

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 1.1.2 then 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.]]