



**ARBITRATORS' AND MEDIATORS'
INSTITUTE OF NEW ZEALAND INC**

Te Mana Kaiwhakatau, Takawaenga o Aotearoa

GUIDE TO ARBITRATION

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GUIDE TO ARBITRATION

1. WHAT IS ARBITRATION?

This Guide is intended to give some idea of the law relating to arbitration and to indicate the procedures to be followed in the conduct of an arbitration. However, it is no more than a guide and those who are embarking on an arbitration should always take advice from professionals experienced in arbitration.

Arbitration is an internationally recognised method of settling disputes. It involves the appointment of an arbitrator, or arbitrators, agreed upon by the parties to the dispute or in some cases appointed by the Court or by an appointing authority, to hear and settle the dispute in accordance with the arbitration agreement and the general law relating to arbitrations. It provides an alternative to litigation. In New Zealand arbitration it is governed by the Arbitration Act 1996.

There are several differences between arbitration and litigation. The first is that the parties to an arbitration choose their own decision maker or arbitrator. Frequently the arbitrator is familiar with technical aspects relevant to the dispute or has specialised knowledge which relates to the subject matter of the dispute. The dispute will often be disposed of more quickly by arbitration than through court processes. An arbitration can normally be heard sooner than it takes to get a case to court. Arbitration is private whereas court proceedings generally are not. Arbitration need not be as formal as a court hearing. Although in an arbitration the parties will have to bear the cost of the arbitral tribunal, with recent significant increases in court fees the difference may not be great.

Any dispute which the parties have agreed to submit to arbitration may be determined by arbitration unless the agreement is contrary to public policy or such a dispute is not capable of determination by arbitration. An arbitral tribunal may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court.

The arbitrator's decision is known as the award. The award is final and binding on both parties. The arbitrator has no powers to enforce an award but the parties may apply to the High Court to have the award enforced as a judgment. The award can be challenged in the High Court only on limited grounds generally speaking relating to the capacity of the parties, the validity or scope of the arbitration agreement, or unfairness or impropriety in the conduct of the proceeding. It can also be challenged on the ground that the decision was wrong in law but the parties may exclude this option in their agreement.

The Arbitration Act 1996 and its schedules provide a procedural framework some of which the parties may vary if they choose. The procedural rules are found in the schedules. The Act also contains provisions relating to the replacement of arbitrators who fail or refuse to act, or who die or are otherwise incapable of acting.

2. ARBITRATION AGREEMENT

The Arbitration Act defines “arbitration agreement” as meaning an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.¹ It may be made orally or in writing, and may be in the form of an arbitration clause in a contract or in the form of a separate agreement.² The agreement may be in a single document or in an exchange of letters between the parties.

The agreement to arbitrate a future dispute (sometimes called a submission or an arbitration clause) may be embodied in the terms of a contract between the parties. This is the situation in many standard form contracts such as commercial leases, building contracts and share milking agreements.

If a dispute is to be referred to arbitration, the first step is to look at the contract and see what the arbitration clause says. That requires notice of the dispute being given to the other party of the intention to go to arbitration. Even if there is no arbitration clause, either party can suggest that a particular dispute be resolved by arbitration, and if the other party agrees, then the parties may agree to the dispute being determined by arbitration.

An arbitration agreement is unenforceable against a “consumer” as defined in the Act. Unless that party by a separate written agreement acknowledged having read and understood the arbitration provisions of the consumer agreement and agrees to be bound by them. A party is a consumer if he or she entered into the contract otherwise than in trade, and the other party entered into that contract in trade.³

3. REFERENCE TO ARBITRATION

Unless otherwise agreed by the parties, the arbitral proceedings commence on the day on which a request for that dispute to be referred to arbitration is received by the respondent.⁴ Once such a request has been made, the parties may wish to enter into another agreement appointing the arbitral tribunal of one or more arbitrators, and identifying the questions which the arbitrator is to decide. It is important that the issues to be decided are stated precisely.

¹ Section 2

² Article 7, First Schedule

³ Section 11

⁴ Article 21, First Schedule

The parties to an arbitration are free to agree on the procedure for the conduct of the arbitration providing the procedures chosen do not transgress the rules of natural justice.⁵

Where there is no agreement as to procedure the arbitrator has the power to decide the procedure.⁶ The essential requirement is for the arbitrator to act fairly, in accordance with the rules of natural justice and within the terms of the arbitration agreement.

Once the parties have agreed that a dispute will be referred to arbitration, they can be held to that agreement. If one party issues court proceedings, the other party can apply to the court for a stay of the court proceedings on the basis that the dispute is being dealt with by arbitration.⁷ Any such application must be made not later than when submitting that party's first statement on the substance of the dispute. The court will stay the proceedings unless it finds that the arbitration agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

4. **ARBITRAL TRIBUNAL**

The term "arbitral tribunal" refers to either a sole arbitrator or a panel of arbitrators. Where there is no agreement as to the number of arbitrators, the arbitration tribunal will comprise 3 arbitrators in the case of an international arbitration, and 1 arbitrator in the case of a domestic arbitration.⁸ An international arbitration is defined in the Act and whether or not a dispute is within the definition of "international" or "domestic" gives rise to important consequences.⁹

Anyone can be an arbitrator. However, it is preferable that the arbitrator be trained, qualified and experienced, having regard to the particular dispute.

AMINZ requires its member arbitrators to be properly trained. An aspiring arbitrator must first attain Associate status and may then, with further training and examination qualify as Fellows. Arbitrators who have the highest standards of training admitted to the AMINZ "Panel" of Arbitrators. The status of AMINZ members can be ascertained by their designatory letters, AAMINZ for Associates and FAMINZ (Arb) for Fellow arbitrators. Details of panel members can be found on the Institute's website.¹⁰

⁵ Article 19, First Schedule

⁶ Article 19 (2), First Schedule

⁷ Article 8, First Schedule

⁸ Article 10, First Schedule

⁹ Article 1 (3), First Schedule

¹⁰ www.aminz.org.nz

All AMINZ qualified arbitrators are bound by the code of ethics and are subject to disciplinary procedures for complaints of professional misconduct.

An arbitrator who does not possess the qualifications agreed to by the parties can be challenged.¹¹

Impartiality

It is important that an arbitrator has no personal relationship with the parties, or any interest in the subject matter of the dispute. If the arbitrator has a relationship or interest, this should be disclosed to the parties. If the interest or relationship is such that the arbitrator cannot be seen to be impartial then the appointment must be declined, or if during the arbitration the arbitrator must resign. The arbitrator should only accept appointment in such circumstances after full disclosure to both parties, and where no party has an objection. If the arbitrator is not personally satisfied that he or she can act with complete impartiality, the appointment must be declined or the arbitration discontinued. The arbitrator must at all times act fairly and impartially in all matters relating to the arbitration.

The parties are free to agree on a procedure for appointing the arbitrator.¹² This may include an agreement to have the arbitration appointed by a third party. The Arbitrator's and Mediators' Institute of New Zealand Inc. provides an appointment service and will make the appointment upon the request of the parties. Once the appointment has been made by a third party it can only be challenged for some lawful cause.

5. PRELIMINARY MEETING

When the arbitrator has been appointed and has accepted the appointment, it is usual to call a preliminary meeting with the parties and their advisers, to clarify the way in which the parties wish to have the questions decided and set a timetable for the progress of the arbitration. In disputes where smaller sums of money are involved it may be more preferable to deal with preliminary or interlocutory matters by exchange of letters or by telephone conference.

At the preliminary meeting the arbitrator will finalise arrangements as to the costs of the arbitration the fees to be paid and by whom. The arbitrator and the parties may agree to deposit the estimated costs of the proceedings in the AMINZ stakeholder account to the order of the arbitrator.

¹¹ Article 12, First Schedule

¹² Article 11 (2), First Schedule

6. POINTS OF CLAIM AND RESPONSE

Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant is to state the facts supporting the claim, the points at issue and the relief or remedy sought.¹³ The respondent must then respond to the claims made by the claimant. The parties may submit with their statements all documents they consider to be relevant, or make reference to the documents or other evidence they intend to submit. Either party may amend or supplement the claim or response during the course of the arbitral proceedings, unless the arbitral tribunal considers it would be unjust to do so.

The purpose of the statements of claim and response is to provide a statement in a summary form of the material facts on which each party relies but not the detailed evidence by which those facts are to be proved, and not matters of law.

Statements of claim and response may not be necessary in every arbitration. The dispute may be a question that can be readily defined in a short submission to arbitration. In such cases it is open to the parties to agree to dispense with detailed statements of claim and response, or the need for a hearing.

The arbitration procedure chosen should be such as to avoid surprises. It is fundamental that the parties are entitled to be fully informed of the case against them. The pleadings should be sufficient to inform the arbitral tribunal of the nature and scope of the dispute.

7. DISCOVERY AND INSPECTION

Discovery is a procedure whereby each party is required to provide to the other a list of all documents which are or have been in that party's possession or control and which are in any way relevant to the issues in the arbitration. Once this list is available, the party must make such documents as are requested available for inspection by the other. Documents which are protected by legal privilege must be identified and disclosed and the grounds of privilege stated, but they do not have to be made available for inspection. Generally speaking, all communications between a party and its lawyer for the purpose of legal advice are privileged and all communications between a party or its lawyer and a third party are privileged if the communications were for the purpose of assisting the lawyer in advising or acting for the client and were made at a time when litigation or arbitration was contemplated.

An arbitrator may, on request, give directions as to discovery prior to the hearing.¹⁴ Unless agreed otherwise, either party may ask for discovery of documents. The

¹³ Article 23, First Schedule

¹⁴ Clause 3 (1) (f), Second Schedule

arbitration agreement may give either party a right to require discovery, but where no right is conferred the arbitral tribunal or the court may order it.

An agreed bundle of documents may be prepared for the purpose of the arbitration. The agreed bundle contains all the documents, apart from the statements of claim and response, the parties wish to produce or refer to during the course of the hearing. Each party and the arbitrator should have a copy to refer to. The documents in the bundle are normally produced by consent as being what they purport to be, for example, as being a letter from the signatory to the person named as addressee, and as sent on or about its date, but not as being evidence of the truth of factual statements in the documents.

8. HEARING

Where the parties have agreed, or the arbitral tribunal has ruled, that a hearing is necessary then the date will be set with the co-operation of the parties, or absent that co-operation by order of the tribunal. The hearing is private and members of the public are not allowed to attend, unless the parties otherwise agree.¹⁵ The procedure and conduct of the hearing is as agreed between the parties and, in the absence of agreement, as decided by the tribunal.¹⁶ The hearing remains throughout under the control of the tribunal. The tribunal must comply with the rules of natural justice which, amongst other things, requires that each party is entitled to a fair and impartial hearing, to have the opportunity to put its case and to be present when the other party is stating its case. A hearing may not be needed if the arbitration is to be “on the documents”. However, unless the parties have agreed that no hearings are to be held, the tribunal must hold a hearing.¹⁷

The arbitral tribunal may adopt whatever procedures are appropriate to the circumstances. However, the usual procedure at the hearing is as follows:

- (a) The party upon whom the burden of proof lies will present its case first. The burden of proof is the burden of establishing the facts that give rise to the party’s claim. The party with the burden of proof will normally be the claimant. The claimant or the claimant’s advocate (or lawyer) will make opening submissions and will call each of the claimant’s witnesses in turn. Each party attempts to prove its case by providing sufficient evidence to convince the arbitral tribunal on the balance of probabilities to decide the issues in its favour.

¹⁵ Section 14

¹⁶ Article 19, First Schedule

¹⁷ Art 24 (1), First Schedule

- (b) Evidence may be given on oath or affirmation or in such manner that the tribunal is satisfied the witness understands the need to tell the truth.¹⁸
- (c) The procedure for taking the oath or affirmation is to ask the witness to hold a bible in his or her right hand and a member of the tribunal says to the witness -

"Do you swear that the evidence you are about to give in this arbitration will be the truth, the whole truth and nothing but the truth?"

The witness replies "I do".

Alternatively the witness may make an affirmation, a non-religious, binding obligation. The procedure for affirmation is similar. A member of the tribunal asks the witness:

"Do you solemnly, sincerely and truly declare and affirm that the evidence you are about to give in this arbitration will be the truth, the whole truth and nothing but the truth?"

The witness replies "I do".

- (c) The witness then gives evidence of the relevant facts that are within his or her knowledge. If an expert is called, that person may give an opinion on the relevant issues based on the facts in evidence. This part of the evidence is called evidence-in-chief. The parties usually agree that the evidence-in-chief will be presented in the form of a written statement which is read to the arbitral tribunal. Alternatively, it may be taken as read, without the need to read it aloud. The evidence may be led, that is, given in response to questions from the claimant or the claimant's advocate or lawyer. During this examination, leading questions may not be asked on matters which are in dispute between the parties. A leading question is one so worded that it suggests to the witness the desired answer. Leading questions may be used in preliminary matters, matters that are not in dispute, or during cross-examination.
- (d) The respondent, or the respondent's advocate or lawyer, then cross-examines the witness. During cross-examination, leading questions may be asked and may extend to any matter relevant to the case.
- (e) If a witness has been cross-examined, the claimant may re-examine the witness but only on matters which have been raised in cross-examination.

¹⁸ Clause 3 (1) (h) & (i), Second Schedule

- (f) The same procedure is followed for all the claimant's other witnesses.
- (g) The respondent, or respondent's advocate or lawyer, then makes opening submissions and calls witnesses in the same way.
- (h) The respondent, or respondent's advocate or lawyer, then has a right to make final submissions, as does the claimant, in turn. If the respondent has elected to call no evidence, the respondent is normally given the right of final reply.
- (i) The arbitral tribunal may ask questions of a witness. Isolated questions may be asked during examination-in-chief and cross-examination but it is preferable for the tribunal to reserve questions until conclusion of the re-examination of the witness. The parties (or their advocates) are then entitled to an opportunity to question the witness on any issues which arise from the tribunal's queries.
- (j) The arbitral tribunal should ensure that there is an adequate means of recording the evidence. The tribunal may take notes or record the evidence or the parties may have agreed to have the evidence recorded or taken down by a shorthand writer. A verbatim transcript may be typed on a word processor, enabling hard copies of the evidence to be available during the course of the hearing.

9. INSPECTING THE SITE

The arbitral tribunal may be invited to inspect the site with which a dispute is concerned, or the tribunal may express a wish to do so. A site may be inspected at any time. It is preferable that for the tribunal to inspect only in the presence of the parties and/or their advocates or lawyers. The purpose of a site inspection is not to provide evidence of what the visit discloses, but to understand better the evidence given.

10. ADJOURNMENTS

The arbitral tribunal may adjourn the hearing from time to time if there are good grounds for doing so. The parties may apply at any time to the arbitral tribunal for an adjournment of the hearing. The tribunal may be asked to consider a related application for costs as a result of any adjournment granted.

11. ARBITRAL TRIBUNAL MAY TAKE ADVICE

Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the tribunal.¹⁹ It may

¹⁹ Article 26, First Schedule

require a party to give the expert any relevant information, and to produce or provide access to any relevant documents, goods or other property for the expert's inspection. Unless otherwise agreed, or if a party so requests or if the tribunal considers it necessary, the expert after delivery of a written or oral report is to participate in a hearing. The parties then have the opportunity to put questions and to present expert witnesses to testify on the points in issue.

The arbitral tribunal may wish to take expert advice on legal issues. All expert advice must be with the knowledge and consent of the parties. The award must still be the tribunal's decision, even if based on the advice sought. A tribunal cannot delegate the authority to decide the matters referred. The parties should be told that the tribunal intends taking advice and their consent sought to consult the person from whom it is proposed the advice is to be taken. The parties may make submissions on the points on which advice is to be sought, and on the advice itself when it has been given. There may be occasions when the tribunal can request advice jointly from the parties or their advisers. Time and expense can be saved where there is an agreement to obtain advice, and the likelihood minimised of a challenge to the subsequent award on the issue on which advice was required.

12. AWARD

The award must be made within the time prescribed in the reference, or where there is no time prescribed, as soon as reasonably possible. If a time is prescribed, the arbitral tribunal should be given the power to extend that time and should ensure that that power is included in the agreement to arbitrate or in the agreed reference. Where the tribunal is given the power to extend the time, the power must be exercised before the prescribed time expires. Unless this is done, and unless the parties agree otherwise, the tribunal will no longer have the power to make an award.

Where the tribunal consists of more than one arbitrator, then unless otherwise agreed by the parties the award will be that of a majority of the tribunal.²⁰ Questions of procedure may be decided by a presiding arbitrator if authorised to do so either by the parties or by all members of the tribunal.

When the award is ready, the arbitral tribunal usually gives notice to both parties that the award may be uplifted on payment of the tribunal's fee. When the parties have jointly paid the fee, or one party has paid the total fee, the tribunal then makes a copy of the award available to each of the parties.

The award must be in writing and signed by the arbitrator or arbitrators.²¹ After the award is made, a signed copy must be delivered to each party. The award must state its date and the place of arbitration. It must state the reasons on which it is based,

²⁰ Article 29, First Schedule

²¹ Article 31, First Schedule

unless the parties have agreed that no reasons are to be given. Where reasons are required the extra time required for preparing them will be reflected in the costs of the award. The award should deal with all the questions referred to arbitration, no more and no less, unless it is issued as an interim award. The tribunal has the power to issue an interim or partial award deciding only some issues, reserving the remaining issues for the final award. The parties may settle their dispute during the arbitral proceedings, and if they so request the tribunal may, if it thinks fit, record the settlement in the form of an arbitral award on agreed terms.

13. INTEREST

Interest may be claimed in terms of the legal rights which one party is seeking to enforce. Whether or not it will be awarded will depend on the circumstances. Where the award is for money due on a contract, interest may be awarded at the rate, if any, provided in the contract for late payment. In addition, and even when there is no other legal claim to interest, the arbitral tribunal has power under section 12 of the Arbitration Act to award interest on the whole or part of any sum which is awarded to any party, or which was in issue in the arbitration and paid before the date of the award. Interest may be awarded for the whole or any part of the period up to the date of the award or the date of payment, and the tribunal has power to fix the rate of interest. Unless the arbitration agreement otherwise provides, or the award otherwise directs, a sum directed to be paid by an award carries interest as from the date of the award at the same rate as a judgment debt.

14. COSTS

Where the Second Schedule to the Arbitration Act applies, then unless the parties agree otherwise the arbitral tribunal has power under clause 6 to award costs. The tribunal can fix and allocate the legal and other expenses of the parties, the fees and expenses of the tribunal and any other expense related to the arbitration. The tribunal may take into account any offer to settle which was made by a party prior to the award, where the award is no more favourable to the other party than was the offer. The fact that such an offer has been made **must not** be communicated to the tribunal until it has made a final determination of all aspects of the dispute other than costs. In the absence of an award fixing and allocating costs, each party is responsible for that party's advocate or lawyer and other expenses relating to the arbitration.

Where the second schedule does not apply, there is no express power for the arbitral tribunal to award costs. Such power may be given by the terms of the arbitration agreement or of the reference, or it may by agreement be excluded. If the claim includes a claim for costs, this would seem to be sufficient to give the necessary power to the arbitral tribunal.

The general rule is that costs are awarded in favour of the party who succeeds in the arbitration, that is, costs follow the event. Sometimes the arbitral tribunal will decide that each party should bear its own costs. The tribunal may decide to hear submissions from the parties as to whether or not costs should be awarded and, if so, the amount of such costs. If costs are awarded, they may be at a level comparable with the costs awarded in court proceedings, which are based on a fixed scale or there may be sufficient reason to make an award covering actual costs. However, the costs awarded do not usually reimburse the party concerned for all costs incurred.

Where the arbitral tribunal is empowered to award costs the award should state who is to pay the fees and expenses of the tribunal. This will usually be the losing party but in some cases the tribunal may consider just that the fee be shared between the parties. When the award is ready, but before it has been signed or dated, the tribunal usually advises the parties of the amount of its fees and expenses but not who is to pay them, and informs the parties that the award will be completed and can be uplifted on payment. Either party can then pay the fees and expenses, and the award can be completed and delivered to the other parties. If the parties have lodged the fees in the AMINZ Stakeholder Account there need be no delay in issuing the award as the arbitrators will order the fees to be paid from the Stakeholder Account.

The award will say whether one party or the other is to pay or whether the payment is to be shared, and if the latter then in what proportions. If one party has paid the tribunal's fees and expenses, that party can recover the other party's share if any, along with any other monies due in terms of the award. Once an award has been completed, by being signed and dated then it cannot be withheld from the parties to secure payment of the fees and expenses. A copy of the award, signed by the arbitrators, must be delivered to each party.²²

15. ENFORCEMENT OF THE AWARD

An award can only be enforced or set aside by the High Court.²³ All applications to enforce or set aside an award must comply with the High Court Rules. The grounds for refusing to enforce an award are very limited.

16. GLOSSARY

The following glossary of terms frequently employed in arbitration may prove useful:

Advocate: An advocate is a person who conducts the case a party both leading up to and at the hearing.

²² Article 31 (4), First Schedule

²³ Article 34, First Schedule

AMINZ: Arbitrators' and Mediators' Institute of New Zealand Inc. AMINZ is the professional body for dispute resolution professionals and the provider of qualifications for arbitrators and mediators. AMINZ maintains a panel of qualified and experienced arbitrators. www.aminz.org.nz

Arbitral Tribunal: This means a sole arbitrator or a panel of arbitrators.

Arbitration: Arbitration is a method of settling disputes and differences between two or more parties whereby such disputes are submitted to the decision of one or more persons specially nominated for the purpose. The arbitration process is governed by the Arbitration Act 1996. Arbitration may occur, by the mutual consent of the parties, as an alternative to a court proceeding or alternatively arbitration may be brought about by Order of the Court after such proceeding has commenced.

Arbitration agreement: Is defined in the Arbitration Act as: An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It is sometimes referred to as the submission.

Arbitrator: The Arbitrator is the person to whom the dispute is referred for a decision.

Award: The Award is defined in the Act as: The decision of the arbitral tribunal on the substance of the dispute and including an interim, interlocutory or impartial award on a submission in an arbitration.

Claimant: The Claimant is the aggrieved party who institutes proceedings by giving the other party, usually known as the respondent, notice requiring a dispute or difference to be referred to an arbitrator.

Code of Ethics: AMINZ has a Code of Ethics which its members must meet or be subject to disciplinary proceedings.

Interlocutories: These are pre-hearing procedural steps which may be taken during the course of the reference. Their purpose is to assist the presentation of facts at the hearing with a view to saving time and expense at the hearing. The procedures include discovery (or disclosure) and inspection of documents, and interrogatories which are questions to which answers are given on oath.

Parties: The parties are the persons who agree to refer present or future differences to arbitration (or the persons who are compelled by order of the Court or by statute to refer their differences to arbitration).

Reference: The reference is the referral of a dispute or difference to an arbitrator. The term sometimes describes the process of arbitration itself.

Respondent: The respondent is the party to an arbitration called upon to respond to a claim.

Stakeholder Account: The AMINZ stakeholder account is for the purpose of holding the arbitrators fees in trust until the award is finalised.

Submission: This means the arbitration agreement. The word submission is also used to refer to the presentation of an argument to the arbitral tribunal.

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