

CODE OF PRACTICE FOR ARBITRATORS

May 2013

INTRODUCTION

The object of arbitration is to deliver a fair resolution of disputes by an impartial tribunal, without undue delay or expense.

This Code of Practice has been prepared for the arbitration community associated with the FOSFA Arbitration Services. The FOSFA Rules of Arbitration and Appeal (The Rules), the Guide to Arbitration and Appeal (The Guide) and the Arbitration Act 1996 (The Act) also provide the framework for conduct appropriate in the handling of arbitration cases, whether first or second tier under the FOSFA system.

This Code of Practice does not attempt to substitute or circumvent the provisions of the law, the Act, the Rules or the Guide, and each should be taken into account by practising arbitrators (the term used herein for those acting as party appointed arbitrators, FOSFA appointed arbitrators, umpires or appeal board members). Trade representatives, who are outside the scope of the Code of Practice, may nevertheless wish to revert to the section in the Code which addresses the issue of arbitrators being or becoming representatives in linked proceedings, and the issue of advocacy/impartiality at page 7.

THE ARBITRATION ACT 1996

The purpose of the Act is to provide users with access to an ethical, cost effective and fair system of resolving disputes by an impartial tribunal without any delays. The parties are free to agree how their disputes are to be resolved and the Act, by Section 4, allows the parties to agree to the application of institutional rules, which facilitates the link to FOSFA arbitration, and to other commodity and shipping services.

The relevant sections of the Arbitration Act 1996 for the purposes of this Code of Practice are as follows:

- “33. (1) The tribunal shall –
- (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
 - (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
- (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence in the exercise of all other powers conferred on it.”
- “34. (1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.
- (2) Procedural and evidential matters include –
- (a) when and where any part of the proceedings is to be held;
 - (b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;
 - (c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;
 - (d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;
 - (e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;
 - (f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;
 - (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;
 - (h) whether and to what extent there should be oral or written evidence or submissions.
- (3) The tribunal should fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).”
- “64. (1) Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances.

- (2) If there is any question as to what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court on an application under section 63(4), the court may on the application of any party (upon notice to the other parties) –
 - (a) determine the matter, or
 - (b) order that it be determined by such means and upon such terms as the court may specify.
- (3) Subsection (1) has effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of an arbitrator).
- (4) Nothing in this section affects any right of the arbitrator to payment of his fees and expenses.”

“68. (1) A party to arbitral proceedings may (upon notice to the other parties to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

- (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –
 - (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
 - (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
 - (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
 - (d) failure by the tribunal to deal with all the issues that were put to it;
 - (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
 - (f) uncertainty or ambiguity as to the effect of the award;
 - (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
 - (h) failure to comply with the requirements as to the form of the award; or
 - (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings of the award.
- (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may –
 - (a) remit the award to the tribunal, in whole or in part, for reconsideration,
 - (b) set the award aside in whole or in part, or
 - (c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section.”

THE GUIDE TO ARBITRATIONS AND APPEALS

The Guide, under the heading “Arbitrators and Umpires – Their Rights and Duties” states –

“Within the framework of the Rules and the law of England, arbitrators and umpires have the right to determine how the arbitration shall be conducted, to decide the time and place of meetings, to call upon the parties for further information or evidence and to make Orders for Direction.

Arbitrators and umpires have the right to be paid their reasonable fees, costs and expenses in respect of their award.

Before accepting appointment, arbitrators and umpires have the duty to satisfy themselves that they are eligible to act in the dispute and that:

- (a) They are a Trading, Full Broker or Full Non-Trading Member or a nominated representative of a Trading, Full Broker or Full Non-Trading Member (Rule 1(c));
- (b) They, (i), are not age 75 or over and, (ii), have not been retired from active trade for more than two years (Rule 1(c));
- (c) They, their company or firm, have no direct or indirect interest in the transaction in dispute;
- (d) They are not already acting as arbitrator or umpire in ten or more disputes excluding arbitrations on quality and/or condition and any arbitration stayed by Court Order;
- (e) They have not already advised or been consulted by one of the parties to the dispute in respect of the specific dispute;
- (f) They are not suspended as an arbitrator.

The arbitrators or umpire may, at their discretion, seek legal advice, any expenses incurred being a charge against the arbitration.

Before proceeding with an arbitration, arbitrators and umpires must satisfy themselves that they have jurisdiction, that is, that there is prima facie evidence of a contract between the parties and that the agreement to arbitrate is subject to the Federation's Rules of Arbitration and Appeal. If they find that they have no jurisdiction they shall issue an award to say so. If they do have jurisdiction they shall proceed to deal with the dispute before them.

Once arbitrators have been appointed their legal duty is to adjudicate jointly and impartially on the dispute between the parties and not to act as agents or advocates of either party. They must act fairly to both parties and must observe the generally accepted but not specifically defined "rules of natural justice". They must ensure that each party is aware of the claims made against him and is given the opportunity to reply to them. Whilst arbitrators are expected to use their general trade knowledge and skill, they may not use any particular knowledge relating to the case in dispute, unless it is first raised with both parties and each is given the opportunity to comment or make submissions on it. Furthermore arbitrators may not decide issues in dispute on a basis not argued or relied on by the parties without first giving the parties an opportunity to make submissions thereon.

Each arbitrator has the right and duty to examine the documentary evidence supplied by both parties to the dispute. If one party puts in any additional evidence that has not been supplied to the other, then copies of this must be sent to the other arbitrator and to the other party. Arbitrators may request additional documents from either party and should advise both parties of such a request.

If at any stage it becomes evident that an arbitrator, his company or firm has any interest, direct or indirect, in the transaction in dispute then he should withdraw as no longer eligible.

Arbitrators and umpires have the duty to ensure that the time limits applicable to arbitrations laid down in the Rules are observed, subject to their discretion to extend them in certain circumstances.

On request, arbitrators and umpires have the duty to keep the Federation informed of the progress of their arbitrations.

If arbitrators are in agreement about their decision, they have the duty to submit to the Federation a draft award, incorporating their reasons, for typing and then for signing by the arbitrators.

If the arbitrators cannot agree, they shall immediately appoint an umpire and notify his name to the parties and the Federation. If they are unable to agree on a person to be appointed as umpire they must notify the Federation in writing, whereupon the Federation will appoint an umpire.

Once an umpire is appointed, he takes over the whole of the case, whereupon the arbitrators cease to have the power to act as arbitrators. However, they may then assume the role of advocate/agent for their respective parties within the evidence/argument supplied and in that capacity make written submissions to the umpire or argue their cases before him but would normally point out to him any areas in which they are in agreement.

Under no circumstances may an arbitrator or an umpire disclose an award until it is taken up."

NB. Some care needs to be applied with regard to the assumption of role when an umpire is appointed, as declared in the text of the Guide, quoted above. The term 'advocate/agent for their respect parties' is not appropriate and will be edited out at the next revision of the Guide. Current thinking and good practice restricts the arbitrators to convey to the appointed umpire, if he requests it, the apparent point or points of disagreement that led to the need to refer the case to an umpire.

CONFIDENTIALITY

Cases are confidential as between the parties and tribunals and arbitrators should not discuss or divulge information about their cases generally, or specific cases.

ACCEPTING APPOINTMENTS TO ACT AS AN ARBITRATOR

The eligibility criteria is set out in the Rules but in addition they or their company or firm should have no direct or indirect interest in the transaction and dispute or with the company or companies involved. Further they must not accept an appointment in cases where they have already advised or given an opinion on the dispute. This extends to companies contacting the arbitrators with the details of the case beyond their request that they accept an appointment as an arbitrator. Any close association with a party to the extent that it cast doubt on their ability to conduct the arbitration in an impartial way should also be taken into consideration. This applies equally to former employers of the company for a period of minimum three years.

PROCEDURES

Beyond that set out in the Guide above, tribunals have the authority under the Act to determine a party's right to an oral hearing and should assess, if any application is made, whether this would be appropriate in the light of the submissions made and then determine the time, place and procedures to be applied for such a hearing at First Tier. Should witnesses be declared and relied upon by one or both parties then an umpire-in-waiting should be nominated to attend the hearing in order that he or she has the benefit of hearing the evidence in the event that the arbitrators get to a point whereby they disagree on an issue or issues in the dispute and formally nominate an Umpire as per the Rules.

ORDERS FOR DIRECTIONS

Tribunals have a duty to respond to requests and more formal applications made by the parties to a dispute in a timely fashion. In regard to applications it is a requirement of the Arbitration Act that such applications should be notified to the other party and the other party or parties comments on it/them sought prior to making decisions to progress the issue or the case as appropriate.

Where a tribunal is of the opinion that the case is not progressing at a reasonable rate they may call upon one or both parties to take the next appropriate step in initially a simple order form and ultimately in a peremptory order, both orders making it clear as to the tribunals expectation and timelines. A peremptory order should also declare the consequences of non action by one or other party. Tribunals are at liberty to issue their own orders, which should be copied to the FOSFA Secretariat. Orders to the parties may also be channelled via the FOSFA Secretariat.

CLOSING PROCEEDINGS

Tribunals should clearly state that proceedings, be they submissions or a hearing, are closed, prior to moving to determine the dispute.

AWARDS

Following the closing of proceedings one or other arbitrator, more usually the claimants arbitrator should undertake the drafting of an award.

Awards should be written in plain English and must be self explanatory and clear as to their meaning. The Arbitration Act requires that all awards should be fully reasoned.

FEES

Under the Rules each party in an arbitration becomes liable for all the fees and expense incurred in connection with the arbitration or appeal.

At First Tier arbitrators are to determine their fees to be included in the award. Fees are to be calculated on the basis of time reasonably spent and should normally be based on the extent and complexity of the case as well as being proportionate to the merits of the case.

Arbitrators should as a matter of good practice record the time they have spent working on a case and/or on any related expenses. Arbitrators are to provide to the FOSFA Secretariat copies of their time sheets in the form set out in the Appendix to this document at the time of declaration of fees. Any issues of irregularity, miscalculation or excessive levels will be subject to scrutiny and possible investigation, as directed by the FOSFA Council.

It is a function of the FOSFA Secretariat that arbitration services are closely monitored by the staff including the progression of cases, the conduct of arbitrators and fees charged, with regular reporting to Council undertaken. Issues of complaint will be notified to the Council Referral Group, appointed by the Council, who will investigate issues of irregularity and/or fees.

EXPENSES

At first tier any expenses arising from the case should be documented, supported by receipts and provided to FOSFA on request.

Appeal related expenses of board members should be recorded on the provided expenses form and supported by receipts. Excessive claims may be subjected to scrutiny.

ARBITRATOR/ADVOCACY ROLES

While English practice allows an arbitrator to become an advocate of a party at second instance such 'practice' can be easily perceived as challenging the neutrality of the arbitrator, particularly outside the UK. It is therefore suggested strongly that first tier arbitrators do not accept trade representative appointments in the same dispute or handle with care representative roles where they have active tribunal appointments involving the same parties.