

AMINZ Expert Determinations Model Clause



**ARBITRATORS' AND MEDIATORS'
INSTITUTE OF NEW ZEALAND INC**
Te Mana Kaiwhakatau, Takawaenga o Aotearoa

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Model Clause for Expert Determination

Guidance note

The following clause is a model dispute resolution clause for inclusion in a commercial contract where the parties wish to provide for expert determination on technical matters, for example settling a rent review dispute, but wish to retain provision for all other disputes to be determined by arbitration.

If the parties wish to have all disputes determined by expert determination, then clauses X.2 & X.4 will require amendment to remove references to arbitration, and clause X.5 should be deleted in its entirety.

It follows, of course, that the model clauses may require amendment for consistency with terminology with the rest of the contract, and if the appointment is *ad hoc*, then clause X.4 will need to be amended to be included in a stand alone agreement to refer a dispute to an expert.

The following should be noted:

- *clause X.1* – the disputes clause is a code. All disputes are dealt with in terms of the clause, and recourse to the courts is not provided for, unless rights of appeal on questions of law are permitted in the arbitration, and in the limited circumstances provided for in the Arbitration Act 1996 and the most egregious cases of fraud and bad faith.
- *clause X.2* – the disputes process is commenced with a notice. At that stage, the claimant (the initiator of the disputes process) needs to have determined if the matter is to be referred to an expert or to arbitration. The model clause will need to be modified where highlighted to identify those issues which are to be determined by an expert.
- *clause X.3* – mediation is an option at any stage, and is not mandatory.
- *clause X.4* – the notice of dispute, where an expert is to be appointed, is to identify the claimant's preferred nominees (not less than 3) and the respondent's reply must either accept one nominee or propose 3 alternatives. If the parties cannot agree, the appointment is then referred to the President of AMINZ to make the appointment in terms of the AMINZ Appointment Policy.

The AMINZ appointment procedure then applies (with statements of impartiality and willingness to act) and with the procedure to be followed then set by the expert in terms of clause X.4, paragraphs (d) to (i) below.

It is important to note that, as the expert is not acting as an arbitrator there is no obligation to follow the rules of natural justice, however the expert is to follow a fair process. Furthermore, the draft assumes that the expert's determination is to be final and binding (ie, no rights of appeal or rehearing in arbitration) and that the expert is not required to give reasons for the determination.

- *clause X.5* – as both expert determination and arbitration are provided for, it is conceivable that a disagreement may arise as to whether or not the dispute falls within the expert's jurisdiction in terms of clause X.2. In that case, the AMINZ Court of Arbitration is to determine whether expert determination or arbitration applies.

The arbitration provisions assume that the AMINZ Arbitration Rules will apply, with a default position that the arbitrator's award will be final and binding with no rights of appeal.

It follows that the AMINZ Arbitration Rules should be reviewed prior to inclusion.

X Disputes

X.1 Disputes

All disputes and disagreements arising out of or in connection with this agreement (*disputes*) will be dealt with in accordance with the following clauses.

X.2 Notice of dispute

If a dispute or disagreement arises out of or in connection with this agreement (*dispute*), the disputing party shall commence the disputes procedure by serving a notice (*notice of dispute*) on the other party.

Where the dispute concerns [*the rent to be paid following the review period / the market price for [insert product] / or other specific technical issue*], such dispute shall be determined by an expert (*the Expert*) in terms of clause X.4 below.

All other disputes shall be determined by arbitration in terms of clause X.5 below.

X.3 Negotiation

The parties may, at any time, whether before or after the notice of dispute has been issued, refer the dispute to the chief executives for negotiation, with or without the assistance of a mediator.

X.4 Expert determination

Where the notice of dispute requires the dispute to be determined by an expert in terms of this clause, unless the parties agree otherwise or the AMINZ Court of Arbitration determines that the dispute should be referred to arbitration in terms of clause X.5 below, the following shall apply.

Appointment of the Expert

- (a) The notice of dispute is to identify not less than three nominees for appointment as the Expert, and shall provide contact details and a brief description of the nominees' expertise and experience.
- (b) The parties, or their legal representatives, shall be entitled to interview the nominees to determine their suitability for appointment. In doing so, the specifics of the dispute must not be discussed and the nominees must not be asked to express any view on the likely outcome of the dispute.
- (c) The respondent in the dispute is to respond to the notice within 15 days of receipt of the notice of dispute either:
 - (1) accepting one of the nominees for appointment as the Expert, or
 - (2) proposing its own list of not less than three nominees for appointment.

If the parties are unable to agree on the appointment of the Expert within 15 days of the respondent's notice, then the Expert is to be appointed by the President of the Arbitrators' and Mediators' Institute of New Zealand (*AMINZ*) on the application of either party.

Conduct of the Expert determination

- (d) The parties acknowledge that the dispute is to be determined promptly and cost effectively, with the objective that the dispute is determined fairly and in a manner which is proportionate to the issues in dispute.
- (e) The Expert is to determine the dispute acting as an expert and not as an arbitrator.
- (f) In determining the dispute, the Expert is to act independently and impartially, and shall otherwise comply with the AMINZ Code of Ethics, and shall discharge the duties of the expert in accordance with all guidance notes, protocols and relevant procedures issued by AMINZ from time to time.
- (g) The Expert shall adopt procedures commensurate with the objectives outlined in paragraph (d) above, including:
 - (i) organizing preliminary conferences,
 - (ii) calling for submissions, disclosure of documents and provision of witness statements, from the parties,
 - (iii) scheduling a conference of the parties, to enable the Expert to discuss the dispute and to clarify any issues raised by the dispute,
 - (iv) conducting any site visits or other investigations, and
 - (v) any other measure reasonably required to enable the Expert to determine the dispute.
- (h) The parties acknowledge that the determination of the dispute by the Expert is to be conducted in private, and unless the parties agree otherwise, no document prepared or provided for the purposes of the determination, including the Expert's decision and no proceedings of the Expert, are to be disclosed to any other party.
- (i) The Expert is to provide a decision on the dispute [*without the necessity for giving reasons for the decision*] within 45 days of confirmation of the Expert's appointment in terms of paragraph (c) above. In reaching the decision, the Expert is to take account of the submissions and other supporting information provided by the parties, the Expert's own investigations, the Expert's own knowledge and expertise in relation to the matters in dispute, and any other issue which the Expert considers relevant.
- (j) The decision of the Expert on the dispute shall be final and binding on the parties.
- (k) The parties are to share equally in the costs and expenses of the Expert.

X.5 Arbitration

All disputes, save for any dispute determined by an Expert in terms of clause X.4 above, will be settled by arbitration by a sole arbitrator in accordance with the Arbitration Act 1996 and its amendments and the AMINZ Arbitration Rules current at the time arbitration is commenced.

The place of arbitration will be [] and the law applicable to the arbitral proceedings and the matters in dispute will be New Zealand law.

Where a party disagrees over whether or not the dispute should be determined by an Expert under clause X.4 above, or settled by arbitration under this clause, that party must notify the other party of such disagreement within 15 days of receipt of the notice of dispute issued in terms of clause X.2 above. The disagreement will then be referred to the AMINZ Court of Arbitration for determination on the same basis as a challenge to an arbitral tribunal in terms of article 4 of the AMINZ Arbitration Rules.