Potential investors

77. A potential investor is an individual or entity with the ability to become a future investor in the company, either by subscribing for a fresh issue of shares or by acquiring shares from an existing shareholder.

78. Notwithstanding that cornerstone of good governance which requires all investors to be treated equally, the differences between potential and existing investors should be recognised by the company and its board.

79. The potential institutional investor expects clear and transparent disclosure from companies. This information should be readily available to them in all forms of the media as well as directly from the company. Each corporate entity should make an individual department responsible for dealing with queries from people wishing to invest. These potential investors, whether they are individuals or institutions, will expect high standards of corporate governance, board integrity and confidence as stakeholders in the sustainability of the business of the company.

Dispute resolution

Principle 8.8: Companies should establish a formal process to resolve internal and external disputes

80. Disputes (or conflict) involving companies are an inevitable part of doing business and provide an opportunity not only to resolve the dispute at hand but also to address and solve business problems and to avoid their recurrence.

81. It is incumbent upon directors and executives, in carrying out their duty of care to a company, to ensure that disputes are resolved effectively, expeditiously and efficiently. This means that the needs, interests and rights of the disputants must be taken into account. Further, dispute resolution should be cost effective and not be a drain on the finances and resources of the company.

82. Disputes may arise either within a company (internal disputes) or between the company and outside entities or individuals (external disputes).

83. Internal disputes may be addressed by recourse to the provisions of the Act and by ensuring that internal dispute resolution systems are in place and function effectively.

84. External disputes may be referred to arbitration or a court. However these are not always the appropriate or most effective means of resolving such disputes. Mediation is often more appropriate where interests of the disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced.

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85. A distinction should be drawn between processes of dispute resolution (litigation, arbitration, mediation and others) and the institutions that provide dispute resolution services.

86. In respect of all dispute resolution institutions and regardless of the dispute resolution process or processes adopted by each, an indispensable requirement is its independence and impartiality in relation to the parties in dispute.

87. The courts, independent mediation and arbitration services (not attached to any disputing parties) and formal dispute resolution institutions created by statute (for example, the Companies Tribunal as referred to in Annex 8.1) are empowered to resolve disputes by mediation or conciliation and by adjudication. Their effective use should be ensured by companies.

Principle 8.9: The board should ensure disputes are resolved as effectively, efficiently and expeditiously as possible

88. Successful resolution of disputes entails selecting a dispute resolution method that best serves the interests of the company. This would, in turn, entail giving consideration to such issues as the preservation of business relationships and costs, both in money and time, especially executive time.

89. It is also important to recognise that the use of mediation allows the parties to create options for resolution that are generally not available to the parties in a court process or in arbitration. Further, the Act makes provision for alternative dispute resolution processes to be conducted in private.

90. Mediation is not defined in the Act. The concept has an accepted meaning in practice in South Africa. Mediation may be defined as a process where parties in dispute involve the services of an acceptable, impartial and neutral third party to assist them in negotiating a resolution to their dispute, by way of a settlement agreement. The mediator has no independent authority and does not render a decision. All decision-making powers in regard to the dispute remain with the parties. Mediation is a voluntary process both in its initiation, its continuation and its conclusion.

91. Similarly conciliation is not defined in the Act. Conciliation is, like mediation, a structured negotiation process involving the services of an impartial third party. The conciliator will, in addition to playing the role of a mediator, make a formal recommendation to the parties as to how the dispute can be resolved.

92. Once again, adjudication is not defined in the Act but the process will not differ significantly from arbitration.

93. In selecting a dispute resolution process, there is no universal set of rules that would dictate which is the most appropriate method. Each case should be carefully considered on its merits and, at least, the following factors should be taken into account:

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93.1. *time available for the resolution of the dispute.* Formal proceedings, and in particular court proceedings, often entail procedures lasting many years. By contrast, alternative dispute resolution (ADR) methods, and particularly mediation, can be concluded within a limited period of time, sometimes within a day.

93.2. *Principle and precedent.* Where the issue in dispute involves a matter of principle and where the company desires a resolution that will be binding in relation to similar disputes in the future, ADR may not be suitable. In such cases court proceedings may be more appropriate.

93.3. *Business relationships.* Litigation and processes involving an outcome imposed on both parties can destroy business relationships. By contrast mediation, where the process is designed to produce a solution most satisfactory to both parties (a win-win resolution), relationships may be preserved. Where relationships and particularly continuing business relationships are concerned, therefore, mediation or conciliation may be preferable.

93.4. *Expert recommendation.* Where the parties wish to negotiate a settlement to their dispute but lack the technical or other expertise necessary to devise a solution, a recommendation from an expert who has assisted the parties in their negotiations may be appropriate. This process would be termed conciliation.

93.5. *Confidentiality.* Private dispute resolution proceedings may be conducted in confidence. Further, the Act makes provision for alternative dispute resolution processes to be conducted in private.

93.6. *Rights and interests.* It is important in selecting a dispute resolution process to understand a fundamental difference they have to adjudicative methods of dispute resolution (court proceedings, arbitration and adjudication). The adjudicative process involves the decision maker imposing a resolution of the dispute on the parties after having considered the past conduct of the parties in relation to the legal principles and rights applicable to the dispute. This inevitably results in a narrow range of possible outcomes based on fundamental considerations of right and wrong. By contrast, mediation and conciliation allow the parties, in fashioning a settlement of their dispute, to consider their respective needs and interests, both current and future. Accordingly, where creative and forward-looking solutions are required in relation to a particular dispute and particularly where the dispute involves a continuing relationship between the parties, mediation and conciliation are to be preferred. For example, a contract can be amended or materially rewritten.

94. Mediation and conciliation require the participation and presence of persons empowered and mandated to resolve the dispute.

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Principle 8.10: The board should select the appropriate individual(s) to represent the company in alternative dispute resolution (ADR) processes

95. ADR has been a most effective and efficient methodology to address the costly and time consuming features associated with more formal litigation. Statistics related to success range from a low of 50%, for those situations in which the courts have handed down a case for ADR, to an average of 85% - 90% where both parties are willing participants

96. Mediation is often suggested as an ADR method with the assumption that the parties are willing to engage fully in the process. A process of screening is undertaken by many mediators, which excludes those who fall short of the criteria of will and capacity. This is described in the field in terms of readiness or ripeness for ADRs. Incapacity, as in the case of mental illness and inability to grasp the concepts, should naturally result in exclusion from the process.

97. Those who are resistant to ADRs are problematic in terms of ubiquitous referral.

98. ADR has become the intervention of choice in many instances and so it behoves specialists to improve the overall rate of intake and success. Clearly the optimal outcome would be to increase the overall satisfaction with the process and outcome of successful resolution.

99. The Courts will enforce an ADR clause to resolve a dispute providing all are subject to an agreed set of rules and practices such as the place and language of the process.

100. Contracting parties who are attuned to the fact that a dispute will be administered and resolved by a third party are naturally inclined to resolve it themselves. If, for example, the ADR processes are made subject to the rules of the Arbitration Foundation of Southern Africa (AFSA), it will be administered by AFSA. If the ADR processes are ad hoc, a recalcitrant party in bad faith may be able to frustrate the process.

101. An example ADR clause has been developed by the Institute of Directors and AFSA and settled by senior counsels. That clause is set out in Annex 8.2 and is recommended to be incorporated in all contracts, especially major procurement and cross border contracts.

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Annex 8.1 – The Companies Tribunal

1. Section 156 of the Act offers an election to parties in dispute. A person seeking to address an alleged contravention of the Act or to enforce a right in terms of the Act has a choice of four different procedures or remedies. In terms of this section the person:

   1.1. May attempt to resolve any dispute with or within a company through alternative dispute resolution;

   1.2. May apply to the Companies Tribunal for adjudication where so permitted;

   1.3. May apply to the High court; or

   1.4. May file a complaint with the Panel or Commission.

2. Section 166 deals with alternative dispute resolution. As an alternative to bringing a matter before a court or filing a complaint with the commission, a person may refer the matter in dispute to the Companies Tribunal or to an "*accredited entity*" for resolution by mediation, conciliation, or arbitration.

3. The resolution of a dispute may be recorded in the form of an order of court. This facility is not available to parties who resolve a dispute by mediation and conciliation outside the terms of the Act. Notwithstanding, a High Court can make a mediation resolution or an arbitrator's aware an order of court.

4. Section 180 deals with adjudication before the Companies Tribunal. The Companies Tribunal must decide disputes expeditiously and fairly. It may conduct the proceedings informally. It must issue a decision with reasons at the conclusion of proceedings. In appropriate and defined circumstances the proceedings may be held in private.

5. Section 193 deals with the establishment of the Companies Tribunal. The Companies Tribunal is a juristic person. It is described as independent "*subject only to the Constitution and to the law*". The Companies Tribunal must perform its functions impartially and without fear, favour or prejudice and in as transparent a manner as is appropriate having regard to the nature of the specific function.

6. The Companies Tribunal consists of a chairman and not less than 10 other women or men appointed by the Minister, on a full or part-time basis.

7. The Companies Tribunal may adjudicate any matter brought before it in terms of the Act. It may also assist in the resolution of disputes by the alternative dispute resolution methods referred to in section 166, namely, mediation, conciliation or arbitration.

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Annex 8.2 – Private dispute resolution

The Act does not preclude the use of private dispute resolution outside the terms of the Act. In other words, the Act does not preclude the resolution of disputes which arise out of the application of the provisions of the Act by persons or institutions other than the Companies Tribunal and other than accredited agencies. The dispute resolution provisions of the Act would not apply to such (private) dispute resolution processes. Operating within the terms of the Act will however ensure that disputes are dealt with by appropriately accredited bodies (the Companies Tribunal or a duly accredited agency). In addition section 167, which provides for the recordal by consent of the resolution of a dispute in the form of a court order, is a significant addition to our law. This section applies only to disputes resolved in terms of the Act and not to private mediation processes.

Of course those disputes not contemplated by section 156 (that is, disputes not arising out of the application of the provisions of the Act)[1] may be resolved by recourse to court or by private alternative dispute resolution methods. Much of the contents of this chapter apply equally to dispute resolution in terms of the Act and to private dispute resolution.

The recommended ADR clause to be incorporated in contracts reads as follows and is online at www.iodsa.co.za :

DISPUTE RESOLUTION CLAUSE

1 DISPUTE RESOLUTION

If any dispute arises out of or in connection with this Agreement, or related thereto, whether directly or indirectly, the Parties must refer the dispute for resolution firstly by way of negotiation and in the event of that failing, by way of mediation and in the event of that failing, by way of Arbitration. The reference to negotiation and mediation is a precondition to the Parties having the dispute resolved by arbitration.

A dispute within the meaning of this clause exists once one Party notifies the other in writing of the nature of the dispute and requires the resolution of the dispute in terms of this clause.

Within 10 (ten) business days following such notification, the Parties shall seek an amicable resolution to such dispute by referring such dispute to designated representatives of each of the Parties for their negotiation and resolution of the dispute. The representatives shall be authorised to resolve the dispute.

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In the event of the negotiation between the designated representatives not resulting in an agreement signed by the Parties resolving the dispute within 15 business days, the parties must refer the dispute for resolution by way of mediation in accordance with the rules of the Arbitration Foundation of Southern Africa ("AFSA").

In the event of the mediation envisaged in 1.4 failing in terms of the rules of AFSA, the matter must, within 15 business days, be referred to arbitration as envisaged in the clauses below.

The periods for negotiation or mediation may be shortened or lengthened by written agreement between the parties.

Each Party agrees that the Arbitration will be held as an expedited arbitration in Sandton in accordance with the then current rules for expedited arbitration of AFSA by 1 (one) arbitrator appointed by agreement between the Parties, including any appeal against the arbitrator's decision. If the Parties cannot agree on the arbitrator or appeal arbitrators within a period of 10 (ten) Business Days after the referral of the dispute to arbitration, the arbitrator and appeal arbitrators shall be appointed by the Secretariat of AFSA.

The provisions of this clause 1 shall not preclude any Party from access to an appropriate court of law for interim relief in respect of urgent matters by way of an interdict, or *mandamus* pending finalisation of this dispute resolution process for which purpose the Parties irrevocably submit to the jurisdiction of a division of the High Court of the Republic of South Africa.

The references to AFSA shall include its successor or body nominated in writing by it in its stead.*

This clause is a separate, divisible agreement from the rest of this Agreement and shall remain in effect even if the Agreement terminates, is nullified or cancelled for whatsoever reason or cause.

* AFSA is a non-profit organisation of longstanding and high integrity which provides independent and comprehensive administrative services in support of mediation and arbitration. The IoD recommends the choice of AFSA as a service provider to provide the parties with the maximum benefit from use of the dispute resolution clause. Should the Parties acting on the basis of informed consent wish to dispense with service providers or substitute others, then this clause will need to be redrafted. AFSA has joined with the University of Pretoria in issuing a diploma in Mediation and Arbitration. In doing so, numerous individuals have been trained as mediators and arbitrators. AFSA also has the most experienced panel of experts for effective alternative dispute resolution.

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