

# **The Law Society of New South Wales Rules for Commercial Arbitrations and Model Clause**

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# THE LAW SOCIETY OF NEW SOUTH WALES RULES FOR THE CONDUCT OF COMMERCIAL ARBITRATIONS

(Incorporating the Expedited Commercial Arbitration Rules)

## Authority for Rules

The Rules for the Conduct of Commercial Arbitrations (“the Rules”) apply to commercial arbitrations conducted in accordance with the provisions of the [Commercial Arbitration Act 2010](#) (NSW) and are subject to this Act.

Where parties have agreed between them that a dispute arising or having arisen between them shall be submitted to arbitration, the arbitration shall be conducted in accordance with either of the following:

- a. The Law Society of New South Wales Rules for the Conduct of Commercial Arbitrations; or
- b. The Law Society of New South Wales Expedited Commercial Arbitration Rules (Rules numbered 1 to 22 and Schedule 2 apply).

Where any agreement, submission or reference provides for arbitration under the Rules of The Law Society of New South Wales, the parties are taken to have agreed that the arbitration is to be conducted in accordance with these rules or any modified, amended or substituted rules which the Law Society may have adopted and which have come into effect before the start of that arbitration. Please note definitions are set out in Rule 16.

<b>PART I</b>
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<b>PRELIMINARY</b>
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## **RULE 1 Appointment of an Arbitrator**

- 1.1 Nothing in these Rules prevents the parties to a dispute from agreeing on an arbitrator or arbitrators of their choice.
- 1.2 If the parties in dispute do not agree on an arbitrator, the Law Society President for the time being will in his or her absolute discretion appoint an arbitrator.

## **RULE 2 Notice of Dispute**

- 2.1 This Rule applies to the extent that it is not inconsistent with the Agreement (as defined in Rule 16).
- 2.2 If a dispute is covered by the submission to arbitration in an Agreement, any party to the dispute and the Agreement may give written notice of the dispute to the other party or parties (“Notice of Dispute”).
- 2.3 The Notice of Dispute is to be served at the address for the party or parties specified in the Agreement. Service may be effected personally, by mail, or by any means of electronic transmission.

- 2.4 The passage of ten (10) days after service of the Notice of Dispute automatically refers the dispute to Arbitration in accordance with these Rules unless it is settled within those ten days.
- 2.5 The parties can, in writing, waive the service of the Notice of Dispute and instead, call for the appointment of an arbitrator by the Law Society President in accordance with paragraph 1 of Rule 3.

**RULE 3 Call for Appointment**

- 3.1 If a Notice of Dispute has been given under an Agreement or under Rule 2, and the dispute has not been settled, any party can make a written request to the Law Society President, to appoint an arbitrator. The request is to be made with:
  - a. a copy of the Notice of Dispute; or if the parties have waived service of the Notice of Dispute, a copy of the waiver;
  - b. a copy of the Agreement containing the submission to arbitration;
  - c. the names and addresses of the parties to the dispute; and
  - d. a brief description of the nature of the dispute with enough particulars of the dispute to allow the Law Society President to appoint an appropriate arbitrator.
- 3.2 The Law Society President is to appoint an arbitrator within ten (10) days of receipt of the request, together with its associated material. This time limit may be extended if the supplied material does not, in the opinion of the Law Society President give enough information about the dispute.
- 3.3 If the request does not indicate that more than one (1) arbitrator is required, the Law Society President is to appoint one (1) arbitrator only.

**RULE 4 Appointment Fee**

- 4.1 The parties shall deposit with the Law Society the prescribed Appointment Fee.
- 4.2 The Appointment Fee shall be such sum as is prescribed by the Law Society at the relevant time.
- 4.3 There can be no appointment of an arbitrator until the Appointment Fee has been paid to the Law Society.

**RULE 5 Entry on Reference to Arbitration**

- 5.1 In Rules 5 to 15 “Arbitrator” means either an arbitrator appointed by the Law Society President, or an arbitrator appointed by agreement of the parties.
- 5.2 The Arbitrator must, within seven (7) days of receiving written advice of his or her appointment give written notice to the parties of the time and place of a preliminary conference which the parties or their duly authorised representatives must attend.
- 5.3 At or prior to that preliminary conference, the Arbitrator must advise any conditions which he or she wishes to include in the Arbitration Agreement, (as defined in Rule 16), (including provision of security for the costs of the Arbitration) and that Arbitration Agreement is to be signed by the parties at the preliminary conference.

- 5.4 When the parties sign the Arbitration Agreement, the Arbitrator must sign it, and the Arbitration commences at that time.
- 5.5 If any party fails to attend any preliminary conference or does not agree with the conditions proposed by the Arbitrator or the jurisdiction of the Arbitrator, and does not sign the Arbitration Agreement, the Arbitrator must notify the parties and the Law Society in writing within two (2) days whether he or she accepts appointment notwithstanding that disagreement. On such acceptance, the Arbitration commences.
- 5.6 When the Arbitration has commenced, the Arbitrator must fix a time, date, place, and timetable agreeable to the parties, but if the parties do not agree, the Arbitrator may give directions setting these, which then bind the parties.
- 5.7 If the parties do not agree on the terms of reference of the Arbitration, the Arbitrator may make a binding determination on that.

**RULE 6 Appointed Arbitrator Failing to Act / Loss of Arbitrator**

The Law Society President must appoint a replacement Arbitrator, within a reasonable time of:

- 6.1 receiving written notice from the Arbitrator that he or she does not accept the appointment;
- 6.2 being called on by a party if the Arbitrator does not commence the Arbitration within one (1) month of his or her appointment; or
- 6.3 being advised of the death of an Arbitrator, or an Arbitrator otherwise having become incapable of continuing the Arbitration because of legal incapacity, ill health, or other actual incapacity.

**RULE 7 Release of the Law Society**

Except in respect of any fraud, the parties release the Law Society, its officers, employees, and agents from any liability of any kind whatsoever arising out of or in connection with the Arbitrator's appointment, the arbitral procedure, or the Preliminary Final Award.

**RULE 8 Provision of Security**

The Arbitrator may direct that the parties provide security for the costs of the Arbitration. Any such security is to be deposited from time to time and applied as directed by the Arbitrator. If there is any default in giving the security, the Arbitrator may make such directions for the further conduct of the Arbitration as the Arbitrator then considers appropriate.

**RULE 9 Preliminaries not to Prejudice Scope of Arbitration**

- 9.1 The description of the dispute given in the Notice of Dispute under Rule 2 or in accordance with Rule 3 does not define or limit the scope of the Arbitration.
- 9.2 Any party may raise in its claim, defence, cross-claim or defence to cross-claim, any other dispute or difference which has arisen under the Agreement.
- 9.3 Unless limited by the Agreement, any amendment or addition to claims is at the discretion of the Arbitrator and can be subject to any conditions as to costs or otherwise as the Arbitrator considers appropriate.

**RULE 10 General Duty of Arbitrator**

- 10.1 The Arbitrator must adopt procedures suitable to the circumstances of the dispute, avoiding unnecessary delay and expense, to provide an expeditious cost-effective and fair means of determining all of the matters in dispute.
- 10.2 The Arbitrator must be independent of, and act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with the case of any opposing party, as well as a reasonable opportunity to be heard on the procedure adopted by the Arbitrator.

**RULE 11 General Duty of Parties**

- 11.1 The parties must do all things reasonably necessary for the proper, speedy, and cost-effective conduct of the Arbitration, and must promptly comply with all directions or rulings by the Arbitrator whether about procedural or evidentiary matters or otherwise.
- 11.2 The parties are to keep all aspects of the Arbitration and all information and knowledge disclosed in it absolutely confidential, but this obligation does not prevent:
  - a. the parties from giving evidence in any Court whether in proceedings about the Arbitration, the Dispute or otherwise; or
  - b. the parties disclosing to their legal and other advisors or their insurers, so long as the disclosing party binds the advisor or insurer to the same obligation of absolute confidentiality.

**RULE 12 Waiver of Right to Object**

- 12.1 If a party takes part, or continues to take part, in the Arbitration without immediately or within a reasonable time thereafter, taking any objection:
  - a. that the Arbitrator lacks jurisdiction;
  - b. that the Arbitration has been improperly conducted;
  - c. that there has been a failure to comply with the Agreement; or that there has been any irregularity affecting the Arbitrator or the Arbitration,

then that party is deemed to have waived its right to make the objection later, whether before the Arbitrator or a Court, unless it shows that, at the time it took part or continued to take part in the proceedings, it did not know and could not with reasonable diligence have discovered, the grounds for the objection.

- 12.2 If the Arbitrator rules that he or she has jurisdiction and a party does not question that ruling in a Court within the time fixed by the Arbitrator (or if no time is fixed, within a reasonable time and not later than the conclusion of the preliminary conference), then that party is deemed to have waived any right it may otherwise have had to later object to the Arbitrator's jurisdiction on any ground which was the subject of that ruling, and is deemed to have submitted to the Arbitrator's jurisdiction.

### **RULE 13 Procedural Directions**

- 13.1 The Arbitrator can make such directions or rulings about procedural and evidentiary matters as he or she sees fit, but within the limits set by Rule 10.
- 13.2 The Rules in Schedule 1 govern the Arbitration, unless the parties agree that it is to be expedited, and in that case the Rules in Schedule 2 apply.

### **RULE 14 Views and Other Material**

- 14.1 If the Arbitrator reasonably believes that a view of the subject matter or site of any dispute might assist the Arbitrator in determining the dispute, then he or she may do so. The Arbitrator can use his or her own observation not merely to assist in understanding the evidence but also as evidence for deciding the dispute however the Arbitrator must first notify the parties of any preliminary adverse conclusion which is based solely on the Arbitrator's observations at the view and then must give the parties a reasonable opportunity to meet it.
- 14.2 The Arbitrator can obtain such technical and/or legal assistance or advice as the Arbitrator, in his or her discretion reasonably requires provided that, in so doing, the Arbitrator complies with the rules of natural justice. The cost of that assistance is part of the costs of the Arbitration.

### **RULE 15 Awards**

- 15.1 The Arbitrator can within a reasonable time deliver one or more Interim Awards and then a Preliminary Final Award to deal with all issues in dispute, except for the costs of the Arbitration.
- 15.2 The Preliminary Final Award is binding on the parties. The parties have no right of appeal other than that provided in the Act.
- 15.3 If the security for costs is less than the amount which the Arbitrator determines as the costs of the Arbitration, then the Arbitrator may withhold the Preliminary Final Award until the outstanding balance is paid.
- 15.4 After the Preliminary Final Award, the Arbitrator can direct the parties to give evidence and make submissions about the costs of the Arbitration and the Arbitrator must then within a reasonable time deliver the Final Award, dealing with all issues in dispute and dealing with the costs of the Arbitration.
- 15.5 The Awards must be made in writing and signed by the Arbitrator in at least as many hard copies as there are parties, and those hard copies

forwarded by mail to the parties or collected from the Arbitrator as he or she directs.

## **PART II**

## **GENERAL**

### **RULE 16 Definitions**

In these Rules:

**'Agreement'** means any agreement between the parties including a submission of present or future disputes to arbitration.

**'Appointment Fee'** has the meaning described in Rule 4.2.

**'Arbitration'** means any domestic commercial arbitration whether or not administered by a permanent arbitral institution as per the Act.

**'Arbitration Agreement'** means the written terms of engagement proposed by the Arbitrator to bind the parties to these Rules and acknowledge the Arbitrator's jurisdiction to determine the dispute.

**'Arbitrator'** has the meaning described in Rule 5.1.

The **'costs of the Arbitration'** include the fees and expenses of the Arbitrator, any Appointment Fee or other fee payable to the Law Society, the room hire, transcript, and the costs and disbursements of the parties.

**'Act'** means the **'Commercial Arbitration Act 2010 (NSW)'** and includes any other legislation which precedes, amends, or replaces that Act.

**'Court'** means any Court which has jurisdiction under the Act.

**'days'** means normal working days and excludes Saturdays, Sundays, and public holidays in NSW.

**'dispute'** includes, but is not limited to, a claim made by the purchaser under Clause 7 of the Contract for Sale of Land in NSW.

**'Interim Measure'** has the meaning specified in Section 17 of the Act.

**'Experts' Conclaves'** for the purposes of Schedules 1 and 2 means a conference between expert witnesses which occurs outside the hearing, without legal representatives being present, with the aim of producing a joint report of the kind referred to in Clause 4 of Schedule 1.

**'Final Award'** means an award issued under Rule 15.4 that deals with all issues including the costs of the Arbitration.

**'Law Society'** means The Law Society of New South Wales.

**'Notice of Dispute'** has the meaning described in Rule 2.2.

**'Preliminary Final Award'** means an award issued under Rule 15.2 that deals with all issues other than the costs of the Arbitration.

**'written'** or **'writing'** includes anything sent by facsimile transmission or by electronic mail irrespective of whether or not such thing is in fact received or, if received, printed at or by the address to which that thing is sent provided that the sender has both printed out a copy of the thing sent and can verify that the address used was an address specified for the electronic reception of information.

**RULE 17 Application of Rules**

- 17.1 These Rules are subject to the Act and to any agreement between the parties about the Arbitration. Otherwise, where the parties to a dispute have agreed to Arbitration in accordance with these Rules, they must comply with these Rules.

**RULE 18 Counting of Days**

- 18.1 For the purpose of counting days under these Rules, the first day is the day following the day when notice is first actually received or deemed to be received under paragraph 2 of this Rule, whichever is earlier. If the last day is a non-business day at the residence or place of business of the addressee, then the period is extended until the first business day which follows.
- 18.2 Any notice, which is posted, is deemed to have been received on the second day following the day of posting. Any notice, which is sent by electronic transmission is deemed to have been received on the day of transmission.

**RULE 19 Multiple Arbitrators – Appointment of Umpire**

- 19.1 Where there is more than one Arbitrator then, where the context requires it, “Arbitrator” means Arbitrators and, also subject to Rule 20, means any umpire who is appointed.
- 19.2 Where there is an even number of Arbitrators, those Arbitrators must appoint an umpire if the Arbitrators fail to agree on any matter for determination.
- 19.3 If the Arbitrators are unable to agree on the umpire within seven (7) days of their disagreement, then they must notify the parties in writing, and any party may then make a written request to the Law Society President to appoint an umpire. The Law Society President must within ten (10) days thereafter appoint an umpire and advise the parties, the Arbitrators, and the nominated umpire accordingly.

**RULE 20 Determination by an Umpire**

- 20.1 When the umpire is appointed, he or she must, within two (2) days, notify the parties and the Law Society of his or her acceptance of the appointment and the Arbitrators must within seven (7) days of notification of the umpire’s appointment provide the umpire with a written statement of the points of agreement and points of disagreement, but without reasons, together with all other written material relevant to the Arbitration including exhibits and items marked for identification but excluding private notes of the Arbitrators.
- 20.2 The umpire must then proceed to deliver an award as soon as is reasonable and, in so doing, must take into account the evidence before the Arbitrators but is not bound by any of the points of agreement expressed by the Arbitrators, and no further evidence is to be led before the umpire unless the umpire considers it appropriate.

**RULE 21 Termination of the Arbitration**

The arbitration is terminated after the handing down of the Final Award by the Arbitrator, or the umpire, or by the execution of a settlement agreement between the parties before the handing down of the Final Award.

## **RULE 22      Mediation and Arbitration**

- 22.1 If the parties select a dispute resolution process in which Arbitration is preceded by mediation, the mediator cannot act as the arbitrator, except as provided for under section 27D of the Act.
- 22.2 If during the Arbitration, the Arbitrator and the parties believe that some direct negotiation or some assisted negotiation or mediation would assist resolution of the dispute, then the Arbitration is to be adjourned for that process to occur. Unless otherwise agreed by the parties, this process must take place within twenty-one (21) days of the adjournment and conclude within twenty-eight (28) days.
- 22.3 If the parties wish to mediate, the mediator is to be appointed by the parties. If the parties cannot agree on a mediator, either party may request the President of the Law Society to appoint a mediator and the parties must then in good faith join in the mediation which must be conducted in accordance with the Mediation Rules of the Law Society.

<b>SCHEDULE 1</b>
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The Arbitrator can make any directions or rulings as he or she considers to be reasonable and may include the following:

1. the form and extent of any submissions or documents defining the issues in dispute;
2. the preparation of any joint statement of issues, to define and narrow the issues in dispute;
3. the holding of further preliminary conferences, meetings between experts and/or representatives of the parties, or Experts' Conclaves chaired by the Arbitrator, to narrow issues in dispute, including the manner in which they are conducted and who is to attend, and preparation of a document recording the results;
4. the preparation of joint reports by experts engaged by the parties recording the matters on which they agree, the matters on which they disagree, and identifying the reasons for disagreement and their respective contentions about that;
5. the preparation of joint bundles of documents including at any meetings between experts and/or representatives of the parties and any Experts' Conclaves;
6. the provision of factual information to experts engaged by the parties for use in their joint deliberations or preparation of any joint report;
7. the production of documents for inspection by any opposing party;
8. the form of any evidence in chief, by witness statement or otherwise, and when it is to be provided to the Arbitrator and any other party;
9. the extent of or limitations on oral hearings, including reasonable time limits on oral evidence and the provision of written opening addresses and final submissions; and/or,
10. the service of offers of settlement without prejudice except as to costs.

<b>SCHEDULE 2 THE LAW SOCIETY EXPEDITED COMMERCIAL ARBITRATION RULES</b>
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The Arbitration is to be conducted in accordance with the following Rules.

1. The claimant must, within twenty-one (21) days of the date on which the Arbitration commences provide the following to each other party and to the Arbitrator:
  - a. a written outline describing the dispute, the legal and factual issues involved, its contentions in relation to those issues, and the amount of its claim;
  - b. all statements of evidence and copies of all documents on which it relies;
  - c. any expert reports on which it relies; and,
  - d. its written submissions on the legal and factual issues involved in its claim.
2. After that each other party must within a further period of twenty-one (21) days, provide the following to each other party and to the Arbitrator:
  - a. a written initial submission indicating whether or not it agrees with the claimant's outline of the dispute, and if not, its statement of the nature of the dispute (including any cross-claim), the legal and factual issues involved in the claimant's claim and any such cross-claim, its contentions in relation to those issues, and the amount of any such cross-claim;
  - b. all statements of evidence and copies of all documents on which it relies;
  - c. any expert reports on which it relies;
  - d. any objections which it has to the statements of evidence, experts' reports, and documents served by the claimant, detailing the basis of any such objection; and,
  - e. its written submissions on the legal and factual issues involved in the claimant's claim and any cross-claim brought by it.
3. After that, any party can reply to written material served within a further period of twenty-one (21) days, by providing the following to each other party and to the Arbitrator:
  - a. a written reply indicating whether or not it agrees with the initial submission and, if not, its reply as to the nature of the dispute, the issues likely to arise and its contentions in relation to same;
  - b. all statements of evidence and copies of documents in reply to material served under paragraph 2b;
  - c. any expert reports in reply;
  - d. any objections which it has to the statements of evidence, experts' reports, and documents detailing the basis of any such objection; and,
  - e. its written submissions in reply to the legal and factual issues involved.
4. If a cross-claim is made then each other party can reply, in the same manner as set out in paragraph 3, to written material served in respect of such cross-claim.
5. The Arbitrator can direct that expert reports not be served and that, instead, the experts retained by the parties are to be each provided with all of the relevant material and then jointly confer and produce a joint report or reports (all by a time fixed by the Arbitrator) recording the matters on which they agree, the matters on

which they disagree, and identifying the reasons for disagreement and their respective contentions about that.

6. The Arbitrator can direct that the experts retained by the parties attend one or more Experts' Conclaves chaired by the Arbitrator, to narrow issues in dispute, the Conclaves are to be held at a time and are to be conducted and recorded as directed by the Arbitrator.
7. The Arbitrator can make any other directions or rulings as he or she considers to be reasonable, which may include directions like paragraphs 1, 2, 3, 5, 6, 7 and 10 of Schedule 1.
8. After that, the Arbitrator must determine the matter based on the written material unless the Arbitrator decides that an oral hearing is necessary to explain or resolve conflicts in the written material.
9. If the Arbitrator decides that an oral hearing be held about any of the issues in dispute, then that hearing is to be conducted as soon as possible at a time and as directed by the Arbitrator, including any reasonable time limits on oral evidence and the provision of written opening addresses and final submissions.
10. Any times fixed by this schedule can be varied by agreement of the parties. If there is no agreement, on proper cause being shown by a party, the Arbitrator can vary the times fixed but on such terms as to costs or otherwise as the Arbitrator considers reasonable.

**Model Clause – Arbitration**

1. If a dispute arises in relation to or is in any way connected with this contract (“**Dispute**”), it must be determined in accordance with paragraphs 2, 3 and 4 of this clause. This paragraph does not prevent a party from making an application to a court for urgent interlocutory relief.
2. A party to this contract claiming that a Dispute has arisen must give written notice specifying the nature of the Dispute (“**Notice**”) to the other party or parties to the contract. If the parties are unable to resolve the Dispute within ten business days following the giving of the Notice, they must then have the Dispute determined by arbitration conducted in **[insert location]** in accordance with this clause.
3. If the parties do not agree within a further seven days (or within a longer period agreed to in writing by them) on:
  - 3.1 the scope of and the procedures to be adopted in an arbitration of the Dispute; and
  - 3.2 the timetable for all the steps in those procedures; and
  - 3.3 the identity and fees of the arbitrator; then
  - 3.4 any party may request the President of The Law Society of New South Wales to appoint the arbitrator; and
  - 3.5 the parties must participate in the arbitration of the Dispute in accordance with The Law Society of New South Wales Rules for the Conduct of Commercial Arbitrations and the *Commercial Arbitration Act 2010* (NSW).
4. Subject to the *Commercial Arbitration Act 2010* (NSW), if a party:
  - 4.1 refuses to participate in an arbitration of the Dispute to which the party earlier agreed; or
  - 4.2 refuses to comply with paragraph 3.5 of this clause, a Notice having been served in accordance with paragraph 2; then
  - 4.3 that party is not entitled to recover the party’s costs in any court proceedings relating to the Dispute, even if that party is successful; and
  - 4.4 that party consents to an order of the Supreme Court of New South Wales that it will specifically perform and carry into execution paragraph 3.5 of this clause.