THE DEVELOPMENT OF THE ASEAN ALTERNATIVE DISPUTE RESOLUTION (ADR) GUIDELINES FOR CONSUMER PROTECTION

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FOREWORD

The welfare and interests of consumers is a central element of regional economic integration in the Association of Southeast Asian Nations. In this regard, the availability of effective dispute settlement mechanisms plays an important role in ensuring that consumers have substantive recourse when consumer disputes arise. The use of alternative dispute resolution in ASEAN Member States provides a low-cost, efficient and relatively informal way of resolving such consumer disputes. Having in place a well-established, effective, and viable alternative dispute resolution system in ASEAN Member States thus allows consumer disputes to be resolved quickly and expediently, in a manner that is neutral and fair, and in a way that minimises trade disruptions in the region.

At present, however, there is a lack of clarity in ASEAN Member States as to how such methods of alternative dispute resolution should be understood, set up, and implemented. Each ASEAN Member State is also at a different stage of advancement and sophistication in the utilisation of alternative dispute resolution mechanisms as part of their repertoire for redress in consumer disputes. Accordingly, it is an important part of the capacity building process in ASEAN to (a) analyse the present state of play of alternative dispute resolution for consumer disputes in each ASEAN Member State; and (b) to have in place recommendations and guidelines to strengthen the systemic development of alternative dispute resolution in ASEAN as a whole.

In furtherance of this objective, the present Project undertook two studies. First, a Country Assessment and Best Practices Report was prepared which assessed the alternative dispute resolution mechanisms and methods presently available in ASEAN Member States, and identified a number of important international best practices for the development of such mechanisms for consumer disputes. That report concluded by acknowledging that ASEAN Member States had gained some ground in implementing alternative dispute resolution, but that more could still be done in terms of ensuring that the alternative dispute resolution regimes of ASEAN Member States were fine-tuned for efficiency, neutrality, and for the consumer dispute context.

As the second study in this Project, the present ASEAN Alternative Dispute Resolution Guidelines seek to develop a set of guiding principles for a unified and harmonized approach to alternative dispute resolution of consumer disputes across ASEAN Member States. It is hoped that with these guidelines in place, ASEAN Member States will have an informative guiding document which they can consult, review, and implement to strengthen and fine-tune their respective alternative dispute resolution regimes for consumer disputes.

TABLE OF ABBREVIATIONS

AADCP	ASEAN-Australia Development Cooperation Program
ACBRCP 11	ASEAN Capacity Building Roadmap for Consumer Protection 2011
ACBRCP 25	ASEAN Capacity Building Roadmap for Consumer Protection 2025
ACCP	ASEAN Committee on Consumer Protection
ADR	Alternative Dispute Resolution
ADR Guidelines	ASEAN Alternative Dispute Resolution Guidelines for Consumer Protection
AEC	ASEAN Economic Community
AHLP	ASEAN High Level Principles on Consumer Protection
AMS	ASEAN Member States
ASAPCP	ASEAN Strategic Action Plan for Consumer Protection
ASEAN	Association of Southeast Asian Nations
ASEC	ASEAN Secretariat
CABP Report / Report	Country Assessment and Best Practices Report
CCPID	Competition, Consumer Protection and Intellectual Property Division
Handbook	Handbook of ASEAN Consumer Protection Laws and Regulations
OECD	Organisation for Economic Cooperation and Development
TOR	Terms of Reference for the present Project
UNCTAD	United Nations Conference on Trade and Development
UNGCP	United Nations Guidelines for Consumer Protection

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The ASEAN Committee on Consumer Protection ("**ACCP**"), with the support from the ASEAN-Australia Development Cooperation Program ("**AADCP**"), has commissioned the development of the ASEAN Alternative Dispute Resolution Guidelines for Consumer Protection (the "**ADR Guidelines**") with a view to understanding the different approaches to ADR, the means by which it has been implemented in the different ASEAN Member States ("**AMS**"), and the steps necessary for the effective establishment and application of ADR mechanisms within the consumer protection policy framework in AMS (the "**Project**"). It is envisioned that, by developing a unified approach to ADR in line with international best practices, consumer protection within ASEAN will be steadily enhanced. This would set in place the right conditions for broadening economic growth, promoting competitive markets, and attracting cross-border investments in and across ASEAN as a whole.

Against this backdrop, the substantive work in this Project leading to the formulation of the ADR Guidelines proceeded in two stages. First, an assessment was conducted of the ADR mechanisms and methods presently available in AMS, with a view to identifying (a) the present state of play of ADR in each State, (b) relevant international best practices for purposes of standard-setting, and (c) recommendations for the further development and enhancement of such ADR mechanisms in AMS. The information and findings from this assessment was recorded in a Country Assessment and Best Practices Report ("**CABP Report**" or "**Report**"), which provided the necessary foundation and basis of the present ADR Guidelines.

As the second study in this Project, these ADR Guidelines seek to develop a set of guiding principles for a unified and harmonized approach to alternative dispute resolution of consumer disputes across AMS. It is hoped that with these guidelines in place, AMS will have an informative guiding document which they can consult, review, and implement to strengthen and fine-tune their respective ADR regimes for consumer disputes. Accordingly, the present ADR Guidelines address the second stage in the Project, by setting out:

- An overview of the features of consumer disputes that need to be accounted for in the design of ADR mechanisms;
- The foundational guiding principles on which the ADR Guidelines are based;
- A detailed explanation of each of the components which go into establishing an efficient ADR mechanism for consumer disputes, from conception to roll-out; and
- Proposed recommendations for adopting and implementing the ADR Guidelines in AMS.

I. CHAPTER 1: INTRODUCTION

A. BACKGROUND

1. Consumer protection and welfare are important tenets under the ASEAN Economic Community. Consumer protection policies and laws ensure that consumers are provided with wider choices and competitive prices, are able to make decisions based on accurate, clear and consistent information, and are able to buy with trust and confidence through effective product and services safety standards and regulations. Indeed, with over 600 million consumers in ASEAN, a stable consumer protection legal framework plays an important role in promoting competitive markets, attracting cross-border investments, and contributing to ASEAN's regional economic growth.

2. However, to enforce such consumer protection policies and laws, consumers need access to an efficient dispute resolution system for the redress of complaints or violations of their consumer rights. Traditionally, the avenue for such recourse has been the commencement of litigation before the domestic courts of a country. However, recourse to litigation is often costly, time consuming, and stressful. Depending on the particular country concerned, a consumer may also face difficulties in succeeding in litigation if the laws of evidence in that country do not require the opposing party to disclose all relevant evidence relating to the complaint. In such situations, a consumer may find himself in a position of having pursued litigation of a consumer dispute for several years, committing significant time and resources, without a favourable outcome. In addition, on a systemic and policy level, the traditional resolution of consumer disputes through court-based litigation also places strain on the domestic courts of AMS because it unnecessarily takes up limited judicial resources for consumer disputes which tend to be numerous, low-value, and lacking in complexity. Each unresolved consumer dispute also has accumulative and knock-on effects on consumer confidence as a whole, which is disruptive for the promotion of cross-border trade and economic growth in AMS.

3. To resolve these issues, a proactive stance has been taken by AMS as regards the architecture of a dispute resolution system that is able to resolve consumer disputes efficiently. In this context, the use of ADR mechanisms to resolve consumer disputes in AMS is critical as it offers substantial advantages compared to traditional litigation. Broadly speaking, and as will be detailed in the sections that follow, ADR mechanisms tend to be more cost-effective, quicker, more flexible in procedure, and consent-based in nature. These characteristics make ADR mechanisms more suitable as redress mechanisms for consumer disputes which tend to be quickly and easily resolved if channeled to an appropriate ADR process (compared to traditional litigation).

4. Despite the advantages of ADR, a preliminary survey of the consumer protection regimes of AMS suggests that each AMS has its own domestic ADR policies and

laws, resulting in a complex and differentiated legal and policy environment across States. This challenge is compounded in the regional ASEAN context since each AMS is at a different stage of advancement in implementing ADR processes. The degree of acceptance, accessibility and awareness of disputants to ADR mechanisms also differs widely across AMS, resulting in a disparity of experience for consumers from one State to another. All of these complexities combined result in a challenging regional environment which undermines the general objective of the efficient resolution of consumer disputes by ADR.

B. OBJECTIVE OF THE PROJECT

5. The objective of the present Project was set by the ACCP and AADCP in the Terms of Reference ("**TOR**"). In 2013, ASEAN conducted a study which identified ADR as a viable and effective alternative to traditional litigation in the area of consumer disputes. In so doing, it also acknowledged that there was yet clarity over how the different ADR mechanisms are understood, set up, and practiced in the various AMS.

6. In order to ensure that there is a common understanding and approach on ADR across ASEAN, there is a need for ASEAN policymakers to have a common reference document which describes the various approaches to ADR, and the considerations, requirements and steps necessary for effective establishment and application of ADR mechanisms, particularly within the context of the ASEAN consumer protection policy framework and practice.

7. As a response to this need, the objectives of the Project are to:

   a. Assess the ADR mechanisms and methods available in AMS and identify international best practices both within ASEAN and beyond; and

   b. Develop a guideline for common approaches to ADR, to enable ACCP and the relevant ministries in AMS to set up and implement effective ADR mechanisms in their respective States.

C. PURPOSE OF THE ADR GUIDELINES

8. The present ADR Guidelines address the Project's second objective as set out in the TOR and as described in paragraph 7(b) above. The ADR Guidelines will cover the following:

   a. Objectives of the different types of ADR as well as the factors to be considered when setting up the various ADR mechanisms, particularly in the context of AMS consumer protection policies;

   b. Assessment of the feasibility in practice of each type of ADR such as practicality, institutional and cultural fit, human and financial resources, and

power parity among potential users;

c. Preparations needed for establishment of the appropriate ADR such as a needs assessment and identification of goals, participatory design process (involvement of stakeholders), adequate legal foundation, and effective supports;

d. Implementation criteria—effective selection, training and supervision of ADR providers, financial support, outreach, effective case selection and management, and program evaluation procedures;

e. Appropriate legal status of each of the ADR—whether decisions would have binding commitments; and

f. Common approaches to establish the different types of ADR—possibly in stages.

9. Taking into account the different stages of consumer protection development across AMS, the ADR Guidelines will provide an explanation of the ADR mechanisms for consideration by AMS, and detail a step-by-step approach of how to put those ADR mechanisms in place, in a manner that can be applied across all AMS.

D. THE STRUCTURE OF THIS REPORT

10. The present ADR Guidelines comprise five Chapters. As seen from the preceding sections, Chapter I sets out an introduction, provides the background details and overarching description of the present Project, and describes how the ADR Guidelines fit within the purpose of the Project. It also outlines the Project's objectives, the scope of work, and the structure of the ADR Guidelines.

11. Chapter II explains the features of consumer disputes to be accounted for in the design of ADR mechanisms. These include the features of consumer disputes in general, the features specific to domestic consumer disputes, the features unique to cross-border consumer disputes, as well as ASEAN context and culture.

12. Chapter III expounds on the key principles supporting an effective consumer protection ADR regime. These principles are drawn from a close review of international best practices and ASEAN's consumer protection objectives and goals. They constitute foundational principles for effective ADR, and inform how ADR processes ought to be designed.

13. Chapter IV sets out the guidelines for developing ADR mechanisms for consumer disputes. It covers an assessment of the feasibility in practice of each type of ADR for consumer disputes, and details the considerations involved in the implementation of ADR mechanisms from conception to roll-out.

14. Finally, Chapter V concludes by considering the way forward and by setting out

several recommendations for the smooth adoption and implementation of the ADR Guidelines in AMS.

II. CHAPTER 2: FEATURES OF CONSUMER DISPUTES TO BE ACCOUNTED FOR IN THE DESIGN OF ADR MECHANISMS

15. In order for any ADR mechanism to deal effectively with the resolution of consumer disputes, the rules and procedure of the ADR mechanism need to be attuned to the specific features of consumer disputes. These specific features comprise (a) features arising in consumer disputes generally, (b) features that are specific to domestic consumer disputes, (c) features that are specific to cross-border consumer disputes, and (d) the ASEAN context and culture. Each of these topics will be dealt with in the sections that follow.

A. GENERAL FEATURES

16. As will be recalled from paragraphs 19 to 22 of the CABP Report, a consumer is defined as someone who purchases goods or services in a personal and not a commercial capacity. A producer, trader, or supplier, by contrast, is defined as a person who acts in the course of a trade or business and sells goods or services for commercial gain or profit. Consequently, consumer disputes tend to contain several general features which emanate from the peculiarity of the consumer-producer relationship.[1]

1. Power Imbalances between Consumer and Producer or Supplier

17. There tends to be power imbalances inherent in the nature of the relationship between consumers on the one hand, and producers or suppliers on the other.[2] Consumers generally do not have a say or control over many aspects of the goods and services they are supplied with. By way of example, in purchasing a good or service, a consumer often does so without having had an opportunity to assure himself or herself that:

a. The good or service is of satisfactory quality, fits its description, and is reasonably able to fulfil the purpose for which it was sold;

b. The good or service is safe and complies with the relevant health and safety regulations; and

c. The good is free from defects.

18. Similarly, given that most producers or suppliers are large companies, standard terms

[1] ASEAN, Handbook on ASEAN Consumer Protection Laws and Regulations, p 3; European Parliament, "The notion of 'consumer' in EU Law" (Library Briefing, Library of the European Parliament, 6 May 2013).
[2] ASEAN, Handbook on ASEAN Consumer Protection Laws and Regulations, p 3; A R Vining & D L Weimer, "Information asymmetry favoring sellers: a policy framework" (1988) 21 Policy Sciences 281.

and conditions are often adopted and imposed on consumers without any compromise or negotiation. As such, consumers are often price-takers in consumer transactions, and the vast majority of consumer sales contracts tend to impose one-sided terms which are in favour of producers.

19. Such a power imbalance frequently surfaces in the consumer disputes context and affects how disputes between consumers and producers are resolved.

    a. First, producers are likely to have much more financial wherewithal compared to consumers. This financial disparity means that a producer can drag on a dispute resolution process inordinately by filing unnecessary applications, letters, and legal submissions—thereby greatly increasing the cost and stress of dispute resolution for the consumer—in a bid to force the consumer to drop his claim. This is especially the case if there are other consumers who may wish to bring a claim against the producer, and who are awaiting the outcome of the dispute resolution process before deciding whether to do so. In such a situation, a producer may seek to use financial muscle to force a consumer out of the dispute resolution process.

    b. Second, producers also tend to have access to top lawyers, whereas consumers are often self-represented. As such, a consumer who finds himself in a dispute resolution process with a producer will be at a severe disadvantage if he has a poor understanding of his legal rights by virtue of having no access to a lawyer, but yet faced with an opponent who has had access to expert legal advice and representation. This problem is further compounded by the fact that the sales contract is often already greatly in the producer's favour, as it was drafted by the producer and simply accepted by a consumer who has little say.

    c. Third, because of this power imbalance, consumers often find themselves particularly disadvantaged in a dispute resolution process, and will often take whatever is offered to them, even if it is a poor option.

20. In light of the above, an ADR mechanism will need to have in-built safeguards that will suitably address such power imbalances in the consumer-producer relationship.

2. Volume of Disputes

21. Given the nature of consumer transactions—*i.e.* virtually every individual is a consumer and engages in multiple consumer transactions on a daily basis—consumer disputes tend to be extremely voluminous in nature. The consumer market, both domestic and cross-border, is enormous and a high volume of trade takes place every day. The ever-growing nature of the consumer market is facilitated in no small way by the proliferation of the digital marketplace and the increasing prevalence of internet or

online transactions, which take place over computers and mobile electronic devices.[3]

22. Consequently, the number of consumer disputes that may potentially arise will and continues to increase significantly over time. This has an impact on the nature and design of ADR mechanisms in several ways:

    a. First, ADR mechanisms will have to be appropriately priced. If not, there will likely be a large number of consumers who may decide not to pursue a claim if costs are unaffordable or prohibitive. On a systemic level, this encourages bad behaviour on the part of the producer because it effectively results in a "*subsidy*" of the costs that would otherwise be imposed on the negative externalities of the producers' acts.

    b. Second, ADR mechanisms will have to be efficient and quick. An inefficient ADR regime would result in bottlenecks, delayed outcomes, and a large backlog of cases if consumer disputes do not reach an outcome within a fairly short amount of time.

    c. Third, ADR mechanisms will have to be effective, in that they have to arrive at a just outcome with limited availability of an appeal. If not, frequent appeals result in unresolved cases which still have to be dealt with. Given that new consumer disputes will continue to arise, an ineffective ADR regime tends to result in unnecessary appeals which in turn have a multiplier effect on case load.

    d. Finally, ADR mechanisms cannot be overly complex. The greater the complexity of an ADR mechanism, the greater the duration it is likely to take for a dispute to arrive at a just resolution. Thus, ADR mechanisms need to be designed with clear procedures that are easy to follow, and with a goal of avoiding overly burdensome procedures. In addition, the entire network of a State's ADR regime needs to be appreciated as a whole, so as to weed out and eradicate unnecessary regime-overlaps.

3. Variety of Disputes

23. Consumer disputes tend to cut across numerous different areas depending on the type of problem encountered, as well as the sector or industry involved. As was noted in paragraphs 28 to 66 of the CABP Report, such disputes span, *inter alia*: (a) contractual disputes, (b) product safety, defective products and health hazards, (c) unfair or unsolicited sales, (d) unethical or fraudulent pricing strategies, (e) fraud and scams, (f) insurance and financial advisory, (g) telecommunications, (h) e-commerce, (i) credit

[3] K Alboukrek, "Adapting to a New World of E-Commerce: The Need for Uniform Consumer Protection in the International Electronic Marketplace" (2003) 35 George Washington University International Law Review 425

and banking, and (j) healthcare and professional services.[4]

24. Accordingly, ADR mechanisms must account for the fact that consumer disputes tend to involve a very large variety of problems, sectors, and industries. This can be done in three ways.

25. First, broadly speaking, an ADR mechanism has to be general enough to encompass consumer disputes regardless of sector and type. This means that ADR mechanisms that have an overly narrow scope of subject matter could end up being ineffective. The exception, however, is where a specialised dispute settlement mechanism is set up to deal specifically with consumer disputes in a particular sector which sees a very high volume (e.g. consumer banking disputes). In such situations, a specialised dispute settlement mechanism is useful because it solves a targeted problem in a high-volume area in a manner that leverages on its specialisation to achieve an effective outcome.

26. Second, given the wide-ranging problems and sectors involved, a consumer dispute could involve a very specialised problem or area of law. As such, an ADR mechanism needs to have in-built procedures which allow the involvement of a subject matter specialist in the resolution process if that should prove necessary.

27. Third, the large variety of consumer disputes also means that different disputes come with different requirements, preferences and needs. Therefore, in this author's view, to prescribe a particular ADR mechanism (*e.g.* mediation) as being the best or most appropriate ADR method for resolving consumer disputes would be simplistic and reductive. The reality is that the efficient resolution of consumer disputes requires a network of different ADR mechanisms, working alongside traditional litigation, to cater to the wide variety of disputes.

4. Value of Disputes

28. Given the wide variety involved, it is a given that consumer disputes involve a spectrum as far as the value of such disputes is concerned. Value is, of course, relative. Thus, one might easily imagine a consumer with a terminal health problem arising from an unsafe product bringing a multi-million dollar claim against an errant producer. The reality, however, is that the vast majority of consumer disputes are very low value. This is a natural consequence of the fact that most of our daily consumer transactions revolve around low-value goods and services.

29. An ADR mechanism catering to consumer disputes must therefore contend with one key problem. As Lord Thomas aptly described:[5]

[4] AADCP II, "Consumer Protection Digests and Case Studies: A Policy Guide, Volume I" (ASEAN Secretariat, November 2014); AADCP II, "Consumer Protection Digests and Case Studies: A Policy Guide, Volume II" (ASEAN Secretariat, December 2015)

[5] P Cortes, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (CUP, 2018) at viii.

> "*Often, the disputes that arise are of low or modest value, such that it would be disproportionate to retain lawyers to litigate in the traditional manner. Proportionality aside, many consumers would, in any case, simply be unable to afford legal advice or representation*."

30. As is clear from the passage above, any effective ADR mechanism for consumer disputes must appreciate that affordability is a critical concern. The vast majority of consumers are unlikely to resort to traditional litigation, incurring substantial sums in legal fees, only to obtain a remedy that is worth less than the expenses borne in the process. As such, the cost of obtaining a remedy by resorting to an ADR mechanism must, as far as possible, be proportionate to the value of the claim in dispute. A failure to keep costs in check will erode the benefits of obtaining a resolution itself. On a systemic level, this decreases access to justice, and again, has an implied effect of subsidising errant producer behaviour.

B. FEATURES SPECIFIC TO DOMESTIC CONSUMER DISPUTES

31. Two issues arise where domestic consumer disputes are concerned. First, there is often less of a need for parties to conclude a dispute resolution clause to govern their dispute settlement obligations. Since both parties are from the same State, and their business relations and commercial activities generally occur within that same State, any disputes that arise can usually be brought before the domestic courts of that State. Hence, even without a specific dispute settlement clause in place, disputing parties will often seek recourse by litigation, as an immediate port of call, for the enforcement of their rights.

32. As such, domestic ADR institutions often have an uphill task trying to persuade individuals to utilise ADR mechanisms to resolve consumer disputes, despite its numerous advantages, since that requires a change of mindset for the consumer. It is therefore very important for efforts to be made to promote awareness of the available ADR mechanisms and the advantages associated with each such mechanism.

33. Second, domestic consumer disputes tend to involve a wider net of people from that State being affected by the same problem when it arises. As such, ADR mechanisms may need to provide some avenues for multi-party participation in the dispute resolution process. Such availability of multi-party ADR would result in significant cost savings since the alternative would mean that each single party would have to bring a different claim against the same producer or supplier, resulting in multiple cases which are largely duplicitous.

C. FEATURES SPECIFIC TO CROSS-BORDER CONSUMER DISPUTES

34. As the world becomes more globalised, the nature and complexity of consumer disputes have grown in tandem to become more international, multilateral, and cross-border. Despite the increasing interconnectedness of States, geographical and

territorial boundaries continue to create problems for international trade. A disputing party's ability to enforce its rights across boundaries, borders and territories has thus become closely related to the effectiveness of the dispute settlement mechanism that governs consumer relationships and transactions. In this regard, the problems specific to cross-border consumer disputes are as follows:

a. *Language*:[6] The most obvious concern is the language barrier that consumers / traders would face in cross-border transactions. In the EU context, commentators have noted that this is a large factor in a consumer's determination of whether to attempt dispute resolution at all. Pursuing cross-border dispute resolution often means that consumers would have to travel abroad to the foreign country where the trader is situated. Most of these countries operate only in their own language, and consumers are compelled to conduct proceedings in a foreign language. Although there are consumer organisations that offer assistance in referring complaints and translating the relevant documents, the trouble that consumers would have to go through is often enough to deter them from even attempting dispute resolution at all. As such, it is important that ADR be conducted in a common language between the parties.

b. *Importance of a contractual ADR clause*:[7] Unlike domestic consumer disputes, the issue of litigation is much more complex where cross-border disputes are concerned. In such situations, access to litigation in a domestic court is often not so clear-cut, as the issue of which court has jurisdiction over the subject matter of the dispute, or is the appropriate forum for deciding the dispute, is a complex one that is governed by the principles of private international law. Indeed, to add to that complexity, each State's rules of private international law are different, and thus the same issue of whether a domestic court can or should exercise jurisdiction over a dispute is often treated differently in different States. Consequently, the process of commencing litigation in respect of a cross-border dispute is often a lengthy and complicated process spanning several years, involving parallel litigation in multiple courts and very substantial legal costs even in the preliminary phase of establishing the appropriate domestic forum for the litigation of the international dispute. Most of these problems can be fixed if parties were to enter into a contractual ADR clause. This would take the dispute entirely out of any domestic litigation situation and allow the dispute to be resolved by ADR, thereby avoiding the bulk of the conflicts of laws problems. Some general sample ADR clauses have been included for reference in Annex 1.

[6] G Ruhl, "Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: a Critical Evaluation of the European Legislature's Recent Efforts to Boost Competitiveness and Growth in the Internal Market" (2015) 38 Journal of Consumer Policy 431.
[7] Ibid; P Cortes and F E De la Rosa, "Building a Global Redress System for Low-Value Cross-Border Disputes" (2013) 62 International and Comparative Law Quarterly 407; J Hill, *Cross-border Consumer Contracts* (OUP, 2008)

c. *Forum selection, bias and neutrality*:[8] Under the rules of private international law in most States, establishing the appropriate forum for litigation is a balancing exercise that involves an assessment of the facts and circumstances of the parties' relationship, the activity or transaction concerned, and the various connecting factors to a domestic jurisdiction, in order to appraise which is the most appropriate or convenient forum for litigating the dispute. When approached on these criteria, however, there is often a substantial risk that the most appropriate or convenient forum for litigation is the court of the State of one of the disputing parties. This could lead the other disputing party to feel that there may be a lack of impartiality or a risk of bias since the domestic court of a State may favour its own national. Again, many of these problems can be avoided if parties resort to ADR. By removing the dispute from the domestic sphere, ADR tends to preserve neutrality by removing the perceived "home-State" bias. In addition, most ADR rules provide that the neutral (*i.e.* mediator, arbitrator or conciliator), should not be a national of the State of either of the parties. This also preserves and protects the neutrality of the proceedings, and helps to dispel any notion of perceived bias.

35. In light of the above-mentioned features of cross-border disputes, consumers are often deterred from pursuing cross-border litigation of consumer disputes. Seen against the backdrop of these problems, the advantages posed by a comprehensive consumer protection ADR regime becomes even more pronounced, as problems associated with choice of law or the applicable law will matter less in consensual dispute resolution. The issue of language barriers is also easily resolved by implementing an ADR procedure that gravitates towards a neutral or international culture and context, and by the use of a common language between the parties for conducting the ADR procedure.

D. THE ASEAN CONTEXT AND CULTURE

36. Finally, in order to gain the most out of the dispute settlement process, ADR mechanisms should incorporate regional preferences as much as possible.[9] Given that most ADR involve consensual processes based on the willingness of a party to settle the dispute, incorporating the ASEAN context and culture in ADR would enhance the chances of the expedient and peaceful resolution of consumer disputes, as well as increase the likelihood of compliance with any binding decision. Indeed, the skilful incorporation of ASEAN culture into an ADR mechanism could also build commonality between the disputing parties, which would go some way to correcting power imbalances.

37. In this regard, a deeper look at the various AMS' preferences and cultural use of ADR

[8] P Cortes and F E De la Rosa, "Building a Global Redress System for Low-Value Cross-Border Disputes" (2013) 62 International and Comparative Law Quarterly 407

[9] R Kaushal and C T Kwantes, "The role of culture and personality in choice of conflict management strategy" (2006) 30 International Journal of Intercultural Relations 579

indicates that all AMS share several overarching preferences arising out of ASEAN regional culture:[10]

a. *Informality and flexibility*: There is a preference for ADR mechanisms that are less formal, and which have also been localised to the nature of the parties' relationship, as opposed to more formal forms of dispute resolution such as litigation where mandatory legal procedures are applied to parties regardless of the context. It is therefore important for ADR mechanisms to allow a greater degree of customisation between disputing parties.

b. *Respect for authority figures*: There is a clear respect for authority that is seen across all AMS, and which is deeply embedded in history, tradition, and culture. This is seen by the fact that all AMS traditionally used forms of ADR such as mediation or conciliation where the third-party neutral facilitating the dispute resolution is an elder or community leader. This is an important point to take into account for ADR mechanisms requiring the participation of a third-party neutral.

c. *Importance of relationships and social harmony*: There is generally a desire to value relationships over rights and obligations. However, it must be noted that, culturally speaking, such a tradition developed in the context of community disputes where disputing parties had to interact and keep good relations for the long term. Thus, while ASEAN people tend to be collectivist in nature, in the author's opinion, the importance of preserving relationships or social harmony may not have much bearing in consumer disputes which are generally conducted on an arms-length basis between parties who are unlikely to have a long-term relationship.

d. *Avoidance of confrontation*: ASEAN culture is generally non-confrontational in nature, with emphasis being placed on politeness and courtesy. Consequently, there is a general preference for modes of dispute resolution which do not require parties to engage in tit-for-tat exchanges over a dispute.

e. *Saving "face"*: The concept of "saving face" relates to the preservation of

[10] J Lee and H H Teh, *An Asian Perspective on Mediation* (Singapore Academy of Law, 2009); Ahmad Jefri Rahman, "Developments in Arbitration and Mediation as Alternative Dispute Resolution Mechanisms in Brunei Darussalam – Part 2" (2014) 16:3 Asian Dispute Review 120; I Chanboracheat, "Comparative Analysis on Alternative Dispute Resolution in Cambodia and China, in Particular, Arbitration" (2017); S Sorphea and T Sideth, "Dispute Resolution Outside the Judicial System at the National and Sub-National Levels" (Parliamentary Institute of Cambodia, June 2015); H Juwana, "Dispute Resolution Process in Indonesia" (Institute of Developing Economies, March 2003); Country Report on the Alternative Dispute Resolution in Laos, Regional Training for Chief Justice on the Alternative Dispute Resolution (February 2015); Patricia-Ann T. Prodigalidad, Building an ASEAN Mediation Model: The Philippine Perspective (2012); Teh Hwee Hwee, "Mediation Practices in ASEAN: The Singapore Experience", Speech delivered at the 11th ASEAN Law Association General Assembly Conference in Bali, February (2012); Sorawit Limparangsri and Montri Sillapamahabundit, Mediation Practice: Thailand's Experience (2012) (ALA Workshop Papers); Le Hong Hanh and Le Thi Hoang Thanh, "Mediation and Mediation Law of Vietnam in Context of ASEAN Integration"

respect, avoiding shame and public humiliation, and the maintenance of harmony outwardly. While it assumes a great degree of interconnectedness and attributability between the community and the individual, the reality is that saving "face" is often a great motivator for parties to participate in an ADR process which could potentially result in a win-win situation. In such a setting, parties are able to negotiate on a joint explanation or resolution of their dispute which could allow both of them to outwardly present a "win", thereby avoiding any public humiliation of losing or entering into a bad bargain.

38. As a result of the above features of ASEAN culture, commentators have explained that several assumptions of Western forms of dispute settlement may be incompatible in the ASEAN context, and some variations will have to be made. Nonetheless, it suffices to say that given the nature of ASEAN culture, and the long history of using ADR informally in community disputes, such ADR processes with the right modifications tend to be well suited to consumer disputes arising in the ASEAN context.

III. CHAPTER 3: GUIDING PRINCIPLES IN DEVELOPING AND IMPLEMENTING ADR MECHANISMS FOR CONSUMER DISPUTES

A. FOUNDATIONS FOR THE KEY PRINCIPLES

39. The foundations for the key principles set out below are the product of a detailed review of a substantial number of documents arising from academic material, practice information, and international working groups. While it would not be useful to set out in this section the list of information that were considered by the author in drafting the guiding principles below, it should be noted that the principles drafted below are a result of studying three areas of issues in combination.

40. First, a great deal of focus was placed on analysing a key area of research—the international standards on ADR that have been developed by multi-governmental groups for standard-setting purposes, as well as by individual governments for implementation across their internal municipalities. It was this area of research that was most relevant because (a) the objectives of those documents closely matched ASEAN's current objectives, (b) the multi-stakeholder nature of those working groups also meant that due regard was given to regional implementation by different States or governments, and (c) each of these guidelines were developed specifically for consumer disputes.

41. These international standards were drawn from:

a. The United Nations Guidelines for Consumer Protection ("**UNGCP**"),[11] which

[11] UNCTAD, "United Nations guidelines on consumer protection" <https://unctad.org/topic/competition-and-consumer-protection/un-guidelines-on-consumer-protection> accessed 27 November 2020.

sets out what the United Nations envisions to be the main characteristics of an effective consumer protection regime;

b. The European Union Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes ("**EU Directive**"):[12] Similar to the situation faced in ASEAN, the EU Directive recognizes disparity amongst EU States on the use of ADR in consumer protection policy and provides steps for States to take to ensure the uniform adoption and minimum standards of ADR to be required;

c. The United Kingdom's Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015,[13] which creates a new "residual" ADR scheme for consumer disputes, and appoints a principal authority to certify and monitor relevant ADR providers;

d. The United States Federal Trade Commission,[14] which appears to adopt a policy of autonomy, and does not subscribe to any controlling guidelines at the federal level in the area of consumer protection;

e. The Organisation for Economic Co-operation and Development ("**OECD**") and its Recommendation on Consumer Dispute Resolution and Redress,[15] which sets out principles for an effective and comprehensive dispute resolution and redress system that would be applicable to both domestic and cross-border disputes; and

f. The UNCTAD Manual on Consumer Protection, Consumer Dispute Resolution and Redress (2017),[16] which echoes the criteria mentioned in the EU Directive for an effective ADR consumer protection regime.

42. Second, due diligence was also undertaken to assess how the guiding principles could best reflect and take into account the existing principles that ASEAN has already developed in the area of consumer disputes. These include:

[12] EUR-Lex, "Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)" <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011> accessed 27 November 2020.

[13] Legislation of the United Kingdom, "The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015" <https://www.legislation.gov.uk/uksi/2015/542/contents/made> accessed 27 November 2020.

[14] United States Federal Trade Commission, "About the FTC" <https://www.ftc.gov/about-ftc> accessed 27 November 2020.

[15] Organisation for Economic Co-operation and Development, "OECD Recommendation on Consumer Dispute Resolution and Redress" (12 July 2007) <https://www.oecd.org/sti/ieconomy/38960101.pdf> accessed 27 November 2020.

[16] United Nations Conference on Trade and Development (UNCTAD), "Manual on Consumer Protection" <https://unctad.org/system/files/official-document/ditccplp2017d1_en.pdf> accessed 27 November 2020.

a. The ASEAN High-Level Principles on Consumer Protection;[17]

b. The ASEAN Study on Models for Internal Complain Systems and External Consumer Redress Schemes in ASEAN, Output 8: ASEAN Complaint and Redress Mechanism Models;[18]

c. The ASEAN Study on Development of Complaint and Redress Mechanism Models in ASEAN, Output 9: Guidelines for the Selection and Implementation of Complaint and Redress Models;[19]

d. The ASEAN Strategic Action Plan for Consumer Protection 2016-2025;[20]

e. The ASEAN Capacity Building Roadmap for Consumer Protection 2020-2025, Roadmap 2025;[21]

f. The ASEAN Capacity Building Roadmap for Consumer Protection 2020-2025, Regional Capacity Building Brief;[22] and

g. The Handbook on ASEAN Consumer Protection Laws and Regulations.[23]

43. Finally, serious consideration was given to how the various features of consumer disputes set out in Chapter 2(A), (B) and (C) above, and the ASEAN cultural issues detailed in Chapter 2(D) above, could be duly and suitably incorporated into these guiding principles.

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[17] AADCP II, "ASEAN High-Level Principles on Consumer Protection" <https://aseanconsumer.org/file/pdf_file/ASEAN%20High%20Level%20Principles%20on%20Consumer%20Protection.pdf> accessed 27 November 2020.

[18] AADCP II, "Models for Internal Complaint Systems and External Consumer Redress Schemes in ASEAN, Output 8: ASEAN Complaint and Redress Mechanism Models" (6 December 2013) <https://www.asean.org/storage/images/2015/January/Community-ASEAN_economic_community-consumer_protection-key_document/Output%208%20i.Complaint%20and%20Redress%20Models%20-%209Jan14.pdf> accessed 27 November 2020.

[19] AADCP II, "Development of Complaint and Redress Mechanism Models in ASEAN, Output 9: Guidelines for the Selection and Implementation of Complaint and Redress Models" (6 December 2013) <https://www.asean.org/wp-content/uploads/images/2015/January/Community-ASEAN_economic_community-consumer_protection-key_document/Output%209%20%20Guidelines%20for%20Selection%20of%20Models%20-%209Jan14.pdf> accessed 27 November 2020.

[20] ASEAN Strategic Action Plan for Consumer Protection 2016-2025: Meeting the Challenges of a People-Centered ASEAN Beyond 2015 <https://asean.org/storage/2012/05/ASAPCP-UPLOADING-11Nov16-Final.pdf> accessed 27 November 2020.

[21] AADCP II, "ASEAN Capacity Building Roadmap for Consumer Protection 2020-2025, Roadmap 2025" <http://aadcp2.org/wp-content/uploads/ASEANCapacityBuildingRoadmap2020-2025_20200303.pdf> accessed 27 November 2020.

[22] AADCP II, "ASEAN Capacity Building Roadmap for Consumer Protection 2020-2025, Regional Capacity Building Brief" <http://aadcp2.org/wp-content/uploads/ASEANCapacityBldgRoadmap2025_RegionalBrief_20200304.pdf> accessed 27 November 2020.

[23] ASEAN, Handbook on ASEAN Consumer Protection Laws and Regulations <https://asean.org/wp-content/uploads/2018/05/Handbook-on-ASEAN-Consumer-Protection-Laws-and-Regulation.pdf> accessed 27 November 2020.

44. The end product is a list of 10 principles that establish certain key markers of what an ADR mechanism should possess in order to efficiently deal with consumer disputes arising in ASEAN. These principles will be set out in rule-form in the sections that follow.

B. PRINCIPLE 1: DEVELOPMENT OF NATIONAL POLICIES FOR ADR OF CONSUMER DISPUTES

45. Principle 1

a. AMS should develop a national policy for ADR of consumer disputes;

b. AMS should review and undertake a study of their existing dispute resolution and redress frameworks to ensure that they provide consumers with access to fair, easy to use, timely and effective ADR and redress mechanisms without unnecessary cost or burden.

c. In so doing, AMS should ensure that their domestic frameworks provide for a combination of different mechanisms for dispute resolution and redress in order to respond to the varying nature and characteristics of consumer complaints.

d. In addition, AMS should pay special attention to the domestic cultural preferences of their respective States, and undertake a study as to how best their existing ADR mechanisms for consumer disputes may be modified to reflect such culture.

C. PRINCIPLE 2: ACCESS TO JUSTICE

46. Principle 2

a. AMS shall facilitate access by consumers to ADR procedures and shall ensure that consumer disputes which involve a producer, supplier, or trader established in their respective States can be submitted to an ADR institution which complies with the requirements set out in these principles.

b. AMS shall ensure that ADR entities:

i. Maintain an up-to-date website which provides the parties with easy access to information regarding ADR procedures, and which enables consumers to submit a complaint and the requisite supporting documents online.

ii. Where applicable, enable the consumer to submit a complaint offline;

iii. Enable the exchange of information between the parties via electronic means or, if applicable, by post; and

iv. Accept both domestic and cross-border consumer disputes.

c. AMS shall ensure that, when ADR entities are permitted to establish pre-specified monetary threshold or limits to confine access to ADR procedures, those thresholds must be set at a level which does not significantly impair the consumers' access to justice.

D. PRINCIPLE 3: EXPERTISE, INDEPENDENCE AND IMPARTIALITY

47. Principle 3

a. AMS shall ensure that the persons in charge of ADR possess the necessary expertise and are independent and impartial. This shall be done by ensuring that such persons:

i. Possess the necessary knowledge and skills in the field of ADR of consumer disputes, as well as a general understanding of law;

ii. Are not liable to be relieved from their duties without just cause;

iii. Are not subject to any conflicts of interest as regards either party or their representatives;

iv. Are remunerated in a way that is not linked to the outcome of the procedure; and

v. Shall without undue delay disclose to the ADR institution and/or disputing parties any circumstances that may, or may be seen to, affect their independence and impartiality or give rise to a conflict of interest with either party to the dispute they are asked to resolve. The obligation to disclose such circumstances shall be a continuing obligation throughout the ADR procedure.

b. In the event of a situation falling within Principle 3(a)(v) above, AMS shall ensure that ADR entities have in place procedures to ensure that:

i. The person concerned is replaced by another person that shall be entrusted with conducting the ADR procedure; or failing which

ii. The person concerned refrains from conducting the ADR procedure; or failing which

iii. The person concerned is allowed to continue to conduct the ADR procedure only if the parties have not objected after they have been informed of the circumstances and their right to object.

E. PRINCIPLE 4: TRANSPARENCY

48. Principle 4

a. AMS shall ensure that ADR entities make publicly available on their websites and by any other appropriate means, clear and easily understandable information on:

i. Their contact details, including postal address and e-mail address;

ii. The types of disputes they are competent to deal with, including any threshold or limit (monetary or otherwise) if applicable;

iii. The procedural rules governing the resolution of a dispute and the grounds upon which the ADR institution may refuse to deal with a given dispute;

iv. The languages in which complaints can be submitted to the ADR institution and in which the ADR procedure is conducted;

v. Any preliminary requirements the parties may have to meet before an ADR procedure can be instituted;

vi. Whether or not the parties can withdraw from the procedure;

vii. The costs, if any, to be borne by the parties, including any rules on awarding costs at the end of the procedure;

viii. The general length of the ADR procedure and the average time taken to resolve disputes;

ix. The legal effect of the outcome of the ADR procedure, including the penalties for non-compliance in the case of a decision having binding effect on the parties, if applicable; and

x. The enforceability of the ADR decision, if relevant.

b. AMS shall ensure, however, that the fact that a particular dispute has been submitted to ADR, the identities of participants to the ADR proceedings, and any and all information and documents disclosed in the course of ADR proceedings, shall be kept confidential.

F. PRINCIPLE 5: EFFECTIVENESS

49. Principle 5

a. AMS shall ensure that ADR procedures are effective and shall fulfil the following requirements:

i. The parties have access to the procedure without being obliged to retain a lawyer or a legal advisor;

ii. The ADR institution which has received a complaint notifies the parties to the dispute as soon as it has received all the documents containing the relevant information relating to the complaint; and

iii. The outcome of the ADR procedure is made available as soon as reasonably practicable from the date on which the ADR entity has received the complete file relating to the complaint.

G. PRINCIPLE 6: FAIRNESS AND DUE PROCESS

50. Principle 6

a. AMS shall ensure that in ADR procedures:

i. The parties shall have a reasonable opportunity to express their views, and to be provided with the arguments, evidence, documents and facts put forward by the other party, any statements made and opinions given by experts, and be able to comment on them; and

ii. The parties are notified of the outcome of the ADR procedure in writing;

b. In ADR procedures which are aimed at resolving the dispute by proposing a solution, AMS shall ensure that:

i. The parties have been informed that they may withdraw from the procedure at any stage;

ii. They have a choice as to whether or not to agree to or follow the proposed solution;

iii. The proposed solution may be different from an outcome determined by a court applying legal rules;

iv. The parties have been informed of the legal effect of agreeing to or following a proposed solution;

v. The parties, before expressing their consent to a proposed solution or settlement, are allowed a reasonable period of time to reflect.

H. PRINCIPLE 7: LEGALITY

51. Principle 7

a. AMS shall ensure that in ADR procedures which are aimed at resolving the

dispute by imposing a solution on the consumer, the solution imposed shall not result in the consumer being deprived of the protection afforded to him by the mandatory provisions of the law of the State of the applicable law.

I. PRINCIPLE 8: EFFICIENCY

52. Principle 8

a. AMS shall ensure that ADR procedures are conducted expediently, with an appropriate level of oversight, and without undue delay.

J. PRINCIPLE 9: PARTY AUTONOMY

53. Principle 9:

a. AMS shall ensure that in ADR procedures:

i. The parties are given, as far as possible, the right to agree on modifications of the ADR procedure as they deem fit; and

ii. The parties are given, as far as possible, the right to agree on the person who is deciding their dispute, or otherwise facilitating the resolution of their dispute.

K. PRINCIPLE 10: ENFORCEMENT

54. Principle 10

a. AMS shall ensure that the outcome of the ADR procedure may be made enforceable; and

b. Nothing shall affect the rules applicable to the recognition and enforcement in another AMS of an agreement made enforceable in accordance with Principle 10(a).

IV. CHAPTER 4: GUIDELINES FOR DEVELOPING ADR MECHANISMS FOR CONSUMER DISPUTES

55. Having examined the key principles that States should adopt and integrate into their consumer protection ADR policies, this Chapter turns to consider the various practical considerations involved in implementing an effective ADR regime, with a view to explaining each part of the road map for implementing an ADR mechanism.

A. ABILITY OF ADR MECHANISMS TO MEET THE NEEDS ARISING IN CONSUMER DISPUTES

56. Having considered the various features of consumer disputes that need to be accounted

for in the design of ADR mechanisms, this section starts by analysing the pros and cons of each ADR mechanism, in order to compare and contrast the ability of each form of ADR to meet the needs arising in consumer disputes.

57. As each method of ADR has already been explained in the CABP Report, this section assumes that readers have read the CABP Report and therefore have a basic familiarity with each form of ADR. This section therefore builds upon the content in the CABP Report.

1. Negotiation

General Features of Consumer Disputes	**Ability to correct power imbalances**	Poor. Generally speaking, there is a very poor ability to correct power imbalances in negotiation. This is because negotiation is conducted by the parties itself, often with the participation of their respective lawyers. As such, whatever power imbalance existing between the parties prior to the negotiation often remains, and in fact, is often made use of as a tactical tool in negotiation. A party would have to depend on himself, or on his lawyer, to try and correct any power imbalances.
	Ability to handle large volume of disputes	Excellent. Given that negotiation is conducted by the parties themselves without any interposition or oversight of an institution, there is no administrative burden which could impede the handling of a large volume of disputes. Thus, a very large number of disputes could be resolved by negotiation so long as parties are willing to attempt negotiation and come to a settlement.
	Ability to handle large variety of disputes	Excellent. Again, given that parties are the ones negotiating, there is no limitation to the scope, kind, or variety of disputes that may be negotiated. The drawback, however, is that if participants to the negotiation are simply the parties, there is no specialised help in the event that subject matter expertise proves necessary. In such situations, parties may agree to bring in a subject matter specialist to assist the negotiation. As such, negotiation has the ability to accommodate the parties' needs, given how much flexibility it involves.
	Cost-effectiveness for low-value	Excellent. Negotiation is very cost-effective. Since it is a voluntary process between the parties, often, no money is spent at all. Parties simply meet up to discuss how they

	disputes	wish to settle the dispute. They often do so in public venues or office spaces.
Features of Domestic Consumer Disputes	**Ease of being accepted as an alternative to litigation**	Excellent. Negotiation is often resorted to as a first step prior to litigation. Accordingly, it is highly complementary to most domestic users' general proclivity to resort to litigation. However, given the vast differences between negotiation and litigation, negotiation should not be seen as a close alternative to litigation in terms of *style* or procedure.
	Ease of multi-party participation	Excellent. Parties may allow as many people to participate as they deem fit. Accordingly, as a matter of principle, negotiation would be suitable. However, it is necessary to bear in mind that the greater the number of parties, the more difficult it often is to reach a settlement.
Features of Cross-Border Consumer Disputes	**Ability to accommodate language**	Excellent. It is easy to accommodate any language in the context of a negotiation. Parties may simply speak a common language or use an interpreter.
	Ease of concluding ADR Clause	N.A. While consent is necessary for negotiation, there is no need for any form of *written* consent before parties may negotiate. Accordingly, the vast majority of negotiations take place without parties having signed any form of ADR clause. On the flip side, however, this means that a party is not obligated to negotiate, and may simply walk away from the negotiation at any point.
	Neutrality, independence and impartiality	N.A. This criterion is concerned about the independence and impartiality of a third-party neutral in facilitating a settlement. As such, it is not applicable in negotiation where such a third-party is not involved in the process.
ASEAN Culture	**Informality and flexibility**	Excellent. Negotiation is highly informal and flexible, as parties are absolutely free to decide how they wish to conduct the negotiation, and what type of settlement they wish to agree upon between them.
	Use of authority figure	N.A. None.

and Values	**Value relationships over rights and obligations**	Excellent. The flexibility of negotiation certainly allows parties to value their relationships over their rights and obligations. In negotiating, parties are not bound in any way to resolve the matter by reference to the law. As such, they are entirely free to come up with any solution between them.
	Avoidance of confrontation	Good. While avoidance of confrontation is certainly possible in negotiation, this boils down to the attitude of the parties who are negotiating. If parties are unable to agree, this may result in confrontation and arguments. However, parties may also adopt an entirely collaborative style of negotiation.
	Saving "face"	Excellent. Parties are free to fashion their settlement. Hence, there is a very large scope to agree on a win-win solution that would help both sides save "face".

2. Mediation

General Features of Consumer Disputes	**Ability to correct power imbalances**	Excellent. There is an excellent ability to correct power imbalances given the right mediator. It is the role of the mediator to interpose between the parties and to ensure that both sides approach the mediation in a constructive manner.
	Ability to handle large volume of disputes	Excellent. As most mediation (particularly for low-value and simple disputes) takes about 1 to 2 days on average, the administrative burden is not high. As such, an efficient mediation system should be able to handle a large volume of disputes and resolve them quickly and efficiently.
	Ability to handle large variety of disputes	Excellent. There is no limit to the type of consumer disputes that can be brought to mediation. However, it is simply noted that it may not be suitable to mediate disputes relating to scams or fraud since those types of disputes may involve criminal activity.
	Cost-effectiveness	Good. The bulk of the costs of mediation would be the fees

	for low-value disputes	of the mediator and the fees of parties' lawyers (if lawyers are engaged). While such fees are not insignificant, many institutions tend to have a differential rate depending on the quantum of the dispute.
Features of Domestic Consumer Disputes	**Ease of being accepted as an alternative to litigation**	Good. The objective of mediation is entirely different from litigation. Litigation seeks to resolve a dispute through a legal decision. In mediation, parties are invited to propose their own solutions without any reference to the law. As such, mediation is often seen as a true alternative to court litigation.
	Ease of multi-party participation	Good. Parties are free to agree on a larger number of participants. However, should there be too many parties involved, mediation is likely to be ineffective. This is because the participation of a large number of independent parties would make it difficult for the mediator to conduct private caucuses with each party and would also make it much harder for multiple parties to agree to a settlement.
Features of Cross-Border Consumer Disputes	**Ability to accommodate language**	Excellent. It is easy to accommodate any language in the context of mediation, so long as the parties choose a mediator who speaks the language of choice.
	Ease of concluding ADR Clause	Good. There are usually two ways through which parties can agree on a mediation clause. First, parties may agree to insert a mediation clause into their contract before a dispute even arises. This is fairly rare in practice for mediation. Second, parties may agree to proceed to mediation after a dispute has already arisen. However, in such a situation, since the dispute has already arisen, a party who has a strong legal case may not be willing to participate in mediation but may prefer to simply sue to obtain a judgment.
	Neutrality, independence and impartiality	Excellent. Parties are free to agree on a mediator. There are also often obligations of independence and impartiality contained within the mediation rules.
	Informality and flexibility	Excellent. Although the parties have engaged a mediator, they have free reign to decide how informal or flexible the mediation process is. In fact, the mediator will very often

ASEAN Culture and Values		seek parties' views and encourage them to agree on how the mediation procedure should take place, and the concerns that they have relating to the dispute.
	Use of authority figure	Excellent. Parties are free to appoint an authority figure as the mediator.
	Value relationships over rights and obligations	Excellent. The flexibility of mediation certainly allows parties to value their relationships over their rights and obligations. In mediation, parties are not bound in any way to resolve the matter by reference to the law. As such, they are entirely free to come up with any solution between them.
	Avoidance of confrontation	Good. While avoidance of confrontation is certainly possible in mediation, this boils down to the attitude of the parties who are participating. If parties are unable to agree, this may result in confrontation and arguments. However, parties may also adopt an entirely collaborative style of mediation. In any event, the presence of the mediator often helps parties to maintain civil and cordial relations while discussing.
	Saving "face"	Excellent. Parties are free to fashion their settlement. Hence, there is a very large scope to agree on a win-win solution that would help both sides save "face".

3. Conciliation

General Features of	**Ability to correct power imbalances**	Excellent. There is an excellent ability to correct power imbalances in the conciliation process. Unlike mediation, it is the conciliation commission that is responsible for generating a solution between the parties (without reference to the law). As such, a conciliator is able to put a fair and just proposal to the parties which accounts for any power imbalance in their relationship.
	Ability to handle	Good. Conciliations are likely to take longer than

Consumer Disputes	**large volume of disputes**	mediation as the conciliation commission has to find out parties' perspectives in order to propose a solution that would fit their needs. However, the administrative burden remains fairly low, as the process remains fairly similar to mediation. As such, an efficient conciliation system should be able to handle a large volume of disputes and resolve them quickly and efficiently.
	Ability to handle large variety of disputes	Excellent. There is no limit to the type of consumer disputes that can be brought to conciliation. However, it is simply noted that it may not be suitable to resolve certain disputes relating to scams or fraud by way of conciliation since those types of disputes may involve criminal activity.
	Cost-effectiveness for low-value disputes	Good. The bulk of the costs of conciliation would be the fees of the conciliation commission and the fees of parties' lawyers (if lawyers are engaged). While such fees are not insignificant, many institutions tend to have a differential rate depending on the quantum of the dispute.
Features of Domestic Consumer Disputes	**Ease of being accepted as an alternative to litigation**	Good. The objective of conciliation is entirely different from litigation. Litigation seeks to resolve a dispute through a legal decision. In conciliation, it is the conciliation commission that proposes a solution without any reference to the law. As such, conciliation also provides a good alternative to court litigation.
	Ease of multi-party participation	Good. Parties are free to agree on a larger number of participants. However, should there be too many parties involved, conciliation is likely to take a longer time to arrive at a resolution. This is because the participation of a large number of independent parties would require more time for the conciliator to speak to each party and to obtain their views on the matter.
Features of Cross-Border	**Ability to accommodate language**	Excellent. It is easy to accommodate any language in the context of conciliation, so long as the parties choose a conciliator who speaks the language of choice.
	Ease of concluding ADR	Good. There are usually two ways through which parties can agree on a conciliation clause. First, parties may agree to insert a conciliation clause into their contract before a

Consumer Disputes	**Clause**	dispute even arises. This is used in practice from time to time, especially for sensitive disputes where parties are not inclined to go to litigation which tends to be public. Second, parties may agree to proceed to conciliation after a dispute has already arisen. However, in such a situation, since the dispute has already arisen, a party who has a strong legal case may not be willing to participate in conciliation but may prefer to simply sue to obtain a judgment.
	Neutrality, independence and impartiality	Excellent. Parties are free to agree on a conciliator. There are also often obligations of independence and impartiality contained within the conciliation rules.
ASEAN Culture and Values	**Informality and flexibility**	Average. Conciliation is usually more formal than mediation and negotiation as it is a process that is led by the conciliation commission (rather than the parties). In addition, the conciliator may make a proposal to the parties which they may not have thought of, but which he thinks would be a good solution. As such, parties also have less control on the possible options for settlement in conciliation as compared to mediation.
	Use of authority figure	Excellent. Parties are free to appoint an authority figure as the conciliator.
	Value relationships over rights and obligations	Good. While the settlement need not be one which is proposed in accordance with parties' legal rights and obligations, the fact that it is the conciliator which recommends the solution means that parties may or may not get a chance to value relationships over rights and obligations, unless this is made clear to the conciliator.
	Avoidance of confrontation	Good. While avoidance of confrontation is certainly possible in conciliation, this boils down to the attitude of the parties who are participating, and how the conciliator leads the process. A firm conciliator will often introduce rules to manage the process such that parties remain cordial throughout.
	Saving "face"	Good. The conciliator is likely to be alive to parties' desires to avoid public humiliation, and to try and find a

		win-win solution that would help both sides save "face".

4. Arbitration

General Features of Consumer Disputes	**Ability to correct power imbalances**	Average. While the proceedings are presided over by an arbitrator, the arbitrator is bound to make a decision premised on the parties' legal rights and obligations. As such, insofar as a producer or seller has the advantage of a comprehensive contract it had drafted in its favour, the consumer will have to accept a decision based on its weak legal position. Similarly, arbitration follows a fairly strict procedure once it commences. Thus, if the consumer is unrepresented against a producer with top lawyers, the process does not assist to correct such a power imbalance.
	Ability to handle large volume of disputes	Average. While the top arbitral institutions handle in excess of 400 disputes a year, the reality is that each arbitration takes between 2 to 4 years to resolve. Consequently, it would not be a worthwhile process for the large volume of small consumer disputes in existence. It may, however, be suitable for consumer disputes involving larger sums and cross-border parties.
	Ability to handle large variety of disputes	Excellent. There are few limits to the type of consumer disputes that can be brought to arbitration. It should, however, be noted that the arbitrator's jurisdiction is limited to the scope of the parties' agreement. As such, consumer disputes must fall within the terms of the parties' arbitration clause in order for an arbitrator to possess the jurisdiction to decide the matter.
	Cost-effectiveness for low-value disputes	Poor. Arbitration is expensive, and can often be more expensive than litigation. This is because parties in an arbitration have to pay for their lawyers' legal fees, the arbitrator's fees, the arbitral institution's fees, and often enough, the fees for the venue to host the arbitration proceedings.

Features of Domestic Consumer Disputes	**Ease of being accepted as an alternative to litigation**	Excellent. Arbitration is frequently resorted to as an alternative to litigation. It is resorted to in light of certain advantages including the confidentiality of proceedings, neutrality where foreign parties are involved, and can often be slightly quicker than litigation.
	Ease of multi-party participation	Poor. It is rare for an arbitration to involve multiple parties as the scope of the tribunal's jurisdiction is bound by the scope of the arbitration agreement. Thus, parties would generally have to be privy to the same arbitration agreement and to the same contract in question. In addition, given the length of arbitration proceedings, the introduction of multiple parties actually makes the process much slower, as each party must be afforded the right to be heard and a fair opportunity to present its case.
Features of Cross-Border Consumer Disputes	**Ability to accommodate language**	Good. It is easy to accommodate language by appointing an arbitrator who speaks the particular language, and/or by the use of interpreters (which is very common). However, users of arbitration need to take note that the cost of choosing a different language can be very high—this is because it may mean that all the documents will have to be translated into that language, especially if the arbitrator does not speak that language. As such, while theoretically speaking it is logistically easy to accommodate special languages, this often depends on whether the parties are in agreement, and whether there is an impact on other issues such as costs and length of proceedings (if witness testimony is being interpreted).
	Ease of concluding ADR Clause	Good. There are usually two ways through which parties can agree on an arbitration clause. First, parties may agree to insert an arbitration clause into their contract before a dispute even arises. This is used in practice from time to time, especially for sensitive disputes where parties are not inclined to go to litigation which tends to be public. Second, parties may agree to proceed to arbitration after a dispute has already arisen. However, in such a situation, since the dispute has already arisen, a party who has a weak legal case may not be willing to participate in arbitration and would simply avoid any form of dispute

		resolution premised on a finding of law.
	Neutrality, independence and impartiality	Excellent. Parties are free to agree on an arbitrator(s). There are also often obligations of independence and impartiality contained within the arbitration rules.
ASEAN Culture and Values	**Informality and flexibility**	Average. Arbitration is more formal than mediation, conciliation and negotiation as there is usually a very comprehensive set of rules that the parties have to follow. While parties have the flexibility to amend those rules, many times they simply apply them as is. The proceedings are also fairly formal, and parties are generally formally dressed in the proceedings, with counsel using some level of honorifics (e.g. Sir, Mr. President, Mr Chairman). Parties do not have control of the outcome, as the arbitrator has full discretion to decide the dispute in accordance with the law.
	Use of authority figure	Excellent. Parties are free to appoint an authority figure as the arbitrator.
	Value relationships over rights and obligations	Poor. Arbitration is very similar to litigation in this regard, in that the adjudicator makes a decision in accordance with parties' legal rights and obligations.
	Avoidance of confrontation	Poor. Arbitration is an adversarial process, and operates very similarly to litigation. Thus, there is ample confrontation between the parties in the sense that each side is trying to prove its legal case and disprove the other's, and there is also cross-examination of witnesses from both sides.
	Saving "face"	Poor. As the arbitrator decides the matter in accordance with the law, his objective is not to produce a win-win solution. Hence, the loser in an arbitration would most certainly not be in a position to save "face". The exception is if parties arrive at a negotiated settlement, and agree to implement the negotiated settlement in the form of a consent award in the arbitration. However, in such a situation, the true ADR mechanism being relied on is negotiation, with arbitration simply being the means to

		implement a negotiated settlement.

5. Consumer Complaints Mechanisms / Ombudsman Schemes / Small Claims Tribunals

58. Before analysing the manner in which the different features of consumer disputes are dealt with, a short explanation needs to be given on the nomenclature of "consumer complaints mechanisms", "ombudsmen" and "small claims tribunals".

59. Theoretically speaking, the three terms refer to three different types of mechanisms:

a. A consumer complaints mechanism refers to an organisation that was created specifically for the handling of consumer disputes. This could be both a public or private organisation, and the manner in which such organisations handle consumer disputes really depends largely on its practices. Many, however, function as informal bodies which assist to resolve consumer disputes by applying some form of ADR;

b. An ombudsman scheme is a public scheme by which a public official is tasked with investigating and resolving private consumer disputes.[24] Similarly, the manner in which the ombudsman seeks to resolve a consumer dispute will also depend on the particular practices of the scheme. Again, this usually involves the implementation of some form of ADR; and

c. A small claims tribunal is typically a public tribunal created by statute to resolve low-value disputes. The power of the tribunal to decide a dispute is typically limited by reference to a maximum dispute quantum (*e.g.* $10,000). Given that many consumer disputes are low-value in nature, the small claims tribunal also tends to play an important role in the network of mechanisms for the resolution of consumer disputes. Small claims tribunals also tend to apply a combination of adjudication, mediation or conciliation, depending on the practices of that tribunal.

60. Practically speaking, however, the fundamental premise and practice of consumer complaints mechanisms, ombudsman schemes and small claims tribunals can look and feel similar, and do in fact seek to achieve the same goals. As a matter of general description, they are all dedicated standing bodies for the handling of either consumer disputes specifically or low-value disputes generally. Accordingly, the analysis in this

[24] Albert Fiadjoe, *Alternative Dispute Resolution: A Developing World Perspective* (Cavendish Publishing, 2004) at p 24-25; C Dolder, "Alternative Dispute Resolution" in *The New Oxford Companion to Law* (OUP 2009); K J Mackie, A Handbook of Dispute Resolution: ADR in action at p 15; P Cortes, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (CUP, 2018) at p 31-33; C J S Hodges, "Consumer ombudsmen: better regulation and dispute resolution" (2014) 15 ERA Forum593 at p 597.

section addresses these mechanisms on a general basis, and refers to them collectively as "complaints mechanisms".

General Features of Consumer Disputes	**Ability to correct power imbalances**	Depends on the exact nature and procedure of the complaints mechanism involved. Insofar as the complaints mechanism applies another form of ADR, the relevant section above will be instructive.
	Ability to handle large volume of disputes	Depends on the exact nature and procedure of the complaints mechanism involved. Insofar as the complaints mechanism applies another form of ADR, the relevant section above will be instructive. However, it should also be noted that complaints mechanisms are generally created with the purpose of handling large volumes of disputes. Thus, it is likely that the procedure of a complaints mechanism would have been created to deal with this efficiently.
	Ability to handle large variety of disputes	Depends on the exact nature and procedure of the complaints mechanism involved. Insofar as the complaints mechanism applies another form of ADR, the relevant section above will be instructive. However, it should also be noted that complaints mechanisms are generally created with the purpose of handling large varieties of disputes. Thus, it is likely that the procedure of a complaints mechanism would have been created to deal with this efficiently.
	Cost-effectiveness for low-value disputes	Generally excellent, in light of the fact that these mechanisms are created specifically for handling low-value disputes. Some are even free, or extremely low cost (e.g. below $50).
Features of Domestic Consumer Disputes	**Ease of being accepted as an alternative to litigation**	Tends to be excellent. The following factors make it attractive to consumers: very low cost, tends to be quick, specialised for handling such disputes, and often has reputation and standing as a public or quasi-public body.
	Ease of multi-party participation	Poor. Often handles disputes on a party-to-party basis, as the style of dispute resolution is rather functional, rather than customised for the specific party. In particular, small claims tribunals may have rules which prevent the

		participation of anyone else (not even lawyers) other than the complainant and respondent.
Features of Cross-Border Consumer Disputes	**Ability to accommodate language**	Depends on the exact nature and procedure of the complaints mechanism involved. Traditionally, complaints mechanisms catered to domestic consumer disputes. There has now been a real shift towards catering for the full spectrum of consumer disputes. As such, many complaints mechanisms now handle dispute resolution in English, and may even have staff that function as translators or interpreters.
	Ease of concluding ADR Clause	Not necessary. Recourse to a complaints mechanism tends to be a right so long as the consumer dispute relates to that AMS.
	Neutrality, independence and impartiality	Depends on the exact nature and procedure of the complaints mechanism involved. Certain complaints mechanisms are entirely neutral and impartial, others however, require the third-party to be an interlocutor for the consumer against the producer or seller.
ASEAN Culture and Values	**Informality and flexibility**	Good. Many complaints mechanisms apply mediation and conciliation, which are therefore suitable in terms of informality and flexibility. However, the sheer volume of disputes being handled by these complaints mechanisms can also mean that the procedure can be rushed, and treated rather functionally. In such situations, parties may not be afforded the same kind of informality or flexibility as compared to the usual expectations of mediation or negotiation.
	Use of authority figure	Good. The third party tends to be either a public official, or a respected business person.
	Value relationships over rights and obligations	Good, insofar as the dispute is resolved by mediation or conciliation. In some mechanisms, the third-party neutral may have the ability to adjudicate the dispute if parties fail to settle. In such situations, it would depend on the decision of the neutral.
	Avoidance of	Good. The process is usually cordial, and at arm's length.

	confrontation	The presence of the third-party neutral makes it difficult for parties to become confrontational. In my experience, third-party neutrals within complaints mechanisms also tend to exercise a slightly tighter degree of control over the proceedings as compared to external mediators or conciliators.
	Saving "face"	Good, insofar as the dispute is resolved by mediation or conciliation. In some mechanisms, the third-party neutral may have the ability to adjudicate the dispute if parties fail to settle. In such situations, it would depend on the decision of the neutral.

6. Hybrid Mechanisms

61. Hybrid mechanisms refer to mechanisms where a combination of ADR processes is used to resolve a dispute. Traditionally, the term "hybrid mechanisms" referred to ADR processes which were used one after another or which were converted from one form to another during the ADR process. These included: (a) mediation then arbitration, or "med-arb"; or (b) arbitration then mediation, or "arb-med"; or (c) arbitration then mediation then arbitration, or "arb-med-arb".[25]

62. In modern parlance, however, it is not uncommon to use the term "hybrid mechanism" simply to refer to a dispute resolution method where disputing parties are bound to use a mixture of two forms of ADR either one after another, or within the same process. By way of example, certain complaints mechanisms are fairly open-ended in the sense that the third-party neutral has a great deal of leeway to handle the proceedings, and may in some instances resort to adapting features of mediation, conciliation, and negotiation in the same process.

63. In light of the above, it would not be useful to apply the same table of criteria in respect of hybrid mechanisms, as there remains a great deal of indeterminacy which depends on the exact hybrid mechanisms being applied, and *how* it is applied. Nonetheless, a broad discussion on the pros and cons unique to hybrid mechanisms is useful.

64. One key advantage of using hybrid mechanisms is that the arbitrator or mediator, who is often the same person, will be familiar with the dispute despite sitting in different

[25] Albert Fiadjoe, *Alternative Dispute Resolution: A Developing World Perspective* (Cavendish Publishing, 2004) at p 30-31; R Rhodes, "Mediation-Arbitration (Med-Arb)" (2013) 79:2 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 116; Singapore International Mediation Centre, "Arb-Med-Arb"<https://simc.com.sg/dispute-resolution/arb-med-arb/> accessed 27 November 2020.

capacities (e.g. first as a mediator, and then as an arbitrator). This facilitates a broader understanding of the case and may lead to a greater likelihood of dispute resolution.[26]

65. Conversely, however, arguments have also been made that the use of the same neutral as arbitrator and mediator in a time-staggered process also causes parties to lose faith in the process. This is because a party who has formed the impression that a neutral was not acting in his favour in the mediation, would be unwilling to proceed to the next phase where that same neutral could decide the dispute against him in an enforceable arbitral award.[27]

66. More importantly, the fundamental question remains as to whether hybrid mechanisms are suitable for the resolution of consumer disputes. In this regard, it is the author's view that they do not, for two reasons. First, time-staggered hybrid mechanisms involve the application of one form of ADR after another. In most consumer disputes which are low-value and lacking in complexity, this process is simply inefficient and results in parties going through a much lengthier process with no clear benefit.

67. Second, hybrid mechanisms also tend to be complex to follow for the average user. This is because it requires users to actually appreciate and understand the changing role of the third-party neutral. This is often fairly difficult for the average consumer who is little appreciation for technicalities and is unable to apply himself usefully to the changing role of the neutral.

7. Formulating a Network of ADR Mechanisms for Consumer Disputes

68. At first thought, one might think that the analysis above should be used to decide which ADR mechanism is most suitable for consumer disputes, and to implement such a mechanism to the exclusion of all others. Theoretically speaking, such an academic exercise might be useful to match the resolution of consumer disputes with the best possible ADR method.

69. Practically speaking, however, this is not desirable. It has already been established that consumer disputes are voluminous, highly varied, and of differing values. Thus, in light of these differing features, it cannot be said that any one type of ADR mechanism would be the most suitable. This is especially since the resolution of each dispute depends on the preference of the disputing parties involved.

70. The issue needs to be approached from a systemic standpoint. A perusal of the

[26] B A Pappas, "Med-Arb and the Legalization of Alternative Dispute Resolution" (2015) 20 Harvard Negotiation Law Review 157; M C Weisman, "Med-Arb: The Best of Both Worlds" (2013) Dispute Resolution Magazine 40; Herbert Smith Freehills, "Med-Arb – an Alternative Dispute Resolution practice" (28 February 2012) <https://hsfnotes.com/arbitration/2012/02/28/med-arb-an-alternative-dispute-resolution-practice/> accessed 27 November 2020.

[27] Herbert Smith Freehills, "Med-Arb – an Alternative Dispute Resolution practice" (28 February 2012) <https://hsfnotes.com/arbitration/2012/02/28/med-arb-an-alternative-dispute-resolution-practice/> accessed 27 November 2020.

research shows that there is a broad spectrum of possibilities as regards the type of dispute settlement mechanisms that are being used for consumer disputes. Each of these ADR mechanisms tends to contain dispute settlement procedures of varying degrees of detail, control, and party autonomy.

71. Thus, different ADR mechanisms can be suitable depending on context. Having a network of different types of ADR mechanisms for consumer disputes can therefore have several important advantages:

a. Having in place a system of consumer complaints mechanisms, negotiation, conciliation and mediation tends to provide a very safe network of ADR mechanisms to handle the bulk of consumer disputes which are low-value, voluminous, and generally easy to resolve;

b. In contrast, consumer disputes which are high-value tend to be resolved by way of arbitration or traditional litigation. This is because such disputes tend to be more complex, legal in nature, and a higher sum at stake tends to put parties in a position where they may have a larger appetite of risk to obtain relief.

c. For consumer disputes of low to medium value where parties are cordial and open to cooperation, these disputes would naturally flow towards negotiation and mediation, especially if the cost of mediation is kept low or is subsidised.

d. For consumer disputes of low to medium value where parties are not as cordial and simply want a decision made, these would naturally flow towards conciliation, or potentially litigation as well.

72. In summary, a network of ADR mechanisms is an important tool. It creates a system where consumers have a choice on how to resolve a dispute in accordance with what they believe is important for their specific needs. The availability of different types of ADR mechanisms also means that the volume of disputes is automatically averaged out across the entire network, helping to mitigate bottlenecks.

73. Having dealt with the suitability of the different ADR mechanisms, Sections B to R of this Chapter sets out a practical step-by-step guide on the different stages of implementing ADR mechanisms, and the issues and concerns arising out of each stage. In this regard, as consumer complaints mechanisms and hybrid mechanisms tend to be too indeterminate and will ultimately depend on the needs of a particular State and its legislative objectives, the remaining sections of this Chapter will focus on the 3 main forms of ADR, namely, Arbitration, Mediation and Conciliation.

B. NEEDS ASSESSMENT

74. The first stage in the development of any ADR process is to conduct a detailed needs assessment for the design of the mechanism. This involves the following steps:

a. Obtaining government permission to move ahead with a needs assessment exercise on how the ADR mechanism should be designed;

b. Commissioning of a detailed and targeted study on the domestic consumer disputes settlement regime, with the following objectives:

   i. Ensuring that the existing ADR regime in that AMS complies with the requisite procedures existing in international best practices;

   ii. Ensuring that, insofar as the existing ADR regime may be used by indigenous peoples, that the ADR regime incorporates mechanisms whereby such indigenous peoples have the autonomy to include procedures appropriate to them;

   iii. Ensuring that the existing ADR regime incorporates the principles earlier detailed in these ADR Guidelines, and is well-attuned to the local domestic culture of potential users of ADR;

   iv. Identifying any gaps that are specific to that AMS' ADR regime that need to be filled, or inconsistencies that need to be resolved;

   v. Identifying any modifications to be made to improve the ADR regime in a manner specific to the needs of the users of ADR in that specific AMS;

   vi. Conducting a mapping of the existing ADR institutions in that AMS;

c. Putting together a Working Group comprising stakeholders to provide input in the above study, including:

   i. Government officials—in order to obtain government stakeholder buy-in. This is particularly important if there is an anticipation that legislative work is required to implement the ADR mechanism in question in that AMS;

   ii. ASEAN—this would ensure that the ADR regime is in line with ASEAN's consumer protection objectives, as well as enable experiences and lessons learnt to be shared across AMS' representatives;

   iii. International and local subject matter experts—typically, a panel is formed consisting of subject matter experts who would undertake the study. This step is also important as each of these experts would bring subject matter expertise on best practices and input on how best to modify and implement that AMS' ADR regime. Their participation in the study would also add credibility to the endeavour and promote awareness of the project. This would be useful for attracting usage of the ADR regime in the long run, especially if the experts informally promote the regime through their

respective channels; and

iv. Potential users of the ADR regime—this would usually include engaging business organisations and chambers of commerce within the AMS to have their input on what they would consider to be a process that is user-friendly, fair, efficient, and culturally acceptable.

C. ENGAGEMENT OF STAKEHOLDERS

75. Having identified the stakeholders, the study would usually engage stakeholders in several ways, in order to design the particular ADR mechanism. A number of points are apposite.

76. First, it is worth noting that the size of each group of stakeholders would be entirely up to the specific AMS. By way of example, it is not uncommon for the development of a new ADR institution to comprise a group of 8 to 15 international and local legal experts who would provide detailed input on the rules and procedure of the ADR regime, and how such rules could be amended in a manner useful and unique to that particular AMS.

77. Second, not every group of stakeholder needs to be engaged in the study and planning process at the same time. The process of engagement of stakeholders in fact often proceeds in the order in which the groups are listed in paragraph 74(c) above:

a. The government officials usually commence the study by defining the agenda and objectives desired for that ADR regime.

b. The regional body is then involved to ensure that the domestic goals and objectives are in harmony with the regional plans.

c. Experts are then brought in to turn the goals and objectives into reality. This would often involve producing a plan as well as working in detail on drafting the rules and procedure of the ADR regime. This often involves several roundtable meetings and discussions.

d. In order to test the rules and procedure, in-depth assessments and surveys are conducted with businesses and users of arbitration to identify specific concerns, diagnose problems, and obtain information on increasing the likelihood of submitting a dispute to the ADR mechanism in that particular AMS.

78. All of the above would yield valuable data for strategic planning, understanding the factors hindering the development of ADR, and informing the decision-making process for reforms to the legal and institutional framework. This data can also be used by ADR institutions to shape and market their services.

79. On average, this process of ADR design and architecture can take several months to a

year from start to roll-out.

D. ADDRESSING COMPLIANCE ISSUES

80. The process of implementing an ADR mechanism often involves investigating legal compliance issues. While the exact nature and scope of the legal issues will largely depend on the domestic law of the AMS in question, several common issues include:

a. Whether the ADR regime should be constituted by legislation;

b. Whether the ADR regime involves the exercise of statutory powers in the granting of relief;

c. Whether the ADR institution is required to comply with domestic legislation of entities provided legal services (e.g. in certain countries ADR institutions may be simple corporate entities, whereas in other countries, they may be regulated entities under statute);

d. Whether approval from relevant government agencies need to be sought (e.g. State Attorney's Office, Ministry of Law, Ministry of Justice); and

e. If the ADR institution is thinking of serving foreign consumers or producers, whether there are any concerns arising out of domestic and international sanctions or obligations and the holding of foreign funds.

81. It is a combination of the government officials and domestic legal experts who will provide valuable input on these issues, and ensure that the compliance matters are dealt with.

E. FINANCIAL RESOURCES

82. The ADR regime will need to be supported financially, especially at the beginning. Accordingly, preparations will need to be made to seek financial budget (if some public support is being provided) or donations and funds (if private support is being provided).

83. There is no hard and fast rule on how financial support is provided and the sources of funds. By way of example, the Beihai Asia Arbitration Centre is a new arbitral institution set up in Singapore by the Beihai Arbitration Commission in China, in order to provide arbitration services for Chinese entities dealing with Singapore and vice versa.[28]

84. Conversely, the Permanent Court of Arbitration in The Hague is constituted by

[28] Beihai Asia International Arbitration Centre, "About Beihai Asia International Arbitration Centre (BAIAC)" <https://baiac.org/about-us/> accessed 27 November 2020.

Member States and funded by States.[29] Ultimately, the dispositive question is simply whether a particular funding arrangement will be permitted by the AMS in which the ADR institution is being formed.

F. ESTABLISHING AN ADR INSTITUTION

85. The main issue in establishing an ADR institution is the question of whether the institution should be purely private in nature or whether it should be a public body. In this regard, there is again no hard and fast rule. There are no obvious advantages one way or the other, other than the fact that having some form of government support is useful for the institution to gain traction.

86. Conversely, however, certain practitioners have also made the argument that where an ADR institution has been established with close links to a public body, this may suggest impairment on its neutrality and independence[30] —*i.e.* that domestic individuals and entities may be favoured in a cross-border dispute.

87. Thus, it is simply to be noted that the issue of whether an ADR institution should be established as a public or private body should be a matter that is tested with the surveys conducted with users of arbitration. This would yield useful information as to how the average user will view the ADR regime if it were a public or private entity.

G. STAFFING STRUCTURE OF AN ADR INSTITUTION

88. The staffing structure of an ADR institution which provides services in arbitration is generally as follows:

a. Secretary-General / Chief Executive Officer

b. Deputy Secretary-General / Registrar / Deputy Chief Executive Officer—

c. Senior Legal Counsel

d. Legal Counsel

e. Deputy Counsel / Assistant Legal Counsel

f. Case Manager

89. As is apparent, while the top two levels of the ADR institution tend to focus on business management and growth, the legal staff of the institution run the day-to-day management of the case load. This tends to involve assisting the arbitration tribunal in research and administrative manners. Finally, case managers provide administrative

[29] Permanent Court of Arbitration, "About us"<https://pca-cpa.org/en/about/> accessed 27 November 2020.
[30] O Boltenko, "Cambodia's Arbitration Centre sets off on its First Flight" (10 June 2015, Kluwer Arbitration Blog) <http://arbitrationblog.kluwerarbitration.com/2015/06/10/cambodias-arbitration-centre-sets-off-on-its-first-flight/> accessed 27 November 2020.

and logistical support to the legal staff, and perform work similar to a paralegal.

90. By way of contrast, institutions providing mediation and conciliation services are also similarly staffed. However, such institutions tend not to have as many legal staff, as the procedure is not as complicated or long drawn out as arbitration. Moreover, the progress of the mediation or conciliation is generally taken care of by the mediator or conciliator, and there is generally no need for legal support.

H. FEE STRUCTURE FOR ADR SERVICES

91. A successful ADR institution should be able to fund itself fully through its work. This is done through the collection of fees from parties for the work done by the institution and its staff in facilitating the resolution of the dispute.

92. In this regard, a typical arbitration at an ADR institution generally involves the following types of fees:

a. Case filing fee;

b. Fees for administering the arbitration;

c. Fees for the appointment of an arbitrator;

d. Arbitrator's fees;

e. Fees for filing a challenge to an arbitrator;

f. Fees applicable to emergency arbitrator procedures; and

g. Hearing venue fees, assuming that parties utilise the hearing rooms of the arbitral institution.

93. It is entirely up to the arbitral institution as to how it wishes to charge for its services. Hence, certain arbitral institutions do so by a combination of lump sum, stage fees, or capped fees. Other arbitral institutions simply apply an hourly rate.

94. In comparison, mediation or conciliation at a mediation institution or conciliation commission generally involves the following types of fees:

a. Filing fee;

b. Mediator's or Conciliator's fee; and

c. Venue fees, assuming that parties utilise the hearing rooms of the mediation or conciliation institution.

95. As a matter of comparison of costs, an arbitration administered by a top arbitral

institution that runs the full course of proceedings takes about 2 to 4 years to complete and could involve total fees of approximately $100,000 to $200,000 in arbitral institution fees as broken down at paragraph 92 above, and $1,000,000 to $2,000,000 in legal fees (depending on the law firm).

96. By contrast, a mediation administered by a top institution could take only about 1 to 2 days to complete and could involve total fees of approximately $2,000 to $5,000 in mediation institution fees as broken down at paragraph 94 above, and $20,000 to $30,000 in legal fees (depending on the law firm).

97. Accordingly, it is common for an ADR institution to not only be self-funding but to be profitable as a going concern.

I. HEARING FACILITIES AND ONLINE DISPUTE RESOLUTION CAPABILITIES

98. While arbitration, mediation and conciliation could take place at any venue, parties usually rely on the ADR institution to provide hearing facilities. This is especially the case in a cross-border dispute involving parties and witnesses who are flying in from multiple countries. These hearing facilities should also be equipped with printing facilities.

99. It has also become increasingly important for the hearing facilities to be well-equipped with video conference facilities. This is because it is fairly common for parties and witnesses to participate in ADR by video link. This is especially since the public health situation arising out of COVID-19 has made it necessary for proceedings to be conducted by video link, in light of travel restrictions globally.

100. At present, this is the extent to which dispute resolution has been taken "online" at most top ADR institutions—*i.e.* the dispute resolution proceedings remain conducted by individuals, with online capabilities simply facilitating the logistics. In the author's experience, ADR proceedings conducted in this manner do not pose any additional difficulties compared to in-person proceedings.

J. DESIGNING ADR RULES AND PROCEDURES

101. In order to be well-suited for consumer disputes, the ADR rules and procedures must achieve a balance between party autonomy and legal certainty. On one hand, ADR procedures that are too brief will be ill-suited for practical use, as it does not help the disputing parties to progress in a manner which aids the dispute being resolved. In such cases, a more detailed set of rules and procedures that addresses and fills gaps is required.

102. On the other hand, an ADR procedure that is too detailed, or fashioned to a high level of specificity, runs the risk of being overly prescriptive and lengthy, and impinges on the distinctive preference for flexibility and party autonomy that is often seen in

ASEAN culture. Consequently, effort needs to be made to design ADR procedures that set out clear rules as to the different steps in the dispute settlement procedure, but are restrained and strategic in selecting the issues that they deal with. This could involve stipulating detailed procedures for particularly important issues, but also strategically leaving out certain issues that parties may desire only to deal with after direct negotiations with each other.

103. The other area of balance lies in implementing a set of ADR rules and procedures which are aligned with international best procedures on the one hand, but yet at the same time, contain distinctive and useful features that are applicable only in that particular AMS. Toeing this balance well would allow each AMS to develop its ADR regime in line with an international benchmark and standard, and yet retain an edge that it can market and promote.

104. It is also at this stage that the subject matter experts invited by that particular AMS to form the panel will be put to work. Their main role would be to analyse the international best practices and draft a set of rules and procedures that not only achieves that benchmark, but which is perfectly suited for the unique domestic conditions in that AMS.

K. EMPANELMENT OF NEUTRALS

105. How do parties select the third-party neutral who presides over or facilitates their ADR process? As a starting point, parties are free to agree on any individual to act as their arbitrator, mediator or conciliator so long as that individual fulfils the criteria set out in the rules (usually of expertise, independence and impartiality). Should parties be unable to reach agreement on the appointment of a third-party neutral, the relevant ADR procedural rules usually provide that the ADR institution shall then appoint a third-party neutral in order to break the procedural deadlock.

106. However, to make it easier for parties to know which individuals fulfil these criteria, most, if not all, ADR institutions keep a panel of arbitrators, mediators and conciliators.[31] This is simply a list of pre-approved individuals whom the institution has already vetted and deemed fit to conduct the proceedings as a third-party neutral.

107. In this regard, the features earlier raised as being applicable to consumer disputes are relevant as serious thought must be put into ensuring that the ADR institution's panel of neutrals comprises a good mix of individuals with a variety of language skills, subject matter expertise, industry experience, years of seniority, and degree of training. It is only with a good depth and scope of experienced neutrals that an ADR institution would be able to cater efficiently for the needs of consumer dispute resolution.

[31] See, for instance, SIAC's panel of arbitrators <https://siac.org.sg/our-arbitrators/siac-panel> accessed 27 November 2020.

L. MANAGING ADR OUTCOMES AND DECISIONS

108. The management of ADR outcomes and decisions concerns both a procedural and an administrative aspect. As far as procedure is concerned, managing ADR outcomes means that the third-party neutral must ensure that (a) each party is given its full right to be heard and to explain its position, (b) each party has consented to the ADR process, and (c) a party is not entering into an agreement or making a concession without understanding the impact of his or her actions.

109. This means that the third-party neutrals play a very important role in ensuring the integrity of the process, and need to play active roles in ensuring that each of these rights are given effect in the ADR process. This would include asking parties if they have any further points or arguments to make, asking further questions to ascertain if a party has consented to a particular issue, and explaining to a party the consequences of entering into a settlement agreement etc.

110. On the administrative and logistical aspect, giving effect to these principles means that the neutral must also ensure that the arbitral award or settlement agreement has been duly signed by the parties in accordance with their agreement and with the applicable rules and procedures, including those relating to the formal authorisation of a representative to act on behalf of a corporate or business entity.

M. FINALITY AND ENFORCEMENT

111. Enforceability of an ADR outcome is an important goal which AMS should be guided by in designing their consumer protection ADR regimes. Consumers should be confident that the fruits of the ADR process will ultimately be enforceable. This is not an issue when it comes to arbitration. Most States are parties to the New York Convention which provides for the enforceability of an arbitral award in any other State that has signed the New York Convention.

112. In the case of mediation, although it has been noted that mediated settlement agreements, being voluntarily entered into by disputants, are more likely to be observed, it is nonetheless necessary for disputants to have a safeguard in the event of non-compliance. Indeed, the enforceability of ADR outcomes has been noted as a "*missing piece that could have a significant impact on the use of international mediation*".[32]

113. One issue which arises is that the enforcement methods as described above are likely to differ from State to State. Thus, in most cases, if a settlement agreement pertaining to a consumer dispute has not been complied with, a party would need to sue for a breach of the agreement, obtain a court judgment, and thereafter attempt to enforce it.

[32] E Chua, "Enforcement of International Mediated Settlements without the Singapore Convention on Mediation" (2019) 31 Singapore Academy of Law Journal 572 at 573.

Should enforcement in another State be necessary, the consumer will need to investigate if a reciprocal enforcement arrangement exists between the home State of the consumer and the State of enforcement, failing which, the consumer may need to start a new suit in the State of enforcement in order to "prove" or enforce the judgment that he or she had already obtained in his or her home State. As one might imagine, this truncated process of enforcement is highly burdensome on a consumer. Moreover, if enforcement poses a concern for consumers, this could serve as a significant obstacle towards take-up of the ADR regime.

114. One way in which these concerns may be alleviated is by participating in a harmonised enforcement regime, by which settlement agreements concluded during the ADR process are enforceable in more than one State. Indeed, such a regime has been established by the recent United Nations Convention on International Settlement Agreements Resulting from Mediation concluded on 20 December 2018 (came into force on 12 September 2020) (the "**Singapore Convention**").[33]

115. The Singapore Convention aims to establish an international enforcement regime for mediated settlement agreements, in the same way the New York Convention has done for arbitral awards. Mediated settlement agreements that are international in nature will automatically be enforced in a Member State to the Convention, subject to limited exceptions. It is noted, however, that the Singapore Convention does not apply to consumer agreements. Clause 2(a) of the Singapore Convention states that "[t]his convention does not apply to settlement agreements…concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes".

116. The benefits of a system of reciprocal recognition and enforcement should not be understated as consumers may be more confident of participating in ADR processes if they know not only that the ADR process is likely to reach a win-win outcome, but also that the outcome is enforceable in multiple jurisdictions. The availability of enforcement options in different jurisdictions also confers on parties the advantage of enforcing the agreement in jurisdictions in which a party's assets are located, thereby mitigating the risk of a paper judgment due to that party's dissipation of assets.

117. Accordingly, beyond ensuring that ADR entities adequately apprise consumers of how ADR outcomes may be subsequently enforced if not complied with, AMS may also consider the possibility of developing an international convention allowing the enforceability of mediated settlements in consumer disputes across AMS. Such a convention would bolster the efficacy of its consumer protection ADR regime.

[33] United Nations General Assembly, United Nations Convention on International Settlement Agreements Resulting from Mediation, A/RES/73/198 (20 December 2018) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/456/53/PDF/N1845653.pdf?OpenElement> accessed 27 November 2020.

N. PROMULGATION OF ADR CLAUSES

118. One of the key issues with ADR mechanisms is that they are consensual in nature. Accordingly, they will not gain favour so long as consumers or producers do not consent to their use, however advantageous ADR may be.

119. In this regard, one of the key ways of promoting the use of ADR is by increasing awareness of ADR clauses and by encouraging people to use them in contracts. This would set the stage for the use of ADR when a consumer dispute arises. Thus, greater efforts need to be made to explain to users how such ADR clauses work, and why they are useful in contracts.

120. In addition, serious effort also needs to be made to conduct training and awareness workshops for the legal industry in AMS. This is because it is lawyers who would be the persons drafting these contracts. If the lawyers themselves do not have sufficient exposure to ADR and do not understand them well, they would not risk including such clauses in their clients' contracts.

121. Finally, it is generally the case that each ADR institution would create its own ADR clause to encourage the use of ADR at the institution. Accordingly, the drafting of a suitable ADR clause that fits the necessary criteria under the domestic law of the AMS would also fall within the scope of work that the Working Group of legal experts would be tasked to do.

O. ATTRACTING AND ENGAGING ADR USERS

122. One common point observed from the research in the CABP Report that was applicable to most AMS was the fact that there was a dearth of public information on the ADR mechanisms that are available in many AMS. In other instances, while it was easy enough to find the relevant ADR institution, the webpage of the institution did not actually contain the applicable rules and procedures. Even for AMS with developed ADR regimes, not all the webpages were particularly user-friendly or designed with a new user in mind. More needs to be done to promote awareness of ADR, how it works, and its advantages.

123. This can be done in several ways:

a. AMS should conduct events and conferences with the business community in order to raise awareness amongst potential users of ADR. This would help to educate potential users of ADR about the advantages and availability of ADR to resolve consumer disputes;

b. AMS should assess whether any modifications need to be made to the webpages of their existing ADR institutions, so that the necessary information is publicly available online.

c. AMS should consider the feasibility of having a standalone webpage on the resolution of consumer disputes so that all of the information, and how all of the different ADR mechanisms fit together, can be easily accessible in one place.

d. ADR should be taught as subjects in the universities in each AMS. This tries to tackle the problem from a long-term perspective. As these students come out to work in the industry, there will gradually be a critical mass of people who would be familiar with ADR, and who would encourage its use.

124. All of this would help to attract and engage potential ADR users in the long run.

P. CASE SELECTION AND MANAGEMENT

125. There are several factors involved in case selection and management which constitute good practice in ADR. First, in order for the ADR mechanism to cater to the needs of consumers, institutions cannot pick and choose which cases should be taken on and which should not. The reality is that if the goal is to have disputants in consumer disputes grow in their use of ADR, then the network of ADR mechanisms need to readily deal with and resolve such cases as they arise. Consequently, the power to reject or turn away cases should be limited, and used very sparingly.

126. Second, users of ADR will naturally only choose ADR over traditional litigation for the resolution of their consumer disputes if ADR proves itself to be a much more efficient process. As such, the staff working in the ADR institutions of AMS need to be able to be responsive and enthusiastic about moving each case forward, and pushing the process along. This keeps the average time to resolve a case down, and promotes efficiency in the process.

127. Third, ADR institutions also need to build strategic specialisations internally, so that they are able to allocate the right case to the right person. By way of example, while presumably all legal staff in an arbitral institution would broadly be familiar with contractual consumer disputes, it would nonetheless be useful to build capacity by hiring specialists in other consumer disputes areas like product liability, health regulations, or consumer finance disputes. This not only allows subject matter specialists to share their knowledge, but also allows them to deepen their practice skills in the area in which they are assigned primary responsibility (*i.e.* cases falling within their area of specialisation).

Q. TRAINING AND CAPACITY BUILDING

128. Finally, it is also a function of ADR institutions to conduct continuing professional development and training courses to ensure that users of ADR are kept abreast of the latest developments.

129. This is advantageous in several ways. First, it generally helps with promotion, as it

allows users to see that particular ADR institution as being proactive in and deeply connected to that area of practice.

130. Second, it also allows ADR institutions to build long-term relationships with the ADR community. The reality is that the ADR community consists of largely repeat players who continually use the ADR system. As such, building long-term relationships is very valuable for ensuring that users of ADR continue to resort to it for the resolution of their consumer disputes.

131. Finally, it also allows for ADR institutions to build strategic alliances by inviting legal experts to speak about hot button issues which are breaking new ground. In this way, ADR institutions can also play an important role in not just the practice of ADR, but also its development.

R. CONCLUSION

132. In Chapter 4, we covered a cross-comparison of the different ADR mechanisms to assess their suitability against the features commonly encountered in consumer disputes. We also set out a detailed explanation on how AMS may implement an ADR regime and start an ADR institution, from its starting blocks to roll-out. It is hoped that this will pave the way for a healthy growth in the use of ADR in all AMS.

V. CHAPTER 5: ADOPTING AND IMPLEMENTING THE ADR GUIDELINES IN AMS

A. CONVERGENCE OF STANDARDS IN AMS

133. The CABP Report and ADR Guidelines represent an ambitious but necessary step for making ADR workable for consumer disputes in AMS. By developing common guidelines and approaches to ADR in ASEAN, these guidelines provide a blueprint for the convergence of ADR standards and benchmarks across AMS.

134. How such convergence takes place, however, is for AMS to determine. In this regard, there are several ways in which the ADR Guidelines may be used for full effect. First, the ADR Guidelines may be implemented as a treaty, as was done in the European Union which set out a directive containing their consumer protection guidelines. While this requires the specific agreement of AMS, it transforms the ADR Guidelines into a binding agreement on the regional framework for implementing ADR across AMS.

135. Second, if the AMS are not in favour of formalising the ADR Guidelines as a binding treaty, the next best option is for it to be adopted by ASEAN as a policy document which should be reviewed, consulted and used as a starting premise for each AMS' ADR regime. While the ADR Guidelines would not constitute a legally binding instrument in this form, it would nonetheless benefit from the strong consensus of a

formal document. This would increase the likelihood that AMS would choose to implement the ADR Guidelines in their respective domestic spheres.

B. DOMESTIC IMPLEMENTATION

136. In order for the CABP Report and ADR Guidelines to be of any use, serious thought must also be given to how they can be implemented in accordance with the specific domestic regime of each AMS. Rather than simply being an academic exercise, the research undertaken in this project has indicated that there are gaps within each AMS' ADR regime that needs to be revisited, reconsidered, and re-designed. Initiative 2.1.1 requires the preparation of a report on needs and gaps in access to consumer redress mechanisms which would need to be undertaken. This project would obviously draw on, amongst others, the output of Initiative 1.5.1, the development of the present guidelines. Initiative 1.5.2 is to establish Small Claims Tribunals / ADR in AMS where none are yet developed. It is thus hoped that the CABP Report and ADR Guidelines will pave the way towards such an exercise in the future development of ADR in AMS, and that the ADR regimes of each AMS will be strengthened in the long run.

C. INFORMATION SHARING

137. Another observation that has arisen in the course of the research undertaken in this project is the fact that there has been very little regionalisation of ADR in AMS. A full write up on this has already been included in the CABP Report. Thus, the study indicates that different AMS are at different points of the development of ADR, with some being very advanced, and others having barely begun. As such, it is suggested that AMS should consider how they may work together to share information on the implementation of ADR so that all can benefit as a whole, and so that all AMS are strengthened.

D. CONCLUSION

138. The objective of this Study has been two-fold. First, a CABP Report was prepared which assessed the ADR mechanisms and methods presently available in AMS and identified a number of important international best practices for the development of such mechanisms for consumer disputes. That report concluded by acknowledging that AMS had gained some ground in implementing ADR, but that more could still be done in terms of ensuring that the ADR regimes of AMS were fine-tuned for efficiency, neutrality, and for the consumer dispute context.

139. As the second study in this Project, the present ADR Guidelines seek to develop a set of guiding principles for a unified and harmonized approach to ADR of consumer disputes across AMS. It is hoped that with these guidelines in place, AMS will have an informative guiding document which they can consult, review, and implement to strengthen and fine-tune their respective ADR regimes for consumer disputes.

ANNEX 1

Sample Arbitration Clause

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the [insert arbitration centre] in accordance with the [insert arbitration rules] for the time being in force, which rules are deemed to be incorporated by reference in this clause. The seat of the arbitration shall be [insert country]. The Tribunal shall consist of [insert number] arbitrator(s). The language of the arbitration shall be [insert language].

Sample Mediation Clause

All disputes, controversies or differences arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be first referred to mediation in [insert country] in accordance with the [insert mediation rules].

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ABOUT THE EXPERT

Kevin acts as counsel and legal adviser in cases before arbitral tribunals, international courts, and Singapore courts. He has a particular specialisation in arbitration, international law, alternative dispute resolution, and commercial disputes, and has represented States, MNCs, international organisations, and individuals in a variety of high value matters.

Kevin has particular expertise in international and cross-border disputes. He has acted as counsel in State-to-State disputes before international courts and tribunals, from the Permanent Court of Arbitration to the International Tribunal for the Law of the Sea. He has also been involved in a significant range of investment treaty, contract, construction, energy, oil & gas, and commercial disputes under ICSID, PCA, SIAC, ICC, UNCITRAL, ECT and ad hoc arbitration frameworks. Recent work includes acting for the Republic of Italy in an inter-State arbitration, acting as counsel in several investment treaty and commercial arbitrations, and advising a sovereign government in an inter-State mediation occurring in parallel with proceedings before the International Court of Justice.

Complementing his litigation and arbitration experience, Kevin is regularly instructed in an advisory capacity. He has been appointed as expert / consultant on arbitration, international law and dispute settlement matters by SAARC for the South Asian States (Afghanistan, India, Bangladesh, Bhutan, the Maldives, Nepal, Pakistan and Sri Lanka) and the Council of Europe in respect of the Republic of Armenia. Most recently, he was appointed by the Commonwealth Secretariat to its Roster of Experts on International Law and Dispute Settlement for the Commonwealth States.

In addition to his counsel work, Kevin has taught law and arbitration as Visiting Professor at Zhejiang University, Lecturer at the Sorbonne-Assas International Law School, and Adjunct lecturer at the National University of Singapore. Kevin is dually qualified as an Advocate and Solicitor of the Supreme Court of Singapore and a Barrister of England and Wales. An NUS LL.B. alumnus and Jessup mooter, Kevin holds a first class LL.M. from the University of Cambridge. In 2016, Kevin was named a World Economic Forum Global Shaper.