

INSTITUTION OF MECHANICAL ENGINEERS

RULES FOR EXPERT DETERMINATION

1. DEFINITIONS

- 1.1 "The Parties" are the Parties to the contract under the terms of which the dispute has arisen.
- 1.2 "The Institution" means the Institution of Mechanical Engineers
- 1.3 "The Expert" is the person appointed to determine the dispute.
- 1.4 "The Expert Agreement" is the agreement between the Parties and the Expert, and shall constitute the contract between them. The Institution can provide template Expert Agreement forms if required.
- 1.5 "The Procedure" is the process from the appointment of the Expert to the publication of his Determination.
- 1.6 "The Determination" is the written decision of the Expert.
- 1.7 The words "he", "him", "his" are used herein for ease of reading. Where the circumstances dictate, these words should be read as "she", "her" and "hers".
- 1.8 Days referred to herein shall be calendar days.

2. APPOINTMENT AND REMOVAL OF THE EXPERT

2.1 Appointment

- 2.1.1 The Parties recognise and acknowledge that the Expert is appointed as an Expert, and not as an Arbitrator or Adjudicator.
- 2.1.2 The Expert may be appointed in any of the following ways:
 - 2.1.2.1 By nomination in the substantive contract between the Parties
 - 2.1.2.2 By agreement between the Parties at any time during the performance of the substantive contract between them, whether or not a dispute has arisen.
- 3. If neither 2.1.2.1 nor 2.1.2.2 applies, by appointment by the President or a Past President of the Institution. Such appointments shall be instigated by one or both Parties requesting the appointment of an Expert. The Institution shall make reasonable endeavours to make such appointment within 7 days of receipt of the request, and such appointment shall be binding upon the Parties unless both Parties object to the appointment.
 - 3.1.1 The Parties and the Expert shall enter into a written contract, the Expert Agreement, and this Expert Agreement shall be the sole contractual relationship between the Parties and the Expert. These

Rules shall be incorporated into the Expert Agreement, and, if not specifically referred to therein, shall be deemed to be incorporated.

3.2 Termination of the Expert's Contract

Once appointed (howsoever such appointment was made) the Expert may be removed only by both Parties advising the Expert in writing that his contract has been terminated, and indicating the date upon which such termination is effective. No reason is required for such termination, and the Expert shall have no cause of action for termination or breach of contract. Unless there is bad faith on the part of the Expert he shall be entitled to payment for the work and time already expended, at the rates agreed at the commencement of the Procedure (or a reasonable pro-rata payment if a fixed fee has been agreed).

The entitlement to payment of his fee shall also apply if the Parties agree to settle the dispute before the Expert has issued his Determination.

3.3 Resignation of the Expert.

If the Expert shall fall ill, or become otherwise incapacitated, or shall discover a conflict of interest, or shall consider himself unable to comply with timetable or other requirements of both Parties, he may resign the appointment. Unless the Expert's decision to resign is shown to be associated with bad faith on the part of the Expert, he shall be entitled to reasonable payment for work already undertaken, but he shall forego the remainder of any further fee (whether already agreed or not). He shall promptly return all documents in his possession. The Institution will appoint a replacement Expert should the Parties so wish.

3.4 Death of the Expert

If the Expert shall die after appointment and before publishing his Determination, the Institution will appoint a replacement Expert should the Parties so wish. The Institution will use reasonable endeavours to recover any valuable documentation already sent to the Expert.

4. THE PROCEDURE

4.1 The Parties and the Expert may agree the format and timetable of the Procedure. In the absence of such agreement, the Expert will decide a format and timetable, and this would commence as follows:

- 4.1.1 Within 7 days of the Expert advising the Parties that he has accepted the appointment, each Party shall submit a statement to the Expert of the precise nature of the dispute.
- 4.1.2 Within 7 days of receipt by the Expert of the above-mentioned statements, the Expert may convene a meeting between himself and the Parties (via telephone conference if preferred) to ensure complete understanding of the nature of the dispute, and to enable a further format and timetable of the Procedure to be agreed.

4.2 Each Party shall ensure that all communication with the Expert, including the transmission of documents, shall be simultaneously copied and transmitted by the same means to the other Party.

- 4.3 The Parties, the Institution and the Expert undertake that they will keep confidential the existence of the dispute, the nature of the dispute, the existence of the Determination and the outcome of the Determination.

5. POWERS AND DUTIES OF THE EXPERT

The Expert shall have the following powers and duties:

5.1 Powers

Unless agreed otherwise by the Parties the Expert shall have the power to:

- 5.1.1 decide the extent of his own jurisdiction and the interpretation of the Parties' contract.
- 5.1.2 require either or both Parties to deliver to him and the other Party any documents that could reasonably assist him in delivering his Determination. Should the Party to whom the request is made believe that such document is privileged, or be commercially confidential, he shall demonstrate this to the Expert. The Expert's decision as to whether the document is privileged or commercially sensitive or not shall be final.
- 5.1.3 determine a programme for the Determination, and may amend such programme from time to time as he deems appropriate. Submissions to vary the programme will be entertained by the Expert, but the decision as to variation shall lie with the Expert, unless both Parties are in agreement as to the proposed variation.
- 5.1.4 determine and limit the quantity and type of written evidence and submissions.
- 5.1.5 limit the number of witnesses of fact, and the type and number of expert witnesses.
- 5.1.6 appoint, subject to prior agreement by both Parties, any specialists he considers may assist him in reaching a Determination.
- 5.1.7 call meetings or telephone conferences between himself and the Parties to clarify matters and to receive oral evidence and/or argument. The Expert may produce and publish to the Parties the record of such meetings, and any orders for further action arising from the meetings.
- 5.1.8 undertake whatever investigation he considers is necessary to ensure he can produce a Determination, and such investigation may include site visits, examination of design and/or manufacturing drawings, examination of equipment.
- 5.1.9 adopt an inquisitorial approach to his investigations. Strict rules of evidence shall not apply.
- 5.1.10 amend the Determination in order to correct minor errors of language or arithmetic calculation (the Slip Rule). Such amendment may be requested by either Party, or initiated by the Expert, and such request or initiation must be advised to all Parties within 14 days of the date of publication of the Determination. The Expert shall ensure that the

corrected Determination is published within seven days of receipt of such request, or of his decision to initiate the correction.

5.1.11 order that the Parties shall make interim payments towards the Expert's fees and expenses, and the costs of any specialist appointed under Rule 4.1.6.

5.1.12 charge interest on any fees and expenses not paid by the due date, providing that the rate and method of calculating interest has been stated at the time of his appointment.

5.2 Duties

5.2.1 The Expert shall, both before appointment, and regularly throughout the proceedings, consider his position with regard to personal interest and/or conflict of interest. He shall immediately declare any such interest to the Parties, and, following submissions by the Parties, he shall determine whether he should continue with the Procedure and the Determination.

5.2.2 The Expert shall ensure that each Party is given adequate time and facility for the production and argument of its case.

5.2.3 The Expert shall produce his Determination within a reasonable time after completion of submissions by the Parties.

6. THE DETERMINATION

6.1 The Expert may make more than one Determination at different times on different issues in the dispute.

6.2 The Determination shall be in writing.

6.3 Unless otherwise agreed by the Parties, the Determination shall contain reasons.

6.4 Unless otherwise agreed by the Parties the Determination shall be final and binding on the Parties, and the Parties agree that the dispute referred in the Determination shall not be subsequently referred to any other tribunal (e.g. litigation or arbitration) for further argument or consideration.

6.5 The Expert shall advise the Parties when his Determination is complete, and it shall be delivered to the Parties upon payment in full of any outstanding fees and expenses of the Expert. If one Party pays the outstanding fees and expenses of the Expert with no contribution from the other Party, then the portion due from the other Party shall be recoverable as a debt by the paying Party, unless otherwise agreed by the Parties. In the event that neither Party seeks to take up the Determination by payment of the outstanding fees and expenses, the Expert may, at his sole discretion, deliver the Determination to the Parties, and seek to recover the outstanding fees and expenses from either or both Parties as a debt.

7. COSTS AND INTEREST.

7.1 The Parties are free to agree how the costs of the Procedure and Determination shall be apportioned between them, and as to whether the Expert may award interest on any monies he determines to be due from one Party to the other. In the absence of any such agreement, the following rules shall apply:

7.1.1 Each Party shall bear its own costs in the Determination, including those associated with any expert witnesses or witnesses of fact.

7.1.2 The Parties shall share equally the fees, expenses and disbursements of the Expert and of any specialist appointed under Rule 4.1.6. The Parties shall be jointly and severally liable for these fees, expenses and disbursements of the Expert and of any specialist appointed under Rule 4.1.6.

7.1.3 The Expert shall have the power to award simple interest at commercial rates on any monies decided to become due to one Party from the other, and to order and specify future interest payable in the event of delayed payment of money ordered to be paid.

8. LIABILITY AND INDEMNITY

8.1 The Expert shall not be liable for any act or omission during the course of the Procedure and the publication of the Determination, unless such act or omission can be shown to be the result of bad faith on the part of the Expert. Such protection extends also to the Expert's employer, staff, appointed specialist or any other agent of the Expert.

8.2 The Institution plays no part in the Expert Determination, acting solely as an appointing authority, and shall not be liable for any act or omission of the Expert or of the Expert's employer, staff, appointed specialists or agents.

8.3 The Parties shall, jointly and severally, hold the Institution and the Expert (including any employer, employee, appointed specialists, or any other agent of the Expert) harmless against all claims by third parties in respect of the Expert Determination.