

[]

&

[]

AGREEMENT TO APPOINT FACILITATOR



MARK KELLY.
Barrister & Commercial Mediator

AGREEMENT TO APPOINT FACILITATOR

Parties

[]

&

[]

Engagement of Facilitator

1. The parties are in dispute, in a proceeding in the High Court under CIV-[] ("the Dispute").
2. The parties agree to appoint Mark Kelly ("Facilitator") to facilitate conferencing of their experts in accordance with this agreement.

Role of Facilitator

3. The Facilitator will be neutral and impartial. The Facilitator will assist the parties' experts to complete conferencing in accordance with the High Court Rules, and any protocol for expert conferral which applies to the proceeding.
4. The Facilitator is not engaged to:
 - (a) Make decisions for any party;
 - (b) Impose any solution on the parties;
 - (c) Give professional advice of any kind whatsoever (including legal advice) to any party; or
 - (d) Be responsible himself for recording the results of the any conference, or maintaining any such record; or
5. The facilitator will not accept any other appointment in relation to the Dispute, save an appointment to mediate it.
6. The parties will not subpoena the Facilitator as a witness in any Court, arbitral, tribunal or other proceeding.

Conflicts of interest

7. Prior to any conference, the Facilitator will disclose any material conflict of interest that he might have, that he is aware of, to the parties.
8. If, during the course of any conference, the Facilitator becomes aware of any material

conflict of interest which he might have, he will immediately inform the parties of this. The parties will then decide whether or not the conference should continue.

Participation at the conferencing

9. Each party confirms that their experts will co-operate with the Facilitator and each other, and use their best endeavours to ensure that the conferencing is as productive as it can be.
10. There will be no audio or video recording of the conferencing, or any part of it.
11. Each party:
 - (a) Confirms that its experts have agreed to abide by the High Court Rules in respect of their evidence in the Dispute, and their participation in the conferencing; and
 - (b) Will procure signed copies of the participation agreement at Schedule 1 from its experts.

Videoconference

12. If the conferencing, or any part of it, is conducted by videoconference, it is agreed that:
 - (a) The names of all participating individuals will be declared to all parties, in advance. Only those so declared can attend the videoconference;
 - (b) Separate contact details (email and phone) for each participating individual will be provided to the Facilitator, in advance;
 - (c) To the extent practicably possible, all participating individuals will ensure that:
 - (i) They participate from a space which is private;
 - (ii) Their camera shows a full view of the space they are in, to demonstrate privacy;
 - (d) All participating individuals must:
 - (i) Advise when they enter, or leave, the videoconference;
 - (ii) Advise, immediately, if anyone who has not been declared under (a) above has become able to see and/or hear the videoconference (for example, if someone else enters the room); and
 - (iii) Advise, immediately, if, through a technical error, or otherwise, they become able to see or hear a communication they ought not to be able to see or hear.

Termination

13. The Facilitator may terminate any conference if, after consultation with the experts, the Facilitator considers that the conference has been as productive as it can be.

Exclusion of liability and indemnity

14. Excluding fraud, the parties release, discharge and indemnify the Facilitator in respect of all liability of any kind (whether negligent or not) which may be alleged to arise in connection with, or result from, or relate in any way to, the conferencing (including, but not limited to, any associated videoconference, and the hosting, and/or operation, thereof by the Facilitator).

Defamation

15. The parties and the Facilitator agree that no statements or comments, whether written or oral, made or used by them or their experts, during the conferencing, shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be pleaded in bar to any such action.

Fees and Costs

16. The Facilitator's fee will be \$8500 plus GST per day of the conferencing.
17. A 50% cancellation fee may be charged (at the sole discretion of the facilitator), if the conferencing is cancelled by any of the parties within two weeks of the agreed date for the conferencing. This cancellation fee is payable regardless of which party/parties might be responsible for the cancellation.
18. The facilitator's fee/cancellation fee will be:
 - (a) Shared equally between the parties, unless otherwise agreed in writing; and
 - (b) Paid within seven days from invoice. Interest of 2% per month will be payable on any outstanding sum after that period.
19. If the parties have legal representation, the facilitator relies on the legal representatives to ensure payment of his fee, and reserves the right to look to the legal representatives for payment in the usual way such as when counsel is instructed.
20. Unless otherwise agreed in writing each party will otherwise pay its own costs and expenses of the conferencing.

[]

.....
Authorised signature/s (and please print the name of the authorised signatory/signatories)

.....
Date

[]

.....
Authorised signature/s (and please print the name of the authorised signatory/signatories)

.....
Date

Mark Kelly - Facilitator

.....
Date

SCHEDULE 1

PARTICIPATION AGREEMENT BY EXPERT

I, _____, hereby agree with the parties to the Dispute and the Facilitator that, in consideration for my participation at the conferencing, I will abide by this Agreement to Appoint Facilitator.

.....
Signature

.....
Date