

Disputes: Clauses and Consequences

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New Zealand Institute of Forestry
Te Pūtahī Ngāherehere o Aotearoa Incorporated




**Arbitrators' and Mediators'
Institute of New Zealand Inc**
Te Mana Kaiwhakataū, Takawaenga o Aotearoa

Why this session?


Disputes are an inescapable part of commercial life



It is rarely possible to predict what kind of dispute you may find yourself in, much less likely outcomes



All the more important to ensure that the process which will be followed to deal with disputes is fit for purpose



Dispute resolution clauses are commonplace but, like parachutes, people are seldom interested in the details until they are in freefall.

The objectives of this session are to:

Survey the different pathways to dispute resolution/determination

Demonstrate and allow for discussion of the options

Facilitate debate about what a fit for purpose dispute resolution clause might look like

To give the debate a practical focus ...

We cannot give advice on the specifics
of any real world issues/ clauses

Hence:

Seddon Forestry Limited v Coates Forest
Management Limited

Entirely hypothetical!

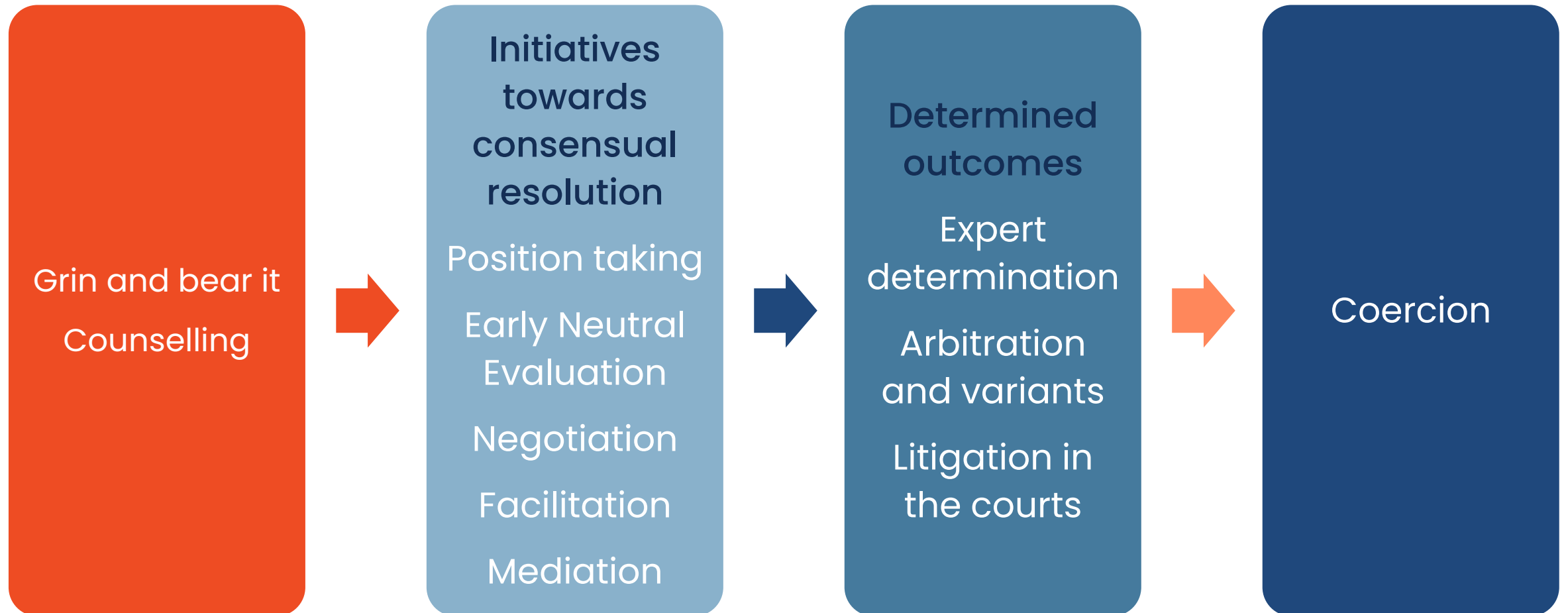
Will use the facts as a platform for
discussion



An aerial photograph of a dense, lush green forest. The canopy is thick and textured, with various shades of green. The text "What are the options?" is overlaid in the center in a large, white, sans-serif font.

What are the options?

The dispute resolution “continuum”



Some obvious points

The main division is as between options in which the parties retain control of the outcomes (e.g., negotiation, mediation) and options in which the parties cede control of the outcome to a third party (litigation in the courts, expert determination, arbitration).

At risk of oversimplification, consensual decision making can focus on commercial interests, whereas determinative processes will focus on rights and obligations.

The two depend on each other for effectiveness: all disputes that settle do so in the context of a determinative process that will kick in if there is no settlement. At the same time, the determinative options would be swamped if there were no settlements.

This is not about choosing a 'right' or 'wrong' process. It is about knowing what tools there are in the toolbox.

Approach

- Royden will start by looking at the determinative processes – starting with litigation in the courts before moving to expert determination and arbitration.
- Mark will then consider the facts from the perspective of a mediator.
- We will finish by looking at some dispute resolution clauses to apply the discussion.
- We welcome, encourage and would very much appreciate questions and debate as we go through the materials.

Assume the facts of Seddon.

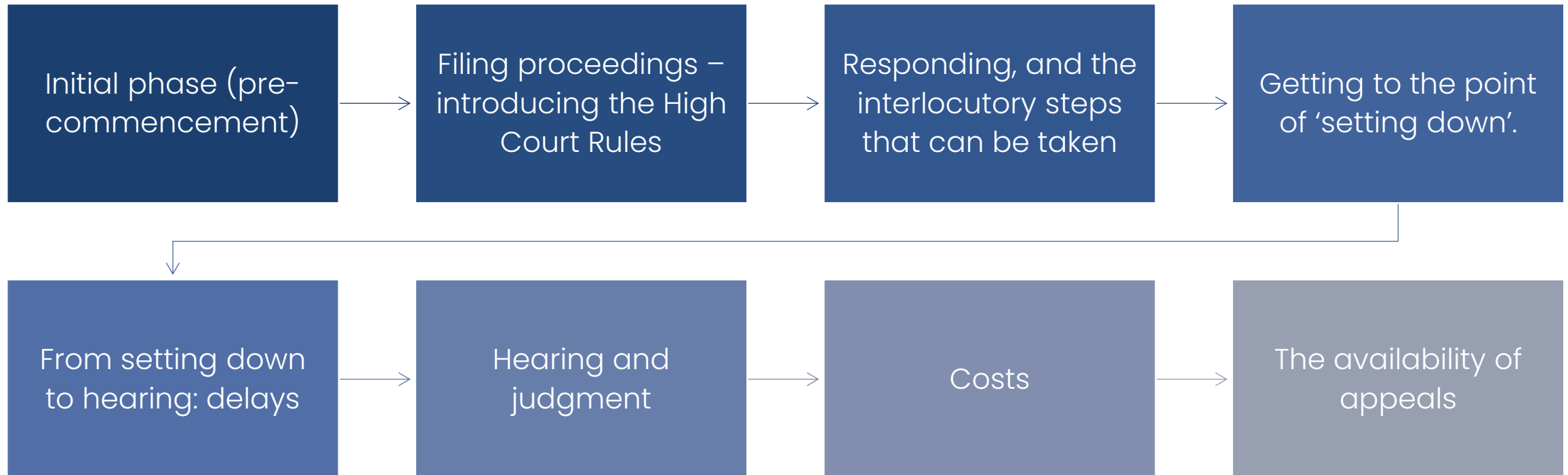
Putting aside any attempts to look for an agreed outcome, if the management contract has no dispute resolution clause (and the other party is unwilling to consider any other option) then where do you go?

Litigation

i.e., bringing a claim in the Courts – here, almost certainly the High Court



High Court Process



Other Government-funded Possibilities

- Other Courts – District Court, Employment Court, Environment Court, Disputes Tribunal
- Many diverse specialist tribunals – e.g., Land Valuation, Human Rights, Tenancy, Waitangi Tribunal



An aerial photograph of a dense, lush green forest. The canopy is thick with various shades of green, ranging from deep forest green to bright, sunlit yellow-green. The trees are closely packed, creating a textured, almost mosaic-like appearance from above. The lighting suggests a sunny day, with some areas appearing brighter than others.

**What if there is a provision
requiring expert determination?**

Expert Determination

- Contract –based
- Advantages
- Pitfalls
- Timing
- Challenges
- Enforcement

**What if there is an
arbitration clause?**

**Or the parties agree to
go to arbitration?**



What is arbitration?

- An arbitration is best defined as a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving the dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard.
- Williams & Kawharu on Arbitration

Usually involves

- Privately contracted decision maker
- Independent and impartial
- Finds facts, applies the law
- Focused on rights, not interests
- Decides issues in dispute
- Gives reasons

Some aspects

- Governed by the Arbitration Act 1996
- Gives effect to UNCITRAL 'Model Law'
- International v domestic
- Enforceability and the New York Convention

Process and Powers

- Appointing the arbitrator
- Rules of process – institutional rules and the procedures in the Act
- The arbitrator's powers – all the remedies that might be awarded in the High Court
- Limited grounds to challenge the outcome
- Costs

Advantages

- Flexibility
- Finality
- Enforceability
- Privacy/confidentiality
- Expertise
- Availability / continuity
- Informality
- No filing or hearing fees
- Speed
- Costs

**What if there is a
mediation clause?**

**Or the parties agree to
go to mediation?**



What is mediation?

- *“the attempt to settle a dispute through a neutral party”*
- *“..puts the power for a solution back into the hands of those most affected – the parties – and enables them to construct a solution that works for them”*

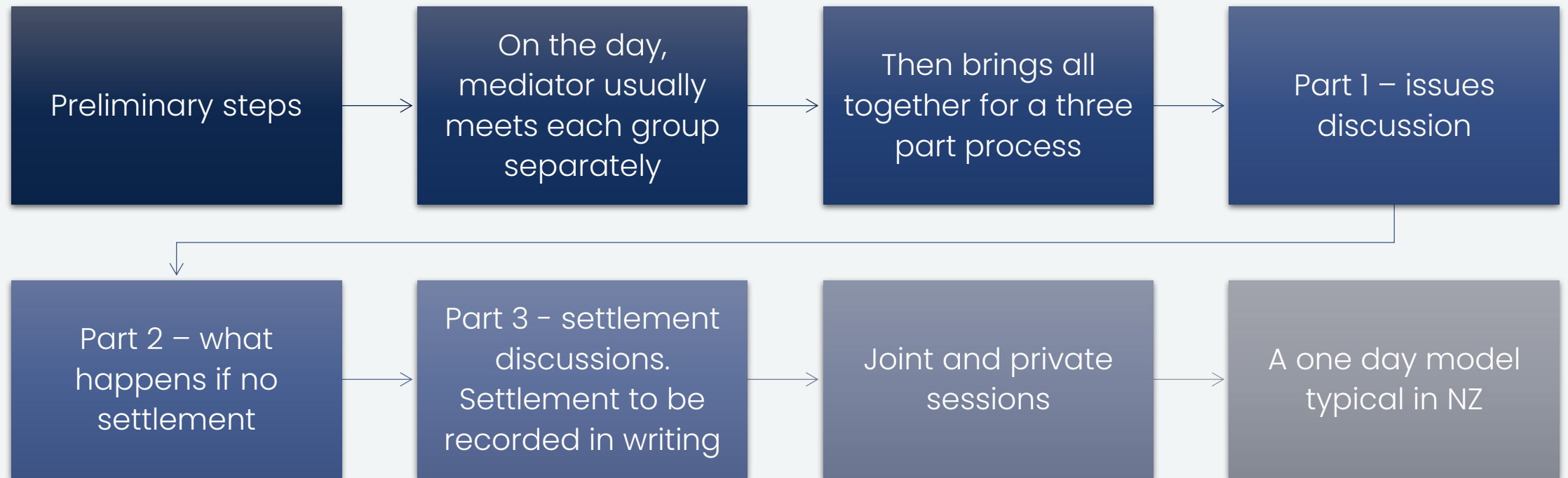
What is mediation?

- Legislation at the time of Henry I (1100–1135) encouraged mediation, or “settlement by love” – “lovedays”
- Modern mediation in New Zealand started in industrial relations – Industrial Mediation Service set up in 1970
- 1990s – mediation spread in NZ into commercial litigation, particularly in construction and insurance disputes
- 85% of leaky homes cases resolved by mediation

What is mediation?

- Mediation now referred to in over 100 statutes
- Many standard form and bespoke contracts require parties to mediate disputes
- Mediation the goto dispute resolution method for the NZ Government when faced with dispute epidemics. Examples include the WHT, the GCCRS and the Farm Debt Mediation Act

How a typical mediation works



Advantages of mediation

- Quick
- Flexible re – timing/format/venue
- Relatively cheap
- High success rate
- Confidential (if agreed)
- Parties get to talk to each other
- Can address issues that a court/arbitration cannot – what is really important to the parties?
Interests!
- Parties can shape own solution, including options a court/arbitration cannot order – addressing interests

Disadvantages of mediation

- No arbiter of truth, what is right/wrong
- No decision imposed
- No result if parties do not agree
- There may be a less forensic review of the facts
- Result may not be driven entirely by legal rights/wrongs
- Personalities may affect outcomes
- Power imbalances may affect outcomes

Mediating Seddon – CFML *Practicalities*

- Mediator selection
- Venue/format
- Pre-mediation information exchange
- Who is coming
 - Party reps – authority to settle
 - Witnesses – “the student”?
 - Lawyers?
 - Experts?
- Draft settlement agreement

Mediating Seddon – CFML *Drivers for Seddon*

- What are Seddon's interests?
- What is Seddon's "BATNA" (best alternative to a negotiated agreement)
- What is Seddon's "WATNA" (worst alternative to a negotiated agreement)

Mediating Seddon – CFML *Drivers for CFML*

- What are CFML's interests?
- What is CFML's "BATNA" (best alternative to a negotiated agreement)
- What is CFML's "WATNA" (worst alternative to a negotiated agreement)

Mediating
Seddon – CFML
*How will the
mediator help on
the day?*

- Focus on what is important for settlement
- Create a constructive environment
- Process management
- Dealing with difficult people
- Reality testing – evaluative?
- Guiding settlement

Mediating
Seddon – CFML
Possible solutions?

- What might go into a settlement agreement?



**Let's look at
some real clauses**

Asset Management Agreement

Dispute Procedure

40. If the Contractor or the Owner considers there is a Dispute or a Forestry Dispute (a Relevant Dispute), the Parties agree to attempt to resolve the Dispute as set out in this clause 41 to 43.

Notice of Dispute

41. If a Relevant Dispute occurs between the parties, the Owner or the Contractor must promptly notify the others in writing of the Relevant Dispute (including the nature of the dispute and all relevant supporting details).

Executive negotiations

42. If a party delivers a notice of a Relevant Dispute under clause XXX to the other party, then within 10 Business Days of the delivery of the notice, senior representatives of the parties who have the authority to resolve the Relevant Dispute must meet and use reasonable endeavours to resolve the Relevant Dispute by joint discussions at the meeting. a. If a Forestry Dispute is not resolved either party may refer the Forestry Dispute to an Expert for determination in accordance with clause YYY

Expert determination for Forestry Disputes

43. Either party may refer any Forestry Dispute which has not been resolved in accordance with the provisions above to an Expert for determination in accordance with this clause and the other party is required to follow the process for Expert determination for Forestry Disputes as outlined.

- a. The Expert will, within 10 Business Days of the referral of the Forestry Dispute to the Expert, fix a reasonable time and place for receiving submissions or information from the Parties or any other persons who it may think fit and may make further enquires and require such other evidence as it considers necessary and will determine the matter with all due diligence.
- b. The Parties will use reasonable endeavours to ensure within 30 Business Days of the Expert's appointment, the Expert provides a detailed written report including findings of fact, reasons for the decision and the determination of the Forestry Dispute.
- c. The Expert will act as an independent expert and not as an arbitrator.
- d. Unless otherwise determined by the Expert:
 - i. the parties will bear the Expert's costs and expenses in equal shares; and
 - ii. each party will bear its own costs and expenses of and incidental to the Expert's determination.
- e. In the absence of manifest error, any determination of the Expert will be binding on the parties, and the parties will not be entitled to seek any further remedy or redress with respect to the Forestry Dispute.

Harvesting/Marketing Agreement

Dispute Resolution And Arbitration

- Where any dispute arises between the parties arising out of or in connection with this agreement, no party may commence any court or arbitration proceedings relating to the dispute unless that party has complied with the procedures set out in this clause.
- The party initiating the dispute (“the First Party”) must provide written notice of the dispute to the other party (“the Other Party”) and nominate in that notice the First Party’s representative for the negotiations. The Other Party must within five Working Days of receiving the written notice of dispute give written notice to the First Party naming the Other Party’s representative for the negotiations. Each representative nominated shall have authority to settle or resolve the dispute.
- If the parties are unable to resolve the dispute by discussion and negotiation within ten Working Days of receipt of the written notice from the First Party, then the parties must immediately refer the dispute to mediation.
- The mediation must be conducted in terms of the Resolution Institute Agreement to Mediate – New Zealand version. The mediation must be conducted by a mediator at a fee agreed by the parties. Failing agreement between the parties, the mediator shall be selected and his or her fee determined by the Chair for the time being of the Resolution Institute.
- The parties shall continue to comply with their other obligations under this agreement notwithstanding the existence of a dispute.

Harvesting Agreement

Dispute Resolution

The parties agree, except where urgent injunctive relief is essential, that:

- (a) any dispute of whatever nature arising between the parties shall be notified in detail in writing by the disputing party to the other ("Dispute Notice");
- (b) once the Dispute Notice is served, both parties shall use their best endeavors over the ensuing twenty (20) Working Days to resolve the dispute by discussion, meeting and/or other informal process;
- (c) only after the expiry of such informal process is either party entitled to pursue resolution of the dispute by referring the dispute to arbitration which shall be the sole mechanism for the resolutions of dispute arising under this Agreement;
- (d) appointment of the arbitrator shall be jointly agreed between the parties; in the event of the parties being unable to agree, then the arbitrator shall be appointed by the president of NZ Institute of Forestry
- (e) if the matter is referred to arbitration, the Arbitration Act 1996 shall apply, provided that the arbitrator, in issuing his award, shall be limited to accepting the position of either FOREST MANAGER or the Contractor only (straight choice/pendulum) and may not, pursuant to the terms of this Agreement, issue any award which may be viewed as a compromise of or settlement between the positions set forth by each of the parties to the arbitration proceedings.

General Services Agreement

Dispute Resolution

The parties agree, except where urgent injunctive relief is essential, that:

- (a) any dispute of whatever nature arising between the parties shall be notified in detail in writing by the disputing party to the other ("Dispute Notice");
- (b) once the Dispute Notice is served, both parties shall use their best endeavours over the ensuing twenty (20) Working Days to resolve the dispute by discussion, meeting and/or other informal process;
- (c) only after the expiry of such informal process is either party entitled to pursue resolution of the dispute by referring the dispute to arbitration which shall be the sole mechanism for the resolutions of dispute arising under this Agreement;
- (d) if the matter is referred, to arbitration, the Arbitration Act 1996 shall apply, provided that the arbitrator, in issuing his award, shall be limited to accepting the position of either the Owner or the Contractor only (straight choice/pendulum) and may not, pursuant to the terms of this Agreement, issue any award which may be viewed as a compromise of or settlement between the positions set forth by each of the parties to the arbitration proceedings.

Consulting agreement

8. Dispute Resolution

8.1. The parties agree to first attempt to resolve disputes through good-faith negotiations.

8.2. If unresolved, disputes shall be referred to mediation in accordance with the Arbitration Act 1996 (NZ).

An aerial photograph of a dense, lush green forest. The canopy is thick and textured, with various shades of green. The text "Concluding points" is centered over the image in a white, bold, sans-serif font.

Concluding points



Dispute Resolution waterfalls – good or bad?

The essentials in a good dispute resolution clause?

Keep it simple

Understand the different realities of litigating in the court, arbitrating, going to expert determination, and/ or attending mediation

Query the value of agreements to negotiate – an obligation to negotiate in good faith is unenforceable.

Query the value of agreements for (e.g.) CEO's to meet – can be done at the time if there is any appetite for it.

If you don't want to go to Court, make sure the clause says unequivocally that you will arbitrate.

Consider the possibilities of choosing a set of rules, and/or as to the appointment of the arbitrator but these are optional extras, not requirements.

If you want to call attention to mediation before arbitrating, that can be very useful but the time within which a mediation is to be convened should be limited

A basic clause might include:

- All disputes will be determined by arbitration under the Arbitration Act 1996 and its amendments.
- Should either party wish to mediate in respect of the dispute(s) then the other party will attend a mediation.
- Unless the mediation resolves the dispute(s), the mediation process is not to delay or compromise the progress of the arbitral proceedings.

Final thoughts

Remember, like the parachute, no dispute resolution clause will prevent disputes arising.

A dispute resolution clause should, however, give rise to a process that will settle or determine the matters at issue effectively, economically, and in a way that is proportionate to the commercial consequences of the outcome.



The home of dispute resolution professionals in Aotearoa New Zealand.

- AMINZ has over 1,000 members who come from a variety of sectors. We are the only organisation worldwide with reciprocal membership rights with the Chartered Institute of Arbitrators.
- As a not-for-profit, AMINZ promotes excellence in dispute resolution, offers internationally recognised training, and connects the public with qualified professionals.
- AMINZ is referenced in over 40 pieces of legislation to appoint dispute resolvers. It has a long history of working with Government on best practice dispute resolution.
- AMINZ is the body nominated by the Minister of Justice to make appointments of arbitrators in the stead of the High Court, pursuant to the Arbitration Act 1996.
- AMINZ is also an Approved Nominating Authority pursuant to the Construction Contracts Act 2002, to appoint adjudicators.



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