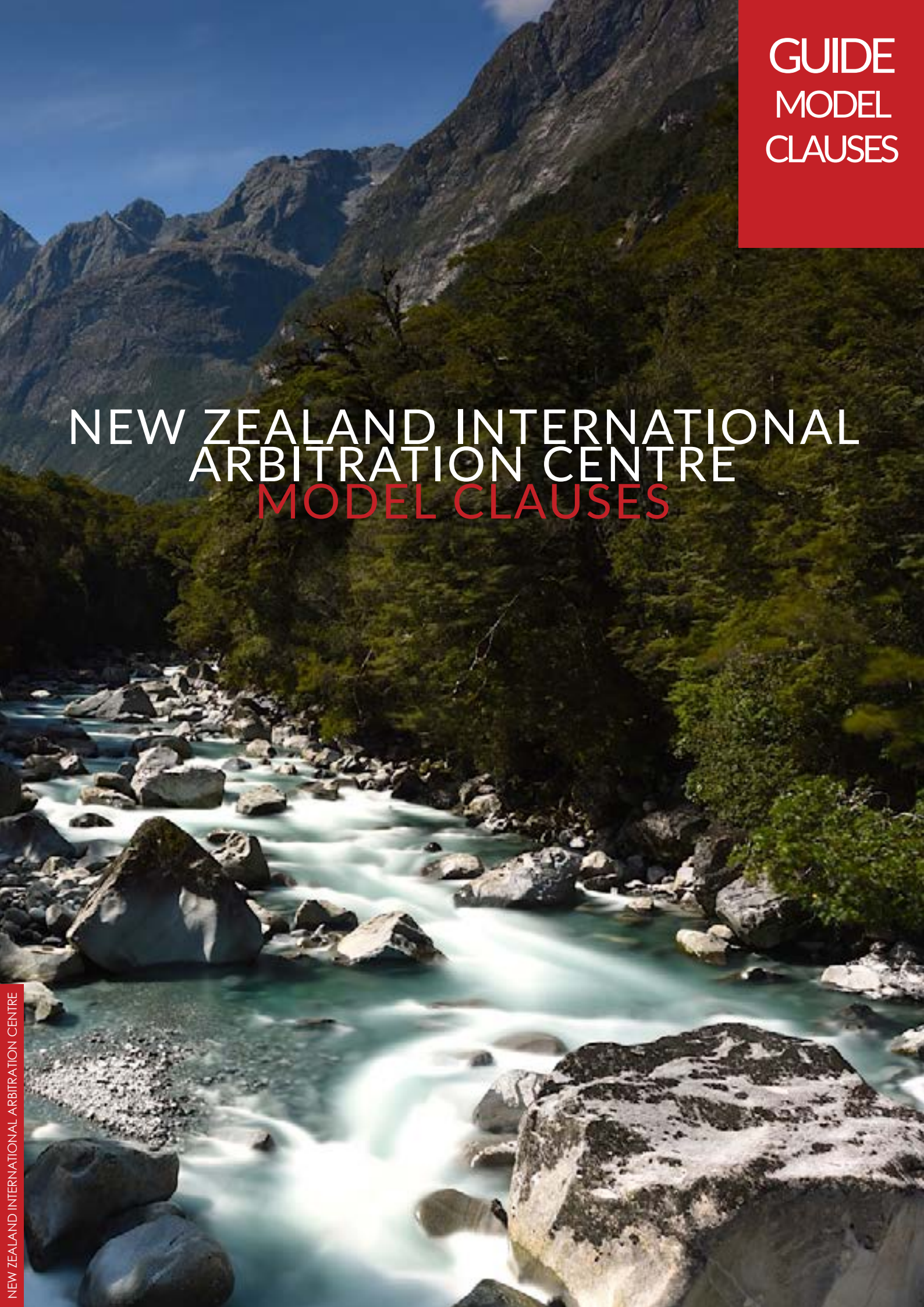
GUIDE
MODEL
CLAUSES



NEW ZEALAND INTERNATIONAL ARBITRATION CENTRE
MODEL CLAUSES

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NZIAC

MODEL CLAUSES

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INTRODUCTION

Ensure an effective and proportionate response in the future should a dispute arise

When was the last time you checked your model dispute resolution clauses that you include in your contracts or services agreements? Almost all private dispute resolution processes require the agreement of the parties to engage in the process. Almost always the dispute resolution clauses included in contracts and agreements for services are old, outdated and, in many cases, ineffective and unenforceable. Such clauses are typically added to contracts/agreements at the 11th hour when everything else has been scrutinised, debated, and agreed.

Dispute resolution clauses are usually not seen as particularly contentious or important. At a time of heightened interest and excitement about the subject matter of such contracts, there is often little appetite to talk about something that might be perceived as negative, or indeed threatening towards the relationship. Often the hope or presumption is that it is something that is included in a contract but will never be needed. Unfortunately, our experience tells us that conflict is an almost inevitable consequence of many commercial transactions/business relationships.

Parties already in dispute are highly unlikely to agree on anything, let alone to refer their dispute to a particular dispute resolution process/service. This is what makes good model clauses critical to enabling the prompt, proportionate and cost-effective resolution of disputes, should they arise in the future.

Having clear and well drafted model clauses can also help to ensure that there is opportunity for commercial relationships to be preserved despite instances where conflicts arise. Good

model clauses can assist the parties in getting back on track quickly and cost effectively.

What makes for a good model clause? One that can be effectively and efficiently relied on to enable a dispute to be resolved promptly by whatever process is agreed. Model clauses need to be clear and certain in terms of both the process and the means of securing the appointment of the relevant third party neutral (for example, arbitrator, mediator, expert). Simply referring disputes arising to mediation or arbitration is **ineffective** and **inefficient**. Parties routinely spend significant time (and money) arguing over what the process should look like, who to appoint to be the mediator or arbitrator and procedural and timetabling matters. This can all be easily avoided by careful drafting of dispute resolution clauses.

WHAT ABOUT MULTI-TIERED OR WATERFALL CLAUSES?

Many multi-tiered clauses are both unenforceable and inefficient and, overall, we would caution against using such clauses.

Multi-tiered clauses typically require the parties to work their way through different dispute resolution processes, starting with direct negotiation, then (failing success in negotiation) mediation, then (failing success in mediation), arbitration.

Arguments often arise as to whether parties have adequately attempted negotiation and mediation, prior to initiating arbitration. Those arguments are costly and delay the ultimate resolution of the dispute.

Ultimately, parties can attempt to negotiate or mediate their dispute at any time. Forced negotiation or mediation by virtue of a dispute resolution clause will not necessarily be the best option for the parties at the time they are contractually bound to engage in those processes. A forced and poorly timed negotiation or mediation process early on that is unsuccessful may serve to dissuade parties from attempting the same at a later date, when the issues have been defined and there has been a sufficient exchange of information and positions such that the time is right and ripe to engage in those processes.

NZIAC'S APPROACH

Rather than encouraging multi-tiered or waterfall clauses, NZIAC's rules for arbitration and mediation allow the parties to move from one process to the next, in an efficient manner. They do this by:

a. requiring any arbitration to be stayed in the event the parties wish to mediate; and

b. allowing a party to initiate arbitration in the event a mediation does not result in a full and final settlement of the dispute.

We recommend all commercial parties ensure an effective model clause is included in any contract they enter into. The model clauses set out below will provide you with effective and efficient access to the dispute resolution process of your choice, should you need it.

ARBITRATION

Arbitration is a formal dispute resolution process whereby two or more parties agree to submit all or certain disputes between them to an independent person called an arbitrator, for a binding decision. Where the arbitration is seated in New Zealand, the process is governed by the Arbitration Act 1996 and the Arbitration Amendment Act 2007. An arbitrator's decision, called an award, is binding on the parties and is enforceable as a judgment of the Court.

The objective of arbitration is to provide a flexible and efficient means of resolving disputes quickly, cost effectively, privately and confidentially without necessarily adhering to the formalised, technical procedures of litigation.

Whilst arbitration is closely related to litigation, there are several key differences which make it an important and attractive alternative to state litigation. In particular, arbitration gives the parties the power to choose their own decision maker, place and time of a hearing, and as far as they can agree, to control the arbitration procedures which may be varied to suit the nature and complexity of the dispute.

Parties can select their own arbitrator and this is particularly helpful in instances where there is a technical matter in dispute as parties can choose a suitably qualified expert. Similarly, if

the parties are from different jurisdictions, they can appoint an arbitrator from their jurisdiction or an entirely different one.

As privacy and confidentiality are key to most commercial relationships, arbitration offers a level of confidentiality that is not always offered in court proceedings. The parties can agree that all evidence and material created or disclosed during arbitration remains confidential. Hearings also generally take place in private. This provides a level of comfort which can help facilitate candid discussions and ultimately assist in resolving the matter in dispute – it is not uncommon for cases to settle during the arbitration process.

The primary objective of modern commercial arbitration is the fair, prompt, and cost-effective determination of any dispute, in a manner that is proportionate to the amounts in dispute and the complexity of the issues involved.

NZIAC operates at the cutting edge of modern and commercial dispute resolution in the Asia-Pacific region, providing fully administered arbitration services governed by its comprehensive suite of arbitration rules, including expedited procedures and access to fixed fee and fee capped services.

NZIAC's services provide parties with the highest quality arbitration services at a realistic and known price.

Options include both institutional arbitration under the NZIAC Arbitration Rules and ad hoc arbitration.

Either option allows the appointment of the arbitral tribunal to be agreed by the parties. However, in the absence of agreement (which is often the case), use of either model clause will ensure the parties have an effective mechanism for the prompt and efficient appointment of the arbitral tribunal allowing the arbitration to proceed without unnecessary delay.

NZIAC ARBITRATION RULES

The settlement of disputes is an important feature of the global commercial and legal landscape. NZIAC has developed a suite of Arbitration Rules that are robust and certain, yet innovative in their common sense approach to the arbitration process.

The Rules are intended to give parties the widest choice and capacity to adopt fully administered procedures that are fair, prompt, and cost effective, and which provide a proportionate response to the amounts in dispute and the complexity of the issues involved.

Unless otherwise agreed by the parties in writing, for an arbitration administered under NZIAC's Rules, the standard Arbitration Rules will apply to all arbitrations in which the claim is for an amount greater than or equal to NZ$2.5 million.

Where the claim is for an amount less than NZ$2.5 million, or the claimant is seeking declaratory relief only, the arbitration will be governed by the relevant NZIAC Expedited Arbitration Rules, namely:

- where the claim is for an amount less than NZ$250,000, or the claimant is seeking declaratory relief only, the NZIAC EIA60 Arbitration Rules will apply;
- where the claim is for an amount greater than or equal to NZ$250,000 and less than NZ$1 million, the NZIAC EIA90 Arbitration Rules will apply; and
- where the claim is for an amount greater than or equal to NZ$1 million and less than NZ$2.5 million, the NZIAC EIA120 Arbitration Rules will apply.

Whilst we would encourage all parties to arbitration proceedings to adopt the NZIAC Arbitration Rules, NZIAC also acts regularly to appoint arbitrators and administer ad hoc arbitrations. The adoption of the NZIAC Arbitration Rules is not a prerequisite to accessing these appointment and administration services provided through the NZIAC Registry.

Model Clause for Arbitration under the NZIAC Arbitration Rules

The following clause should be included in contracts where the parties wish to have any future disputes resolved by arbitration under the New Zealand International Arbitration Centre's Arbitration Rules:

> "Any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the New Zealand International Arbitration Centre."

Note: parties to an existing dispute that have not incorporated the NZIAC Model Arbitration Clause into a prior agreement may still agree to refer that dispute to arbitration under the NZIAC Arbitration Rules by signing the Arbitration Agreement in the form found at Appendix 2 to those Rules.

Model Clause for ad hoc Arbitration

The following arbitration clause should be included in contracts where the parties wish to have any future disputes resolved by arbitration under the applicable arbitration legislation at the seat:

> "Any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the applicable arbitration legislation at the seat. If the arbitration is seated in New Zealand, the Arbitration Act 1996 will apply. The arbitral tribunal shall be appointed from the panel of arbitrators maintained by the New Zealand International Arbitration Centre and, in the event the parties are unable to agree on the composition of the arbitral tribunal within seven days of written notice of the dispute being given, the arbitral tribunal shall be appointed by the New Zealand International Arbitration Centre upon application by any party to this agreement.
>
> The number of arbitrators shall be one. [or may choose three]
>
> The language to be used in the Arbitration shall be English. [or choose another language]
>
> The seat of arbitration shall be Auckland, New Zealand, [or choose another seat]
>
> The governing law of the contract shall be the substantive law of New Zealand. [or choose another country]"

Note: This model clause ensures you can access the New Zealand International Arbitration Centre's case management and administrative oversight and support. However, parties to an existing dispute that have not incorporated this NZIAC Model Clause into a prior agreement may agree to refer that dispute to arbitration with NZIAC at any stage.

MEDIATION

Mediation is a consensual, confidential and relatively informal negotiation process in which parties to a dispute use the services of a skilled and independent mediator to assist them to define the issues in dispute, to develop and explore settlement options, to assess the implications of settlement options and to negotiate a mutually acceptable settlement of that dispute which meets their interests and needs.

The objective of mediation is to enable and empower the parties to negotiate and resolve the dispute promptly, cost effectively and confidentially rather than to have a decision imposed upon them by a judge, arbitrator or adjudicator. The process enables the parties to negotiate flexible and creative solutions which need not conform to strict legal rights or general community standards. This flexibility can help in situations where it is key that the parties maintain an effective and amicable business relationship going forward. In mediation, the parties retain ultimate control over the decision and are guided through the process by the mediator.

In the event that a party to a mediated settlement agreement defaults on the terms of the agreement reached, the parties have the option to pursue legal avenues to enforce the agreement, such as initiating proceedings through the courts.

The following mediation clause should be included in contracts where the parties wish to have any future disputes resolved by Mediation under the New Zealand International Arbitration Centre's Mediation Rules as the primary method of dispute resolution:

> "Any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, shall be referred to mediation in accordance with the Mediation Rules of the New Zealand International Arbitration Centre."

NOTE: parties to an existing dispute that have not incorporated the NZIAC Model Clause into a prior agreement may agree to refer that dispute to Mediation under the NZIAC Mediation Rules by signing the Mediation Agreement in the form found at Appendix 2 to those Rules.

If the mediation does not result in full and final settlement of the dispute, the Mediation Rules allow a party to initiate arbitration within 30 days.

ARB-MED

Arb-Med is a hybrid dispute resolution process that combines the benefits of arbitration and mediation, including speed, procedural flexibility, confidentiality, choice of decision maker, ease of access to the tribunal, continuity, finality, and enforceability of the outcome.

The primary objective of Arb-Med is the informed good faith negotiation and settlement of the dispute by the parties, with the initial assistance and efficiency of the Arbitral Tribunal's information gathering powers, in the context of a formal arbitration process that will immediately resume if the mediation that follows is not successful.

NZIAC has developed Arb-Med Rules for the resolution of disputes that are robust and certain, yet innovative in their commercial common sense approach to the challenge of combining arbitration and mediation in a single unified process that ensures the principles of natural justice are observed and a just, final, and binding decision is made.

The following arb-med clause should be included in contracts where the parties wish to have any future disputes resolved by Arb-Med under the New Zealand International Arbitration Centre's Arb-Med Rules:

> "Any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the Arb-Med Rules of the New Zealand International Arbitration Centre."

NOTE: parties to an existing dispute that have not incorporated the NZIAC Model Clause into a prior agreement may agree to refer that dispute to Arbitration under the NZIAC Arb-Med Rules by signing the Arb-Med Agreement in the form found at Appendix 2 to those Rules.

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