SECURING THE APPOINTMENT OF AN ARBITRAL TRIBUNAL IN THE ABSENCE OF AGREEMENT: THE DEFAULT APPOINTMENT PROCEDURES UNDER THE ARBITRATION ACT 1996 – LITTLE UNDERSTOOD AND SELDOM PROPERLY FOLLOWED

By John Green

Where cl 1 of sch 2 to the Arbitration Act 1996 applies, that clause modifies art 11 of sch 1 and excludes the jurisdiction of AMINZ as the appointed body under s 6A(1) of the Act to appoint an arbitrator. AMINZ may only intervene and appoint an arbitrator in its role as the appointed body where cl 1 of sch 2 does not apply.

Securing the appointment of an arbitral tribunal is really such a simple process, yet the provisions in the Arbitration Act 1996 (the **Act**) which govern the process and procedures to be followed are the least understood and are seldom correctly followed by parties and/or their advisors looking to enforce a contractual right to refer disputes to arbitration.

Twelve months ago, we published an article in ReSolution authored by NZDRC and NZIAC Executive Director, Catherine Green, titled '**Agreeing to disagree: default appointment of arbitrators in domestic arbitrations**'.

The article arose as a result of the large number of enquiries we were receiving (and still receive – hence this article) from parties to disputes (or their legal advisors) who are having difficulty navigating the process for securing the appointment of an arbitral tribunal in circumstances where an arbitration agreement in a contract or transaction does not specify either:

- that the arbitration was to be conducted under the NZDRC/NZIAC/BDT Arbitration Rules; or,
- an appointing person/body, in the event of disagreement as to the composition of the arbitral tribunal or failure or refusal by any party to the arbitration agreement to participate in the appointment process.

The article highlighted the lack of understanding by many parties and their legal advisors as to the correct process to be followed in relation to securing the appointment of arbitral tribunals in domestic arbitrations in which the parties have neither agreed on the constitution of the tribunal nor agreed on a nominating body (either by reference to institutional rules or specifically) and explained the process to be followed to secure the appointment of an arbitral tribunal in those circumstances.

Unfortunately things have not got any better, and with the appointment of AMINZ in March 2017 as the body appointed under section 6A(1) of the Act (the appointed body) to resolve appointment issues under article 11, schedule 1 of the Act, matters have only become more muddled and confused.

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While AMINZ refers to itself as the default body for the appointment of arbitral tribunals, this is only partly correct, and its jurisdiction is constrained to certain circumstances only, namely:

- in relation to international arbitrations where the parties have not agreed on a procedure for appointing the arbitral tribunal; and
- in relation to domestic arbitrations only where a third party, including an institution, fails to perform any function entrusted to it under an appointment procedure agreed upon by the parties. Otherwise AMINZ simply has no jurisdiction or power to make any appointment in relation to domestic arbitrations and any appointment that is made other than by agreement of the parties will be invalid, and any award made pursuant to such an appointment will be unenforceable.

I should add that the appointed body is not permitted to charge parties or their representatives for making appointments under section 6A(1), which condition I suspect simply reflects the nature of the role and the very few cases the Ministry expected to have recourse to those appointment procedures and services.

(I paraphrase Catherine's article from here on)

In every other case, the default appointment procedures set out in clause 1 of schedule 2 to the Act apply.

Schedule 2 of the Act applies to every domestic arbitration unless the parties agree otherwise (section 6).

The learned authors of Williams & Kawharu on Arbitration 2nd Ed, state clearly at 5.4.4 and 5.4.5:

> If cl 1 of sch 2 to the NZ Act applies to a dispute then the parties will be deemed to have agreed upon the appointment procedures specified in cl 1 for the purpose of art 11(2) of sch 1. Clause 1 applies by default to domestic arbitrations and to international arbitrations if chosen by the parties (which would be unusual). In effect, in relation to most domestic arbitrations, the provisions of art 11 do not apply: cl 1 applies instead.
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> The attraction of default appointments under cl 1(4) is that obstacles to the appointment of an arbitrator can be remedied by a party without having to involve the High Court (with the expense and other disadvantages that recourse to the court in arbitral proceedings entails). It was enacted to provide an alternative to the default appointment procedure in art 11 of sch I, which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (the Model Law) and is better suited to large international commercial arbitrations.

Clause 1 of Schedule 2 provides default procedures for appointing the arbitral tribunal. Those procedures constitute the agreed procedure for appointing the arbitrator or arbitrators for the purpose of article 11(2).

Where clause 1 of Schedule 2 applies, that clause modifies article 11 of Schedule 1 and excludes the jurisdiction of the appointed body to appoint an arbitrator. AMINZ may only intervene and appoint an arbitrator in its role as the appointed body where clause 1 of Schedule 2 does not apply.

> *"In relation to most domestic arbitrations, the provisions of art 11 do not apply: cl 1 applies instead (Williams & Kawharu on Arbitration 2nd Ed, at 5.4.4)."*

Interestingly, while in its 2003 report, the Law Commission proposed the repeal of cl 1 such that would entitle the parties to exercise the appointment provisions in art 11(3) of sch 1, AMINZ argued that the default appointment process was an efficient means of avoiding delay and disputation in the appointment process. That has certainly been our experience as a Registry over the past 22 years, and in particular, my experience as an arbitrator having accepted an appointment pursuant to the default appointment procedures in what has become the seminal case on this point: *Hitex Plastering Ltd v Santa Barbara Homes Ltd* [2002] 3 NZLR 695 (HC).

The application and utility of the default appointment procedures cl 1(4) is clearly illustrated by the judgment of Rodney Hansen J in Hitex. Hitex and Santa Barbara fell into dispute over a contract for the supply and installation of exterior cladding by Hitex that required the parties to submit any such dispute to arbitration (this was before the Construction Contracts Act 2002 came into force, so adjudication was not an option back then). The parties were unable to agree on the appointment of an arbitrator. Each party proposed a different person. In order to secure the appointment of an arbitral tribunal in the face of such disagreement, Hitex issued a default notice requiring Santa Barbara to remedy its default (that is, the failure to agree) by accepting me as its proposed arbitrator within seven days. After the expiry of the initial notice period, Hitex sent a further notice to Santa Barbara to the effect that its proposed appointment had now taken effect. I accepted the appointment. Despite my best endeavours, Santa Barbara refused to participate in the arbitration and subsequently opposed enforcement of my award on the ground that the arbitral tribunal was invalidly appointed.

The Court reviewed the appointment procedures and the inter-relationship between article 11 of Schedule 1 and clause 1 of Schedule 2 and concluded they were intended to provide separate and mutually exclusive procedures for the appointment of arbitrators in the event of default or disagreement. The Court determined that the parties' inability to agree on an arbitrator amounted to a default for the purpose of cl 1(4). At [28] Rodney Hansen J held:

> [art 11 of Schedule 1] and [cl 1 of Schedule 2] were intended to provide separate and mutually exclusive procedures for appointment of arbitrators in the event of 'default' or disagreement. Resort to the Court under [art 11] is not available where, by virtue of [cl1(1) of Schedule 2] the procedures in subcls (4) and (5) apply.

The Schedule 2 default appointment procedure simply requires a genuine attempt to reach agreement. At [29] his Honour noted:

> Anyone who peremptorily issues a notice of default without making a reasonable attempt to resolve differences will risk a successful challenge to any appointment which ensues.

In the event that parties disagree as to the composition of the arbitral tribunal, Party A simply needs to issue a notice of default to Party B. That notice of default needs to specify the details of Party B's default (being the failure to agree on the appointment of an arbitrator) and propose that, if that default is not remedied within a specific period of time (to be not less than seven days after service of the notice of default), the individual named in the communication shall be appointed as arbitrator with respect to the dispute between Party A and Party B. **Nothing further is required to be done.**

Where clause 1 of Schedule 2 applies, it provides a quick and effective means of securing the appointment of an arbitral tribunal in the face of delay or obfuscation by another party to the arbitration agreement.

Note that article 11 of Schedule 1 applies to an international arbitration unless the parties have expressly opted into clause 1 of Schedule 2 of the Act. Under section 6(2) of the Act, Schedule 2 of the Act applies to an international arbitration only if the parties so agree.

How can you avoid the problem altogether? the answer is really quite simple!

All that is required is for you to ensure that your contracts have effective arbitration clauses included in them – not the outdated, complicated, multi-tiered, and often unenforceable dispute resolution/arbitration clauses we frequently see still being used today.

NZDRC and NZIAC have developed comprehensive suites of Rules for Commercial Arbitration that are robust and certain, yet innovative in their commercial commonsense approach to challenging issues such as appointment, urgent interim relief, expedited procedures, summary procedures for early dismissal of claims and defences, joinder, consolidation, multiple contracts, confidentiality, representation, mediation, arbitral secretaries, expert evidence, appeals, and costs.

The Rules provide both a framework and detailed provisions to ensure the efficient and cost effective resolution of commercial disputes by arbitration. The Rules are set out in a manner designed to facilitate ease of use and may be adopted by agreement in writing at any time before or after a dispute has arisen.

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

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 that provide a proportionate response to the amounts in dispute and the complexity of the issues involved.

The primary advantages of arbitration under NZDRC's and NZIAC's Arbitration Rules include:

- one simple model clause – the rules act as a default filter for expedited procedures according to the value of the dispute
- a sole arbitrator will be appointed unless the parties agree otherwise
- lower value claims (claims under NZ $2.5M) are dealt with under 45, 60 and 90 day expedited Rules by default in domestic arbitrations and 60, 90 and 120 day expedited rules by default in international arbitrations – claims under NZ$250K will dealt with on the documents by default
- no emergency arbitrator – instead, where urgent interim relief sought, a sole arbitrator or Presiding Arbitrator will be appointed by NZDRC/NZIAC within one working day to determine any application for urgent interim relief

ARBITRATION CLAUSE

20.1 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.

- all fees are fixed and/or capped
- express provisions relating to mediation (arbitral tribunal must stay arbitration proceedings where parties agree to mediate - arbitrator may act as mediator subject to strict rules of conduct)
- opt-in appeals procedures
- rules governing appointment and role of arbitral secretaries – payment comes out of arbitral tribunal's capped fee allowance which reflects the efficiency the arbitral secretary is said to bring to the process
- code of conduct for expert witnesses
- clear disclosure provisions
- rules governing representation – obligation bearing on representative is an obligation or duty of represented party with costs consequences in the event of breach

For domestic contracting parties who wish to have future disputes resolved by arbitration under NZDRC's Arbitration Rules and fully administered services, the following model clause is recommended for inclusion in contracts:

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 Dispute Resolution Centre.

For parties who have their places of business in different States who wish to have future disputes resolved by arbitration under NZIAC's Arbitration Rules and fully administered services, the following model clause is recommended for inclusion in contracts:

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.

Parties to an existing dispute that have not incorporated the NZDRC or NZIAC Model Clause into a prior agreement may agree to refer that dispute to Arbitration under the NZDRC or NZIAC Arbitration Rules by signing the Arbitration Agreement at Appendix 2 to those Rules.

The primary objective of modern commercial arbitration must be the fair, prompt, and cost-effective determination of any proceeding in a manner that is proportionate to the amounts in dispute and the complexity of the issues involved. Sensible contracting, by including an effective arbitration clause, is the first step to achieving those objectives.

ABOUT JOHN GREEN

John is a professional arbitrator, mediator and adjudicator and based in Auckland, New Zealand. He has been appointed in more than 1,200 building, construction, infrastructure and general commercial disputes over the past 28 years relating to residential, commercial and industrial properties and construction projects including, power stations, gas fields, manufacturing and processing plants, stadiums, hotels, land subdivisions, roading, railways, wharves, marinas, drainage, wastewater treatment plants, recycling plants, mining, services, and utilities, involving domestic and internationally based parties, complex technical and legal matters, and sums in dispute exceeding $100M.

John specialises in dispute resolution process design, development and delivery and he is the founder and a Director of the New Zealand Dispute Resolution Centre (NZDRC); the New Zealand International Arbitration Centre (NZIAC); the New Zealand Family Dispute Resolution Centre (FDR Centre); and the Building Disputes Tribunal (BDT).

John is a frequent chair and presenter at conferences, seminars and workshops and he is the author of numerous papers and articles on dispute resolution. He is the Editor of ReSolution® and BuildLaw® and he is the author of Thomson Reuters: 'The Leaky Building Crisis: Understanding the Issues' - Part 4 Dispute Resolution Options and 'Unit Titles Manual' – Chapter 14 Dispute Resolution.

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