

A GUIDE TO:

# Model Clauses



NEW ZEALAND  
DISPUTE RESOLUTION  
CENTRE

Te Pokapū Whakatau Tautohe o Aotearoa



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## Overview

Ensure an effective and proportionate response in the future should a dispute arise

### Model clauses - Introduction

When was the last time you checked your model dispute resolution clauses that you include in your contracts or services agreements? Almost all private dispute resolution processes require the agreement of the parties to engage in the process. Almost always the dispute resolution clauses included in contracts and agreements for services are old, outdated and, in many cases, ineffective and unenforceable. Such clauses are typically added to contracts/agreements at the 11th hour when everything else has been scrutinised, debated, and agreed.

Dispute resolution clauses are usually not seen as particularly contentious or important. At a time of heightened interest and excitement about the subject matter of such contracts, there is often little appetite to talk about something that might be perceived as negative, or indeed threatening towards the relationship. Often the hope or presumption is that it is something that is included in a contract but will never be needed. Unfortunately, our experience tells us that conflict is an almost inevitable consequence of many commercial transactions/business relationships.

Parties already in dispute are highly unlikely to agree on anything, let alone to

refer their dispute to a particular dispute resolution process/service. This is what makes good model clauses critical to enabling the prompt, proportionate and cost-effective resolution of disputes, should they arise in the future.

Having clear and well drafted model clauses can also help to ensure that there is opportunity for commercial relationships to be preserved despite instances where conflicts arise. Good model clauses can assist the parties in getting back on track quickly and cost effectively.

What makes for a good model clause? One that can be effectively and efficiently relied on to enable a dispute to be resolved promptly by whatever process is agreed. Model clauses need to be clear and certain in terms of both the process and the means of securing the appointment of the relevant third party neutral (for example, arbitrator, mediator, expert). Simply referring disputes arising to mediation or arbitration is **ineffective** and **inefficient**. Parties routinely spend significant time (and money) arguing over what the process should look like, who to appoint to be the mediator or arbitrator and procedural and timetabling matters. This can all be easily avoided by careful drafting of dispute resolution clauses.

"Multi-tiered clauses typically require the parties to work their way through different dispute resolution processes, starting with direct negotiation, then (failing success in negotiation) mediation, then (failing success in mediation), arbitration."

### What about multi-tiered or waterfall clauses?

Many multi-tiered clauses are both unenforceable and inefficient and, overall, we would caution against using such clauses.

Arguments often arise as to whether parties have adequately attempted negotiation and mediation, prior to initiating arbitration. Those arguments are costly and delay the ultimate resolution of the dispute.

Ultimately, parties can attempt to negotiate or mediate their dispute at any time. Forced negotiation or mediation by virtue of a dispute resolution clause will not necessarily be the best option for the parties at the time they are contractually bound to engage in those processes. A forced and poorly timed negotiation or mediation process early on that is unsuccessful may serve to dissuade parties from attempting the same at a later date, when the issues have been defined and there has been a sufficient exchange of information and positions such that the time is right and ripe to engage in those processes.

### NZDRC'S Approach

Rather than encouraging multi-tiered or waterfall clauses, NZDRC's rules for arbitration and mediation allow the parties to move from one process to the next, in an efficient manner. They do this by:

- a. requiring any arbitration to be stayed in the event the parties wish to mediate; and
- b. allowing a party to initiate arbitration in the event a mediation does not result in a full and final settlement of the dispute.

**We recommend all commercial parties ensure an effective model clause is included in any contract they enter into. The model clauses set out in this Guide will provide you with effective and efficient access to the dispute resolution process of your choice, should you need it.**

# Arbitration

The settlement of disputes by arbitration is an important feature of the domestic commercial and legal landscape.

The primary objective of modern commercial arbitration is the fair, prompt, and cost effective determination of any dispute, in a manner that is proportionate to the amounts in dispute and the complexity of the issues involved.

NZDRC recommends parties to contracts include a model arbitration clause to ensure they can access arbitration as a dispute resolution option of choice without delay should a dispute arise between them.

[There are two options available to parties depending on whether they wish any arbitration to proceed on an ad hoc basis under the Arbitration Act 1996 or under the NZDRC Arbitration Rules.](#)

What about [mediation](#)? At any stage the parties can still attempt to mediate (or negotiate) their dispute and, in the case of arbitration under the New Zealand Dispute Resolution Centre Arbitration Rules (option 1 below), there will be a mandatory stay of the arbitration proceeding where the parties wish to refer the dispute to mediation after the arbitration has commenced.

The two options for [arbitration](#) are:

1. **Arbitration under the [New Zealand Dispute Resolution Centre Rules](#)** – this model clause will ensure that any dispute is automatically filtered into the most proportionate arbitration process based on the value of the dispute (the parties can always agree on another process, but the default is the most proportionate option in terms of time and cost):

\$2.5M or greater	<a href="#">Standard Arbitration Rules</a>	Timetable to be agreed by the parties or determined by the arbitral tribunal Hearing, unless parties agree otherwise
\$1M up to \$2.5M	<a href="#">ECA90 Arbitration Rules</a>	90 working days to an award 5 working day hearing, unless parties agree otherwise
\$250k up to \$1M	<a href="#">ECA60 Arbitration Rules</a>	60 working days to an award 3 working day hearing, unless parties agree otherwise
Up to \$250k or declaratory relief	<a href="#">ECA45 Arbitration Rules</a>	Documents only Fixed fee service available (terms and conditions apply) 45 working days to an award

2. **Ad hoc arbitration** – this model clause ensures you can access the New Zealand Dispute Resolution Centre's case management and administrative oversight and support.

**Either option allows the appointment of the arbitral tribunal to be agreed by the parties. However, in the absence of agreement (which is often the case), either model clause will ensure the parties have an effective mechanism for the prompt and efficient appointment of the arbitral tribunal allowing the arbitration to proceed without unnecessary delay.**

## Model Clause for Arbitration under the NZDRC Arbitration Rules

The following clause should be included in contracts where the parties wish to have any future disputes resolved by arbitration under the New Zealand Dispute Resolution Centre's Arbitration Rules:

**“Any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, shall be referred**

**to and finally resolved by arbitration in accordance with the Arbitration Rules of the New Zealand Dispute Resolution Centre.”**

Note: parties to an existing dispute that have not incorporated the NZDRC Model Arbitration Clause into a prior agreement may still agree to refer that dispute to arbitration under the NZDRC Arbitration Rules by signing the Arbitration Agreement in the form found at Appendix 2 to those Rules.

## Arbitration (cont)

### Model Clause for ad hoc Arbitration under the Arbitration Act 1996

The following arbitration clause should be included in contracts where the parties wish to have any future disputes resolved by arbitration under the Arbitration Act 1996:

“Any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Act 1996. The arbitral tribunal shall be appointed from the panel of arbitrators maintained by the New Zealand Dispute Resolution Centre and, in the event the parties are unable to agree on the composition of the arbitral

tribunal within seven days of written notice of the dispute being given, the arbitral tribunal shall be appointed by the New Zealand Dispute Resolution Centre upon application by any party to this agreement.

The number of arbitrators shall be one. [or may choose three]

The language to be used in the Arbitration shall be English. [or choose another language]

The governing law of the contract shall be the substantive law of New Zealand. [or choose another country]”

Note: parties to an existing dispute that have not incorporated this NZDRC Model Clause into a prior agreement may agree to refer that dispute to arbitration under the Arbitration Act by signing one of the Arbitration Agreements available on the Arbitration Guides and Resources page.

## Mediation

Mediation is a consensual, confidential and relatively informal negotiation process in which parties to a dispute use the services of a skilled and independent mediator to assist them to define the issues in dispute, to develop and explore settlement options, to assess the implications of settlement options and to negotiate a mutually acceptable settlement of that dispute which meets their interests and needs.



## Mediation (cont)

The objective of mediation is to enable and empower the parties to negotiate and resolve the dispute promptly, cost effectively and confidentially rather than to have a decision imposed upon them by a judge, arbitrator or adjudicator. The process enables the parties to negotiate flexible and creative solutions which need not conform to strict legal rights or general community standards. This flexibility can help in situations where it is key that the parties maintain an effective and amicable business relationship going forward. In mediation, the parties retain ultimate control over the decision and are guided through the process by the mediator.

In the event that a party to a mediated settlement agreement defaults on the terms of the agreement reached, the parties have the option to pursue legal avenues to enforce the agreement, such as initiating proceedings through the courts.

The following mediation clause should be included in contracts where the parties

wish to have any future disputes resolved by Mediation under the New Zealand Dispute Resolution Centre's Mediation Rules as the primary method of dispute resolution:

**"Any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, shall be referred to mediation in accordance with the Mediation Rules of the New Zealand Dispute Resolution Centre."**

NOTE: parties to an existing dispute that have not incorporated the NZDRC Model Clause into a prior agreement may agree to refer that dispute to Mediation under the [NZDRC Mediation Rules](#) by signing the Mediation Agreement in the form found at Appendix 2 to those Rules.

If the mediation does not result in full and final settlement of the dispute, the Mediation Rules allow a party to initiate arbitration within 30 days.

## Arb-Med

**Arb-Med is a hybrid dispute resolution process that combines the benefits of arbitration and mediation, including speed, procedural flexibility, confidentiality, choice of decision maker, ease of access to the tribunal, continuity, finality, and enforceability of the outcome.**



## Arb-Med (cont)

The primary objective of Arb-Med is the informed good faith negotiation and settlement of the dispute by the parties, with the initial assistance and efficiency of the Arbitral Tribunal's information gathering powers, in the context of a formal arbitration process that will immediately resume if the mediation that follows is not successful.

NZDRC has developed [Arb-Med Rules](#) for the resolution of disputes that are robust and certain, yet innovative in their commercial common sense approach to the challenge of combining arbitration and mediation in a single unified process that ensures the principles of natural justice are observed and a just, final, and binding decision is made.

The following arb-med clause should be included in contracts where the parties

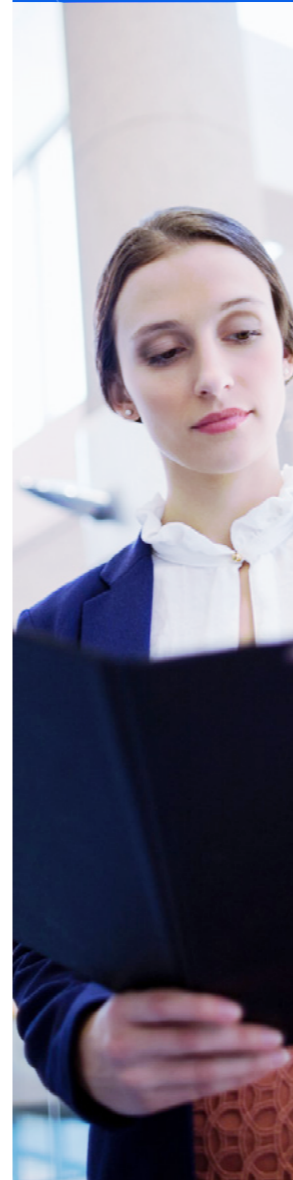
wish to have any future disputes resolved by Arb-Med under the New Zealand Dispute Resolution Centre's Arb-Med Rules:

*"Any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the Arb-Med Rules of the New Zealand Dispute Resolution Centre."*

NOTE: parties to an existing dispute that have not incorporated the NZDRC Model Clause into a prior agreement may agree to refer that dispute to Arbitration under the [NZDRC Arb-Med Rules](#) by signing the Arb-Med Agreement in the form found at Appendix 2 to those Rules.

# Adjudication

**Adjudication provides parties to a dispute with a cost-effective but robust dispute resolution process that results in a determination being made by an independent adjudicator, typically within 35 working days.**



## Adjudication (cont)

Contractual Adjudication offers a proportionate and fast-track dispute resolution process with the primary purpose of improving cashflow, whilst providing quick and relatively inexpensive access to justice, alleviating pressure on the Courts.

Importantly, it also provides parties with a procedural option that is effective and efficient, allowing them to find a resolution to their dispute and move forward as quickly as possible. Based on the successful statutory adjudication scheme which has become the predominant forum for dispute resolution in the construction industry over the last 20 years, contractual adjudication provides a private, proportionate, effective and efficient alternative dispute resolution process, for a wide range of disputes.

The following clause should be included in contracts where the parties wish to have any future disputes resolved by adjudication under the New Zealand Dispute Resolution Centre's [Adjudication Rules](#):

**"Any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, shall be referred to adjudication in accordance with the Adjudication Rules of the New Zealand Dispute Resolution Centre."**

In our experience, in the vast majority of cases the parties comply with an adjudicator's determination and the matter goes no further. However, because an adjudicator's determination is binding in the interim, ie unless or until it is changed, altered or amended by agreement, an arbitral award (if there is an arbitration clause), or court judgment, we also recommend inserting the following clauses together with the adjudication model clause above.

**"Any dispute or difference that has been the subject of an adjudication, may be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the New Zealand Dispute Resolution Centre."**

**No party may commence arbitration or any other legal proceedings other than commencing proceedings necessary to preserve its legal rights unless that party has first complied with the adjudicator's determination."**

NOTE: parties to an existing dispute that have not incorporated the NZDRC Model Adjudication Clause into a prior agreement may still agree to refer that dispute to adjudication under the NZDRC Adjudication Rules by signing an agreement to adjudicate. Simply complete our [online form](#) and our Registry team will prepare this for you.

# Expert Determination

**Expert Determination is a simple means of binding dispute resolution. Unlike arbitration, Expert Determination is not governed by legislation. Expert Determination is a consensual process by which parties to a contract agree to refer matters in dispute to an independent person 'expert' to decide. Expert Determination tends to be used in disputes of a technical nature**





## Expert Determination (cont)

The principle attraction of Expert Determination is that it can provide a binding determination without involving many of the formalities that can beset arbitration and litigation. It also has the advantage of assisting in preserving business relationships where strictly adversarial proceedings may not.

The process is controlled by the parties themselves, who agree beforehand whether or not they will be bound by the decisions of the expert, who is an independent person with expertise relevant to the matters in dispute between the parties.

Expert Determination has become a popular method of resolving disputes in a number of industries involving qualitative or quantitative issues, or issues that are of a specific technical nature of specialised kind, because it is generally quick, inexpensive, informal and confidential.

Looking for a model clause to put in your contract for future disputes? The following clause is recommended:

**“In the event of any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, the parties must refer that dispute in the first instance to Expert Determination in accordance with the Expert Determination Rules of the New Zealand Dispute Resolution Centre.”**

Unless the parties intend for Expert Determination to be final and binding, we recommend that the above clause then be followed by the following model arbitration clause:

**“If either party is dissatisfied with the expert’s determination, either party may, by service of a Notice of Arbitration, require the matter in dispute to be referred to arbitration in accordance with the Arbitration Rules of the New Zealand Dispute Resolution Centre.”**

If a dispute has already arisen and there is no agreement between the parties to refer the dispute to Expert Determination, the parties may enter into an agreement for those purposes, and the following clause is recommended. The words in square brackets should be deleted/completed, as appropriate.

**“[Name of first party] and [Name of second party and Ors] hereinafter referred to as the parties, are parties to a contract entered into on or about [enter date].**

**The parties have agreed that [all matters in dispute between them/the matters in dispute between them set out in the Schedule attached hereto] shall be referred to Expert Determination by [Name of Expert] in accordance with the Agreement for Expert Determination and Rules for Determination of Disputed Matters by Expert of the New Zealand Dispute Resolution Centre (NZDRC), which procedures and rules are deemed to be incorporated by reference herein.**

**[if the parties are unable to agree upon the identity of an Expert within [five (5)/ten (10)] working days from the date of this agreement, then the Expert shall be appointed by NZDRC upon the application of any party.]”**

## Early Neutral Evaluation

**Early Neutral Evaluation is a consensual, confidential and relatively informal process in which parties to a dispute use the services of an independent, neutral evaluator to provide a non-binding evaluation of the facts, evidence and legal merits of the matters in dispute.**



## Early Neutral Evaluation (cont)

The process is specifically designed for disputes which are already in litigation or arbitration. The key elements of Early Neutral Evaluation are that a dispute has already arisen, the parties are a long way apart and looking at lengthy court or arbitral proceedings. In such cases, the parties might benefit from an independent assessment or evaluation of the issues that have arisen and the likely outcome and range of damages if the matter is to proceed, to promote settlement discussions.

The parties may enter into an agreement for those purposes, and the following clause is recommended. The words in square brackets should be deleted/ completed, as appropriate.

"[Name of first party] and [Name of second party and Ors] hereinafter referred to as the parties, are parties to [[a contract entered into on or about [enter date]] or [proceedings in the [ ] Court referred to as CIV- ]].

The parties have agreed that all matters in dispute between them shall be referred to Early Neutral Evaluation by [Name of Evaluator] in accordance with the Agreement for Early Neutral Evaluation and Rules for Early Neutral Evaluation of the New Zealand Dispute Resolution Centre (**NZDRC**) which procedures and rules are deemed to be incorporated by reference herein.

[if the parties are unable to agree upon the identity of an Evaluator within five (5) working days from the date of this agreement, then the Evaluator shall be appointed by NZDRC upon the application of any party.]"





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