

# Clause and effect: The importance of well-drafted model clauses

By Hannah Aziz

## An overview of why well-drafted model clauses matter

### Introduction

Contracts, like disputes, come in all shapes and sizes. Most parties to a contract are keen to get the deal finalised and signed on the dotted line as quickly as possible. There isn't always an appetite to pore over model clauses in a contract, with the parties generally agreeing that as long as there is some form of dispute resolution clause in place, all will be well. Unfortunately, if your dispute resolution model clauses are not well-drafted, this approach may come back to bite. This article will explore what a model clause is, how it operates and why it is vital to parties not only in times of strife but also in ensuring that commercial relationships can be maintained during less tumultuous times.

### What is a model clause and how does it operate?

In the dispute resolution context, a model clause will outline the parties' options in the event of a dispute and the processes that the parties agree to engage in to solve that dispute. Multi-tiered or waterfall clauses require the parties to work through a series of different dispute resolution processes. For example, starting with direct negotiation, then (failing success in negotiation) mediation, then (failing success in mediation), arbitration. We would caution against using such a clause for several reasons. First, there can often be arguments about whether the parties have adequately attempted negotiation and mediation before initiating arbitration. This causes delay and the

inevitable costs implications of such a delay. Second, a forced or poorly timed negotiation or mediation may not serve the parties early on if unsuccessful. In fact, it 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.

### What makes a good model clause?

A good model clause can be effectively and efficiently relied on to resolve a dispute 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, or 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.

### Why are model clauses important?

A well-drafted model clause is vital in giving the parties certainty in times of dispute. Disagreements cause commercial upset and can threaten what was once a strong working relationship. In order to deal with a dispute quickly and cost-effectively, a well-drafted model clause will provide the parties with a level of certainty around how a dispute will be resolved (the process/es to be adopted) and will clearly outline the parties' respective duties to fulfil that process. Knowing that a well-drafted model clause is in place, the parties can be confident that should a problem arise, there will be an effective mechanism to resolve that dispute. Having clear and well-drafted model clauses can also help to ensure that (where appropriate) there is an 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.

### Our approach to model clauses

Rather than encouraging multi-tiered or waterfall clauses, our 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.

Our approach is a commercial, practical, and cost-considerate one. We understand that during the course of a dispute resolution process, it may be that a preferred process comes to light depending upon the parties' appetite to resolve a dispute or in light of any information that emerges during the process. Using our model clauses helps to ensure that the parties can have confidence that they are being guided by procedures that acknowledge the commercial realities of a dispute.

## Conclusion

As outlined above, well-drafted model clauses add value to your business overall and give parties the confidence that commercial relationships can be preserved even during times of conflict. Our carefully drafted model clauses can be used to add that value. For more guidance on our model clauses and on any other dispute resolution process we offer, please visit our websites at NZDRC ([www.nzdrc.co.nz](http://www.nzdrc.co.nz)) for domestic matters and NZIAC ([www.nziac.com](http://www.nziac.com)) for international matters.



## About the author



Hannah works as a Knowledge Manager in NZDRC's Knowledge Management Team.

Previously she was a Board Trustee and Solicitor in the UK, where she was providing legal services to clients across PLCs, SMEs and private and public sectors.