

LEXIS NEXIS CONFERENCE

(AUCKLAND)

30 October 2007

AMINZ COURT OF ARBITRATION

(Arbitration Appeals Tribunal)

Derek S Firth
Barrister, Arbitrator, Mediator & Adjudicator
Level 17, 209 Queen Street, Auckland
P O Box 105392 Auckland City 1143
Telephone: +64 9 307 9129
Facsimile: +64 9 307 9130
Email: dsfirth@ihug.co.nz

INTRODUCTION

The purpose of an AMINZ Arbitration Appeal Tribunal (AAT) is to provide for efficient, confidential and high-quality resolution of appeals from arbitration awards on questions of law.

It will provide parties with an alternative to the present procedure whereby all arbitration appeals go to the High Court and thus lose their confidentiality.

On 23 February 2007, the AMINZ Council approved the AAT Rules, the Constitution of the AMINZ Court of Arbitration, the Admission Criteria for the Arbitration Appeal Panel, and the Schedule of Fees, Costs and Expenses of the AAT Tribunal.

These documents are on the AMINZ website.

The Executive Director of AMINZ, Sharon Wagg, will be the Registrar of the new Tribunal.

THE AMINZ COURT OF ARBITRATION

The most important point to understand is that the terminology does **NOT** mean what it normally means.

The “Court” is not a court at all. But it is an administrative body. The Tribunal which will hear each appeal will be drawn from a Panel of Tribunal members.

It is the selection and appointment of the Panel members which is undertaken by the Court and each appeal is administered by the Court.

While this might seem odd to those not accustomed to international arbitration, this is exactly how the International Chamber of Commerce (ICC) International Court of Arbitration, and the London Court of International Arbitration (LCIA) function.

The purpose of the AMINZ Court is to act as appointing authority under the AAT Rules and to perform any functions conferred on it by the AMINZ Arbitration Appeal Rules. The AMINZ Court follows the standard pattern established with overseas arbitral organisations such as the London Court of International Arbitration.

It will have a quasi-judicial role and operate separately from the AMINZ Council.

The Court shall consist of 10 members (all appointed by the Council) including one President, two Vice-Presidents, three ordinary Members, being New Zealand residents, and four Members who reside outside of New Zealand.

The President for the time being of AMINZ shall be a Member of the Court ex officio.

The appointments are for terms of three years.

The President will be appointed by the Council. The two Vice-Presidents will be appointed by the Court.

When the Court is called upon to appoint one or more Members of an Appeal Tribunal, the appointment or appointments shall be made by the President or by a Vice-President in the name of the Court.

The President and Vice-Presidents are not eligible to be appointed to an Appeal Tribunal.

Other Members of the Court are eligible for appointment, but in that event shall take no part in the appointment of the arbitral tribunal to which they have been nominated or in any other function of the Court relating to such an arbitration.

There is a protection against liability for the Court, its members, AMINZ and its employees, and any of the appointed arbitrators.

ADMISSION CRITERIA FOR ARBITRATION APPEAL PANEL

There will be established an Arbitration Appeal Panel which will comprise former Judges and other suitably qualified arbitrators.

Apart from being an Associate or Fellow of AMINZ, and a Member of the AMINZ Panel of Arbitrators, the person must be “a member of good standing”, “have the necessary personal qualities and qualifications to act as a member of an AAT”, “have the relevant knowledge ...”, and be a person who in the opinion of the AMINZ Council is suitable for admission to the AAP. There will be a prescribed application form requiring appropriate supporting information and documentation and each applicant must have two referees.

Every application for admission to the AAP shall be referred to the AMINZ Court for comment and then to the Council for decision.

The Council is not obliged to furnish any reasons for refusing to admit any applicant.

AMINZ ARBITRATION APPEAL RULES

Any summary (such as this) should be received with extreme caution because the Rules speak for themselves and must be read as a whole.

It has been necessary to address some quite difficult strategic issues. For example:

- How to create a contractually binding private appeals process and, at the same time, legitimately by-pass the statutory provisions for recourse to a court under Article 34 of the First Schedule to the Arbitration Act 1996 or pursuant to clause 5 of the Second Schedule?
- How to ensure that the original Tribunal can continue to be “locked in” to the process in the event of there being a referral back?

There is a tight timeframe for dealing with appeals and the provisions relating to security for costs (which in many cases are likely to be provided by only the appellant) broadly resemble international arbitral processes under, for example, the ICC and the LCIA.

There are provisions dealing with cross-appeals.

Appeals and cross-appeals are confined to alleged errors of law (but there is an express clarification to the effect that “error of law” does not include any question as to whether the award or any part of it was supported by any evidence or any sufficient or substantial evidence; and whether the Arbitral Tribunal drew the correct factual inference from the relevant primary facts.

Some provisions worth highlighting:

- 3.2 Contains specific provisions of the Act and Schedule which continue to apply to the appeals process.
- 4.2 Confines appeals to cases where the parties have agreed to a right of appeal under the Rules and, in particular, have agreed to the provisions of the Appendix. (The Appendix is a critically important part of the Rules because that is where they agree to exclude rights to appeal to the High Court under clause 5 of the Second Schedule; it is where they agree not to seek to enforce in New Zealand or elsewhere any award that may be the subject of an appeal; and it is where there is a technique to ensure that the original Tribunal will accept and action any reference back by an AAT).
- 5.1 Requires a notice of appeal to be filed within 15 working days of the date when the award was received by the appellant. At the same time, the appellant has an opportunity to set out its views on the make-up of the Tribunal in a "composition of the Tribunal letter".

That letter is to be strictly confined to:

- any preference to have one or three members,
 - any criteria which the appellant would prefer the AMINZ Court to take into account when making appointments to the AAT, and
 - any considerations known to disqualify any Members of the AAP from appointment in the particular case.
- 5.2 Requires the respondent to file a notice of opposition within 10 working days of the service of the notice of appeal. At the same time it, too, can deliver a letter relating to the composition of the Tribunal.
 - 6.1 The AAT shall be appointed and constituted by the AMINZ Court and shall have either one or three Members.
 - 6.6 Provides that, within 5 working days of the filing of a notice of opposition by all respondents, the parties may agree in writing to the appointment of a particular person or persons to be the AAT and/or to the appointment of a particular person to be Chairman of the Tribunal.
 - 6.7 Provides that in the absence of agreement between all parties under 6.6, the AMINZ Court shall select and appoint the Member or Members of the AAT.
 - 7.1 -
 - 7.10 Provide for challenge on the basis of "justifiable doubts as to the arbitrator's impartiality or independence". A decision on the challenge will be made by the AMINZ Court whose decision shall be final and if the challenge is sustained then a substitute arbitrator shall be appointed.
 - 8.1 Provides for procedure, including a timetable for the provision of written submissions.

- 9.0 Provides for the award to be in writing, with reasons and to be by a majority (in the absence of unanimity). If there is no majority on any issue, then the Chairman shall decide that issue.
- 9.4 Provides for the scrutiny of a draft by the AMINZ Court which, "may make observations as to possible modifications as to the form of the award".
- 10.0 Deals with security which is to be determined by the AAT.
- 16.0 Deals with time limits.
- 18.0 Deals with the protection of confidential information.
- 19.0 Provides immunity for AMINZ and AAT Members.

SCHEDULE OF FEES, COSTS AND EXPENSES

This provides for an appointment fee covering the time spent by the Registrar and Secretariat in the appointment of the AAT. Also for a Management Fee or the Appointment Fee for the time spent by the Registrar, the Secretariat and the AMINZ Court in the management and administration of the appeal. The parties are jointly and severally liable to AMINZ for the Management Fee.

The fees are set out in Appendices A and B and are variable depending upon the amount in issue and whether the Tribunal is to comprise one or three persons.

There is a provision for the recovery of expenses and disbursements.

Section 4 deals with the fees and expenses of the Tribunal. There is discretionary power for the AAT to deal with the costs of the parties.

Under Section 6, fees are to be assessed and paid in advance.

The ultimate obligation falls upon the appellant.

Derek S Firth
October 2007