set required.

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Annexure A Sample ADR clauses.

Before using these clauses please check the relevant organisation's web site and ensure you comply with the terms and conditions for use of these clauses.

IAMA Sample Clauses

ARBITRATION

The standard clause which is recommended for insertion in agreements where arbitration is the desired method of resolving a dispute is:

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to arbitration in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Rules for the Conduct of Commercial Arbitrations'.

Unless the parties agree upon an arbitrator, either party may request a nomination from either the President OR the Chapter Chairman of the Chapter where the dispute arises.

EXPEDITED ARBITRATION

in small disputes and/or where quantum is limited or restricted

To limit the potential cost of small disputes an additional phrase may be added to the arbitration clause which restricts the right of a formal hearing to when the quantum in dispute is above a certain, agreed amount. For example:

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to arbitration in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Expedited Commercial Arbitration Rules. For disputes in which the quantum is less than \$ (include amount here – usually \$50,000 or under) arbitration shall take place using the submission of documents alone unless both parties agree otherwise.'

MEDIATION - ARBITRATION

Where mediation is the desired method of resolving a dispute and where, if the dispute is not settled by mediation and you require this further option, the dispute is referred to arbitration is:

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to mediation in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Mediation and Conciliation Rules.'

Add the following if you require the matter to go onto arbitration if not settled.

'If the dispute or difference is not settled within 30 days of the submission to mediation (unless such period is extended by agreement of the parties), it shall be and is hereby submitted to arbitration in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Rules for the Conduct of Commercial Arbitrations'.

'Notwithstanding the existence of a dispute or difference each party shall continue to perform the Contract'.

INTERNATIONAL ARBITRATION

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be and is hereby submitted to arbitration in accordance with, and subject to, the UNCITRAL Arbitration Rules. The appointing and administering body shall be The Institute of Arbitrators & Mediators Australia (IAMA). There shall be one arbitrator, the language of the arbitration shall be English, the place of the arbitration shall be (nominate city in Australia).'

Please note:

- The parties may designate different rules to the UNCITRAL Arbitration Rules.
- The parties may provide for 3 arbitrators.
- The parties may designate a language other than English.

EXPERT DETERMINATION

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to an expert in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Expert Determination Rules'

MEDIATION

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to mediation in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Mediation and Conciliation Rules.'

If you require any clarification of any of these clauses and how to use them please contact the Institute.

FAST TRACK ARBITRATION RULES

Any dispute or difference arising out of or in connection with this agreement shall be submitted to arbitration in accordance with, and subject to, the Institute of Arbitrators and Mediators Australia Fast Track Arbitration Rules.

www.iama.org.au

ACDC Sample Clauses
