

Dispute Resolution

New ADR Agreement

- John Tyrill

The agreement set out below for alternative dispute resolution has been prepared on the basis of the author's experiences in mediation, expert determination and other forms of alternative dispute resolution.

It contains the potential for a range of processes to assist parties who might commence say a mediation, but later require other forms of assistance to resolve their dispute - such as a combination of mediation and non-binding expert appraisal. The agreement contains flexibility to enable the parties and the ADR facilitator to move on to processes other than the one they commenced without the need for a new agreement. Of course, the draft agreement could be amended for a particular dispute to provide for one process only, such as mediation or non-binding expert appraisal etc.

The draft purposely interposes a company for taxation and liability reasons. However, it could be readily amended for use by an individual person as the facilitator; provisions which reflect the interposition of a company structure are identified in square brackets.

Another feature of the draft is the range of protections it contains for the facilitator. In the absence of legislative

protection, dispute facilitators must look to the terms of their agreements with the parties for protection. Since the cases over the last few years (particularly regarding arbitrators and court-appointed referees) indicate that disputants' disputious behaviour is sometimes directed towards the person in the middle, the protections are detailed and extensive. There is also an indemnity from the parties to deal with the potential for an aggrieved third party, such as a related company, financier etc.

These provisions have been extended to similarly protect a dispute facilitation organisation, in particular instances.

Some might think these protections are attractive, but that they might be commercially difficult to put in place. It is suggested that they are a reasonable price for the assistance of the facilitator in the attempt to resolve the dispute in a timely and cost-effective manner. The parties' agreement to them might also be considered by the facilitator as a risk-based litmus test whether it is worth trying to assist the partie. If the parties preserve the capacity to sue the facilitator, that will not assist them solve their dispute.

Agreement For Facilitation of Resolution of Disputes

This agreement made the day of 1993.

BETWEEN: [*] (A.C.N.) of [*] ("the Builder");

AND: [*] (A.C.N.) of [*] ("the Proprietor");

AND: [XYZ PTY LIMITED A.C.N. [*]]("the Facilitator").

WHEREAS

- A. By contract made on or about [*] the Builder agreed to carry out the construction of [*] for the Proprietor.
- B. Disputes have arisen (or may arise) between the Builder and the Proprietor ("the parties") as to certain matters relating to the contract and its performance ("the matters in dispute").
- C. The parties have requested the Facilitator [to provide the services of its officer, [*]] to provide assistance to the parties towards the resolution of the matters in dispute by mediation or conciliation and, if so requested by the parties, by the provision of a non-binding oral or written appraisal.

NOW IT IS AGREED

1. [Facilitator

References to the Facilitator shall be construed as including the Facilitator's directors, shareholders, officers and agents (including, without limitation, [*].]

2. Facilitator's Services

Upon and subject to the terms and conditions set out below, the Builder and the Proprietor hereby request the Facilitator to [provide the services of its officer, [*] to] perform the Facilitator's functions ("the Facilitation") under this Agreement.

3. Authority

The parties agree they shall be represented in the Facilitation proceedings by a person with full, delegated authority to settle the dispute.

In the event a party cannot provide to its representative full delegated authority to settle the dispute, it shall disclose to the other party and to the Facilitator the nature of any limitations on its representative's delegated authority and also the procedure required for the party's approval to settle the dispute.

4. Representation

At any meeting between the Facilitator and the parties conducted under this Agreement, unless both parties expressly agree otherwise, either party may be represented or accompanied by its legal advisers.

5. View

If either party so requests or the Facilitator considers it would be helpful, a view shall be conducted of the site or any other place relevant to the matters in dispute by the Facilitator in the company of representatives of the parties.

6. Facilitation

The Facilitator shall:

- (a) from time to time as the circumstances require, or as the parties so wish:
 - (i) convene meetings;
 - (ii) structure and chair negotiations between the parties;
 - (iii) act as a mediator;
 - (iv) act as a conciliator;
 - (v) conduct a mini-trial;
 - (vi) conduct a factual, technical or other investigation and report to the parties on the Facilitator's findings;
 - (vii) make recommendations to the parties;
- (b) if a party so requests and the Facilitator considers it appropriate, provide privately to that party oral comments or opinions about some or all of the matters in dispute;
- (c) if the parties both so request and the Facilitator considers it appropriate, provide to both par-

ties together oral comments or opinions about some or all of the matters in dispute, which comments or opinions shall not be binding upon the parties;

- (d) if so requested in writing by each of the parties in relation to some or all of the matters in dispute and the Facilitator considers it then appropriate to do so, provide the parties with a written appraisal as soon as practicable in such form as it considers appropriate stating the Facilitator's opinion (with reasons) about those matters in dispute, which shall not be binding upon the parties;
- (e) conduct any other process under or in connection with this Agreement requested by the parties, which the Facilitator considers then to be appropriate.

7. Nature of Proceedings

- 7.1 The Facilitation, including any process conducted under or in connection with this Agreement, shall be without prejudice and shall not be binding upon the parties.
- 7.2 Any meeting conducted under this Agreement shall not be a hearing conducted under any legislation dealing with commercial arbitration.
- 7.3 Any process conducted under or in connection with this Agreement is not an arbitration within the meaning of any legislation dealing with commercial arbitration.
- 7.4 The Facilitator shall:
 - (a) not be an arbitrator;
 - (b) proceed in such manner as it thinks fit without being bound to observe the rules of natural justice or the rules of evidence;
 - (c) take into consideration all documents, information and other written and oral material that the parties place before it including documents, information and material relating to the facts in dispute and to arguments and submissions upon the matters in dispute;
 - (d) not be expected or required to obtain or refer to any other documents, information or material but may do so if it so desires.

8. Submissions

- 8.1 If written submissions are required, the parties shall make separate or, if they so wish and agree, joint written submissions to the Facilitator by the date or dates set out in the Schedule to this Agreement or the dates decided upon in the Facilitation and directed by the Facilitator.
- 8.2 Each party shall have a right of written reply to the submission made by the other to be made by the date for reply set out in the Schedule or so directed.
- 8.3 Each party shall have a right of written response to each other's written reply to be made by the date set out in the Schedule or so directed.
- 8.4 The Facilitator may at any time seek written sub-

missions from a party or the parties upon any matter.

8.5 All submissions made by a party to the Facilitator shall be provided at the same time to the other party.

9. Subsequent Proceedings

9.1 Neither this Agreement, any proceedings conducted by the Facilitator arising out of or in connection with this Agreement including any oral or written appraisal (other than a binding written settlement agreement between the parties which has that effect) will prejudice any right of a party at any time to submit the same matters in dispute to arbitration or to litigation.

9.2 The parties will not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not the proceedings relate to the matters in dispute,:

- (a) evidence given or statements made by any party, views expressed or suggestions made by any party in respect of a possible settlement of the dispute;
- (b) admissions made by any party;
- (c) proposals for settlement of the dispute made by the Facilitator or any party;
- (d) the fact that a party has indicated willingness to accept a proposal for settlement made by the Facilitator;
- (e) documents submitted to the Facilitator or presented at the Facilitation by a party (unless these documents are otherwise discoverable);
- (f) documents created for the purpose of the Facilitation;
- (g) statements or notes made by the Facilitator,

in the course of this Facilitation or any other process conducted under or in connection with this Agreement.

9.3 The parties and each of them shall not subpoena the Facilitator to give evidence or to deliver files in any subsequent proceedings. In the event of subpoena in breach of this Agreement, the party so breaching this Agreement shall be responsible to:

- (a) pay the Facilitator for all the Facilitator's time in gaining advice upon, in defending against or in responding to, the subpoena at the Facilitator's then current hourly charge-out rate;
- (b) meet all costs and expenses incurred by the Facilitator in responding to the subpoena, including without limitation any legal costs incurred in obtaining advice upon, and for legal representation in resisting or in responding to, the subpoena.

9.4 The parties shall not join or seek to join the Facilitator in any legal proceedings brought by third parties.

9.5 The Facilitator is disqualified from acting in any

arbitration or judicial proceedings relating to the matters in dispute as an expert for, adviser to, or representative of, either party.

9.6 In the event the parties wish the Facilitator[*s* officer, [*],] to act as an arbitrator or as a court-appointed referee to determine some or all of the, or related, matters in dispute, each of the parties shall expressly request the Facilitator to do so in writing and provide a written waiver and release, in terms acceptable to the Facilitator and also to the other party, of any objection the party might then or in future have to the Facilitator so acting on the basis of, or arising from, the Facilitator's involvement in, or in connection with, this Facilitation.

10. Liability

10.1 Except in the case of fraud, the Facilitator shall not be liable to the parties or each of them upon any cause of action whatsoever for anything done or omitted to be done by the Facilitator pursuant to this Agreement and the parties jointly and severally hereby release and indemnify and keep indemnified the Facilitator against all actions, suits, proceedings, disputes, differences, accounts, claims, demands, costs, expenses and damages of any kind whatsoever (including for, but not limited to, defamation, bias or other misconduct). whether:

- (a) under or in any connection with contract;
- (b) in tort for negligence, negligent advice or otherwise;
- (c) otherwise at law (including by statute, to the extent that it is possible to so exclude liability) and in equity generally, including without limitation for unjust enrichment.

10.2 In the event that, for any reason, the Facilitator or any person within the meaning of that term as defined by clause 1 is found liable notwithstanding the terms of clause 10.1 the parties expressly agree that liability shall be limited to \$100.

10.3 The parties jointly and severally hereby indemnify and shall keep indemnified the Facilitator against all actions, suits, proceedings, disputes, differences, accounts, claims, demands, costs, expenses and damages of any kind whatsoever (including for, but not limited to, defamation, bias or other misconduct) whether:

- (a) under or in any connection with contract;
- (b) in tort for negligence, negligent advice or otherwise;
- (c) otherwise at law (including by statute, to the extent that it is possible to so exclude liability) and in equity generally, including without limitation for unjust enrichment,

by third parties for anything done or omitted to be done by the Facilitator pursuant to or in connection with this Agreement.

11. Security

- 11.1 Within five working days of the date of this Agreement each party shall lodge with the organisation identified in the Schedule the sum set out in the Schedule as security for the Facilitator's fees. The parties shall be jointly and severally responsible to the organisation so identified for its administrative fees in relation to the security.
- 11.2 If so directed by the Facilitator at any time, each party shall lodge additional security in the amount directed within five working days of the Facilitator's direction.

12. Fees

- 12.1 The parties shall pay for all time spent by the Facilitator in preparation for, the conduct of, and in any connection with, the Facilitation (and any other process under or in connection with the Agreement) at the rate or rates set out in the Schedule, plus the Facilitator's reasonable costs and expenses.
- 12.2 The parties shall be jointly and severally liable to the Facilitator for its fees and reasonable costs and expenses.
- 12.3 As between the parties, the Facilitator's fees, costs and expenses shall be shared equally.
- 12.4 The Facilitator shall issue accounts to the parties:
 - (a) from time to time as the Facilitator considers appropriate under the circumstances, and, if not more frequently, on a monthly basis;
 - (b) upon settlement of the matters in dispute; or
 - (c) upon termination or abandonment of the Facilitation or any process conducted under or in connection with this Agreement,

and the Facilitator shall direct the organisation holding security to:

- (i) pay the Facilitator's fees, costs and expenses;
- (ii) inform the parties of any balance then held, if the Facilitator is continuing to perform work under the Agreement; or
- (iii) account to the parties for any balance held as security if the Facilitator's work has been completed.

- 12.5 To the extent the Facilitator's accounts are not covered by security from which the Facilitator can draw, the parties shall pay the Facilitator's fees, costs and expenses within 30 days of the date of the Facilitator's account.

13. Confidentiality

The Facilitation proceedings shall be kept confidential between the parties and the Facilitator and no information relating to the proceedings shall be divulged to any other party at any time or in any circumstances except with prior written consent of the parties.

The Facilitator shall not disclose to the other party any information, document, comment or proposal which has

been provided to the Facilitator on the express basis that it be confidential to the party disclosing and the Facilitator, until and unless the party disclosing subsequently authorises the Facilitator to disclose the information, document, comment or proposal to the other party.

14. Facilitator's Independence and Impartiality

In the event the Facilitator becomes aware of any relationship or interest with either party, its officers, employees, contractors, consultants or agents who are involved in the Facilitation, the Facilitator shall immediately disclose that relationship or interest.

15. Termination

Either party may at any time terminate the Facilitation (including any mediation, conciliation, appraisal or any other process conducted under or in connection with this Agreement) by written notice to the other party and the Facilitator.

Signed for and on behalf of)
 the Builder, [*])
)
)
 Signed for an on behalf of)
 the Proprietor, [*])
)
)
 Signed by)
 [for and on behalf of])
 the Facilitator)

Schedule To Facilitation Agreement

Description of the Matters in Dispute:

Submissions

Date Required

- (i) Builder's submission to Facilitator
- (ii) Proprietor's submission to Facilitator
- (iii) Builder's Reply to Proprietor's Submissions
- (iv) Proprietor's Reply to Builder's Submissions
- (v) Builder's Response to Proprietor's Reply
- (vi) Proprietor's Response to Builder's Reply

Fees

Facilitator's Fees:

Security

Organisation to hold Security:

Amount of Security: