

## **Introduction**

### **Decision by an Independent Expert**

It is generally agreed that an arbitrator must act in a judicial capacity, is required to receive evidence from both parties if offered and to take note of that evidence, and subsequently must issue an award which is final and binding. He is also required to give reasons for his award if requested so to do by either or both of the parties involved.

Whereas an independent expert on the other hand is not required to act judicially, is not required to receive evidence from the parties, nor is he required to take note of any evidence if he does receive it from the parties. He is, however, required to make a formal and binding award. There is no obligation upon the independent expert to give reasons for his award, although the parties may in their initial appointment of the independent expert require him to give reasons.

Although there is a tendency among independent experts to give reasoned awards, there is still considerable unwillingness to do so because it is quite clear that where reasons are given for such awards, and those reasons are found to be faulty, then the expert may be sued for negligence, whereas an arbitrator cannot be sued for negligence.

The procedure for a determination of a dispute by an independent expert may not differ in the initial stages from that by an arbitrator. The expert may well call the parties, or their representatives, to attend upon him. At that meeting the expert will either by consent, or by order, issue what is known as an order for directions. This Order for Directions will set out the timetable for the determination, i.e. the dates by which the written submissions (should they apply) will be made and exchanged, subsequently the dates by which comments upon those submissions shall be forthcoming, and when both comments shall be exchanged.

The majority of determinations, whether decisions by independent experts or arbitrators, may not be carried out in the form of a hearing with parties giving oral evidence on either side. Evidence is submitted in the form of written representations. Thus the disputant will submit a written report

which will state the evidence upon which he wishes to rely to prove his case. He will send this report to the respondent with a copy to expert. The respondent will reply with a similar report following the same procedure. Subsequently, if the parties have agreed, both parties will exchange further reports commenting upon each other's evidence. Thereafter the procedure differs.

Where the independent expert is determining the dispute the expert may entirely ignore the written submissions and determine the dispute by reliance upon his own expertise. This expertise may result in a result which is different from the submissions made by either party.

Once the expert has decided the result he informs the parties that he has made his decision and that his award is awaiting collection. One or both of the parties collects the award upon payment to the expert of his fees, where that form of procedure has been agreed.

The procedure with the use of an independent expert is simple and straightforward. However, a major problem is that there is no judicial control of this procedure. It is a point of importance. There is no recourse to justice other than for a negligent act.

## **Article 1**

### **Nomination of the Expert**

#### **1.1 Unless otherwise agreed in writing by the parties the Determination shall be made:**

- A. by a person agreed to be nominated between the parties at any time during the duration of the agreement; or
- B. if the parties are unable to agree as to who shall be nominated within seven (7) days of the dispute arising, then by a person nominated by the Institute, who accepts appointment as Expert. A party shall formally make a written request to the Institute to make the above nomination. The acceptance of the appointment by the nominated Expert shall be in written form.

**1.2.** Any party shall, by a notice in writing (hereafter called the Notice of Dispute), give notice that it requires a dispute to be referred to expert determination, and call on the other parties to the dispute to agree on the identity of the person to be appointed as Expert.

**1.3.** The Notice of Dispute shall be served at the usual or main address for such party or parties, or their appointed representatives, specified in the Agreement. Unless otherwise agreed between the parties, service may be made personally, by recorded mail, or by facsimile or other means of telecommunication or electronic transmission.

**1.4.** Unless otherwise agreed between the parties, if no agreement has been reached on the identity of the person to be nominated as Expert within seven (7) days after service of the Notice of Dispute or deemed receipt of same, then the dispute, unless settled, shall be referred to expert determination by an Expert nominated by the Institute.

## **Article 2**

### **Nomination of Expert by FICA in the event of a failure to agree**

**2.1** Where the Institute is to exercise powers to nominate persons to act as Experts, those powers shall be exercised by:

a the Chairman of the Institute; or

b the vice-Chairman of the Institute or to any member of the Board to whom the power is formally delegated by the Chairman.

**2.2** Where the Institute is to nominate an Expert the party serving a Notice of Dispute shall also send the prescribed Nomination Fee together with a copy of the Notice of Dispute to the Institute.

**2.3** The Nomination Fee shall be the sum of £250.00 or such other sum as prescribed by the Institute from time to time.

**2.4** A nomination of an Expert by the Institute shall not be effective until the fee is paid.

**2.5** An invitation by the Institute shall be made to an expert for nomination within seven (7) days of receipt of the Notice and accepted in writing within four (4) days of such receipt.

**2.6** In the event of a refusal of the invitation or silence then after six (6) days have expired from the due date of receipt of the acceptance the Institute shall repeat the process with another invitee.

## **Article 3**

### **Notice of Dispute**

#### **3.1 The Notice of Dispute shall contain:**

- a. a copy of the Agreement containing the request for expert determination;
- b. the names, addresses and contact details of the parties to the dispute and those of their representatives;
- c. a brief description of the nature of the dispute containing sufficient detail of the dispute so as to enable the Institute to nominate an appropriate Expert.

## **Article 4**

### **Acceptance of Nomination**

**4.1** The Nominee shall unless agreed otherwise by the parties, within seven (7) days of sending the acceptance of his or her nomination or agreed nomination, give written notice to the parties of the time and place of a Preliminary Conference, which may be real or virtual, which the parties or their duly authorized representatives shall attend.

**4.2** Prior to that Preliminary Conference, the Nominee may advise any conditions he or she wishes to require, including such provision of security for the fees and expenses of the Nominee as shall be reasonable, and request the agreement of the parties to such conditions.

**4.3** On one, or all, the parties agreeing to any such conditions, the Nominee shall accept appointment and shall then be deemed to have entered on the reference as Expert.

**4.4** By issuing the Notice of Dispute and inviting agreement as to nomination the parties agree jointly and severally to be responsible for the reasonable fees and expenses of the nominee who accepts that nomination.

## **Article 5**

### **Agreement to be bound by the Determination**

**5.1** The parties agree that the Expert is an expert in the entirety, or a substantial part, of the subject matter of the Dispute.

**5.2** Unless otherwise agreed in writing by the parties, the determination of the Dispute by the Expert shall be final and binding between the parties except where an effective challenge on the basis of bias or lack of impartiality is made during the proceedings or at such time after the proceedings when the evidence for such a challenge is reasonably able to be discovered.

## **Article 6**

### **Role of the Expert**

**6.1** The Expert shall determine the Dispute as an expert in accordance with these Rules and according to such rules of law as may be determined at the Preliminary Meeting .

**6.2** The parties agree that the Expert is not an arbitrator of the matters in dispute and is deemed not to be acting in an arbitral capacity and is not bound by the rules applicable to arbitration.

**6.3** Unless otherwise agreed by the Parties the Expert shall adopt such procedures as are suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide an expeditious cost-effective and fair means of determining the Dispute.

**6.4** The Expert shall 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 that of any opposing party, and a reasonable opportunity to make submissions on any issue that may arise. The Expert shall decide when the submissions shall close.

**6.5** Any dispute arising between the parties in respect of any matter concerning these Rules or the Process, including the Expert's jurisdiction, shall be submitted to and determined by the Expert.

## **Article 7**

### **The parties**

**7.1** The parties shall do all things reasonably necessary for the proper, expeditious and cost-effective conduct of the Process.

**7.2** The parties may be represented at any Preliminary Conference or meeting convened by the Expert by any authorized person or persons

**7.3** The parties shall comply forthwith with any direction or ruling by the Expert as to procedural or evidentiary matters.

## **Article 8**

### **Confidentiality**

**8.1** The Expert, the parties and all representatives of the parties shall keep confidential all information disclosed during the determination procedure.

**8.2** The requirement as to confidentiality shall apply unless disclosure is required by Order of a Court and then only such disclosure shall be made which allow the

enforcement of such a Determination or its setting aside as provided by a successful challenge as described in Article 5.2. Even in those events any Court shall attempt to limit disclosure as its procedures allow to the minimum information as similar to that published in litigation proceedings in the family or divorce courts.

## **Article 9**

### **Preliminary Conference**

**9.1** The purpose of the Preliminary Conference is to:

- a. attempt to identify the issue or issues in dispute;
- b. agree and direct upon any procedural issues;
- c. agree and direct upon a timetable for provision of submissions, documents and any additional evidentiary material;
- d.** agree and direct upon the terms of appointment of the Expert save and except where the fee level and structure is not agreed. In the later event the Expert shall proceed to implement the Determination procedure seeking such fees as may be reasonable.

## **Article 10**

**10.1** Unless otherwise agreed between the parties or in the event of a disagreement between the parties, the Expert shall make such directions or rulings in relation to the Determination procedure as he or she sees fit. Such directions may be varied upon application or determination of the Expert on its own motion.

**10.2** The directions and rulings made may include directions or rulings in relation to:

- a. identifying or clarifying the issues in dispute, by preparation of a joint statement of issues or otherwise;
- b. provision of submissions, documents and any other evidentiary material relied upon by the parties;
- c. provision of any further submissions and evidentiary material which the Expert considers appropriate;
- d. meetings between the parties, their representatives and/or experts engaged by the parties, whether or not such meetings are attended by the Expert, including the times by which any such steps shall be taken;
- e. And any such matters as may arise during the Determination proceedings

**10.3** Unless otherwise agreed between the parties the following procedure shall apply except as varied by agreement or direction.

**10.4** The procedure shall be conducted in the following manner:

**10.4.1** The party serving the Notice shall, within twenty one (21) days of the date on which the Expert accepts appointment, provide the following to all other parties and to the Expert:

- a. a statement in writing detailing the nature of the dispute, the legal and factual issues involved, its submissions in relation to those issues, and where possible, the quantum of its claim;
- b. all documents and other evidentiary material on which it relies;

**10.4.2** Thereafter, each party other than the party serving the Notice shall, within a further period of twenty one (21) days, provide the following to all other parties and to the Expert:

- a. a statement in writing indicating whether or not it agrees with the all or any elements of the written statement made pursuant to paragraph **1a** and, if not, its statement on the nature of the dispute and any counter claim, its contentions in relation to the legal and factual issues, and the quantum and the quantum of any such cross claim;
- b. all documents and other evidentiary material on which it relies;

**10.4.3.** Thereafter, any party may reply to written material served pursuant to paragraph **2**, within a further period of twenty one (21) days, by providing the following to each other party and to the Expert:

- a. a statement in writing in reply indicating whether or not it agrees with the written statement pursuant to paragraph **2** 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 documents and other evidentiary material in reply to material served pursuant to paragraph **2**;
- c. its written submissions in reply on the legal and factual issues involved.

**10.04.4.** If a cross claim is made in accordance with paragraph **2**, then the cross claimant may reply, in the same manner as set out in paragraph **3**, to written material served in respect of such cross claim pursuant to paragraph **3**.

**10.04.5.** If a party applies and the Expert considers it appropriate, he or she may direct that the experts, if any, where retained by the parties are to be each provided with the material otherwise served pursuant to the above paragraphs and then jointly confer, according to such time limit directions as are appropriate, and produce a joint report or reports recording the matters on which they agree, the matters on which they disagree, and identifying the reasons for any such disagreement and the reasons for those

disagreements. The Expert may make any additional directions with respect to the parties experts as may assist in reaching the determination.

## **Article 11**

### **The Determination**

**11.1** As soon as reasonably practicable after receiving the final submissions and evidentiary material from the parties and experts, if any, according to **Article 10**, the Expert shall determine the Dispute and notify such determination in writing to the parties.

**11.2** Unless otherwise agreed between the parties, the Expert's determination shall be fully reasoned.

**11.3** Unless otherwise agreed between the parties, the Expert's determination shall include for the payment of interest on any monetary sum claimed, in such amount as is compatible with the prevailing bank rate in the place where the Determination takes place or such rate as the Expert deems reasonable having been addressed upon the matter by the parties.

**11.4** Unless otherwise agreed between the parties, the Expert's determination shall include for the allocation of the payment of costs of the determination and of the Expert, having been addressed upon the matter by the parties The parties shall be jointly and severally liable for the costs of the determination.

**11.5** Where the Expert's determination contains:

- a. a clerical mistake;
- b. an error arising from an accidental slip or omission;
- c. a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or other non-substantial error,

the Expert may correct the determination either upon application of a party or his own motion.

## **Article 12**

### **Definitions**

In these Articles:

“The Institute” is the Forum for International Conciliation and Arbitration.

“Agreement” is any agreement between the parties seeking to submit present or future disputes to expert determination.

“the costs of the Determination” includes the fees and expenses of an authorized representatives, whether lay or legal, and party experts, any Nomination Fee or other fee payable to the Institute and costs for room hire and transcripts.

“the costs of the Expert” includes the all reasonable fees and expenses of the Expert

“days” means normal working days and shall exclude Saturdays, Sundays and public holidays.

“the Dispute” means the disputed issues for expert determination in accordance with these Articles.

“Expert” means a person who has accepted appointment to determine the Dispute in accordance with these Articles.

“Preliminary Conference” means a meeting appointed to deal with procedural or administrative matters in connection with expert determination of the Dispute.

## **Article 13**

### **Time**

**13.1** For the purpose of counting days under these Articles, any such period shall begin to run on the day following the day when notice, notification, communication or proposal is actually received or deemed to be received under **Article 1.3**, or any other time related article, whichever is earlier. If the last day of such period is a public or official holiday or a non-business day at place of business or other address of the addressee, then the period is extended until the first business day which follows.

**13.2** Any such notice, notification, communication or proposal which is posted is deemed to have been received on the second day following the day of posting. Any such notice, notification, communication or proposal which is sent by facsimile or other means of telecommunication or electronic transmission is deemed to have been received on the day of transmission.

## **Article 14**

### **Subsequent proceedings**

**14.1** The Expert shall not, without the written prior consent of the parties, accept an appointment to act as arbitrator, or act as advocate or adviser to any party, in any subsequent expert, arbitral or judicial proceedings arising out of or in relation to the Dispute.

**14.2** The parties agree that:

- a. the Expert will not be summoned to give evidence or produce documents in any subsequent expert, arbitral or judicial proceedings arising out of or in relation to the Dispute, by subpoena or otherwise;
- b. with the exception of the Expert's determination, the Expert's papers will not be the subject of a subpoena to give evidence or produce documents in any subsequent expert, arbitral or judicial proceedings arising out of or in relation to the Dispute.

## **Article 15**

### **Continuance of duties and obligations.**

**15.** Where the Dispute arises out of or in relation to a contract or agreement between all or any of the parties, the parties shall continue to perform all obligations and duties notwithstanding the existence of the Determination proceedings.

## **Article 16**

### **Waiver**

**16.1** Unless the parties otherwise agree or subject to any Rule of law to the contrary, if a party to the Determination proceedings takes part, or continues to take part, in the Determination proceedings without making any objection as soon as knowledge of any incident described below becomes known or could reasonably become known :

- a. that the Expert lacks substantive jurisdiction;
- b. that the Determination proceedings has been improperly conducted,
- c. that there has been any other irregularity affecting the Expert or the Determination proceedings,

then that party shall be deemed to have waived its right to make such objection later before a Court or any other tribunal having final determination of the Dispute.

## **Article 17**

**Exemption from liability**

**17.1** The parties agree that the Expert, the Institute and its officers and employees are not liable to any party for or in respect of any act or omission in the discharge or purported discharge of their respective functions under these Articles unless such act or omission is shown to have been deliberately undertaken in order to benefit one party to the detriment of all or any of the other parties.