

## **Rules for the expert determination of commercial disputes (1997 - superseded)**

### **1 Agreement to be Bound**

By submitting the dispute to expert determination in accordance with these Rules ("the Process"), the parties have agreed to participate in good faith in the Process and that the determination of the dispute by the expert will be final and binding upon them.

### **2 Appointment of the Expert**

The Process shall be effected by an expert in the relevant subject matter of the dispute ("the Expert") agreed upon and appointed jointly by the parties. In the event of a failure by the parties to agree as to the appointment of the Expert, either party may request the President or a State or Territory Chapter Chairman for the time being of the Institute of Arbitrators Australia to make the appointment, and the person so appointed will be deemed to be the Expert.

### **3 Conduct of the Process**

(a) The Expert shall conduct the Process in accordance with the principles and procedures set out in these Rules.

(b) The Expert is not an arbitrator of the matters in dispute and shall not be deemed to be acting in an arbitral capacity. The Process or any process conducted under or in any connection with these Rules is not an arbitration within the meaning of any legislation or rules dealing with commercial, industrial, court-annexed or any other form of arbitration.

Any conference conducted under these Rules is not a hearing conducted under any legislation or rules dealing with commercial, industrial, court-annexed or any other form of arbitration.

(c) The process shall commence with the acceptance by the Expert of the appointment by notice in writing to the parties. The Process shall conclude when the Expert has notified the determination of the dispute in writing to the parties.

In the event of the Expert being unable to conclude the Process within a reasonable time by reason of the Expert's illness, death, failure to act or other cause, the Process will terminate and the dispute will then be determined by a further expert appointed in accordance with rule 2 above.

### **4 Procedural Requirements**

(a) The function of the Expert is to make a determination on the dispute as submitted by the parties, in accordance with these Rules.

(b) The Expert must make the determination according to law and must conduct the Process in accordance with the requirements of procedural fairness.

(c) The Expert must make the determination on the basis of information received from the parties and the Expert's own expertise. The Expert is not bound by the rules of evidence and may receive any information in such manner as the Expert thinks fit.

(d) The Expert must disclose all information and documents received from either party to the other party. The Expert must not consult with a party other than in the presence of the other party except where a party, having received due notice, fails to make a written submission or appear at any conference.

(e) If the Expert becomes aware of circumstances that might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially, the Expert must inform the parties immediately. In such circumstances the Expert must terminate the Process unless the parties agree otherwise.

(f) Neither party may communicate directly or indirectly with the Expert in respect of any matter relating to the dispute other than in accordance with these Rules.

(g) The parties may be required by the Expert to attend a preliminary conference to make such procedural and administrative arrangements as are necessary and appropriate (including the Expert's terms of appointment) to enable the Process to proceed.

(h) At any conference with the Expert a party may have legal or other representation. The conference must be held in private, but may include authorised representatives or experts for the parties. If required by the Expert, a transcript of the conference may be taken and made available to the Expert and the parties.

(i) All proceedings and submissions relating to the Process (including the fact that any step in the Process is occurring) must be kept confidential between the parties and the Expert. No information relating to or arising out of the Process may be divulged to any other person, except with the prior written consent of the parties or as may be required by law or to the extent necessary to enforce the determination by the Expert.

(j) 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.

#### **5 Written Submission on the Dispute**

Unless otherwise agreed by the parties at a preliminary conference held under Rule 4(g), the following procedures shall apply ;

(a) Within fourteen (14) days of the date of the commencement of the Process, the Claimant in the dispute must provide to the Respondent and the Expert a statement in writing detailing the nature of the dispute, any agreed statement of facts and a written submission on the dispute in support of the Claimant's contentions of fact and law.

(b) Within fourteen (14) days after the provision of the above submission, the Respondent must provide to the Expert and to the Claimant a written response to the Claimant's submission.

(c) Within seven (7) days after the provision of the Respondent's response under Rule 5(b), the Claimant may provide a written response to the Expert and to the Respondent/s.

(d) If the Expert decides that further information or documentation is required to determine the dispute, The Expert may :

(i) require a further written submission or documents from either or both parties, giving each party a reasonable opportunity to make a written response to the other's submission; and/or

(ii) call a conference between the parties and the Expert in accordance with Rules 4 and 6.

## **6 Conference on the Dispute**

(a) If the Expert decides that a conference between the parties is necessary, the Expert must arrange for a conference at a venue and time convenient for the parties and must notify them accordingly. A conference may take the form of a view.

(b) At least three (3) days prior to the conference the Expert must inform the parties in writing of any specific matters he wishes to be addressed at the conference.

(c) At the time and place notified for the conference the parties or their representatives must appear before the Expert and may make oral representations in respect of the matters notified to them in accordance with Rule 6(b).

(d) At the conference the Expert may permit the making of further submissions and the provision of further information as may be fair and expedient in the circumstances.

## **7 Determination of the Dispute**

(a) As expeditiously as possible after the receipt of the submissions or after a conference, the Expert shall determine the dispute between the parties and notify such determination in writing to the parties. The Expert shall give to the parties, a brief statement of the reasons for the determination.

(b) The Expert may include in the determination whatever interest the Expert considers reasonable on any monetary sum awarded. The Expert may also make declarations or directions in the determination.

(c) Where the determination made by the Expert contains

(i) a clerical mistake;

(ii) an error arising from an accidental slip or omission;

(iii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or

(iv) a defect of form;

the Expert may correct the determination.

## **8 Costs**

Each party will bear its own costs and will share equally the costs of the Expert and the Process. Security for costs must be deposited by both parties at the commencement of the Process, at the direction of the Expert. The Expert shall direct the disbursement of the security monies progressively or at the conclusion of the Process.

## **9 Modification**

Unless otherwise stated these Rules may be modified only by agreement of the parties and the Expert.

#### **10 Exclusion of liability and indemnity**

Except in the case of fraud, the Expert, the Institute of Arbitrators Australia, its directors and officers will not be liable to a party upon any cause of action whatsoever for any act or omission by the Expert in the performance or purported performance of the Process. The parties jointly and severally hereby indemnify and shall keep indemnified the Expert, the Institute of Arbitrators Australia, its directors and officers against all claims, actions, suits proceedings, disputes, differences, demands, costs, expenses and damages arising out of or in any way referable to any act or omission by the Expert in the performance or purported performance of the Expert's role in the Process.

#### **11 Contractual Obligations**

Where the dispute arises out of or in connection with a contract between the parties, the parties shall continue to perform their contractual obligations notwithstanding the existence of the Process.