

Guide to the AMINZ Arbitration Rules 2017

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When will mankind be convinced and agree to settle their difficulties by arbitration?

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1. Introduction

The published AMINZ Arbitration Rules comprise:

- Arbitration Rules
- Emergency Arbitration Protocol
- Appointments Policy
- Rules for Awarding Costs in Arbitration
- Appeals Rules

At the time of publication, the Rules reflect current international best practice (as evidenced by published international rules) and the NZ approach to the Model Law of combining domestic and international arbitration into a single act. The Rules are also drafted with flexibility in mind to ensure their suitability for arbitral proceedings large and small, complex and more straightforward.

The Rules include a model clause, and set out a default arbitral process, from notice through to award.

The Emergency Arbitration protocol is a stand-alone document for those who wish to avail themselves of an emergency arbitrator, primarily for interim measures and preliminary orders, without signing on for the Rules as a whole.

The Appointments Policy outlines the procedures followed by AMINZ for making appointments, either by agreement or pursuant to the default provisions in article 11 of the First Schedule to the Arbitration Act 1996 or clause 1 of the Second Schedule.

The Rules for Awarding Costs in Arbitration reflect the provisions of clause 6 of the Second Schedule to the Act, which provides for the arbitral tribunal to *fix and allocate* the costs of the arbitration. Parties should note that the approach to awarding costs under the Arbitration Act is different from that of the courts. Further guidance is

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provided by the AMINZ Guide for Awarding Costs in Arbitration, available for download from the AMINZ website (<https://www.aminz.org.nz>).

The Appeals Rules outline the procedure for appealing to the Appeals Tribunal from an arbitral award on a question of law. Note that the default position under the Arbitration Rules is that the parties agree that there will be no appeals (appeals on questions of fact are not allowed in any circumstances in terms of clause 5(10)).

Where the parties do agree to appeals on questions of law, the Rules provide for such appeals to be heard by the AMINZ Appeals Tribunal, rather than by the High Court.

2. Agreement to arbitrate (*Preamble*)

The Preamble to the Rules includes a model clause, which simply provides for arbitration in Auckland before a sole arbitrator in accordance with the Arbitration Rules, and for NZ law to apply.

If adopted without amendment, the Rules provide for:

- (1) The provision of interim measures and preliminary orders by an Emergency Arbitrator.
- (2) Advances on the arbitral tribunal's costs to be held in the AMINZ Stakeholder Account.
- (3) Appointment of the arbitral tribunal by the AMINZ Court of Arbitration.
- (4) Administration of the arbitral proceedings by an AMINZ appointed Registrar.
- (5) The arbitral tribunal to be assisted by a tribunal secretary.
- (6) Expedited arbitration.
- (7) The arbitral tribunal to be guided by the IBA Guidelines on Conflicts of Interest and Party Representation, and Rules of Evidence.
- (8) The more complete submission of preliminary documentation in the form of a Notice of Arbitration and Answer.
- (9) Summary dismissal.
- (10) Streamlined arbitral procedures for the exchange of pleadings, disclosure of evidence, and the provision of witness statements and opening and closing submissions.
- (11) No appeals on questions of law, unless the parties agree to appeals to the AMINZ Arbitration Appeals Tribunal.
- (12) Costs to be *fixed and allocated* in accordance with the AMINZ Rules and Guidelines on Awarding Costs in Arbitration.

If the model clause is adopted, further refinement to the Rules can, of course, be agreed between the parties and the arbitral tribunal at the first preliminary conference (subject to the constraints on agreement in the Arbitration Act).

The agreement to arbitrate may, it goes without saying, be included as part of a disputes resolution clause in a commercial agreement, or it may be agreed on an *ad hoc* basis after a dispute has arisen, whether in writing or by oral agreement.

3. Commencement of proceedings (*Article 1*)

The arbitral proceedings are commenced by *notice of arbitration*, served on both the other parties to the arbitration and on the Executive Director of AMINZ, and payment of the application fee.

The respondent then has 28 days within which to serve its *answer*, and if the answer includes a counterclaim, the claimant then has 14 days to provide its *reply*.

Each of these documents requires a reasonably complete disclosure details of the parties, the agreement to arbitrate, a summary of the dispute and any procedural issues, for example composition of the tribunal (whether agreed or nominated), seat, applicable law, appeals and the like.

It is worth noting that if the claimant wishes the arbitration to be dealt with on an expedited basis, then this must be disclosed in the *notice of arbitration*.

4. Emergency Arbitration (*Article 5*)

There may be circumstances in which a party may require interim measures or preliminary orders in terms of articles 17 to 17M of the First Schedule to the Act before the appointment of the arbitral tribunal.

It is important to note that the Arbitration Amendment Act 2016 modified the definition of *arbitral tribunal* in section 2 to include any emergency arbitrator appointed by agreement or pursuant to any institutional arbitration rules. The consequence of this is that an *award* as also defined in section 2 includes an award of an emergency arbitrator, and is therefore enforceable as such.

The emergency arbitration procedures in Article 5 of the Rules are as follows:

- The *notice of arbitration* must first have been served.
- The application should be made electronically to AMINZ, and must specify any information known to the applicant which would be in the *answer* (if it has not been served), the relief sought and reasons for urgency, preferences for the emergency arbitrator, and whether or not the application is to be heard on notice.
- The application for the appointment of the emergency arbitrator must be served on the other parties to the arbitration, unless giving such notice would "*defeat the entire purpose of the application*", in which case the application can be dealt with on an *ex parte* basis.
- If the arbitral tribunal has been appointed, then the application is to be dealt with by the arbitral tribunal.
- The AMINZ Court will deal with the application within 48 hours of receipt of the application and payment of the fee.

- The application is to be dealt with within 14 days. If the tribunal is appointed in the interim, the emergency arbitrator is to continue to deal with the application.
- The interim measures or preliminary orders granted by the emergency arbitrator are to expire automatically if not confirmed or varied by the arbitral tribunal within 60 days of the tribunal's appointment.

While the use of emergency arbitrators is growing internationally, it is likely that this procedure will be used relatively sparingly in those situations where there is benefit in appointing a specialist arbitrator to consider interim measures on an urgent basis.

It is worth noting that the emergency arbitrator cannot be a member of, or subsequently be appointed to, the arbitral tribunal.

5. **Appointment of the arbitral tribunal** (*Article 3*)

Where the parties have agreed on a sole arbitrator, AMINZ will appoint that arbitrator.

If the parties fail to agree on an arbitrator, or if the agreement provides for AMINZ to make the appointment (whether of the sole arbitrator or the third arbitrator in the case of a three member tribunal), then that appointment will be made by the AMINZ Court of Arbitration.

The AMINZ Court will then provide the parties with a list of five potential nominees, comprising at least one of each parties' nominees and such further candidates selected in accordance with the AMINZ Appointments Policy. The parties then return the list with not more than two nominees to which that party objects and the rest ranked in order of preference from (1) to (3). The AMINZ Court then makes the appointment.

If the Court is unable to make the appointment under that procedure, then the appointment is made in accordance with the Appointments Policy.

6. **Summary dismissal** (*article 32.2(d)*)

Article 32.3 outlines the general powers of the arbitral tribunal, which include the summary dismissal of claims which are clearly without legal merit or which fail to disclose any reasonably arguable cause of action or which cannot succeed.

It is important to note that this power is one which must be exercised in accordance with the principles of natural justice, particularly giving the parties the opportunity to be heard on the point.

7. **Expedited arbitration** (*article 33*)

In many cases, the dispute does not warrant the expense and time involved in full arbitral proceedings.

The criteria for expedited arbitration are:

- the arbitration is before a sole arbitrator,
- the claimant has sought expedited arbitration in the *notice of arbitration*,

- the amount in dispute does not exceed \$2 million, and
- the issues do not disclose significant disagreement of fact or complex legal issues.

The AMINZ Court will then decide whether or not the arbitration is to be dealt with on an expedited basis within 14 days.

If the arbitration is to proceed on an expedited basis, the following applies:

- the periods for submissions will be truncated,
- the dispute may be determined on the papers only, and
- the arbitral tribunal will issue an interim award with summary reasons only within one month of the last submission by the parties (on the substance of the dispute) and the final award (including for costs) is to be issued within two months of such last submission.

The expedited procedures may be modified by the tribunal, as the circumstances require.

8. **Arbitral proceedings (Article 6)**

The Rules provide for:

- a preliminary conference within 30 days,
- the arbitral tribunal to be guided by the IBA Rules of Evidence,
- submission of *points of claim* and *points of defence* (and counterclaim, if any, and *points of defence to counterclaim*),
- disclosure of all documents and other evidence relied on by the parties,
- confirmation of witness statements and cross-examination, and
- *hot-tubbing* or experts, and tribunal appointed experts.

Article 60.2(b) includes the holding of an issues hearing, or *Kaplan Opening*. The issues hearing is typically held either after the first preliminary conference or after the exchange of pleadings. At the hearing, the parties are required to present their submissions on the dispute and to identify the areas of factual, expert and/or legal disagreement.

The benefit of this approach is to require the parties to consider and present their cases, thereby narrowing the issues in dispute as early as possible in the arbitral proceedings.

9. **Costs (Article 7)**

As mentioned above, any advance on the arbitral tribunal's costs is to be held in the AMINZ Stakeholder account; a copy of the stakeholder protocol (based on the stakeholder agreement) is attached to the Rules.

Clause 6 of the Second Schedule to the Act provides for the arbitral tribunal to *fix and allocate* costs.

under the AMINZ Rules for Awarding Costs in Arbitration, the procedure for fixing and allocating costs is as follows:

- The parties may have agreed on how costs are to be handled – the tribunal is to raise the issue of costs as soon as practicable in the proceedings.
- The costs and expenses of the arbitration, to be fixed by the tribunal at a reasonable amount, include:
 - fees and expenses of the arbitral tribunal (and tribunal secretary, if any),
 - fees and expenses of AMINZ (including the AMINZ Court of Arbitration and the Registrar, if any),
 - expert costs,
 - witness expenses, if any, and
 - the reasonable legal and other expenses of the parties.
- Costs follow the event, which will mean that the unsuccessful party is to bear the costs of the successful party, subject to the circumstances of the case warranting a departure from this principle.
- The circumstances of the case include interim costs orders, degree of success of the successful party, conduct of the parties and settlement offers.

Parties sometimes raise claims for lost opportunity or disruption as part of their costs claims. It is worth noting that the award of costs is the compensation for the expense incurred in enforcing a party's rights; it is not an award of damages.

10. Conclusion

As mentioned above, the AMINZ Arbitration Rules and related documents have been drafted to take account of the latest amendments to the Arbitration Act 1996 and to align arbitration in New Zealand with international best practice.

The Rules may also be used for international arbitration, even where New Zealand is not the seat and where NZ law does not apply (though some amendment may be required in that case to reflect the chosen law, particularly if it is not a Model Law country).

At the time of writing, further amendment to the Arbitration Act is before Parliament, though it is unlikely that those amendments will necessitate amendment to the Rules.

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