

Model ADR Contract Clauses

A drafting guide to key ADR clauses

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CEDR Model ADR Contract Clauses

(A) Why you should consider including an ADR clause in your commercial contract

Including in a contract a clause which requires the parties to attempt to settle any dispute arising out of the contract by some form of ADR should increase the chances of settling any such dispute before, or notwithstanding that, the parties resort to formal proceedings. Litigation is usually expensive, wastes valuable management time and is destructive to relationships. Effective mediation will generally save costs and time and help to preserve these relationships.

Mediation is an integral part of the civil justice systems in Hong Kong and internationally and there may be adverse costs consequences in failing to properly consider its use.

The advantages of inserting an ADR clause include:

- It prompts the parties to consider a process which, unlike negotiation, may not necessarily occur to them (and at an earlier stage than they may do otherwise).
- It introduces a specific process, which gives the parties a clear framework for exploring settlement.
- The mediation process involves a skilled and neutral third party trained to work with parties to facilitate communication which is geared towards an agreed durable settlement.
- The mediation process changes the focus for the parties away from the events of the past towards the realism of the present and the needs of the future.
- A constructive and non-adversarial process allows parties to maintain and /or repair working relationships.
- Such a clause may give the parties a chance to pre-empt an order from the court requiring ADR and enable them to conduct any ADR process on their own pre-agreed terms. For example, under the Civil Justice Rules of Hong Kong there is an underlying objective requiring the courts to actively manage cases with Rule 1.4 (2)(e) empowering the court to encourage the use of ADR procedures, to prompt an earlier settlement. The judges in Hong Kong have become increasingly aware of the success of mediation in bringing about an end to what often appeared to be intractable and difficult disputes. The potential of achieving a binding solution - over 75 per cent of mediations reach an agreed and binding solution despite earlier impasse.
- Keeping and / or moving the negotiation process out of the public arena.

- An early successful conclusion to the dispute will provide substantial savings in legal and management costs, freeing up the business for more productive endeavours.

How

The following is a checklist for the draftsman of some key areas to consider:

1 **Decision makers**

Do you want to identify the decision makers engaging in the ADR process e.g. managing director, CEO? This may provide clarity but is not strictly necessary; you can simply refer to the parties, leaving the decision as to appropriate attendees to the relevant time. Under the CEDR Asia Pacific Mediation Rules attendees are encouraged to come with full authority.

2 **Pre-litigation**

Do you want to attempt the ADR process before any adversarial process begins? In Hong Kong one cannot oust the jurisdiction of the court, but the court will stay proceedings to allow parties to honour their agreement to mediate. A party's right to seek injunctive or declaratory relief or to avoid a time bar will always be preserved. The prospect of settlement may be higher before the lines of battle have been drawn by a hostile step of commencing court proceedings/arbitration. The CEDR Asia Pacific Mediation Agreement provides that litigation or arbitration may be commenced or continued unless the parties agree otherwise (Clause 11).

3 **Single or multi-step clause**

Do you want a single stepped process or a multi-step process? The choice is whether to move straight to mediation or to combine different ADR processes, for example to provide for direct negotiations followed by mediation if the negotiations fail.

4 **Time limits / time span**

What time frame do you want? To be effective, it is better to provide for a clear process and timetable. The CEDR Asia Pacific Mediation Rules cover termination provisions under Clause 9.

5 **Identifying procedural rules**

Your clause will be more effective if you refer to a known and accepted set of model mediation rules. The CEDR Mediation Rules can be found on the CEDR Asia Pacific's website at www.CEDR-Asia-Pacific.com. To be effective ensure that you have:

- (a) A clear process,
- (b) A trigger for the process,
- (c) A time frame (beginning and end),
- (d) Easily identifiable decision makers,
- (e) Clarity on whether you want the mediation to take place before or during an adversarial procedure or whether you want to leave your options open.

(B) Model clauses

1 Simple core mediation clause

Core wording

‘If any dispute arises in connection with this agreement, the parties shall attempt to settle it by mediation in accordance with the CEDR Asia Pacific Mediation Rules. Unless otherwise agreed between the parties, the mediator shall be nominated by CEDR Asia Pacific.’

Notes

This clause by itself should be sufficient to give the parties the opportunity to attempt to settle any dispute by mediation. CEDR Asia Pacific Mediation Rules provide clear guidelines on the conduct of the mediation and require the parties to enter into an agreement based on the CEDR Asia Pacific Rules in relation to its conduct. This will deal with points such as the nature of the dispute, the identity of the mediator and where and when the mediation is to take place. If an ADR / mediation clause is sufficiently certain and clear as to the process to be used it should be enforceable. The reference in the clause to a CEDR Asia Pacific Mediation Rules should give it that necessary certainty.

2 Simple core mediation clause including time and notification

Core wording

‘If any dispute arises in connection with this agreement, the parties shall attempt to settle it by mediation in accordance with the CEDR Asia Pacific Mediation Rules. Unless otherwise agreed between the parties, the mediator shall be nominated by CEDR Asia Pacific. To initiate the mediation a party must give notice in writing (‘ADR notice’) to the other party[ies] to the dispute requesting a mediation. A copy of the request should be sent to CEDR Asia Pacific.

The mediation shall start not later than [] days after the date of the ADR notice.’

Notes

This wording is to address the concern that mediation should provide a quick solution rather than delay an outcome. It evidences intention that mediation should happen quickly and provides a trigger for commencement of the mediation with the service of the notice, including a copy to CEDR Asia Pacific so that it can assist the parties to move the process as quickly as possible.

3 Simple core mediation clause including time, plus reference to court proceedings in parallel

Core wording

'If any dispute arises in connection with this agreement, the parties shall attempt to settle it by mediation in accordance with the CEDR Asia Pacific Mediation Rules unless otherwise agreed between the parties, the mediator shall be nominated by CEDR Asia Pacific. To initiate the mediation a party must give notice in writing ('ADR notice') to the other party [ies] to the dispute requesting a mediation. A copy of the request should be sent to CEDR. The mediation shall start not later than [] days after the date of the ADR notice. The commencement of a mediation will not prevent the parties commencing or continuing court proceedings / an arbitration.'

Notes

Strictly this wording is not necessary as nothing in the core mediation wording prevents the issuance of court proceedings. Further, CEDR's Asia Pacific Mediation Agreement, Clause 11, provides that litigation or arbitration may commence or continue unless the parties are otherwise agreed. The inclusion of this wording in the contract clause may however allay the concern if a party wishes to retain the ability to resort to court proceedings.

4 Simple core mediation clause including time, plus reference to no court or arbitration proceedings until mediation terminated

Core wording

'If any dispute arises in connection with this agreement, the parties shall attempt to settle it by mediation in accordance with the CEDR Asia Pacific Mediation Rules unless otherwise agreed between the parties, the mediator shall be nominated by CEDR Asia Pacific. To initiate the mediation a party must give notice in writing ('ADR notice') to the other party [ies] to the dispute requesting a mediation. A copy of the request should be sent to CEDR Asia Pacific. The mediation shall start not later than [] days after the date of the ADR notice. No party may commence any court proceedings/arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay.'

Notes

The rationale for this wording is that an ADR contract clause is intended to curtail court proceedings, etc, and that for them to run in parallel may not be conducive to any attempt to settle. The prospects of settlement may be higher before the lines of battle have been drawn by the hostile steps of commencing court proceedings / arbitration.

Bear in mind that, in the Hong Kong and English jurisdictions, the courts retain the ability to issue interim relief but have the power to stay proceedings, in appropriate circumstances and upon terms, to allow parties to honour an agreement to mediate.

[An additional note for cases where the CEDR Asia Pacific Mediation Agreement is subsequently used- Clause 12 of the CEDR Asia Pacific Agreement requires parties to set out their agreed changes to such agreement. The core wording on this page would be an agreed change so for completeness should be noted in Clause 12.]

5 Multi-tiered process

Core wording

‘If any dispute arises in connection with this agreement, directors or other senior representatives of the parties with authority to settle the dispute shall, within [] days of a written request from one party to the other, meet in a good faith effort to resolve the dispute.’

If the dispute is not resolved at that meeting, the parties shall attempt to settle it by mediation in accordance with the CEDR Asia Pacific Mediation Rules. Unless otherwise agreed between the parties, the mediator shall be nominated by CEDR Asia Pacific. To initiate the mediation a party must give notice in writing (‘ADR notice’) to the other party(ies) to the dispute requesting a mediation. A copy of the request should be sent to CEDR Asia Pacific. The mediation shall not start later than [] days after the date of the ADR notice.’

[The draftsman has the choice to add Version 1, referring to court proceedings in parallel, or Version 2, no court proceedings until the mediation is completed.]

Version 1: ‘The commencement of a mediation shall not prevent the parties commencing or continuing court proceedings / an arbitration.’

Version 2: ‘No party shall commence any court proceedings / arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay.’

Notes

This adds an extra step providing for negotiations before mediation and the choice is then to have arbitration or litigation in parallel or deferred until after the mediation has effectively terminated.

6 International core mediation clause

Core wording

“If any dispute arises in connection with this agreement, the parties shall attempt to settle it by mediation in accordance with the CEDR Asia Pacific Mediation Rules Hong Kong, unless otherwise agreed between the parties; the mediator will be nominated by CEDR Asia Pacific Hong Kong. The mediation will take place in [city / country of neither / none of the parties] and the language of the mediation will be []. The Mediation Agreement referred to in the CEDR Asia Pacific Mediation Rules shall be governed by, and construed and take effect in accordance with the substantive law of [XXXX]. If the dispute is not settled by mediation within [] days of commencement of the mediation or within such further period as the parties may agree in writing, the dispute shall be referred to and finally resolved by arbitration. CEDR Asia Pacific shall be the appointing body and administer the arbitration. CEDR shall apply the UNCITRAL rules in force at the time arbitration is initiated. In any arbitration commenced pursuant to this clause, the number of arbitrators shall be [1 - 3] and the seat or legal place of arbitration shall be [Hong Kong].”

Notes

This model clause should be suitable for international contracts, i.e. contracts between parties in different jurisdictions, but consideration should be given to including provisions relating to the location / language of the mediation, as well as the governing law and jurisdiction applicable to the mediation agreement along the lines of this paragraph. The clause refers to arbitration under CEDR’s auspices if mediation does not resolve the dispute, but another arbitral institution and its rules may be identified where parties agree.

The clause can be amended to refer to ‘CEDR Asia Pacific Hong Kong, if the draftsman believes this will specify more clearly where to find CEDR for international parties.