

Panel members may find it helpful to have a set of rules available which subject to the agreement of the parties they can choose to adopt in full or in part or perhaps just use as a reference tool. ICAEW recommends consideration is given to the use of these rules unless the expert and the parties have agreed different rules, terms and conditions or procedures. Use of the rules by panel members is non-mandatory.

ICAEW thanks The Academy of Experts for its permission to base these rules on The Academy of Experts Rules for Expert Determination (as at 12 March 2014).

RULES FOR EXPERT DETERMINATION

Part 1: General Rules & Principles

1.1: Interpretation

- 1.1.1 'ICAEW' meant the Institute of Chartered Accountants in England and Wales whose administrative office is at Metropolitan House, 321 Avebury Boulevard, Milton Keynes, MK9 2FZ, telephone +44 (0)1908 248367, DX 31427 Milton Keynes.
- 1.1.2 'The president' refers to the president of ICAEW for the time being and any officer, or employee or agent or representative of ICAEW authorised for the purpose of fulfilling this function.
- 1.1.3 References to the 'procedure' are references to an expert determination conducted in accordance with the rules in Parts 1 and 2.
- 1.1.4 The 'expert' is defined in rule 1.4.
- 1.1.5 Words used in the singular include the plural and vice versa as the context may require. The masculine is taken to include the feminine.

1.2: Scope

- 1.2.1 Where an expert determination agreement provides for expert determination under ICAEW's rules, the rules in force at the time the agreement is entered into shall be deemed to form part of that expert determination agreement.

1.3: Services of Notices, Communication and time calculation

- 1.3.1 Unless the parties have agreed otherwise, any notice or other communication that may be or is required to be given under these rules shall be (a) in writing and delivered by first class post or transmitted by fax or email and (b) copied to the other party and the expert. The same applies to all communications during the currency of the assignment, apart from those of a purely administrative nature such as fee notes.
- 1.3.2 For the purpose of calculating a period of time under these rules, in the case of delivery by first class post, such period shall begin to run from 48 hours after the notice or communication is sent; in the case of a fax or an email sent after 4pm, such period shall begin to run from the following day.
- 1.3.3 Any reference to "days" in this agreement means working days and does not include weekends or public holidays.

1.4: Appointment of the Expert

- 1.4.1 The president will appoint the expert having had regard to any firms or individuals whom the president is asked not to appoint, and having had regard to any conflicts of interest which may be reported to the president by the expert whom the president is minded to appoint.

1.5: The Expert

- 1.5.1 **Function:** the expert shall act as an expert and shall determine the dispute before him. The expert shall not act as an arbitrator or adjudicator, nor as an expert witness. The parties agree that the expert determination process is not an arbitration or adjudication within the meaning of any statute.
- 1.5.2 **Role:** the expert shall adopt procedures suitable to the circumstances of the particular case so as to provide an expeditious, cost-effective and fair means of determining the dispute between the parties.
- 1.5.3 **Neutrality:** the expert must act with impartiality, must have no vested interest in the outcome of the dispute and must not be biased in any way towards or against either party. If the expert becomes aware of any circumstance which might reasonably be considered to affect his ability to act impartially and disinterestedly, he must inform the parties and the president immediately. The parties must then inform the expert and the president within ten days whether or not they agree that the expert should continue the determination. If either party considers that the expert should withdraw, the president will decide whether the expert is to withdraw. The president's decision will be binding. A new expert will be appointed under 1.4.1.
- 1.5.4 **Evidence:** the expert is not bound by the rules of evidence and may at his discretion receive and take into consideration any information submitted to him by either party in such manner as he thinks fit and may give such weight to the same as he considers appropriate.
- 1.5.5 **Final and binding:** the expert's determination shall be final and binding on the parties. It shall be made in writing.
- 1.5.6 **Interest:** unless otherwise agreed in writing by the parties the expert has discretion to award simple interest at such a rate and for such period as he thinks fit on any amount in dispute or any part of it and he may also award interest for late payment of the award.
- 1.5.7 **Payment:** unless otherwise agreed in writing by the parties any amount payable under the determination shall be paid within ten days of the determination.
- 1.5.8 **Liability:** the expert shall not be liable for any act or omission arising from the expert determination under these rules unless such act or omission is shown to have been fraudulent or deceitful. ICAEW and any officer, or employee or agent or authorised representative of ICAEW shall not be liable for any such act or omission of the expert unless it is shown that it was a party to fraudulent or deceitful conduct by the expert.
- 1.5.9 **Indemnity:** the expert shall not voluntarily (a) provide oral evidence or (b) divulge, produce or disseminate or provide details (in whole or in part) of any documents or information arising from the expert determination to any person or body other than the parties. The expert will only be released from the requirements of this sub-rule where he is under a legal obligation to provide oral evidence or other details, including where he has been ordered to do so by a court of competent jurisdiction.
- 1.5.10 **Incapacity, resignation or death:** if the expert is unable to reach a determination in accordance with a timetable acceptable to the parties or otherwise set out in rule 2.1 due to incapacity, the expert shall withdraw from the determination, retain any interim payments that have been made in the course of the procedure, forego the rest of his fee and arrange for the documents to be returned to the parties. The president will

then appoint another expert, if the parties wish. If the expert is unwilling to reach a determination he shall resign from the determination, forego his fee and repay any interim payments already made in the course of the procedure and arrange for the documents to be returned to the parties. The president will then appoint another expert, if the parties wish. If the expert dies during the course of the determination, the president will use his best endeavours to ensure that the parties' documents are returned and will appoint another expert if the parties wish.

- 1.5.11 **Discretion:** at the request in writing of either party, and either with the agreement of all other parties or of his own motion, the expert shall have discretion (a) to amend the time limits set out in parts 1 and 2 of these rules and/or (b) to amend any of the procedural rules in part 2 of these rules. The expert's decision as to his exercise of this discretion shall be final.
- 1.5.12 **Consultation:** unless otherwise determined by the expert and agreed with the parties, no one party or anyone acting on one party's behalf shall communicate with the expert in the absence of 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 a notice under rule 2.6.1, has failed to make a written submission or appear at a meeting.
- 1.5.13 **Disclosure:** except as provided in rule 2.5, the expert must disclose all information and documents received from any party to all other parties.

1.6: The Determination

- 1.6.1 **Law:** English law applies to the determination.
- 1.6.2 **Language:** the determination shall be conducted in the English language and the parties will provide to the expert, at their own expense, translations into English of any documents and communications in a foreign language, if requested by the expert.
- 1.6.3 **Confidentiality:** each person involved in the expert determination shall maintain the confidentiality of the expert determination and may not use or disclose to any party the determination or any information concerning, or obtained exclusively in the course of, the expert determination except to the extent that: (a) the parties have agreed otherwise in writing (b) the information is already in the public domain (c) disclosure is necessary in connection with legal proceedings relating to the expert determination or (d) disclosure is otherwise required by law.
- 1.6.4 **Slip rule:** where the expert's determination contains a clerical mistake, an error arising from an accidental slip or omission, a miscalculation of figures or a mistake in the description of any person, thing or matter, or a defect of form, the expert may correct the determination.
- 1.6.5 **Costs:** unless otherwise agreed between the parties, each party shall pay its own costs of or incidental to the procedure. Unless otherwise agreed in writing between the parties, the parties shall be jointly and severally liable for the costs of the procedure, and shall pay those costs in equal shares.

1.7: Procedure

- 1.7.1 The procedure will be as specified with the rules listed in part 2.

- 1.7.2 The rules in part 2 may only be varied by the written agreement of (a) all the parties to the dispute and (b) the expert as provided for in rule 1.5.11.
- 1.7.3 A party who becomes aware of any non-compliance with the rules in part 1 or 2 must object in writing within ten days of the time at which he became aware or should have been aware of the non-compliance, or he will be deemed to have waived his right to object.

Part 2: Procedural Rules & Requirements

2.1: Timetable

- 2.1.1 The following timetable is subject to 1.5.11: the timetable shall be variable at the discretion of the expert.
- 2.1.2 Within ten days of the date on which the expert accepts appointment, the claimant shall provide the following to any other party and to the expert: (a) a written document setting out the nature of the dispute, the legal and factual issues involved, his submissions in relation to those issues and the quantum of his claim; and (b) all documents and other evidentiary material on which he relies ('the claim').
- 2.1.3 Within ten days after receipt of the claim, all parties shall provide any other party and the expert with: (a) a written document indicating whether or not he agrees with the claimant's description of the dispute and, if not, his statement of the nature of the dispute (including any cross claim), the legal and factual issues involved in the claim and any cross claim, his submissions in relation to those issues, and the quantum of any cross claim and (b) all documents and other evidentiary material on which he relies ('the response').
- 2.1.4 Within five days after receipt of the response, any party may provide to the expert and the other party: (a) a written document indicating whether he agrees with the response and, if not, why he disagrees; and (b) any documents or other evidentiary material in relation to the response and/or the cross claim ('the reply').
- 2.1.5 If a cross claim is made under rule 2.1.3 then the cross claimant may serve a reply to the written material served in response to such a cross claim under rule 2.1.3. Such reply shall be served within five days of receipt of the reply under rule 2.1.4.

2.2: Meetings/hearings

- 2.2.1 If he considers it necessary, the expert may at any stage hold a meeting or teleconference/web conference with both of the parties, but not with one in the absence of the other, to clarify the issues in dispute and make such orders as he considers necessary for the fair and expeditious determination of the dispute.
- 2.2.2 All parties will be given at least five days notice (or such shorter period as the parties and the expert agree) that such a meeting/teleconference/web conference is to be held.
- 2.2.3 At least three days (or such shorter period as the parties and the expert agree) before such a meeting or teleconference/web conference the expert must inform the parties in writing of any specific matters to be addressed at the meeting.
- 2.2.4 The expert may also hold a substantive hearing if he considers it necessary to determine the dispute.

- 2.2.5 All parties will be given at least ten days notice that such a substantive hearing is to be held.
- 2.2.6 At least five days before such a substantive hearing the expert must inform the parties in writing of any specific matters to be addressed at the hearing.

2.3: Expert evidence

- 2.3.1 Where exceptionally a party or both parties has considered it desirable to engage their own expert, the expert may, if he considers it appropriate, direct that the party's or parties' expert(s) attend a meeting with him so as to narrow the issues in dispute; or direct that the parties' experts shall meet and discuss matters relevant to their expertise, and produce a joint statement of experts, setting out those matters on which they are agreed, and those matters on which they do not agree, with reasons for such disagreement. Where the expert attends a meeting of parties' experts, the expert shall have total discretion over the procedure adopted and the recording of any decisions made at such a meeting.

2.4: Powers of the expert to seek further evidence

- 2.4.1 The expert may at any time, on his own motion or at the request of a party, allow or require further evidence, including the submission of documents or other information in a party's possession or control.
- 2.4.2 The expert may, on his own motion or at the request of a party, ask a question of a party and/or require statements or appearances by witnesses for either party.
- 2.4.3 The expert may, on his own motion or at the request of a party, inspect or require the inspection of any site, property, product or process as he deems appropriate.
- 2.4.4 The expert may, on his own motion or at the request of a party, carry out such non-destructive tests as he deems appropriate.
- 2.4.5 The expert may at any time, on his own motion or at the request of a party, seek assistance from learned counsel or from an expert (or experts) in the field appropriate to the matter being addressed, provided that the expert first informs all parties of his intention to seek such assistance, and provided that he informs the parties of the likely cost of such assistance. Neither party may prevent the expert from seeking such assistance if he considers it appropriate to seek it. The expert has discretion to order that either party should pay the cost of such assistance; in the absence of such order, the cost of such assistance is to be borne equally by the parties.

2.5: Withholding information by reason of confidentiality

- 2.5.1 A party may invoke the confidentiality of information it wishes or is required to submit for expert determination. The party shall submit the information to the Expert stating the reasons for which it considers the information to be confidential. If the Expert determines that the information is to be classified as confidential, he shall decide under which conditions and to whom the confidential information should be disclosed.

2.6: Power to impose sanctions

- 2.6.1 Where a party has failed to provide the expert with information which he has requested or where a party has failed to attend a meeting, the expert may serve on the party a notice stating that unless the information is served within five days or the party attends a meeting on a set date he will proceed to determine the matter in the absence of the information/the meeting.

- 2.6.2 The expert is entitled to draw adverse inferences, where appropriate, from the non-production of information or non-attendance at a meeting.
- 2.6.3 The expert shall determine the dispute on the basis of information that is before him.

2.7: The determination

- 2.7.1 As soon as reasonably practicable after receiving the submissions and evidentiary material from the parties under rules 2.1 to 2.5, the expert shall determine the dispute between the parties and notify such determination in writing to the parties.
- 2.7.2 Unless otherwise agreed by the parties and communicated to the expert in writing at the time of his appointment, the expert will not give reasons for his determination.
- 2.7.3 The determination shall be delivered to the parties upon payment in full of the Expert's outstanding fees and expenses. If one party pays the expert's fees and expenses when the other party should have paid all or part of that sum, then such amount shall be recoverable forthwith by the paying party from the other party, unless otherwise agreed in writing by all the parties.