*INTRODUCTION: The primary purpose of this possible clause is to encourage parties to retain a process facilitator as early as possible (which may even be before any dispute arises). It is proposed that the facilitator (referred to here as a “****Guiding Mediator****”) should be granted the status of a mediator on procedural issues, to protect the confidentiality of the parties’ communications, enabling them to explore with the Guiding Mediator the most appropriate[[1]](#footnote-1) method and/or mixed mode of dispute resolution for assisting the parties to resolve any dispute. This clause provides for a default method of resolving disputes (mediation followed by arbitration) in case the use of a Guiding Mediator on process issues is not accepted or implemented. This default method is an optional provision, however, as litigation in the courts of a mutually acceptable jurisdiction may be preferable in some cases. The possibility of eliminating the default mediation and arbitration provisions provided in this clause should be considered in each case. Furthermore, although this clause has been drafted with institutional mediation and arbitration rules in mind, these proceedings could be ad hoc instead. Overall, this model clause should be viewed only as a possible starting point and modified in accordance with whatever is deemed most appropriate in each case. Please send all feedback regarding this clause to* [*laura.kaster@gmail.com*](mailto:laura.kaster@gmail.com) *and to* [*jlack@lawtech.ch*](mailto:jlack@lawtech.ch)*.*

**Possible Appropriate Dispute Resolution (ADR) clause for the appointment of a Guiding Mediator**:

**CLAUSE No. \_\_: GUIDED DISPUTE RESOLUTION**

1. Guided Mediation: Any disagreement or dispute between the parties arising out of or relating to this agreement, including its formation, related documents and any non-contractual claims, shall be [resolved as](http://resolve.as/) quickly and efficiently as possible by mutual consent using the most appropriate form of dispute resolution available for that disagreement or dispute (e.g., negotiation, mediation, conciliation, litigation or arbitration) or a combination of such processes as agreed to by the parties. The parties [shall/may][[2]](#footnote-2) jointly retain a neutral, independent and impartial mediator to focus initially on process issues (the “**Guiding Mediator**[[3]](#footnote-3)”). The Guiding Mediator will help the parties to design an optimal process for achieving an early and mutually-acceptable resolution. The optimal process should be efficient and cost-effective, taking into consideration relationships and commercial interests, as well as other important factors identified by the parties (e.g., enforceability, remedies, deadlines, etc.)[[4]](#footnote-4) The Guiding Mediator shall maintain strict confidentiality regarding all aspects of the process, including any private conferences with parties and/or their attorneys. The Guiding Mediator may provide non-binding recommendations on process issues. The parties agree that any information they or their attorneys exchange or provide to the Guiding Mediator and/or other parties or stakeholders as part of this appropriate dispute resolution process will be treated as confidential and immune from discovery or disclosure.[[5]](#footnote-5) The Guiding Mediator shall be granted mediation privilege and professional secrecy status as a mediator to ensure that all information exchanged or provided pursuant to this process shall be legally privileged and immune from disclosure or discovery to the extent possible under applicable laws. Once appointed, the Guiding Mediator may act as a mediator and/or arbitrator in any subsequent proceedings with the prior written consent of all the parties involved in those proceedings.[[6]](#footnote-6) If a Guiding Mediator was not retained within [thirty (30)][[7]](#footnote-7) days from the date of first request for the appointment of a Guiding Mediator by a party, or if no other process or ADR neutral has been agreed to or appointed by that date by mutual consent of all the parties involved in the dispute, the substantive matters in dispute shall be settled by mediation [in accordance with the rules of the [NAME OF INSTITUTION] in effect at that date].[[8]](#footnote-8)
2. Arbitration: If the dispute is not fully resolved by [mediation] within [ninety (90)][[9]](#footnote-9) days from the date a party first requested the appointment of the Guided Mediator or [sixty (60)] days from the appointment of the Guided Mediator as the substantive matters mediator or of another mediator as provided for above (whichever period is longer), any dispute arising out of or relating to this agreement or this dispute resolution clause, including the making, breach, termination or validity thereof, shall be finally resolved by binding [expedited][[10]](#footnote-10) arbitration [by a sole arbitrator], [in accordance with the rules of the [INSERT NAME OF INSTITUTION] in effect at that date][[11]](#footnote-11), unless all of the parties agree in writing to another process.
3. Seat & Language of any Proceedings: The seat of any proceedings shall be [INSERT CITY NAME AND COUNTRY] although meetings may physically take place elsewhere or by Internet by mutual consent of the parties. The language of any proceedings shall be [INSERT LANGUAGE]. [Nothing in these provisions shall preclude a party from reasonably seeking emergency or injunctive relief before any court or arbitral tribunal of competent jurisdiction of its choice anywhere in the world].[[12]](#footnote-12)

1. “Appropriate” in this context includes a broad range of parameters that best address the parties’ needs, taking into consideration such factors as cost, time, relationships, confidentiality, impact on stakeholders, enforceability, propensity of the conflict to escalate, reputational issues, etc. [↑](#footnote-ref-1)
2. Whether the appointment of a Guiding Mediator should be compulsory or optional is something to be discussed in advance. It is recommended by some that there should be a clear commitment to do so (i.e., using “shall” instead of “may”) as otherwise it may be difficult to get consensus on doing so once the dispute has arisen. For others, this should be identified as a possibility, but not an obligation, so that the clause (and concept) can be raised in the original contract. [↑](#footnote-ref-2)
3. Rather than use the term “Process Facilitator”, which may connote the sense of an additional process or cost, the Working Group recommends referring to this person as a “Guiding Mediator”, to clarify that the role of this neutral may not only be to do process design, but that they can also assist in overcoming early impasse or acting as a mediator on substantive issues. [↑](#footnote-ref-3)
4. A list of factors to take into consideration when designing a dispute resolution process is available on IMI’s website at <https://www.imimediation.org/about-imi/who-are-imi/mixed-mode-task-force/>. [↑](#footnote-ref-4)
5. It may be worth drafting a confidentiality agreement to this effect, including the inability for the Guiding Mediator to be summoned as a witness, especially if the seat of the proceedings does not automatically recognize mediation privilege. [↑](#footnote-ref-5)
6. It is suggested that an additional waiver be signed by all of the disputants involved if the Guiding Mediator will also have a further role, especially if (s)he will act as an arbitrator. The issue of any influential information heard in caucuses should also be addressed. (Please consider only relying on such information if it has been disclosed with the disclosing party’s consent.) [↑](#footnote-ref-6)
7. It is suggested that clear deadlines be set by which the appointment of a Guiding Mediator should have occurred. This provision, however, is optional. The suggestion of thirty (30) days and sixty (60) days in this section is something for the parties to review and are only suggestions. [↑](#footnote-ref-7)
8. The choice of the mediation (or other first process) being ad-hoc or institutional mediation is also something to be discussed and reviewed on a case-by-case basis. [↑](#footnote-ref-8)
9. An adequate amount of time should be provided before initiating the second stage (in this case, arbitration). [↑](#footnote-ref-9)
10. Certain institutions have specific provisions for expedited arbitration, which normally entail a sole arbitrator as well as reduced pleadings/hearings and a faster deadline for the issuing of an award. [↑](#footnote-ref-10)
11. Once again, the arbitration may be ad hoc or institutional. This is something for the parties to discuss and decide in each case. The parties and their counsel should also check the rules of any institutions used to verify they have complied with the requirements for the same person acting as mediator and arbitrator, if they have chosen to do so. [↑](#footnote-ref-11)
12. This is an optional provision, and some ADR institutions already have provisions for this in their rules. [↑](#footnote-ref-12)