

CODE OF PRACTICE FOR ARBITRATORS

April 2018

INTRODUCTION

The object of arbitration is to deliver a fair resolution of disputes by an impartial tribunal, without undue delay or expense, and under FOSFA by persons familiar with the oilseeds, oils and fats business.

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 Arbitrations and Appeals (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, 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 6.

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 arbitration 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 – Their Rights and Duties” states –

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

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

Before accepting appointment, arbitrators 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 2(b));
- (b) They, (i), are not age 75 or over, (ii), have not been retired from active trade for more than two years (Rule 2(b)), and (iii) have at least ten years experience in the trade;
- (c) They, their company or firm, have no direct or indirect interest in the transaction in dispute;
- (d) They have not already advised or been consulted by one of the parties to the dispute in respect of the specific dispute;
- (e) They are not suspended as an arbitrator.

The arbitrator/s may, at their discretion, seek legal advice; any expenses incurred being a charge against the arbitration.

Before proceeding with an arbitration case, arbitrators 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 Arbitration Rules. 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 it 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 must be sent to the other party and to the other arbitrators. 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/her company or firm has any interest, direct or indirect, in the transaction in dispute then he/she should withdraw as no longer eligible.

Arbitrators 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 have the duty to keep the Federation informed of the progress of their arbitration cases.

Once arbitrators are in agreement about their decision, or by a majority, they have the duty to submit to the Federation a draft award, incorporating their reasons, for processing and signing by the arbitrators.

The third arbitrator, appointed by the Federation, shall act as chair of the tribunal, and be responsible for the active progression of the case and monitor/record the performance of the case.

Under no circumstances may an arbitrator disclose the contents of, or the decisions made within, an award.

Arbitrators shall comply with the Code of Practice for Arbitrators."

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.

While no longer a rule provision or Guide note that caps the number of cases an arbitrator can take on at any one time arbitrators should be mindful of their capacity to act and progress their case load. The old upper limit of ten cases should still be born in mind in this respect.

PROCEDURES

Beyond that set out in the Guide 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.

The introduction of a third arbitrator in first tier cases, who will be appointed by the Federation as chair of the tribunal, is a measure to provide a degree of control of the case as well as accountability. The chair will be expected to expedite proceedings, to keep the Federation informed of progress and to conduct matters in a fair and efficient manner, thereby ensuring advancement towards a timely and proper resolution of the issues in the best interests of not only the disputant parties themselves but also of the Tribunal and the Federation.

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. It is a requirement under the Arbitration Act that such applications should be notified by one party to the other party, whose response on matters raised should be sought before decisions are made on progressing the case.

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 an order in peremptory terms, both orders making it clear as to the tribunal's expectation and timelines. The order in peremptory terms 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 Federation. Orders to the parties may also be channelled via the Federation's offices for onward transmission.

CLOSING PROCEEDINGS

Tribunals should clearly state when proceedings, whether in the form of written submissions or at an oral hearing, have been closed before moving to determine the dispute.

AWARDS

Following the closing of proceedings and the completion of deliberations, one arbitrator from the tribunal, usually the chair, 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. It is the Federation's policy that a degree of standardisation is applied to awards; this with the assistance of the secretariat. The Award of the arbitrator/s shall be dispatched to the Federation timely, but generally within 30 consecutive days from the close of submissions.

FEES

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

Arbitrators should keep a written record of their fees and any case-related expenses incurred. The amounts and record should be provided to the Secretariat in the form set out in the Appendix to this document. Fees should be calculated on the basis of time reasonably spent on any interlocutory matters, assessing the merits of the case and determining the issues. Any issues of irregularity, miscalculation or excessive levels will be subject to scrutiny and investigation, as directed by the FOSFA Council.

Interim payment of fees is appropriate to cases that become protracted and of significant workload. The more normal approach shall be an expectation of fees paid to tribunal members once all the fees in the case have been paid to take up the award.

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, who will investigate issues of delay, irregularity and/or excessive fees. Appeal boards should also record their out of hearing time spent on preparation, post hearing review and where applicable drafting (more normally the responsibility of the chair). An element of common fee to time reasonably spent will be levied by the chair in appeals.

EXPENSES

Any expenses arising from arbitration and appeal cases should be documented, supported by receipts and provided to the Federation on request. Parties are at liberty to call for a breakdown of the expenses claimed.

AWARD OF FEES AND COSTS

The tribunal may make an award allocating the costs of the arbitration between the parties. The tribunal should award costs on the general principle that costs should follow the event except where it appears to the tribunal that, in the particular circumstances of the case, this is not appropriate in relation to the whole or part of the costs. The tribunal may determine by award the recoverable costs of the arbitration/appeal on such basis as it thinks fit.

ANNUAL REPORTING REQUIREMENTS

Arbitrators are to provide to the Federation an annual statement of activities demonstrating their 'active in the trade' credentials, including training events, relevant conferences and seminars and trade orientated engagements; such statement to be submitted by the

end of February in each year. This statement will not be published or disseminated beyond the Council of the Federation/its Arbitration Referral Group.

In addition each arbitrator is to submit a biographical profile which will be publically available via the website, through the Directory of Arbitrators. This will assist parties in making first tier appointments. The Council has decreed that content will be formatted and its length determined.

ARBITRATOR/ADVOCACY ROLES

While English practice allows an arbitrator to become an advocate of a party at second instance such 'practice' can easily be perceived as challenging the neutrality of the arbitrator, particularly from outside the UK. First tier arbitrators should not accept trade representation appointments at appeals in the same dispute. Care also needs to be taken in representation roles where arbitrators have active tribunal appointments involving the same parties and or shipments.

