

**ARBITRATORS' AND MEDIATORS'  
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**Inquisitorial Processes**

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**Clause 3 (1) (a), Second Schedule, inquisitorial processes**

An arbitrator or arbitrators in a domestic arbitration are free to adopt “inquisitorial processes” unless the parties agree otherwise.

The expression “inquisitorial processes” is not defined or elaborated upon.

The Oxford English Dictionary defines “inquisitorial” as like an inquisitor. An “inquisitor” is an official investigator. To “investigate” is to inquire into, examine, study carefully.

An arbitrator would be most unwise to memorise the English Dictionary meaning, put on his or her hob-nail boots and, armed with suitable binoculars, magnifying glass, chemistry kit, Accountancy Standards and NZSS 3910 embark upon the arbitration.

A reference to “inquisitorial” immediately conjures up thoughts of Civil Law countries. However in practice, even a correct application of the Civil Law inquisitorial process would not necessarily infringe our English law understanding of the rules of natural justice.

This is because there is no interference with the right to be heard, and a fair opportunity is given to respond, on all relevant aspects, to the inquisitor.

It is not suggested the Civil Law “inquisitorial process” should be copied, but as a matter of interest it often works like this:

- each side presents to the other, and the tribunal a full dossier containing a narrative of the matters in dispute, statements by relevant witnesses, and copies of relevant documents
- the tribunal examines the dossiers and calls for supplementary material if required
- each side is reasonably free to add further material to its dossier
- the tribunal may appoint an independent expert to investigate - this may be through visiting the parties, meeting with and questioning witnesses, examining documents and raw materials, then providing a written report to the tribunal
- the report is copied to the parties who have an opportunity to comment on it directly or by their own experts
- at the hearing when witnesses may give evidence, most questioning is undertaken by the tribunal but the parties or their representatives are given limited rights of cross examination
- throughout the process the tribunal is free to call for more information which may assist it to determine the correct outcome.

There is relatively little about the process which could be described as offensive or draconian and, if conducted openly and with protection against a party being taken by surprise, is unlikely to infringe the English Law rules of natural justice.

The main point about an inquisitorial process is that the arbitrator ceases to be a sphinx-like umpire who simply ensures that rules of procedure are followed before weighing up the respective strength of each side's case and,

instead, actually participates in the drawing out of evidence and the critiquing of it.

Our courts are moving more towards an inquisitorial process. The rules of procedure are designed to facilitate inquiry and eliminate surprise. In Australia, in Trade Practices Act cases (the equivalent of our Commerce Act), some judges will require opposing economists to be in court at the same time to listen to each other's evidence and to be questioned together by both Bench and Bar. At least one well known arbitrator in Australia currently adopts the same procedure, as a matter of course, with expert witnesses in construction cases.

The recently retired senior judge of the New Zealand Commercial List, Sir Ian Barker, has expressed the view in a recent Commerce Act case that the Australian practice just referred to would seem to have considerable merit. He was speaking in the context of competing economic experts.

Arbitrators in New Zealand have been permitted to adopt an inquisitorial process, of sorts, since 1908 when the Second Schedule to the Act of that year introduced powers to arbitrators as follows

*"6. The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire on oath in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds papers, accounts, writings, or documents within their possession or power that may be required or called for and do all such*

*other things as during the proceedings on the reference the arbitrators or umpire may require."*

It has not been fully appreciated that this power, given to arbitrators in New Zealand in 1908 conferred, to a limited extent, a greater right than the powers of a High Court Judge in that if a party to civil proceedings (a director of a company which is a party, or the actual party if an individual) is not subpoenaed by the other side then a judge has no power to require that party attend and to answer any questions; or similarly to produce documents in the absence of in order for discovery taken out by the other side. The 1908 Act conferred such powers on arbitrators in New Zealand regardless of what the opposition chose to do.

The power of an arbitrator to act in an inquisitorial manner is not new - it has been with us for <sup>90</sup>~~50~~ years.

BUT - and it is a very big but - the power in Clause 3 of the Second Schedule should never override the words of Article 18 of the First Schedule:

*"Equal treatment of parties -the parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case."*

Any so called "inquisitorial process" must be consistent with, and within the boundaries defined by, the above words. It must also be consistent with and within the boundaries defined by the rules of natural justice. The rules of natural justice are enshrined in Article 34 since the breach of them provides

one of the very few grounds upon which an award can be set aside. The need to observe the rules of natural justice are singled out as one of two examples of public policy.

When seen in this light:

- the need for each party to be given a full opportunity of presenting that party's case, and
- the need to observe the rules of natural justice,

it will be seen that "inquisitorial processes" can, in practice, be relevant only to certain aspects of procedure and not to any substantive departure from the requirement for a fair hearing.

There is a significant interrelationship between "inquisitorial processes" and an arbitral tribunal drawing on "its own knowledge and expertise." Many of the comments made in the next section of this paper are equally relevant to the scope of an inquisitorial process.