PART 31 Experts And Assessors

PART 31

Introductory 31.1 - 31.2

31.1

A reference to an ‘expert’ in this Section of this Part is a reference to an expert who has been instructed to give or prepare evidence for the purpose of court proceedings.

31.2

Parties are referred to the English “Protocol for the Instruction of Experts to give evidence in civil claims” which is reproduced at Schedule A to this Part as amended from time to time. Not all parts of the Protocol are applicable to litigation before the DIFC Courts but the Protocol provides valuable practical guidance both to those who instruct experts and experts themselves as to what they are expected to do in civil and commercial proceedings before the Court . The Court will expect legal practitioners and experts to have read the Protocol.

Experts — Overriding duty to the Court 31.3 - 31.11

31.3

It is the duty of an expert to help the Court on the matters within his expertise.

31.4

This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

31.5

Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

31.6

An expert should assist the Court by providing objective, unbiased opinion on matters within his

expertise, and should not assume the role of an advocate.

31.7

An expert should consider all material facts, including those which might detract from his opinion.

31.8

An expert should make it clear:

(1) when a question or issue falls outside his expertise; and

(2) when he is not able to reach a definite opinion, for example because he has insufficient information.

31.9

If an expert's opinion is not properly researched because he considers that insufficient data is available, this must be stated in his report with an indication that the opinion is no more than a provisional one.

31.10

In a case where an expert witness who has prepared a report is unable to confirm that the report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report.

31.11

If, after producing a report, an expert changes his view on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the Court (through the legal representatives of the party instructing the expert or directly to the Court in the case of a Court-appointed expert).

Court's power to restrict expert evidence 31.12 - 31.18

31.12

Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

31.13

No party may call an expert or put in evidence an expert's report without the Court's permission.

31.14

Any application for permission to call an expert witness or serve an expert's report should normally be made at the Case Management Conference.

31.15

When a party applies for permission under Rule 31.13 he must identify:

(1) the field in which he wishes to rely on expert evidence; and

(2) where practicable the expert in that field on whose evidence he wishes to rely.

31.16

If permission is granted under Rule 31.13 shall be in relation only to the expert named or the field identified under Rule 31.15.

31.17

In appropriate cases the Court will direct that the reports of expert witnesses be exchanged sequentially rather than simultaneously. This is an issue that the Court will normally wish to consider at the Case Management Conference.

31.18

The Court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party.

Orders 31.19

31.19

Where an order requires an act to be done by an expert, or otherwise affects an expert, the party instructing that expert must serve a copy of the order on the expert instructed by him.

General requirement for expert evidence to be given in a written report 31.20

31.20

Expert evidence is to be given in a written report unless the Court directs otherwise.

Documents referred to in experts' reports 31.21 - 31.23

31.21

Unless they have already been provided, copies of any photographs, plans, analyses, measurements, survey reports or other similar documents relied on by an expert witness as well as copies of any unpublished sources must be provided to all parties at the same time as his report.

31.22

Rules 28.7 to 28.9 provide that (subject to Rule 31.53) a party may inspect a document mentioned in an expert's report. An expert's report will frequently list all or many of the relevant previous papers (published or unpublished) or books written by the expert or to which the expert has contributed. Requiring inspection of this material may often be unrealistic, and the collating and copying burden could be considerable.

31.23

A party wishing to inspect a document in an expert report should (failing agreement) make an application to the Court . The Court will not permit inspection unless it is satisfied that it is necessary for the just disposal of the case and that the document is not reasonably available to the party making the application from an alternative source.

Written questions to experts 31.24 - 31.28

31.24

A party may put to:

(1) an expert instructed by another party; or

(2) a Court-appointed expert appointed under Rule 31.29;

written questions about his report.

31.25

Written questions under Rule 31.24:

(1) may be put once only;

(2) must be put within 28 days of service of the expert's report; and

(3) must be for the purpose only of clarification of the report;

unless:

(a) the Court gives permission; or

(b) the party who has instructed the expert agrees.

31.26

In cases where questions that are oppressive in number or content are put, or questions are put for any purpose other than clarification of the report, the Court will disallow the questions and make an appropriate order for costs against the party putting them.

31.27

An expert's answers to questions put in accordance with Rule 31.24 shall be treated as part of the expert's report.

31.28

Where:

(1) a party has put a written question to an expert instructed by another party in accordance with Rule 31.24; and

(2) the expert does not answer that question;

the Court may make one or both of the following orders in relation to the party who instructed the expert:

(a) that the party may not rely on the evidence of that expert; or

(b) that the party may not recover the fees and expenses of that expert from any other party.

Court-appointed expert 31.29 - 31.47

31.29

The Court may appoint one or more independent experts to report to it on specific issues designated by the Court .

31.30

Not less than 21 days before making any such appointment, the Court will notify each party in writing of the name of the proposed expert, of the matter in respect of which the opinion of the expert will be sought and of the qualifications of the expert to give that opinion.

31.31

The Court shall establish the terms of reference for any Court-appointed expert report. A copy of the final terms of reference shall be sent by the Court to the parties.

31.32

The Court-appointed expert shall, before accepting appointment, submit to the Court and to the parties a statement of his independence from the parties and the Court . Within 7 days of receipt of the statement the parties shall inform the Court whether they have any objections to the Court-appointed expert’s independence.

31.33

Any such objection must be made in writing and filed with the Court and will be taken into account by the Court in deciding whether or not to make the appointment.

31.34

The Court-appointed expert may request a party to provide any relevant and material information or to provide access to any relevant documents, goods, samples, property or site for inspection, examination or experiment.

31.35

If a party objects to a request made under Rule 31.34 the Court shall, at the request of the Court appointed-expert or the party determine the validity of the objection and may direct the party to comply with the request.

31.36

The Court may give directions about any inspection, examination or experiments under Rule 31.34 which the Court appointed-expert wishes to carry out.

31.37

The Court appointed-expert shall record in his report any non-compliance by a party with a request under Rule 31.34 or direction by the Court and shall describe its effects on the determination of the specific issue.

31.38

A party shall have the right to receive any information and to attend any inspection provided in compliance with a request made under Rule 31.34.

31.39

A party may examine any document that the Court-appointed expert has examined and any correspondence between the Court and the Court-appointed expert.

31.40

The Court-appointed expert shall report in writing to the Court . The Court-appointed expert shall describe in the report the method, evidence and information used in arriving at the conclusions.

31.41

The Court shall send a copy of such expert report to the parties.

31.42

Within 28 days of receipt of the Court-appointed expert’s report, any party may respond to the

report in a submission by the party or through an expert report. The party must serve the submission or expert report on the Court , the Court-appointed expert and the other parties.

31.43

Any party may use a Court-appointed expert’s report as evidence at the trial.

31.44

The Court may direct that the Court-appointed expert attend any hearing. The Court may question the Court-appointed expert, and he may be questioned by the parties.

31.45

The Court may give any expert report made by a Court-appointed expert and its conclusions such weight as it considers appropriate.

31.46

The Court may order that any party shall be responsible for part or all of the fees and expenses of a Court-appointed expert, including:

(1) directing any party to pay an amount into Court ; and

(2) making payment to the expert on account to be revised on final judgment .

31.47

Unless the Court otherwise directs, the parties are jointly and severally liable for the payment of the Court-appointed expert’s fees and expenses.

Concurrent Expert Evidence 31.48

31.48

(1) This Rule does not affect the provisions set out in the rest of this Part.

(2) If it considers it appropriate in the circumstances of the case, the Court may give directions that expert witnesses engaged by opposing parties be sworn and present their evidence concurrently as a

panel.

(3) Where the expert witnesses testify as a panel, unless the Court orders otherwise:

(a) each expert may, with the permission of the Court, give a short opening statement not exceeding 10 minutes (or such longer period as may be allowed by the Court) to introduce his report,

(b) each expert will thereafter be subject to questioning by the Court and Counsel, and the Court may direct that the expert witnesses may be questioned in any sequence that the Court thinks fit before or after they have testified as a panel.

(c) The expert witnesses may also be directed by the Court and Counsel to comment on the views of the other expert witnesses on the panel, and may also, with the permission of the Court, make a short concluding statement not exceeding 10 minutes (or such longer period as may be allowed by the Court).

(4) The Court may give any other directions as to the giving of concurrent expert evidence as it thinks fit.

Power of Court to direct a party to provide information 31.49 - 31.50

31.49

Where a party has access to information which is not reasonably available to the other party, the Court may direct the party who has access to the information to:

(1) prepare and file a document recording the information; and

(2) serve a copy of that document on the other party.

31.50

The document served must include sufficient details of all the facts, tests, experiments and assumptions which underlie any part of the information to enable the party on whom it is served to make, or to obtain, a proper interpretation of the information and an assessment of its significance.

Contents of report 31.51 - 31.56

31.51

An expert’s report must comply with the requirements set out in Rules 31.52 to 31.56.

31.52

An expert’s report should be addressed to the Court and not to the party from whom the expert has received his instructions.

31.53

The expert’s report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

31.54

The instructions referred to in Rule 31.53 shall not be privileged against production but the Court will not, in relation to those instructions:

(1) order production of any specific document; or

(2) permit any questioning in Court , other than by the party who instructed the expert;

unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under Rule 31.53 to be inaccurate or incomplete (or unless the party who gave the instructions consents to it). If the Court is so satisfied, it will allow the cross-examination where it appears to be in the interests of justice to do so.

31.55

An expert’s report must:

(1) give details of the expert’s qualifications;

(2) give details of any literature or other material which the expert has relied on in making the report;

(3) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;

(4) state clearly if a stated assumption is, in the opinion of the expert witness, unreasonable or unlikely;

(5) make clear which of the facts stated in the report are within the expert’s own direct knowledge;

(6) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert’s supervision;

(7) where there is a range of opinion on the matters dealt with in the report:

(a) summarise the range of opinion; and

(b) give reasons for his own opinion;

(8) contain a summary of the conclusions reached;

(9) if the expert is not able to give his opinion without qualification, state the qualification; and

(10) contain a statement that the expert understands his duty to the Court , and has complied and will continue to comply with that duty.

31.56

An expert's report must be verified by a statement of truth as well as containing the statements required in Rules 31.55(9) and 31.56(10) above. The form of the statement of truth is as follows:

"I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion."

(Attention is drawn to Section VI of Part 29 which sets out the consequences of verifying a document containing a false statement without an honest belief in its truth).

Use by one party of expert's report produced by another 31.57

31.57

Where a party has produced an expert's report, any party may use that expert's report as evidence at the trial.

Discussions between experts 31.58 - 31.64

31.58

The Court will normally direct a meeting or meetings of expert witnesses (including any Court-appointed expert) before trial. Sometimes it may be useful for there to be further meetings during the trial itself. The Court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to:

(1) identify and discuss the expert issues in the proceedings; and

(2) decide, with the benefit of that discussion, on which expert issues they share or can come to

share the same expert opinion and on which expert issues there remains a difference of expert opinion between them (and what that difference is).

31.59

The Court may specify the issues which the experts must discuss.

31.60

Subject to any directions of the Court , the procedure to be adopted at a meeting of experts is a matter for the experts themselves, not the parties or their legal representatives .

31.61

Neither the parties nor their legal representatives should seek to restrict the freedom of experts to identify and acknowledge the expert issues on which they agree at, or following further consideration after, meetings of experts.

31.62

The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.

31.63

Unless the Court orders otherwise, at or following any meeting, the experts should prepare a joint memorandum for the Court recording:

(1) the fact that they have met and discussed the expert issues;

(2) the issues on which they agree;

(3) the issues on which they disagree; and

(4) a brief summary of the reasons for their disagreement.

31.64

Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.

Consequence of failure to produce expert's report 31.65

31.65

A party who fails to produce an expert's report may not use the report at the trial or call the expert to give evidence orally unless the Court gives permission.

Expert's right to ask Court for directions 31.66 - 31.68

31.66

An expert (including any Court-appointed expert) may file a written request for directions to assist him in carrying out his function as an expert.

31.67

An expert must, unless the Court orders otherwise, provide a copy of any proposed request for directions under Rule 31.66:

(1) (if he is not a Court-appointed expert) to the party instructing him, at least 7 days before he files the request; and

(2) to all other parties, at least 4 days before he files it.

31.68

The Court , when it gives directions, may also direct that a party be served with a copy of the directions.

Trial 31.69

31.69

At trial the evidence of expert witnesses is usually taken as a block, after the evidence of witnesses of fact has been given.

II ASSESSORS 31.70 - 31.71

31.70

This Section of this Part applies where the Court appoints one or more persons (an 'Assessor ') under Article 18 of the Court Law .

31.71

The Assessor shall assist the Court in dealing with a matter in which the Assessor has skill and experience.

Appointment of Assessor 31.72 - 31.77

31.72

Not less than 21 days before making any such appointment, the Court will notify each party in writing of the name of the proposed Assessor , of the matter in respect of which the assistance of the Assessor will be sought and of the qualifications of the Assessor to give that assistance.

31.73

Where any person has been proposed for appointment as an Assessor , objection to him, either personally or in respect of his qualification, may be taken by any party.

31.74

Any such objection must be made in writing and filed with the Court within 7 days of receipt of the notification referred to in Rule 31.72 and will be taken into account by the Court in deciding whether or not to make the appointment.

31.75

Prior to commencing duties an Assessor shall take an oath or affirmation of office in accordance with these Rules .

31.76

An Assessor who has or may have a conflict concerning the subject matter of the proceedings must disclose the matters giving rise to that conflict to the Court and the parties to the proceeding as soon as he becomes aware of the conflict or potential conflict.

31.77

For the purposes of this Section of this Part, an Assessor has a conflict of interest in relation to proceedings if the Assessor has any interest, pecuniary or otherwise, that could conflict with the proper performance of the Assessor’s functions in relation to the proceedings.

Part to be taken in proceedings by Assessor 31.78 - 31.85

31.78

An Assessor shall take such part in the proceedings as the Court may direct and in particular the Court may:

(1) direct the Assessor to prepare a report for the Court on any matter at issue in the proceedings; and

(2) direct the Assessor to attend the whole or any part of the trial to advise the Court on any such matter.

31.79

If the Assessor prepares a report for the Court before the trial has begun:

(1) the Court will send a copy to each of the parties;

(2) the parties to the proceedings shall be given an opportunity to make submissions on the Assessor’s report; and

(3) the parties may use it at trial.

31.80

The Assessor will not give oral evidence or be open to cross-examination or questioning.

31.81

The range of topics on which advice might be sought from the Assessor should be canvassed with the parties’ legal representatives by, at the latest, the stage of final submissions.

31.82

Ordinarily, the questions asked of the Assessor by the Court should not stray outside the range previously discussed with the parties’ legal representatives .

31.83

The questions ultimately put by the Court , together with the answers given by the Assessor , must be disclosed to the parties' legal representatives before any draft judgment is handed down.

31.84

The parties' legal representatives will thereafter be given the opportunity to make submissions to the Court , as to whether the advice given by the Assessor should be followed. Ordinarily, any such submissions should be in writing; but if there is good reason for doing so, an application may be made for an oral hearing. The Court will consider any such submissions before finalising any judgment .

31.85

Generally speaking, the interests of proportionality and finality will make it unnecessary to repeat the procedure after the Court and the Assessor have had the opportunity of considering the parties' submissions and any suggested further or revised questions. Accordingly, unless the Court in its discretion thinks it appropriate to disclose them to the parties' legal representatives before the judgment is finalised, any further or revised answers will simply be recorded in the judgment , together with the Court's decision as to whether or not to accept the Assessor's advice and its reasons for doing so.

Remuneration of Assessors 31.86 - 31.88

31.86

The Registrar shall pay to any Assessor appointed under this Section of this Part a fee as set out in Schedule B to this Part for carrying out his duties and shall reimburse him for any expenses reasonably incurred.

31.87

The remuneration to be paid to the Assessor for his services shall be determined by the Court and shall form part of the costs of the proceedings.

31.88

The Court may order any party to deposit in the Registry a specified sum in respect of the Assessor's fees and, where it does so, the Assessor will not be asked to act until the sum has been deposited.

Schedule A to Part 31 Protocol for the Instruction of Experts to give evidence in civil claims