

Resolution Institute

A guide to commercial arbitration

Contents

Background	1
Who is Resolution Institute?	1
Who is this guide intended for?	1
Scope	1
What is commercial arbitration?	2
When do disputes go to arbitration?	3
How arbitration works	4
Nominations	5
Overview	5
Considerations	5
The nomination process	6
Processes	7
Types of hearings	7
Where is the arbitration held?	7
Fees	8
Code of conduct	8
Resolution Institute Arbitration Rules	8
Suggested model clauses	9
Questions	10
How are arbitrators graded?	10
How do I become an arbitrator?	10
How do arbitrators remain accredited?	10
Final tips and suggestions	11
Preparing for your arbitration	11
Next steps	11
Contact us	11

Background

Who is Resolution Institute?

Resolution Institute is the leading voice in dispute resolution in Australia. We are a vibrant community of arbitrators, mediators, expert determiners, adjudicators, restorative justice practitioners and other dispute resolution professionals who promote and foster the use of dispute resolution and the work of our members.

Who is this guide intended for?

The purpose of this guide is to provide a general overview of the arbitration process. It is intended to give an introductory understanding of commercial arbitration to business people and those in commercial contracts, who are interested in alternative ways to resolve contract disputes.

This guide may also be useful to those interested in seeking accreditation as an arbitrator.

The Resolution Institute's Guide to Commercial Arbitration is intended to be the definitive resource to navigate the commercial arbitration process for business people, those in commercial contracts, and future arbitrators.

Scope

This guide discusses commercial arbitration arising from a dispute resolution clause or agreement between the parties, or as directed by a court.

This guide does not cover:

- International commercial arbitration, which arises in contracts where one or more parties have their place of business outside Australia. Arbitration is often used in disputes between parties from different national jurisdiction, but that is beyond the scope of this guide.
- Adjudication of building and construction disputes, under state and territory building and construction security of payment legislation.
- Other forms of dispute resolution, which may be agreed by parties to a dispute, including mediation and expert determination.

This guide is not intended as legal advice. For legal advice please speak to your solicitor or legal representative.



Background

What is Commercial Arbitration?

What is arbitration?

Arbitration is a way to resolve disputes as an alternative to going to court. Arbitration proceedings are overseen by an arbitrator (rather than a judge or magistrate), who considers the evidence and arguments presented by the parties, and hands down an arbitral award.

Arbitration in Australia is governed by each state and territory's version of the uniform law, with only minor differences in the *Commercial Arbitration Act* between jurisdictions. In practice, this provides a consistent system for arbitration within Australia.

The arbitration process is considered formal, determinative, and confidential. Other methods of dispute resolution exist, each with their costs and benefits.



Dispute resolution methods sit on a scale trading formality and finality with cost and duration.

Similarities to litigation

- The parties each present their case to an impartial person, the arbitrator, who considers the evidence and makes a decision.
- Often includes hearings where the parties present evidence.
- Can deal with complex issues, and can take time to resolve.
- Governed by an agreed set of rules, and is administered by an arbitrator who hears the arguments of the parties, and considers the evidence, before handing down their decision.
- The decision, or arbitral award, is a legally binding decision which is generally enforceable in court.
- Documents and evidence provided in an arbitration are considered confidential, and disclosure is limited. Arbitration proceedings do not form part of the public record in the way that litigation in court does.

Differences with litigation

- Less formal and more flexible. The way the arbitration proceedings are conducted can be changed by agreement of the parties.
- The place an arbitration takes place, known as the seat of arbitration, is agreed by the parties or decided by the arbitrator, rather than taking place in a court room.
- The arbitrator can provide a provisional timetable for the arbitration.
- The rules used in an arbitration can be agreed between the parties prior to the dispute arising, in their dispute resolution clause.

When do disputes go to arbitration?

The arbitration process often begins well before the parties are in dispute. The parties may have a commercial relationship, and include a dispute resolution clause in a contract between them. For model clauses which can be included in a contract to refer disputes to arbitration, please see page 9.

Once a dispute arises, depending on the relationship, the nature of the dispute, and prior agreements, other methods of resolving the dispute may be attempted.



The parties have an existing commercial relationship.
A contract between them includes a clause agreeing to resolve conflicts by arbitration.



A dispute arises in the commercial or contractual relationship.



At first, the parties attempt to resolve the dispute through communication and negotiation.
Other stages of dispute resolution (as previously agreed) are exhausted.



Arbitration is initiated, and then conducted by an arbitrator.
The arbitrator considers the arguments and the evidence presented.



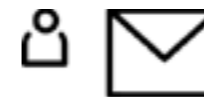
An arbitral award is handed down by the arbitrator and is court enforceable.

Arbitration can also be initiated by court-order. For example, if the parties have previously agreed to resolve the dispute through arbitration, but instead attempt to take the matter to court, the court may refer the dispute back to arbitration.

If there is no contractual obligation to use arbitration, the parties may agree to use arbitration to resolve their dispute after it has arisen.

How arbitration works

The procedure followed during the course of the arbitration may vary depending on the arbitration rules agreed upon by the parties. The following summary outlines the arbitration process under the Resolution Institute Arbitration Rules 2020 available on our website: www.resolution.institute



The party raising the dispute (the **claimant**) sends a notice of arbitration to the other party (the **respondent**).



The **respondent** replies with a response to notice of arbitration.

The notice of arbitration and response to the notice of arbitration are written documents establishing the beginning of arbitration, defining the issues being arbitrated, and practical details like contact information and a proposed seat of arbitration.



The parties can agree on who the arbitrator will be, if they haven't already agreed on how an **arbitrator** will be chosen. **Arbitrators** may be suggested by either party in the Notice of Arbitration or the Response to Notice of Arbitration. As the largest dispute resolution organisation in Australia and Aotearoa New Zealand, Resolution Institute facilitates selecting a professional arbitrator from a wide and diverse pool.

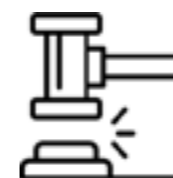


Once an arbitrator has been chosen, the **claimant** will typically send their Statement of Claim to the **respondent** and the **arbitrator**. The Statement of Claim outlines the relevant facts, the issue in dispute, the legal basis or argument for the claim, the remedy sought, and the names and contact details of the parties.

The **respondent** replies with a Statement of Defence, which responds to all of the points raised in the Statement of Claim. The Statement of Defence, as far as possible, also includes copies of documents and other evidence the **respondent** intends to rely upon.



The **arbitrator** requests other statements from the **claimant** and **respondent** as appropriate. Written statements from witnesses can be submitted as evidence by the parties. The parties may request, or the **arbitrator** may decide, to hold hearings where oral testimony and arguments can be presented.



Once the **arbitrator** has considered all the evidence and arguments presented by the parties, the **arbitrator** hands down the arbitral award.

The award is final and binding on the parties.

Nominations

Overview

Resolution Institute may act as an appointing body such as an Authorised Nominating Authority under various legislative regimes, or on the contractual agreement of the parties. Through these arrangements, it acts as an independent, impartial and neutral third-party organisation to nominate the most appropriate accredited arbitrator. In doing so, Resolution Institute draws on its broad and multidisciplinary member base including arbitrators within the legal sector and those with more technical expertise.



Compliance check



Shortlisting



Pick a chair



Nominations shortlist



Acceptance appointment

Considerations

Resolution Institute carefully considers the nature of the dispute, the experience and knowledge required, relevant accreditations, location and price point to nominate a professional to assist the parties in resolving their dispute.

On receipt of a nomination application, Resolution Institute will appoint an arbitrator with consideration for:

- The provision of a high quality, timely, efficient and cost-appropriate arbitration service
- The type and nature of dispute
- Specific requirements of parties to the dispute
- Legislative and/or contractual requirements
- The appointment of a arbitrator with appropriate experience, standing in the community, qualifications, current accreditation, professional membership of Resolution Institute and standing within peer group
- Availability of qualified arbitrators to conduct and complete the arbitration process in a timely way
- Conflict of interests of potential arbitrators
- Reputation of the arbitrator and past experiences with that arbitrator (either positive or negative)
- Past contribution and service of the arbitrator to Resolution Institute
- Diversity considerations including, but not limited to: gender, age, experience and qualifications, and cultural background

Nominations

The nominations process

and impartiality.

1. Initial review of applications

For each nomination application, the Nomination Services Officer completes the compliance check of the application, considering a core set of factors and other features unique to the circumstances of the dispute. This includes the technical nature of the dispute, jurisdiction, quantum of claim, the qualifications, experience, and expertise required, as well as the specific requirements of the applicant.

2. Consideration and recommendation/shortlisting

Following the initial review, a summary is prepared setting out the key details and compliance criteria of the matter, including a short list of arbitrators. Formulation of this shortlist requires the Nomination Services Officer to assess the appropriate experience, reputation, standing, accreditation, qualifications, and grading of the available professional members, matching these to the criteria as set out in the application. In the circumstances where a member cannot be identified to match the criteria and requirements of the application, the Nomination Services Officer will discuss with both the CEO and the CFO to find an alternative for consideration.

3. Consultation

With the shortlist completed, the Nomination Services Officer firsts consults with the CFO to consider any potential conflict of interest, and then consults with the appropriate Resolution Institute Council Chair to identify any issues relating to the proposed shortlist including conflict of interest, risks of independence, bias,

4. Appointment

The Chair will nominate a candidate from the short list of potential arbitrators. Following nomination by the Chair, the Nomination Services Officer will contact the nominee, confirm their availability to accept the matter, and discuss in general the nature of the dispute and the relevant fees. The Nomination Services Officer then confirms the nominee's acceptance or repeats the process with the next member on the shortlist.

5. Post Appointment

After Resolution Institute issues a Notice of Nomination to the parties the arbitrator then liaises directly with the parties to enter a formal engagement. The Nomination Services Officer will manage and administer the matter on an ongoing basis, checking to completion status of the matters until the Notice of Completion is returned and the Nomination Fee is invoiced.

Processes

Types of hearings

In deciding what type of arbitration best suits the requirements of the parties, parties will typically choose between an oral hearing or a documents-only arbitration.

Oral hearing

The more common procedure for arbitrations is to conduct an oral hearing. This is the occasion where they will put their factual case and present their argument before the Tribunal so that it can reach a decision on the dispute.

Documents-only arbitration

In a documents-only arbitration, the Tribunal bases its decision entirely on written submissions and documentary evidence provided by the parties, with no opportunity to hear from counsel or take evidence from witnesses at an oral hearing.

Although a more cost-effective solution, a documents-only arbitration is not suited to every dispute, for example, in instances where contemporaneous written evidence is limited or highly technical expert evidence is necessary.

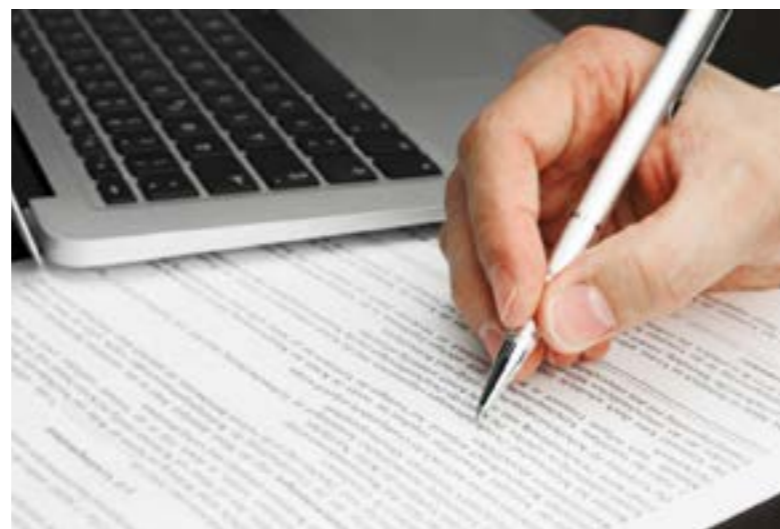
Expedited arbitration

Similarly, parties may also choose an expedited arbitration in which the process is limited to a single-day oral hearing without discovery.

Where is the arbitration held?

Arbitrations requiring an oral hearing are conducted in person or virtually, by electronic means, so that the parties and their representatives may present their case to the Tribunal. The location for in person hearings is negotiated between the parties and the arbitrator.

It is important to note that the decision to conduct a documents-only arbitration does not necessarily carry the consequence that there is to be no hearing, face-to-face or virtual; if a party to a documents-only arbitration later requests a hearing the Tribunal may be bound to comply and hold a hearing.



Processes

Fees

Generally you can expect an arbitrator to charge between \$250–\$450 (incl. GST) per hour, with the cost to have us nominate or appoint a dispute resolver being \$550.00 (incl. GST).

However, there are a multitude of factors that affect the costs of an arbitration, including the complexity of the dispute, its approximate timeframe, the frequency of meetings between the parties and the arbitrator, and so on. Although quantum can be an indication of complexity, lower value matters may also entail substantial work, for example, where one of the parties is self-represented. Ultimately, the amount of the costs of an arbitration are to be at the discretion of the arbitrator who may direct that the costs are to be limited to a specified amount.

As such, it is not possible to be given exact pricing prior to the commencement of an arbitration. That said, Resolution Institute and its members are mindful of costs and will make choices early on in order to tailor the service to the needs of the client, and the arbitrator is encouraged to set a reasonable fixed fee for low quantum matters.

Code of conduct

Arbitrators who conduct arbitrations under the Resolution Institute Arbitration Rules shall at all times comply with the Chartered Institute of Arbitrator's Code of Conduct. Although not forming part of the Resolution Institute Arbitration Rules, the Chartered Institute of Arbitrator's Code of Conduct assists arbitrators to carry out their professional duties ethically with independence and impartiality.

Resolution Institute Arbitration Rules

In Australia and Aotearoa New Zealand provisions for the conduct of the arbitration are fairly comprehensive due to the countries' adoption of the Model Law. The particular feature of the Resolution Institute Rules is that Resolution Institute plays a minimal role in the conduct of the arbitration, including the preparation of the award. This means that the parties and the Tribunal have as much control over the process as the Model Law permits.



Suggested model clauses

Model clauses may be inserted into the contracts of parties wishing to arbitrate under the Resolution Institute Arbitration Model.

Oral hearing

Parties wanting to arbitrate under the Resolution Institute Arbitration Model may insert into their contract an arbitration clause in the following terms:

Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to arbitration in accordance with, and subject to, Resolution Institute Arbitration Rules.

Unless the parties agree upon an arbitrator, either party may request a nomination from the Chair of Resolution Institute.

Documents-only arbitration

Parties seeking a 'Documents Only' arbitration may consider inserting the following provision into their contracts:

Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to arbitration in accordance with, and subject to, Resolution Institute Arbitration Rules.

Unless the parties agree upon an arbitrator, either party may request a nomination from the Chair of Resolution Institute.

The arbitration shall be conducted as a "Documents-Only" arbitration under the Resolution Institute Arbitration Rules.

Expedited arbitration

Parties seeking an 'Expedited' arbitration may consider inserting the following provision into their contracts:

Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to arbitration in accordance with, and subject to, Resolution Institute Arbitration Rules.

Unless the parties agree upon an arbitrator, either party may request a nomination from the Chair of Resolution Institute.

The arbitration shall be conducted as an "Expedited" arbitration under the Resolution Institute Arbitration Rules.

Existing disputes

Parties to an existing dispute who wish to refer that dispute to arbitration under these Rules, may agree to do so in the following terms:

We the undersigned, agree to refer to arbitration under the Resolution Institute Arbitration Rules all disputes or differences arising out of or in connection with:

[#insert brief description of contract, project or relationship under which disputes or differences have arisen or may arise]

Questions

How are arbitrators graded?

All accredited arbitrators are graded according to their relative ability to arbitrate different types of disputes. The grading scale is:

- **Grade 1:** Those considered to have wide experience in arbitration and able to deal with large and/or complex arbitrations.
- **Grade 2:** Those considered able to conduct arbitrations of medium size, or which are straight forward, within the arbitrator's fields of expertise.
- **Grade 3:** Those with less experience who are considered able to conduct small arbitrations which may call for knowledge in restricted or specialised fields.

How do I become an arbitrator?

To become an accredited arbitrator you must complete a training course, complete pupillage or professional development, and be assessed by a panel of peers.

To get accredited you should first undertake an approved university course in arbitration. Once you have received a certificate of satisfactory completion of an approved university course you would need to complete either pupillage or professional development.

The Professional Certificate in Arbitration, a university post-graduate program offered as a joint venture between Resolution Institute and the University of Adelaide Law School, meets these requirements. More details can be found on the [University of Adelaide website](#)

How do arbitrators remain accredited?

To maintain your accreditation you must be a member of Resolution Institute, meet CPD requirements, and meet masterclass requirements.

Continuing Professional Development (CPD) scheme

As part of their continuing development all accredited arbitrators must undertake at least 30 hours of eligible training every three years, with a target to complete 10 hours in arbitration or related determinative practices each year.

Masterclass policy

All Grade 1 and Grade 2 arbitration accreditations are reviewed every three years in a process known as 'the triennial review'. Furthermore, Grade 1 and 2 Arbitrators and Grade 2 must complete one masterclass every three year review period.

For more information on Resolution Institute accreditations, view our [Policy for the Registration of Practising Arbitrators](#).

Final tips and suggestions

Preparing for your arbitration **Contact us**

It is essential that parties and their representation be thoroughly prepared to present their case in a manner that is courteous to the arbitrator and the opposing party. This means that prior to the arbitration relevant evidence and witnesses should have been gathered, submissions and witness statements served, copies of documents or supporting media provided, and so on. Additionally, in the interest of efficiency, be mindful of delays and be punctual to any and all hearings, and if an adjournment is required be sure to seek this as soon as possible. Furthermore, be mindful of any instructions given to you by the arbitrator or Resolution Institute, and read any directions or communications carefully.

Next steps

Whether you are ready to move forward with your arbitration or still have questions about the arbitration process, Resolution Institute is eager to assist. Regardless of the urgency of the matter, it is crucial to contact us as early as possible to ensure your matter progresses as efficiently as possible. Among other matters, during your initial enquiry our team may go through the respective benefits of each dispute resolution pathway at the inquiry level prior to confirming commercial arbitration as the appropriate way to resolve the dispute. We aim to respond to all enquiries within two to three business days, however, if you need an immediate response, or simply prefer to talk, please call us instead.

Sydney Office

+61 2 9251 3366
1800 651 650
infoaus@resolution.institute

Suite 602, Level 6
Tower B, Zenith Centre
821-843 Pacific Highway
Chatswood NSW 2067

PO BOX 440
Chatswood NSW 2057

Wellington Office

+64 4 470 0110
0800 453 237
infonz@resolution.institute

Level 4 Gleneagles Building
69-71 The Terrace
Wellington 6011

PO Box 10-991
Wellington 6143



About Resolution Institute

Resolution Institute Resolution Institute is the peak membership organisation of dispute resolution professionals within Australia and Aotearoa New Zealand. Resolution Institute members engage in arbitration, mediation, adjudication, expert determination, facilitation, conflict coaching, conciliation and restorative justice and has a membership base of over 3,000 professionals, across a diverse range of industry sectors, including building and construction, finance, commercial, community, technology, mining, local government, insurance, environmental and family.

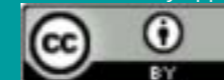
Resolution Institute is committed to promoting and supporting the use of dispute resolution through education, training, and accreditation of professionals, to contribute to the provision of quality dispute resolution services.



© Resolution Institute 2021

All material presented in this publication is provided under a Creative Commons Attribution 3.0 Australia www.creativecommons.org/licenses/by licence.

For the avoidance of doubt, this means this licence only applies to material as set out



The details of the relevant licence conditions are available on the Creative Commons website (accessible using the links provided) as is the full legal code for the CC BY 3.0 AU licence www.creativecommons.org/licenses

Resolution Institute Sydney office
Suite 602, Level 6, Tower B, Zenith Centre
821-843 Pacific Highway
CHATSWOOD NSW 2067
Telephone: +61 2 9251 3366
Freecall: 1800 651 650
Email: infoaus@resolution.institute

Resolution Institute Wellington office
Level 4, 69-71 The Terrace
WELLINGTON 6011
Telephone: +64 4 470 0110
Freecall: 0800 453 237
Email: infonz@resolution.institute

www.resolution.institute

