

Choosing the best Dispute Resolution Process for your business.

A dispute resolution clause should be more than an agreement to agree to resolve any dispute. The goal when drafting a dispute resolution clause is to provide clarity and certainty for the parties on the mechanism for the resolution of a dispute and how this process will be undertaken.

There are several potential dispute resolution mechanisms that you can choose from, and each option comes with differing advantages and disadvantages – what's most important to you will depend on the specifics of your business.

Dispute Resolution Option

Pros

Cons

Dispute Resolution Option	Pros	Cons
Negotiation 	<ul style="list-style-type: none"> • No cost • Retain decision-making abilities / control the outcome • Maintain relationship with client • Discussions can remain confidential • Option to involve a third-party if desired 	<ul style="list-style-type: none"> • Voluntary process / requires input from both parties • No guaranteed resolution
Mediation 	<ul style="list-style-type: none"> • Retain decision-making abilities / control the outcome • Higher chance of maintaining the relationship with the client • Discussions can remain confidential 	<ul style="list-style-type: none"> • Voluntary process / requires input from both parties • No guaranteed resolution
Neutral Evaluation 	<ul style="list-style-type: none"> • Retain decision-making abilities / control the outcome • More cost effective than court / tribunal • Evaluator is usually legally trained and therefore better qualified than a mediator • Evaluator is qualified to advise what a court or tribunal may decide, as well as advise how an industry expert may perceive the dispute 	<ul style="list-style-type: none"> • Voluntary process / requires input from both parties • No guaranteed resolution
Expert Determination 	<ul style="list-style-type: none"> • Cost effective • Can be binding or nonbinding – depending on what the terms of the contract state • Opportunity to proceed to binding arbitration following expert determination, if you were to make the expert determination nonbinding • Discussions can remain confidential • Can be conducted on the papers 	<ul style="list-style-type: none"> • Not supported by legislation therefore the contract must set out the type of expert (or a chosen individual), the process i.e., appointment, making of submissions, and the grounds for determination • No requirement for impartiality • Limited avenues to challenge the determination • Effectiveness depends on the drafting of the respective clause in the contract
Binding Arbitration 	<ul style="list-style-type: none"> • Binding decision is made on behalf of the parties (may also be a disadvantage, depending on the outcome) • Removes the necessity for litigation • We don't usually see mediation as well as arbitration in a contract so may attract a faster resolution 	<ul style="list-style-type: none"> • More aggressive approach • Decision-making abilities are removed from the parties' control • Only enforceable in countries that are a party to the New York Convention (Australia, UK, Ireland and Singapore are all parties) • Differing rules around arbitration depending on the country
Courts / Litigation 	<ul style="list-style-type: none"> • Binding decision is made on behalf of the parties (may also be a disadvantage, depending on the outcome) 	<ul style="list-style-type: none"> • Least likely to preserve the relationship with the client • Administratively onerous • Potentially significant time and cost implications • Loss of confidentiality