



NEW ZEALAND DISPUTE RESOLUTION CENTRE
TE POKAPŪ MŌ TE WHAKATAU TAUTOHE O AOTEAROA

**COVID-19 COMMERCIAL LEASE
ARBITRATION RULES
(Government subsidised scheme)**

2020 Revision

**NEW ZEALAND DISPUTE RESOLUTION CENTRE
TE POKAPŪ MŌ TE WHAKATAU TAUTOHE O AOTEAROA**

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FOREWORD

The settlement of disputes by arbitration is an important feature of the domestic commercial and legal landscape.

NZDRC has been contracted by the Ministry of Justice to deliver subsidised arbitration and mediation services for eligible parties to commercial leases who are in dispute about the payment of rent and outgoings where the tenant has experienced a material loss of revenue during an Alert Level 3 or 4 lockdown period (a **Lockdown Period**) because of government restrictions put in place to combat COVID-19 (the **Scheme**).

NZDRC's arbitration services under the Scheme will be conducted in accordance with NZDRC's COVID-19 Commercial Lease Arbitration Rules (these **Rules**).

These Rules are based on our well established and proven expedited ECA45 Arbitration Rules, as amended to comply with the provisions of the Scheme.

The Rules set out the processes and procedures to be followed for a 'documents only' arbitration and are specifically designed to result in an award being made which finally determines all substantive issues in dispute within 45 working days.

NZDRC has long established itself as the leader in private commercial dispute resolution in New Zealand and these Rules allow NZDRC to continue to offer a world class arbitration service that is tailored to meet the needs and requirements of commercial parties, and which is fundamentally and purposively directed to ensuring the resolution of commercial lease rent disputes relating to the COVID-19 lockdown in a manner that is private, efficient, effective and certain.¹

For more information visit: www.nzdrc.co.nz.

¹ NZDRC is respected as the country's most experienced and trusted provider of private commercial arbitration and mediation services and has been delivering commercial arbitration (including expedited arbitration on the documents) and mediation services under its institutional rules for over 30 years.



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RULES

1.0 INTRODUCTION

- 1.1 These are the 45 day Expedited COVID-19 Commercial Lease Arbitration Rules of the New Zealand Dispute Resolution Centre (**NZDRC**) and may be referred to as the NZDRC COVID-19 Commercial Lease Arbitration Rules (**Rules**).
- 1.2 Where there is any conflict between these Rules and a mandatory provision of the Arbitration Act 1996 (the **Act**) from which the Parties cannot contract out of, that mandatory provision will prevail, and these Rules must be read consistently with that mandatory provision. Where there is any conflict between these Rules and an optional provision of the Act from which the Parties are permitted to contract out of, these Rules will prevail and constitute an agreement not to be bound by that conflicting provision.
- 1.3 NZDRC owns the copyright to these Rules and they may only be used by parties, or intending parties, to an arbitration administered by NZDRC.
- 1.4 The functions of NZDRC under these Rules will be performed by the registrar appointed by NZDRC (the **Registrar**). All communications to NZDRC must be addressed to the Registrar and all communications with the arbitral tribunal must be copied to the Registrar.

2.0 RIGHT TO REFER DISPUTES TO ARBITRATION UNDER RULES

- 2.1 These Rules are solely for use under the Government's subsidised arbitration service for parties to commercial leases who are in dispute about the payment of rent and outgoings where the tenant has experienced a material loss of revenue during an Alert Level 3 or 4 lockdown period (a **Lockdown Period**) because of government restrictions put in place to combat COVID-19 (the **Scheme**).
- 2.2 Parties to a dispute will be eligible to access the Scheme if:
 - (a) the dispute is a Qualifying Dispute (see Rule 2.3);
 - (b) at least one of the parties to the Qualifying Dispute meets the Eligibility Criteria (see Rule 2.4); and
 - (c) the applicants have not previously accessed mediation or arbitration services (whether with NZDRC or another provider contracted to the Ministry of Justice) in respect of the Qualifying Dispute in question.
- 2.3 A dispute is a **Qualifying Dispute** if:
 - (a) it is about the payment of rent and outgoings where the tenant has experienced a material loss of revenue during a Lockdown Period because of government restrictions put in place to combat COVID-19; and
 - (b) the payment of rent and outgoings during the relevant Lockdown Period has not previously been the subject of an agreement or arbitral award between the parties to the dispute.
- 2.4 The **Eligibility Criteria** for the subsidy are:

- (a) the party's business is New Zealand based;
- (b) the party's business has 20 or fewer full-time equivalent staff:
 - (i) in the case of the tenant, per lease site; or
 - (ii) in the case of the landlord, in total.

3.0 CALCULATION OF PERIODS OF TIME FOR THE PURPOSES OF ARBITRATION UNDER RULES

3.1 All periods of time for the purposes of arbitration under these Rules will commence from the date NZDRC serves a Notice of Appointment of Arbitral Tribunal on the parties (**Commencement Date**).

3.2 Unless otherwise specified, a **working day** means the 24-hour period of any day of the week other than:

- (a) a Saturday, a Sunday, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, Labour Day, and Waitangi Day;
- (b) a day in the period commencing on 24 December in any year and ending with the close of 5 January in the following year;
- (c) a day that is an official holiday or non-business day at the usual place of residence or business of the arbitrator or a relevant Party; and
- (d) if Waitangi Day or Anzac Day falls on a Saturday or a Sunday, the following Monday.

3.3 Any period of time will begin to run on the first day following the date when the any notice, communication or proposal is received, or the date upon which an action is to be undertaken by a party or the arbitrator. If the last day for service of any notice, communication or proposal is not a working day at the address for service of the addressee, the period is extended until the first working day that follows.

4.0 INITIATING ARBITRATION

Agreement to Arbitrate

4.1 Where the parties have agreed to refer a Qualifying Dispute to arbitration under these Rules, the parties must first complete an **Agreement to Arbitrate** in the form set out on the NZDRC website.

Application for Arbitration under the Scheme

4.2 Any eligible party may then initiate arbitration under these Rules by completing an **Application for Arbitration** in the form set out on the NZDRC website. The party who initiates the arbitration will be the **Claimant** and the other party to the lease will be the **Respondent**.

Selection and appointment of arbitrator by NZDRC

4.3 A sole arbitrator will be appointed by NZDRC upon receipt of a duly completed Application for Arbitration.

- 4.4 NZDRC will use best endeavours to appoint an arbitrator and serve a **Notice of Appointment of Arbitral Tribunal** on the parties within three working days following receipt of a completed Application for Arbitration.
- 4.5 No party or third person may appoint an arbitrator under these Rules. NZDRC alone is empowered to appoint arbitrators.
- 4.6 NZDRC may require each party to provide such information as it deems necessary to fulfil its selection and appointment function under these Rules. NZDRC will have regard to such information but will not be bound by it in making such appointment as it sees fit.

Revocation of appointment of arbitrator

- 4.7 NZDRC may revoke an arbitrator's appointment and appoint a replacement arbitrator upon its own initiative, or on a written challenge by any party, if:
- (a) the arbitrator gives written notice to NZDRC and every party of the arbitrator's intent to resign as arbitrator;
 - (b) the parties agree to the revocation of the arbitrator's appointment;
 - (c) circumstances exist that in NZDRC's opinion give rise to justifiable doubts as to the arbitrator's impartiality or independence; or
 - (d) the arbitrator becomes, in fact or in law or by reason of infirmity, unable or unwilling to perform the functions of that office, or in fact fails to fulfil their functions within prescribed time limits in accordance with these Rules.
- 4.8 A decision to revoke an arbitrator's appointment is an administrative decision and is final and binding on the parties and the arbitrator. It is not subject to appeal to NZDRC. NZDRC is not required to state or communicate reasons for its decision.

5.0 PROCEDURAL LAW GOVERNING THE ARBITRATION

- 5.1 The Act applies to this arbitration agreement and the arbitration, including the First and Second Schedules of the Act, except to the extent that the procedural law is modified by this agreement or by further written agreement of the parties and such agreement or modification is not prohibited by the Act.
- 5.2 No party may apply to the High Court under clause 4 of the Second Schedule of the Act to determine any preliminary question of law.
- 5.3 No party may appeal to the High Court under clause 5 of the Second Schedule of the Act on any question of law arising out of an award without the consent of every other party given after the making of that award or without the leave of the High Court.
- 5.4 No party may apply to the High Court under clause 6(3) of the Second Schedule of the Act to vary the amount or the allocation of fees and expenses arising out of any award.

6.0 THE NATURE OF THE DISPUTE

- 6.1 The issue in dispute to be decided by the arbitrator is limited to the payment of rent and outgoings where the tenant has experienced a material loss of revenue during a Lockdown Period because of government restrictions put in place to combat COVID-19.

7.0 PROCEDURE

7.1 The arbitrator has the widest discretion permitted by law to resolve the dispute in a just, speedy, cost effective, and final manner in accordance with these Rules and the principles of natural justice. The parties expressly acknowledge and accept that what is necessary to satisfy the requirements of natural justice in an arbitration under these Rules having regard to the fixed time limits set may by necessity differ from what might constitute natural justice in other settings.

Claim

7.2 The claimant must serve a statement in writing setting out particulars of the claim (**Claim**) on the arbitrator and every other party.

7.3 The Claim must include:

- (a) the nature and basis of the Claim;
- (b) the relief or remedy sought;
- (c) copies of any expert reports or witness statements relied on by the Claimant;
- (d) copies of the lease and all other documents relied on by the Claimant; and
- (e) submissions on the factual and legal issues involved in the Claim, and the Claimant's contentions as to those issues.

7.4 The Claim must be served on the arbitrator and every other party on or before the fifth working day after the Commencement Date. If the claimant fails to serve the Claim within that period, the arbitrator must terminate the arbitration proceedings.

Response

7.5 A respondent may serve a statement in writing in response to the Claim (**Response**) on the arbitrator and every other party.

7.6 The Response must include:

- (a) what matters in the Claim are accepted or agreed;
- (b) what matters are disputed, with reasons why;
- (c) any affirmative defence for the purpose of set-off or abatement against any amount of money claimed by the claimant;
- (d) copies of any expert reports or witness statements relied on by the respondent;
- (e) copies of all documents relied on by the respondent; and
- (f) submissions on the factual and legal issues involved in the Claim and the Response, and the respondent's contentions as to those issues.

7.7 The Response must be served on the arbitrator and every other party on or before the tenth working day after the Commencement Date (the **Response Period**). In making an award, the arbitrator must disregard any Response served after the end of the Response Period.

Reply and Rejoinder

- 7.8 The claimant may serve a statement in writing in reply to the Response (**Reply**) on the arbitrator and every other party.
- 7.9 The Reply must be strictly in reply to the Response and cannot raise any new issues. The Reply may include supporting documents.
- 7.10 The claimant's Reply must be served on the arbitrator and every other party on or before the fifteenth working day after the Commencement Date.
- 7.11 An arbitrator who receives a claimant's Reply under Rule 7.10 may refuse to consider any new material or issues raised in the Reply.
- 7.12 A respondent who receives a claimant's Reply under Rule 7.10 may serve on the arbitrator and every other party a statement in writing in answer to the Reply (**Rejoinder**).
- 7.13 The Rejoinder must be strictly in reply to the Reply and cannot not raise any new issues. The Rejoinder may include supporting documents.
- 7.14 The Rejoinder must be served on the arbitrator and every other party on or before the eighteenth working day after the Commencement Date.

Joinder and consolidation

- 7.15 There is no provision for joinder or consolidation under these Rules.

No hearing

- 7.16 Arbitration under these Rules is a process for determining the matters in dispute on the documents only ('on the papers'). Oral hearings are not permitted under these Rules.
- 7.17 However, the arbitrator may, at their sole discretion, convene a conference of the parties for the purpose of clarifying any aspects of the matters in dispute, the parties' submissions, or any evidence submitted to the arbitrator, or for determining any application for directions or relief procedures under these Rules.

Evidence and admissibility

- 7.18 Each party will bear the burden of proving the facts relied upon to support its claim or any affirmative defence.
- 7.19 The arbitration will proceed on the basis of written submissions, evidence, and any other material which is provided to every other party and the arbitrator in accordance with the procedures set out in these Rules.
- 7.20 The arbitrator may request further relevant submissions, information, or evidence from a party at any time, but must give every other party a reasonable opportunity to comment on any such submissions, information, or evidence.
- 7.21 The admissibility, relevance, weight, and materiality of any evidence offered by the parties will be determined by the arbitrator. The arbitrator is not bound by any rules of evidence which might apply in a court of law.

Default of a party

- 7.22 If, without showing sufficient cause, the claimant fails to serve the Claim within the period of time fixed under these Rules, the arbitrator must terminate the proceedings.
- 7.23 If the claimant can show sufficient cause for serving a Claim out of time, the arbitrator:
- (a) must accept the Claim; and
 - (b) must extend the periods of time fixed under these Rules for the serving of a Response, Reply, or Rejoinder, by a period the arbitrator considers appropriate having regard to the circumstances.
- 7.24 If the respondent fails to serve a Response, the claimant fails to serve a Reply, or the respondent fails to serve a Rejoinder within the relevant periods of time fixed under these Rules, the arbitrator must continue the proceedings.
- 7.25 In making an award, the arbitrator must disregard any Response, Reply or Rejoinder served after the end of the relevant period for service under these Rules.
- 7.26 Except in the case of Rule 7.22 (failure to serve the Claim without sufficient cause), in the event of a failure by any party to comply with these Rules or the directions of the arbitrator without showing sufficient cause for such failure, the arbitrator must continue the proceedings and make an award on the information and evidence before them.
- 7.27 If, however, it appears to the arbitrator that the arbitration has been abandoned by the parties, or all claims are withdrawn by the parties, the arbitrator may order the discontinuance of the arbitration provided that, after giving the parties a reasonable period within which to respond, no party objects in writing.

Waiver of right to object

- 7.28 A party to the arbitration that continues with the arbitration without promptly raising:
- (a) a plea as to jurisdiction;
 - (b) an objection as to any direction or order of the arbitrator;
 - (c) any objection as to failure to comply with these Rules; or
 - (d) any other irregularity affecting the arbitrator or the conduct of the arbitration,
- will be deemed to have waived its right to object later, unless that party establishes that at the relevant time it did not know, and could not with reasonable diligence have discovered, the grounds for objection.

8.0 AWARD

- 8.1 The arbitrator must make one or more awards as required for the final determination of the dispute as soon as practicable after considering all submissions and evidence received within the periods fixed under these Rules.
- 8.2 The arbitrator will use best endeavours to make a final award within 45 working days of the Commencement Date.

Scrutiny of Award by NZDRC

- 8.3 Before signing an award, the arbitrator shall submit the award in draft form to NZDRC for scrutiny.
- 8.4 The Registrar may make recommendations as to the form of the award directed to identifying any errors in computation, any clerical or typographical errors, or any errors of a similar nature in the award. The Registrar may also draw the arbitrator's attention to any points of substance or any internal inconsistencies in the award without affecting the arbitrator's independence and autonomy in rendering the award.
- 8.5 No award shall be made by the arbitrator until it has been approved by the Registrar as to form.

Provision of Award

- 8.6 A copy of the signed award will be given to the parties as soon as possible after signature.

Settlement or other grounds for termination

- 8.7 The parties are encouraged to find their own resolution to the dispute. In the event that the parties can settle their dispute before an award which finally determines all the substantive matters in dispute is made, the arbitrator must issue an order for the termination of the arbitral proceedings, and may, at their sole discretion, record the terms of the settlement and issue a final award on agreed terms if requested by the parties. The arbitrator is not obliged to give reasons for such an award.

9.0 COSTS OF ARBITRATION

Arbitrator's fees

- 9.1 The arbitrator's fees and expenses shall be met in full by the Ministry of Justice under the Scheme.

Party's own costs and expenses

- 9.2 The parties must meet their own costs and expenses of the arbitration (for example, legal or expert fees).

10.0 EXCLUSION OF LIABILITY AND INDEMNITY

- 10.1 The Parties, together and separately, release and discharge the arbitrator and NZDRC, its agents and employees, from all liability of any kind (whether involving negligence, misrepresentation, breach of contract, or breach of any equitable, fiduciary, statutory or other duty, or otherwise) which may be alleged to arise in connection with, or to result from, or to in any way relate to the exercise of any of their functions, duties or powers, whether at law, under these Rules, or otherwise, unless the act or omission is the fraudulent act of the arbitrator, NZDRC, its agents or its employees. The arbitrator, NZDRC, or any agent or employee of NZDRC who has not acted fraudulently, will continue to be released and discharged from liability as provided in these Rules.
- 10.2 No statements or comments, whether written or oral, made or used by the arbitrator, NZDRC, its agents and employees, in connection with, or resulting from, or in any way relating to the arbitration, may be relied on to found or maintain any action for defamation, libel, slander, or any related complaint.

- 10.3 The Parties, together and separately, undertake to indemnify and keep indemnified the arbitrator, NZDRC, its agents and employees, against all claims, costs, expenses, liabilities, awards, damages and proceedings of any kind (properly sustained or incurred by the parties directly, or indirectly made by any third party) in relation to, or in connection with, the exercise of the functions, duties, or powers of the arbitrator, NZDRC, its agents or employees, whether at law, under these Rules or otherwise, unless the claims, costs, expenses, liabilities, awards, damages or proceedings arise out of a fraudulent act or omission of the arbitrator, NZDRC, its agents or employees. If the arbitrator, NZDRC or any agent or employee has not acted fraudulently, they will continue to be indemnified as provided in these Rules.
- 10.4 The purpose of Rules 10.1-10.3 is to provide the arbitrator, NZDRC, its agents and employees, with the widest immunity from liability that the law will allow.

11.0 STORAGE OF ARBITRATION DOCUMENTS

- 11.1 Unless a party requests the return of any original documents provided to the arbitrator for the purpose of the arbitration, all original documents will be destroyed by the arbitrator after the expiry of three calendar months following the date of the last award made by the arbitrator in relation to the dispute.

12.0 COMMUNICATIONS

- 12.1 All applications, notifications, submissions, documents, or other communications in relation to the arbitration may validly be served by email.

13.0 MISCELLANEOUS

- 13.1 All decisions of NZDRC with respect to its functions and obligations under these Rules are final and binding on the parties and the arbitrator. Such decisions are of an administrative nature. They are not subject to appeal to NZDRC, and NZDRC is not required to state or communicate reasons for its decisions.
- 13.2 By agreeing to arbitration under these Rules, the parties and arbitrator are deemed to have agreed not to apply to any court, judicial authority, or any other body having jurisdiction, for any relief regarding NZDRC's jurisdiction or authority under these Rules so far as that agreement is not inconsistent with the law.
- 13.3 In all matters not expressly provided for in these Rules, NZDRC, the parties, and the arbitrator must act in the spirit of these Rules and make every effort to ensure that an award made under these Rules is enforceable.
- 13.4 The Registrar may from time to time issue Practice Notes to supplement, regulate and implement these Rules for the purpose of facilitating the administration of arbitrations governed by these Rules.