ICT SERVICES AGREEMENT SCHEDULES

SCHEDULE 8.3

DISPUTE RESOLUTION PROCEDURE

CONTENTS

Section A

Product Description

1. PRODUCT TITLE

ICT Services Agreement - Schedule 8.3 (Dispute Resolution Procedure).

2. PURPOSE OF PRODUCT

The purpose of the schedule is to specify a procedure for the escalation and resolution of disputes between the parties which meets the Authority's objectives and maximises the likelihood of disputes being resolved quickly and with the minimum interruption to the Services or to the Authority's activities.

3. COMPOSITION

- There are a variety of possible mechanisms for resolving disputes (see Section B below) and the dispute resolution schedule should, therefore, set out those mechanisms which are most appropriate having regard to the nature of the services being provided.

- Depending on the nature and circumstances of a dispute, the schedule may also set out a procedure for escalation of the dispute to key individuals or organs within the Authority and the Contractor.

4. DERIVATION

Authority requirements

5. RELATED CLAUSES & SCHEDULES

Clauses: 27 (Disputes)

Definitions: "Dispute"

"Dispute Resolution Procedure"

"Escalation Process"

6. ALLOCATION

The proposed Dispute Resolution Procedure should be issued to bidders as part of the descriptive document and a finalised version issued with the ITT.

7. QUALITY / REVIEW

- Authority to review any amendments to the Dispute Resolution Procedure proposed by the bidder during dialogue phase of the procurement.

- Authority expertise: project management, commercial/procurement, legal.

Section B

Guidance

1. INTRODUCTION

1.1 The purpose of the Dispute Resolution Procedure is to maximise the prospects of resolving disputes between the parties quickly and in a cost-effective manner. Disputes can arise in a wide variety of circumstances and each dispute will have its own particular facts, issues and potential solutions. Therefore, a different approach to managing and effectively resolving a dispute may be required depending on the nature of the dispute. The Dispute Resolution Procedure therefore needs to be sufficiently flexible to accommodate various types of dispute and on each occasion when a problem arises, specific legal advice is likely to be required so that the process is managed appropriately.

1.2 Litigation and arbitration provide the primary means of resolving large-scale disputes that involve complex questions of liability. However, there is currently a move towards alternative dispute resolution tools and techniques which have proven to be quicker and more cost-effective. The Authority therefore needs to understand the options available and to provide for these when drafting and discussing the Dispute Resolution Procedure.

1.3 There are many types of mechanism that could be considered by the Authority for inclusion in the Dispute Resolution Procedure, each with advantages and disadvantages. No single process is entirely risk free or without disadvantages and it is therefore important for the Authority to understand the pros and cons of each process before deciding on the approach to be adopted. Once a decision as to the best mechanism has been made, the Dispute Resolution Procedure needs to set out, in clear terms, when and how disputes will be escalated and how they will be resolved. It is important that the drafting is clear and unambiguous so that both parties have certainty as to the process that is to be followed.

2. DRAFTING THE DISPUTE RESOLUTION PROCEDURE

2.1 The Appendix to this Part B provides a summary of the more common forms of dispute resolution setting out the general advantages and disadvantages of each. Before drafting the dispute resolution procedure, the Authority will need to assess

which of these are the most appropriate in the circumstances and provisions for the chosen mechanism(s) should then be included in the schedule.

2.2 The first issue for the Authority to bear in mind when considering the various forms of dispute resolution, is whether the Authority or the Contractor is more likely to be a claimant if a dispute did arise. A dispute resolution procedure should then be chosen which is suited to whether the Authority is more likely to be a claimant or defendant under the procedure.

2.3 The extent to which the nature of the services will be suited to a particular type of dispute resolution, (e.g. expert determination) should also be considered. In some cases, it may be appropriate to have certain categories of dispute dealt with by different forms of dispute resolution e.g. expert determination for technical disputes and another form of resolution for non-technical disputes.

2.4 The issue of whether certain dispute resolution processes will be binding on the parties will also affect the Authority's decision as to which form of dispute resolution to propose. The Appendix to this Part B states which processes are binding and which are not. It is worth noting that for any processes involving a third party (such as an expert or evaluative mediator) who is giving their opinion on the dispute concerned, the impact of the third party's decision will be governed by the terms of the Agreement (and any other terms of reference) and the Agreement or the relevant schedule should therefore state whether the expert's decision will be binding or not. If it is not to be binding then the Authority should consider what options it would need to have at this stage and specify these in the Agreement.

2.5 If the Contractor is located in a different jurisdiction to the Authority, this will also affect the decision of what dispute resolution procedure to use. For instance, there may be some instances where an arbitral award is easier to enforce overseas than a Court Order. The location of the dispute resolution forum or seat may also be significant, and may be influenced by issues such as the availability of key witnesses. The choice of law for resolution of any dispute is of key importance. It follows that issues of jurisdiction should be considered carefully before a dispute resolution process is selected.

3. ESCALATION PROCEDURES

3.1 Whatever the mechanism for dispute resolution chosen by the Authority, it is common for many contracts (particularly ICT services contracts) to include an escalation procedure together with a governing law and jurisdiction clause.

3.2 There are a number issues to consider when drafting an escalation procedure, as follows:

3.2.1 Escalation procedures are usually mandatory but if the Authority is more likely to be a claimant, then the Authority may prefer the procedure to be optional. If the escalation procedure is stated to be mandatory in the Agreement and the parties want to follow a different process when a dispute does actually arise (e.g. mediation or expert determination for a particular technical issue), then this change must be documented via the Change Control Procedure.

3.2.2 The Authority should consider whether it needs to preserve a right to seek certain preliminary relief outside of the escalation procedure. This may be the case where such relief is required to preserve the status quo. One example of this kind of preliminary relief would be the right to seek a mandatory injunction to compel the Contractor to keep the Authority's connection to its server open so that the Authority can continue to receive or access the services. Another example would be the right to seek an injunction or other relief to prevent IPR infringement.

3.2.3 There may be circumstances in which it would be beneficial for both parties to have the right to bypass the escalation procedure and have certain issues resolved by expert determination. This might be the case for technical issues where an ICT specialist would be appointed as an expert to determine whether, for example, developed software had met the specification. If this is the case the Authority would need to draft the dispute resolution clauses carefully so that the expert determination procedure was carved out from the escalation procedure and that these were, in turn, carved out from the governing law clause.

3.2.4 If the escalation procedure is optional and the parties decide not to exercise it, the Authority should ensure that the clause specifies whether or not the

parties can exercise the option to invoke the escalation procedure at a later stage.

3.3 To ensure that any resolution brought about by the escalation procedure is binding, it would need to be recorded via the Change Control Procedure. This may also need to be supplemented by a settlement agreement depending on the particular circumstances (see the Appendix to this Part B).

3.4 The escalation clause must dovetail with any governance provisions included in the Agreement. The governance provisions will contain processes for the parties to meet, discuss and report on a variety of issues relating to the Agreement. The Authority will not want delay in resolving issues because they have been discussed over a number of weeks or months in a forum under the governance provisions, only to be discussed again under a mandatory escalation procedure. Accordingly, the draft section of the schedule provides for escalation to the Project and Programme Boards as a preliminary stage of the escalation procedure.

4. TIMETABLE FOR DISPUTE RESOLUTION

4.1 The Authority should always ensure that timescales specified for the resolution of disputes suit the Authority's needs. The various mechanisms for dispute resolution will require different timescales (as described in more detail in the Appendix to this Part B) and this should be taken into account when considering which is appropriate.

4.2 In addition, where there is an escalation procedure, there are a number of further factors which will affect the timetable for resolution of a dispute including:

4.2.1 The number of escalation levels;

4.2.2 The appropriate people at each escalation level to seek to resolve the dispute. For the first level of escalation, it is usual for individuals such as project managers to seek to resolve the dispute. The second level is usually someone further up the reporting line who is responsible for the project and, thirdly, a senior officer from each party;

4.2.3 The timescale for each escalation level. Inevitably the timescale will be rather ad hoc in that it is a “fit all” timescale in terms of the range and complexity of the disputes that may arise. Timescales for each escalation level tend to range from one to 10 Working Days and the Authority should

resist extending them further without good reason (particularly where the escalation procedure is mandatory) otherwise months could be taken up with a process which may not prove effective or, worse still, could be used as a delaying tactic. If progress is being made but more time is needed than is provided for in the escalation clause then such change must be recorded in accordance with the Change Control Procedure.

APPENDIX

Alternative Forms Of Dispute Resolution: Understanding The Options

Set out below is a summary of the main processes and procedures currently available in the UK together with a brief analysis of the advantages and disadvantages in each case:

5. NON-BINDING PROCESSES

Basic Negotiation

5.1 This is the method most widely used in practice and often takes place before more formal dispute resolution procedures are invoked. It is flexible, informal and cost-effective if it works.

Mediation

5.2 Facilitative mediation is the most common type of mediation. It is a voluntary process which encompasses negotiation, but with the assistance of an independent third party mediator. The mediator works with the parties to reach a negotiated settlement through facilitation. He does not, however, adjudicate or make a binding decision.

5.3 Mediations are conducted on a confidential basis and remain non-binding unless and until the parties reach an agreement to settle their differences. The mediation itself will normally involve an initial plenary meeting and opening statements by the parties followed by private meetings, break-outs and further plenary meetings.

5.4 It is vital that the parties are represented at the mediation by people who have authority to instruct their lawyers to reach agreements, otherwise opportunities to settle may be lost.

Advantages of Mediation	**Disadvantages of Mediation**
• fast (most conclude in one day) • cost-effective • confidential • can help the parties avoid litigation or arbitration can help the parties preserve their relationship and carry on with a project	• settlement may not be achieved, resulting in wasted costs and delay

Advantages of Mediation	Disadvantages of Mediation
• parties retain control (no judge or arbitrator) • the parties can have a free and frank discussion (because it is "without prejudice") • it can enable creative and business-driven decisions • it can be used in conjunction with other dispute resolution processes and even after litigation or arbitration has begun	

5.5 Evaluative mediation, which is slightly different to facilitative mediation, allows the mediator to make an evaluation of all or part of the case during the mediation. He will look at the merits of each side's case as part of the process. His views are not, however, binding in any way. The hope is that by identifying strengths and weaknesses, the mediator will cause the parties to take a more realistic view of the merits and achieve a settlement.

Early Neutral Evaluation

5.6 This involves an independent third party such as a QC or judge evaluating information regarding a case and issuing an opinion on the likely outcome or a point of law. It can be fast and cost-effective and the hope is that it will lead to informed settlement negotiations and a final resolution.

Mini Trial or Executive Tribunal

5.7 This process combines advocacy, facilitated negotiation and evaluation. Each side's case is presented to a panel by advocates. The panel comprises a mediator and senior executives from each side. Submissions are made by the advocates. The executives then begin negotiations facilitated by the mediator. If settlement is not achieved, the executives may ask the mediator to render an advisory opinion. The idea is to help the executives see the strengths and weaknesses in their case. There is, however, no adjudication and nothing is binding unless and until a settlement is achieved. It is sometimes called an "Executive Tribunal".

6. BINDING PROCESSES

Arbitration

6.1 Arbitration is the resolution of disputes through a private process where the dispute is resolved by the decision of a nominated third party. Though private it is nonetheless formal and binding.

Advantages of Arbitration	Disadvantages of Arbitration
• it is private unlike litigation in the Courts • it provides neutrality where parties come from different countries and may therefore have different legal cultures • there is scope to appoint an expert in a particular field such as information technology or telecommunications • there is flexibility in relation to how the arbitration is conducted • arbitration awards are generally difficult to appeal which means that the successful party may be able to enforce the award without having to face numerous appeals and the delay that can be associated with this • cross-border enforcement is made easier by the existence of international treaties • provided that the parties co-operate and the arbitrator's diary is clear, it can be an efficient and speedy process	• arbitrators lack the penal sanctions available to Judges - this can undermine their power and prevent them from requiring an obstructive party to comply with directions and other (pre-trial) procedural matters • arbitrations can be more expensive than Court proceedings, particularly where one party is obstructive • arbitration involves extra cost such as the arbitrators fees and administrative fees payable to his arbitral institution • sometimes first choice arbitrators with expertise in a particular field will not be available • the Courts have the power to join third parties to litigation proceedings whereas in arbitration this is rarely the case unless all parties involved have agreed to it - this means that great care should be taken before providing for arbitration in multi-party situations such as large ICT projects involving one or more contractors, their sub-contractors etc. • the fact that arbitration awards are generally hard to appeal can increase the risk of unfairness if a party is unable to challenge an award that is wrong

Litigation in the Courts

6.2 Litigation is the process of resolving disputes through the use of the formal Court system. It is not voluntary, except in the sense that the claimant chooses to issue a claim in the first place. Once a case is started, it is not usually possible to withdraw without paying the other side's costs. The court imposes its own findings and the winner may enforce that judgment.

Advantages of Litigation	**Disadvantages of Litigation**
• the courts have more power over the parties compared with arbitration • it can be an efficient process if the parties are prepared to co-operate in getting the case ready for trial • the parties are not required to pay for the judges time or the cost of using court rooms etc. • some divisions of the Court system contain specialist Judges, such as the Patents Court and the Technology and Construction Court • the Courts have the power to organise and run multi-party litigation • numerous regional and bilateral treaties enable cross-border enforcement of judgments • in broad terms, the decisions of Judges can be appealed more easily than those of arbitrators thereby reducing the risk of injustice in some cases	• documents filed at Court which record the parties claims and defences will become matters of public record • the trial of commercial disputes will be in open court and therefore accessible to the public and the media • witness statements, which often contain detailed and commercially sensitive information, will also be in the public domain once the trial begins • the public nature of the Court system may not therefore suit parties that wish to avoid the risk of adverse publicity • where the volume of work is high, the availability of Judges can sometimes be a problem and cause delays

Expert Determination

6.3 This involves the appointment of an independent third party who makes a final and binding determination. It tends to be used in relation to contracts that require a valuation (for example, assets involved in the sale of the company) and for resolving technical matters (for example, on an ICT agreement, to determine whether software meets specification). It is an

informal process (compared with arbitration) and is not subject to due process. It is very difficult to appeal.

Advantages of Expert Determination	**Disadvantages of Expert Determination**
• generally it is a quick and cost-effective process • it is a private process • the parties normally control the timing and procedure • it dispenses with the need for the parties to appoint their own technical experts (leading to cost savings). • it can be suitable on large projects where quick decisions on technical issues are required so that the parties can carry on and avoid delay and the risk of lasting damage to their relationship	• high risk because of the absence of due process (the expert is not, for example, bound to act on the evidence and submissions of the parties and instead can proceed on the basis of his own opinions) • in general terms, the process is not subject to the legal safeguards and standards of fairness that exist in arbitration or litigation • the parties are very much in the hands of the expert because of the final nature of the determination, so they will need to be confident in his abilities • the expert cannot rule on his own jurisdiction so he may be challenged in the Courts - leading to delay and extra cost • good experts are not always available • there is no requirement on the expert to give reasons for his decision • it may be difficult to sue the expert and show that he got his decision wrong - because of flexibility inherent in the terms of reference to him • there is no convention for the enforcement of expert determination abroad • expert determination remains largely untried in relation to commercial disputes in the UK and the law relating to it is unsettled

Adjudication

6.4 This process is similar to expert determination and carries the same sorts of risks. It is popular in the construction industry in particular.

7. HYBRID PROCESSES

Med-Arb

7.1 This process combines mediation and arbitration. The parties begin with a mediation and, if that does not result in a resolution, the matter is referred to arbitration. Importantly the same third party will facilitate the mediation and thereafter hear the arbitration. Whilst this may lead to savings of time and money, it can also prevent a free and frank exchange at the mediation stage. Parties may be reluctant to participate fully if they fear that without prejudice statements or offers made by them at the mediation stage will count against them in the arbitration (even though, strictly speaking, the arbitrator should not take such matters into account).

Medaloa

7.2 This is another hybrid process which combines mediation and last offer arbitration. The parties mediate first and, if there is no settlement, the last offers made during the mediation are submitted to the mediator who chooses one or the other. The mediator then renders a final and binding decision.

Section C

Pro-forma/Example Schedule

Dispute Resolution Procedure

[Guidance: This schedule is included for guidance purposes only and should not be regarded as a recommendation that the following Dispute Resolution Procedures are adopted or that they are appropriate for every project. Before drafting this schedule, careful consideration should be given to the different types of dispute resolution mechanisms discussed in the guidance set out in the Appendix to Section B. Those mechanisms most appropriate to the project should be selected and included in the Dispute Resolution Procedure schedule. This example anticipates that a dispute will be dealt with by an escalation procedure which includes the following stages:

Stage 1 - Commercial Negotiation

Stage 2 - Mediation

Stage 3 - Arbitration

The Agreement stipulates at clause 8 (Delays Not Due To One Party) that a dispute may be assessed by an independent expert. This example includes such a procedure for dealing with referrals to an expert for determination (paragraph 11 (Expert Determination)).

Other possible dispute mechanisms that have not been included in this example include:

- ***Early neutral evaluation***
- ***Mini trial or executive tribunal***
- ***Adjudication***
- ***Med-Arb***
- ***Medola***

(please refer to the Appendix to Section B for explanatory notes regarding these alternatives)]

[Guidance: Multi-Party Dispute Resolution: The Agreement and this schedule 8.3 assume a single service provider solution and do not include drafting to cater for multi-party situations. Please refer to Section 2 of the Key Commercial Principles (Multi-Supplier Issues) for a discussion on the issues to be considered in a multi-party model.]

DEFINITIONS

[Guidance: Subject to agreement of this schedule, the following definition(s) will be added to schedule 1]

"Case Summary"	a concise summary of a party's case in a Dispute subjected to mediation;

"CEDR"	the Centre for Effective Dispute Resolution of International Dispute Resolution Centre, 70 Fleet Street, London, EC4Y 1EU;
"Dispute Resolution Timetable"	the Standard Dispute Timetable or the Expedited Dispute Timetable;
"Exception"	a deviation of project tolerances in accordance with PRINCE2 methodology in respect of the Agreement or in the supply of the Services;
"Expedited Dispute Timetable"	the reduced timetable for the resolution of Disputes set out in the Appendix to schedule 8.3 (Dispute Resolution Procedure) to be used in accordance with the provisions of paragraph 1.6 of schedule 8.3 (Dispute Resolution Timetable);
"Expert"	the person appointed by the parties in accordance with paragraph 4.2 of schedule 8.3 (Dispute Resolution Procedure);
"Mediator"	the independent third party appointed in accordance with paragraph 3.2 of schedule 8.3 (Dispute Resolution Procedure);
"Notice of Dispute"	a written notice served by one party on the other stating that the party serving the notice believes that there is a Dispute;
"Standard Dispute Timetable"	the standard timetable for the resolution of Disputes set out in Appendix to schedule 8.3 (Dispute Resolution Procedure);

8. INTRODUCTION

8.1 The Dispute Resolution Procedure shall start with the service of a Notice of Dispute.

8.2 The Notice of Dispute shall:

8.2.1 set out the material particulars of the Dispute;

8.2.2 set out the reasons why the party serving the Notice of Dispute believes that the Dispute has arisen;

8.2.3 elect (subject to the provisions of paragraph 8.6 below) whether the Dispute should be dealt with under the Standard Dispute Timetable or the Expedited Dispute Timetable; and

8.2.4 if the party serving the Notice of Dispute believes that the Dispute should be dealt with under the Expedited Dispute Timetable, explain the reason why.

8.3 Unless agreed otherwise, the parties shall continue to comply with their respective obligations under the Agreement regardless of the nature of the Dispute and notwithstanding the referral of the Dispute to the Dispute Resolution Procedure.

8.4 Subject to paragraph 9.5, the parties shall seek to resolve Disputes firstly by commercial negotiation (as prescribed in paragraph 9 below), then by mediation (as prescribed in paragraph 3 below) and lastly by recourse to arbitration (as prescribed in paragraph 12) or litigation [(in accordance with clause 71 (Governing Law and Jurisdiction))]. Specific issues may be referred to Expert Determination (as prescribed in paragraph 11 below) where appropriate.

8.5 The time periods set out in the Dispute Resolution Timetable shall apply to all Disputes unless the parties agree that an alternative timetable should apply in respect of a specific Dispute.

8.6 The parties may only agree to use the Expedited Dispute Timetable in exceptional circumstances where the use of the Standard Dispute Timetable would be unreasonable, including (by way of example) where one party would be materially disadvantaged by a delay in resolving the Dispute. If the parties are unable to reach agreement on the use of the Expedited Dispute Timetable within five Working Days of the issue of the Notice of Dispute then the use of this timetable shall be at the sole discretion of the Authority.

8.7 [If at any point it becomes clear that an applicable deadline set out in the Dispute Resolution Timetable cannot be met or has passed, the parties may agree in writing to extend the deadline. Any agreed extension shall have the effect of delaying start of the subsequent stages set out in the Dispute Resolution Timetable by the period agreed in the extension.]

9. COMMERCIAL NEGOTIATIONS

[Guidance: This is a relatively simple clause to provide principles for the resolution of disputes at a management level without third party intervention. It is anticipated that most low level issues would be routinely resolved by dialogue between the parties. A structured procedure for low level dispute resolution (Escalation Process) which reflects the composition of the management and reporting structures, is set out in schedule 8.1 (Governance).]

9.1 Subject to paragraph 9.5, the parties shall use all reasonable endeavours to settle any Dispute between them in good faith and in accordance with the procedure set out in this paragraph 9.

9.2 In the first instance, the Authority and the Contractor will make reasonable endeavours to resolve all Disputes as soon as possible, at the lowest level in the project structure in which they can best be managed. Where either party considers that a Dispute cannot be resolved within acceptable timescales the dissatisfied party may escalate the Dispute to the next level in the partnering structure in accordance with the following escalation process (**"Escalation Process"**), provided that the parties shall not repeat this process in respect of a Dispute relating to an Exception that has been escalated already in accordance with this process:

Escalation Process
Project Manager; then
Project Board; then
Programme Board.

9.3 [The speed of escalation and resolution of Disputes during this commercial negotiations stage will be judged by reference to the seriousness and operational impact of the issue and should be agreed between the parties (but in default of agreement at the discretion of the Authority).] The timescale for resolving Disputes by commercial negotiations shall be as set out in the applicable section of the Dispute Resolution Timetable.

9.4 If the parties have not settled the Dispute in accordance with the Escalation Process and the time period provided in paragraph 9.3 then the parties shall refer the matter to mediation in accordance with paragraph 10 of this schedule.

9.5 If either party is of the reasonable opinion that the resolution of a Dispute by commercial negotiation, or the continuance of commercial negotiations, will not result in an appropriate solution or that the parties have already held discussions of a nature and intent (or otherwise were conducted in the spirit) that would equate to the conduct of commercial negotiations in accordance with this paragraph 9, that party shall serve a written notice to that effect and the parties shall proceed to mediation in accordance with paragraph 10.

10. MEDIATION

10.1 In the event that a Dispute between the parties cannot be resolved by commercial negotiation in accordance with paragraph 9 the parties shall attempt to resolve it in accordance with CEDR's model mediation procedure.

10.2 If the parties are unable to agree on the joint appointment of a Mediator within the timescale specified in the applicable section of the Dispute Resolution Timetable, they shall make a joint application to CEDR to nominate the Mediator.

10.3 The Mediator, after consultation with the parties where appropriate, will:

10.3.1 attend any meetings with either or both of the parties preceding the mediation, if requested or if the Mediator decides this is appropriate and the parties agree;

10.3.2 read before the mediation each Case Summary and all the documents sent to him;

10.3.3 chair, and determine the procedure for the mediation;

10.3.4 assist the parties in drawing up any written settlement agreement; and

10.3.5 abide by the terms of CEDR's model mediation procedure and CEDR’s code of conduct for mediators.

10.4 The Mediator (and any member of the Mediator’s firm or company) will not act for either of the parties individually in connection with the Dispute in any capacity during the Term. The parties accept that in relation to the Dispute neither the Mediator nor CEDR is an agent of, or acting in any capacity for, any of the parties. Furthermore, the parties and the Mediator accept that the Mediator (unless an

employee of CEDR) is acting as an independent contractor and not as an agent or employee of CEDR.

CEDR

10.5 CEDR, in conjunction with the Mediator, will make the necessary arrangements for the mediation including, as necessary:

10.5.1 nominating, and obtaining the agreement of the parties to, the Mediator;

10.5.2 organising a suitable venue and dates;

10.5.3 organising exchange of the Case Summaries and documents;

10.5.4 meeting with either or both of the parties (and the Mediator if appointed), either together or separately, to discuss any matters or concerns relating to the mediation; and

10.5.5 general administration in relation to the mediation.

10.6 If there is any issue about the conduct of the mediation upon which the parties cannot agree within a reasonable time, CEDR will, at the request of any party, decide the issue for the parties, having consulted with them.

10.7 The parties agree to notify the Mediator that they wish to observe the relevant timescales agreed in the Dispute Resolution Timetable.

Participants

10.8 Each party will state the names of:

10.8.1 the person(s) who will be the lead negotiator(s) for that party, who must have full authority to settle the Dispute; and

10.8.2 any other person(s) (such as professional advisers, colleagues or sub-contractors) who will also be present at, and/or participating in, the mediation on that party's behalf.

Exchange of Information

10.9 Each party will send to CEDR at least 2 (two) weeks before the mediation, or such other date as may be agreed between the parties and CEDR, sufficient copies of:

10.9.1 its Case Summary; and

10.9.2 all the documents to which the Case Summary refers and any others to which it may want to refer in the mediation.

10.10 In addition, each party may send to the Mediator (through CEDR) and/or bring to the mediation further documentation which it wishes to disclose in confidence to the Mediator but not to any other party, clearly stating in writing that such documentation is confidential to the Mediator and CEDR.

10.11 The Mediator will be responsible for sending a copy of each party's Case Summary and supporting documents (pursuant to paragraph 10.9.1) to the other simultaneously.

10.12 The Parties should try to agree:

10.12.1 the maximum number of pages of each Case Summary; and

10.12.2 a joint set of supporting documents or the maximum length of each set of supporting documents.

The Mediation

10.13 The mediation will take place at the time and place arranged by CEDR. The parties agree to request that CEDR arrange the time and place for the mediation within the timescale specified in the applicable section of the Dispute Resolution Timetable. If the mediation cannot be arranged within the relevant timescale the parties shall treat the delay as though they had agreed an extension to the Dispute Resolution Timetable in accordance with paragraph 8.7.

10.14 The Mediator will chair, and determine the procedure at, the mediation.

10.15 No recording or transcript of the mediation will be made.

10.16 If the parties are unable to reach a settlement in the negotiations at the mediation, and only if all the parties so request and the Mediator agrees, the Mediator will produce

for the parties a non-binding recommendation on terms of settlement. This will not attempt to anticipate what a court might order but will set out what the Mediator suggests are appropriate settlement terms in all of the circumstances.

10.17 The parties agree to notify CEDR that the maximum duration for the mediation meeting shall be as set out in the applicable section of the Dispute Resolution Timetable.

Settlement Agreement

10.18 Any settlement reached in the mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, the parties (in accordance with the Change Control Procedure where appropriate). In any event any settlement agreement must be finalised within the timescales specified in the Dispute Resolution Timetable unless the parties agree an extension to the Dispute Resolution Timetable in accordance with paragraph 8.7. The Mediator will assist the parties in recording the outcome of the mediation.

Termination

10.19 The mediation will terminate when:

10.19.1 a party withdraws from the mediation;

10.19.2 a written settlement agreement is concluded;

10.19.3 the Mediator decides that continuing the mediation is unlikely to result in a settlement; or

10.19.4 the Mediator decides he should retire for any of the reasons in CEDR's code of conduct.

Stay of Proceedings

10.20 Any litigation or arbitration in relation to the Dispute may be commenced or continued notwithstanding the mediation unless the parties agree otherwise or a court so orders.

Confidentiality

10.21 Every person involved in the mediation will keep confidential and not use for any collateral or ulterior purpose:

10.21.1 information that the mediation is to take place or has taken place, other than to inform a court dealing with any litigation relating to the Dispute of that information; and

10.21.2 all information (whether given orally, in writing or otherwise) arising out of, or in connection with, the mediation including the fact of any settlement and its terms.

10.22 All information (whether oral or documentary and on any media) arising out of, or in connection with, the mediation will be without prejudice, privileged and not admissible as evidence or disclosable in any current or subsequent litigation or other proceedings whatsoever. This does not apply to any information, which would in any event have been admissible or disclosable in any such proceedings.

10.23 Paragraphs 10.21 and 10.22 shall not apply insofar as any such information is necessary to implement and enforce any settlement agreement arising out of the mediation.

10.24 None of the parties to the mediation will call the Mediator or CEDR (or any employee, consultant, officer or representative of CEDR) as a witness, consultant, arbitrator or expert in any litigation or other proceedings whatsoever. The Mediator and CEDR will not voluntarily act in any such capacity without the written agreement of all the parties.

Mediators fees and expenses

10.25 CEDR's fees (which include the Mediator's fees) and the other expenses of the mediation will be borne equally by the parties. Payment of these fees and expenses will be made to CEDR in accordance with its fee schedule and terms and conditions of business.

10.26 Each party will bear its own costs and expenses of its participation in the mediation.

Exclusion of Liability

10.27 Neither the Mediator nor CEDR shall be liable to the parties for any act or omission in connection with the services provided by them in, or in relation to, the mediation, unless the act or omission is shown to have been in bad faith.

11. EXPERT DETERMINATION

11.1 If the Agreement expressly requires a Dispute to be referred to expert determination or the Dispute relates to any aspect of the technology underlying the provision of the Services [or otherwise relates to an ICT technical, financial technical or other technical nature as the parties agree] and the dispute has not been resolved using the Escalation Process or mediation pursuant to paragraph 10, then either party may request (which request will not be unreasonably withheld or delayed) by written notice to the other that the Dispute is referred to an Expert for determination.

11.2 The Expert shall be appointed by agreement in writing between the parties, but in the event of a failure to agree within 10 Working Days, or if the person appointed is unable or unwilling to act, the Expert shall be appointed on the instructions of either the president of ***[Guidance: You should insert the appropriate society or organisation (after checking with them first]*** (or any other association that the parties reasonably understand to have replaced it) in relation to a technical Dispute, [or to the president of the Law Society in relation to all other Disputes.]

11.3 The Expert shall act on the following basis:

11.3.1 he/she shall act as an expert and not as an arbitrator and shall act fairly and impartially;

11.3.2 the Expert's determination shall (in the absence of a material failure to follow the agreed procedures) be final and binding on the parties;

11.3.3 the Expert shall decide the procedure to be followed in the determination and shall be requested to make his/her determination within 30 Working Days of his appointment or as soon as reasonably practicable thereafter and the parties shall assist and provide the documentation that the Expert requires for the purpose of the determination;

11.3.4 any amount payable by one party to another as a result of the Expert's determination shall be due and payable within 20 Working Days of the Expert's determination being notified to the parties;

11.3.5 the process shall be conducted in private and shall be confidential; and

11.3.6 the Expert shall determine how and by whom the costs of the determination, including his/her fess and expenses, are to be paid.

12. ARBITRATION

12.1 The parties may at any time before court proceedings are commenced agree that the Dispute should be referred to arbitration in accordance with the provisions of paragraph 12.4.

12.2 Before the Contractor may commence any court proceedings it shall serve written notice on the Authority of its intention and the Authority shall have 15 Working Days from receipt of the Contractor's notice in which to reply [requesting] the Dispute to be referred to arbitration in accordance with the provisions in paragraph 12.4.

12.3 In its notice to the Authority pursuant to paragraph 12.2, the Contractor may request that the Dispute is referred to arbitration, to which the Authority may, in its sole discretion consent.

12.4 If a Dispute is referred to arbitration the parties shall comply with the following provisions:

12.4.1 the arbitration shall be governed by the provisions of the Arbitration Act 1996 and the London Court of International Arbitration (**"LCIA"**) procedural rules shall be applied and are deemed to be incorporated into this Agreement (save that in the event of any conflict between those rules and this Agreement, this Agreement shall prevail); [***Guidance: may wish to agree supplementary/special terms in addition as an alternative to the procedural rules of the LCIA***]

12.4.2 the decision of the arbitrator shall be binding on the parties (in the absence of any material failure by the arbitrator to comply with the LCIA procedural rules);

12.4.3 the tribunal shall consist of a sole arbitrator to be agreed by the parties and in the event that the parties fail to agree the appointment of the arbitrator within 10 Working Days or, if the person appointed is unable or unwilling to act, as appointed by the LCIA; and

12.4.4 the arbitration proceedings shall take place in London.

13. URGENT RELIEF

Nothing in this schedule 8.3 shall prevent either party from seeking injunctive relief at any time.

14. [SUB-CONTRACTORS

[Guidance: Consider whether any Sub-contractors are likely to be involved in the delivery of the Services and whether their input will be required to resolve any dispute that may arise.]

14.1 The Contractor shall procure that any Sub-contractor involved in Services which are the subject of a Dispute shall, at the request of either party, provide any assistance required in order to resolve the relevant Dispute, including the provision of any information, data or documentation and the attendance at any meetings or hearings.

14.2 The Authority shall not be responsible for any costs incurred by any Sub-contractor participating in the resolution of any Dispute.]

APPENDIX

Dispute Resolution Timetable

Disputes will be escalated in accordance with the following timetable:

Stage	Standard Dispute Timetable	Expedited Dispute Timetable
Time permitted for resolution of Dispute by commercial negotiations pursuant to paragraph 2 of this schedule from the date of the Notice of Dispute	[one month]	[10 Working Days]
Period of time in which Dispute is to be referred to mediation in accordance with paragraph 9.4	[10 Working Days]	[five Working Days]
Time permitted in paragraph 10.2 to agree the appointment of the Mediator	[10 Working Days]	[five Working Days]
Period of time in which Mediator may convene the mediation meeting from the date of appointment in accordance with paragraph 3.13	[30 Working Days]	[20 Working Days]
Maximum duration of mediation meeting in accordance with paragraph 3.17	[three Working Days]	[one Working Day]
Period of time in which the mediation settlement is to be recorded in writing and signed by the parties in accordance with paragraph 3.18	[10 Working Days]	[five Working Days]

[Guidance: The timescales provided are for discussion purposes. You may wish to consider whether the timescales are appropriate.]