

# Model Executive Tribunal Procedure

Including guidance notes



## **Model Executive Tribunal Procedure**

### **Introduction**

Executive Tribunal is a more formalised version of mediation. Each Party presents its case to a panel consisting of an independent chair and senior executives from each of the Parties. The Executives should not have previously been involved in the dispute. After the presentations and questioning the panel retires to discuss the dispute. The chair may act as mediator to help the representatives negotiate a settlement or may give them a non-binding evaluation if they request it.

Executive Tribunal:

- involves a neutral third party to facilitate negotiation;
- is quick, inexpensive and confidential;
- enables the Parties to reach results which are not possible in an adjudicative process such as litigation or arbitration and may be to the benefit of both/all parties, particularly if there is a continuing business relationship; and
- involves representatives of the Parties who have sufficient authority to settle. In some cases, there may be an advantage in the representatives being people who have not been directly involved in the events leading up to the dispute and in the subsequent dispute.

The procedure for the Executive Tribunal is flexible and this Model Procedure can be adapted (with or without the assistance of CEDR Solve) to suit the parties.

An Executive Tribunal can be used:

- in both domestic and international disputes;
- whether or not litigation or arbitration has been commenced; and
- in two-party and multi-party disputes.

Rules or rigid procedures in the context of a consensual and flexible process which is the essence of ADR are generally inappropriate. The Model Procedure (and these guidance notes) and the Model Agreement should be sufficient to enable parties to conduct an Executive Tribunal.

In some cases the agreement to conduct an Executive Tribunal will be as a result of an "ADR clause" (such as one of the CEDR Model ADR Clauses) in an underlying commercial agreement between the Parties. Where that is the case, the Model Procedure and Executive Tribunal Agreement (ET Agreement) may need to be adapted to take account of the terms of the clause.

The Model Agreement, which has been kept as short and simple as possible, incorporates the Model Procedure. The ET Agreement can amend the Model Procedure either by setting out the amendments in the ET Agreement or by stating that amendments made in manuscript (or otherwise) on the Model Procedure are to be incorporated.

### **Executive Tribunal Agreement**

- 1 The parties ("the Parties") to the dispute in question ("the Dispute"), the Neutral and The Centre for Effective Dispute Resolution ("CEDR Solve") will enter into an agreement ("the ET Agreement") in the form of the CEDR Model Executive Tribunal Agreement in relation to the conduct of the Executive Tribunal. This Model Procedure may be varied by the ET Agreement. All communications relating to, and at, the Executive Tribunal will be without prejudice (see paragraph 17 below).

### **Neutral**

- 2 An independent third party ("the Neutral") who will be nominated by CEDR Solve, subject to the agreement of the Parties, will:
  - attend any meetings with any or all of the Parties preceding the Executive Tribunal, if requested or if the Neutral decides this is appropriate;
  - read before the Executive Tribunal each Summary and all the Documents sent to him/her (see paragraph 7 below);
  - chair, and (after consultation with the Parties) determine the procedure for, the Executive Tribunal (see paragraph 10 below);
  - assist the Parties in drawing up any written settlement agreement; and
  - abide by the terms of the Model Procedure, the ET Agreement and CEDR's Code of Conduct.
- 3 The Neutral (and any member of the Neutral's firm or company) will not act for any of the Parties individually in connection with the Dispute in any capacity either during the currency of the ET Agreement or at any time thereafter. The Parties accept that in relation to the Dispute neither the Neutral nor CEDR Solve is an agent of, or acting in any capacity for, any of the Parties. The Parties and the Neutral accept that the Neutral (unless an employee of CEDR Solve) is acting as an independent contractor and not as agent or employee of CEDR Solve.

### **CEDR Solve**

- 4 CEDR Solve, in conjunction with the Neutral where appropriate, will make the necessary arrangements for the Executive Tribunal including, as necessary:
  - nominating, and obtaining the agreement of the Parties to, the Neutral;
  - drawing up the ET Agreement;
  - organising a suitable venue and dates;
  - organising exchange of the Summaries and Documents;
  - meeting with any or all of the representatives of the Parties (and the Neutral if he/she has been appointed), either together or separately, to discuss any matters or concerns relating to the Executive Tribunal; and
  - general administration in relation to the Executive Tribunal.
- 5 If there is any point on the conduct of the Executive Tribunal (including as to the nomination of the Neutral) upon which the Parties cannot agree within a reasonable time from the date of the notice initiating the Executive Tribunal ("the ADR notice"), CEDR Solve will, at the request of any Party, decide the issue for the Parties, having consulted with them.

### **Participants**

- 6 Each Party will state in the ET Agreement the names of:
- the executive that will be its Executive Tribunal panel member ("the Executive"). The Executive must have the necessary authority to settle the Dispute; and
  - any other person(s) (such as professional advisers, expert witnesses) that it intends will be present on its behalf at, and/or participate in, the Executive Tribunal.

Each Party, in signing the ET Agreement, will be deemed to be agreeing on behalf of both itself and all such persons that they agree to the confidentiality provisions of the Model Procedure.

### **Exchange of information**

- 7 Each Party will send to CEDR Solve at least two weeks before the Executive Tribunal, or such other date as may be agreed between the Parties, sufficient copies of:
- a concise summary ("the Summary") stating its case in the Dispute; and
  - all documents to which the Summary refers and any others to which the Party may want to refer in the Executive Tribunal ("the Documents"),
- which CEDR Solve will send on to the other Party(ies) and the Neutral.

In addition, each Party may send to the Neutral (through CEDR Solve) and/or bring to the Executive Tribunal further documentation which it wishes to disclose in confidence to the Neutral but not to any other Party, clearly stating in writing that such documentation is confidential to the Neutral and CEDR Solve.

- 8 The Parties should try, through CEDR Solve and/or the Neutral, to agree:
- the maximum number of pages of each Summary and of their Documents;
  - a joint set of documents from their respective Documents;
  - the order and length of their submissions (and replies, if any) to the Executive Tribunal panel;
  - the identity of witnesses and expert (if any) who will be participating in the presentation at the Executive Tribunal.

### **The Executive Tribunal**

- 9 The Executive Tribunal will take place at the place and time stated in the ET Agreement.
- 10 The procedure at the Executive Tribunal will be determined by the Neutral, after consultation with the Executives. The usual procedure will be:
- each of the Parties will make a presentation of its case to a panel consisting of the Executives and the Neutral. Each presentation will be in the order, and not exceed the length, set out in the ET Agreement;
  - each Party may reply to any of the points made in the other Party's presentation(s). The replies will be in the same order as the presentations and will not exceed the length set out in the ET Agreement;
  - presentations and replies may be made in any form and by any of the participants (see paragraph 6 above) and may be supported by any of the Documents;
  - the Neutral and the Executives may ask questions to clarify points raised in the presentation but otherwise the presentations and the replies will not be interrupted;

- as soon as possible after the conclusion of the presentations, the Executives will meet and attempt to negotiate a settlement of the Dispute. The Executives will invite the Neutral to be involved in, and facilitate, the negotiations; and
- no person other than the Executives and the Neutral may attend the negotiations without the consent of all the Executives.

11 No formal record or transcript of the Executive Tribunal will be made.

12 If the Parties are unable to reach a settlement in the negotiations at the Executive Tribunal, and only if all the Executives so request and the Neutral agrees, the Neutral will produce for the Parties a non-binding written recommendation on terms of settlement. This will not attempt to anticipate what a court might order but will set out what the Neutral suggests are appropriate settlement terms in all of the circumstances.

### **Settlement agreement**

13 Any settlement reached in the Executive Tribunal will not be legally binding until it has been reduced to writing and signed by, or on behalf of, the Parties.

### **Termination**

14 Any of the Parties may withdraw from the Executive Tribunal at any time and shall immediately inform the Neutral and the other Parties in writing. The Executive Tribunal will terminate when:

- a Party withdraws from the Executive Tribunal; or
- a written settlement agreement is concluded; or
- the Neutral decides that continuing the Executive Tribunal is unlikely to result in a settlement; or
- the Neutral decides he should retire for any of the reasons in the Code of Conduct.

### **Stay of proceedings**

15 Any litigation or arbitration in relation to the Dispute may be commenced or continued notwithstanding the Executive Tribunal unless the Parties agree otherwise or a court so orders.

### **Confidentiality etc.**

16 Every person involved in the Executive Tribunal will keep confidential and not use for any collateral or ulterior purpose:

- the fact that the Executive Tribunal is to take place or has taken place, other than to inform a court dealing with any litigation relating to the Dispute of that fact; and
- all information, (whether given orally, in writing or otherwise), arising out of, or in connection with, the Executive Tribunal including the fact of any settlement and its terms.

17 All information (whether oral or in the form of documents, tapes, computer discs etc.) arising out of, or in connection with, the Executive Tribunal will be without prejudice, privileged and not be admissible as evidence or disclosable in any current or subsequent litigation or other proceedings whatsoever. This does not apply to any information which would in any event have been admissible or disclosable in any such proceedings.

18 None of the Parties to the ET Agreement will call the Neutral or CEDR Solve (or any employee, consultant, officer or representative of CEDR Solve) as a witness, consultant, arbitrator or expert in any litigation or other proceedings whatsoever. The Neutral and CEDR Solve will not act voluntarily in any such capacity without the written agreement of all the Parties.

**Fees, expenses and costs**

19 CEDR Solve's fees (which include the Neutral's fees) and the other expenses of the Executive Tribunal will be borne equally by the Parties. Payment of these fees and expenses will be made to CEDR Solve in accordance with its fee schedule and terms and conditions of business.

20 Each Party will bear its own costs and expenses of its participation in the Executive Tribunal.

**Exclusion of liability**

21 Neither the Neutral (including any Assistant Neutral and/or any Neutral's Adviser) nor CEDR Solve (including any employee and/or agent of CEDR Solve) shall be liable to any of the Parties for any act or omission in connection with their services provided by them in, or in relation to, the Executive Tribunal, unless the act or omission is shown to have been in bad faith.

## **Guidance notes**

The paragraph numbers and headings in these notes refer to the paragraphs and headings in the Model Procedure.

The same terms ("the Parties" etc.) are used in the Model Procedure and the Model Agreement.

### **Executive Tribunal Agreement - paragraph 1**

If CEDR Solve is asked to do so by a party wishing to initiate an Executive Tribunal, it will approach the other Party(ies) to a dispute to seek to persuade it/them to participate.

Ideally representatives of the Parties (and the Neutral if he/she has been identified) and CEDR Solve (or whatever other ADR body is involved, if any) should meet to discuss and finalise the terms of the ET Agreement.

Alternatively, the party who has taken the initiative in proposing the Executive Tribunal may wish to send a draft agreement based on the CEDR Model ET Agreement to the other Party(ies).

### **Neutral - paragraphs 2-3**

The success of the Executive Tribunal will, to a large extent, depend on the skill of the Neutral. CEDR Solve believes it is very important for the Neutral to have had specific training and experience. CEDR Solve has its own body of trained and experienced Neutrals and will assist the Parties in identifying and appointing a suitable Neutral.

In some cases it may be useful to have more than one Neutral, or to have an independent expert who can advise the Neutral on technical issues - "the Neutral's Adviser". All should sign the ET Agreement which should be amended as appropriate.

It is CEDR Solve's practice, as part of its Neutral training programme, to have an Assistant Neutral ("the Assistant Neutral") attend most Executive Tribunals. The Assistant Neutral signs the ET Agreement and falls within the definition "the Neutral" in the Model Procedure and the ET Agreement.

It is advisable, but not essential, to involve the Neutral in any preliminary meeting between the Parties.

### **CEDR Solve paragraphs 4-5**

CEDR's Code of Conduct covers such points as the Neutral's duty of confidentiality, impartiality and avoiding conflicts of interest.

### **Participants paragraph 6**

It is essential that the Executives are sufficiently senior and have the necessary authority from the respective Parties to settle the dispute without having to refer to anybody else.

### **Exchange of information - paragraphs 7-8**

Documentation which a Party wants the Neutral to keep confidential from the other Party(ies) (e.g. a counsel's opinion, an expert report not yet exchanged) must be clearly marked as such. It can be disclosed by the Party before or during the Executive Tribunal. It will not be disclosed by the Neutral or CEDR Solve without the express consent of the Party.

One of the advantages of ADR is that it can avoid the often excessive disclosure (including witness statements) of litigation and arbitration. The Documents should be kept to the minimum necessary to understand a Party's case and to give the Neutral a good grasp of the issues. The Summaries should be similarly brief.

### **The Executive Tribunal - paragraphs 9-12**

Professional advisers, particularly lawyers, can and usually do attend the Executive Tribunal. The lead role in the negotiations is usually taken by the Executives because the commercial interests of the Parties will normally take the negotiations beyond strict legal issues. The advisers, however, can play an important role in the exchange of information, in the presentation, in advising their clients on the legal implication of a settlement and in drawing up the settlement agreement.

The intention of paragraph 12 is that the Neutral will cease to play an entirely facilitative role only if the negotiations in the Executive Tribunal are deadlocked. Giving a settlement recommendation may be perceived by a Party as undermining the Neutral's neutrality and for this reason the Neutral may not agree to this course of action. Any recommendation will be without prejudice and will not be binding.

### **Settlement agreement - paragraph 13**

If no agreement is reached, it is nonetheless open to the Parties to adjourn the Executive Tribunal to another time and place. Experience shows that even where no agreement is reached during the Executive Tribunal itself, the Parties will often reach a settlement shortly after, as a result of the progress made during the Executive Tribunal.

### **Stay of proceedings - paragraph 15**

Although a stay may engender a better climate for settlement, it is not essential that any proceedings relating to the Dispute be stayed. If they are stayed, it is the responsibility of the Parties and their legal advisers to consider and, if necessary, deal with the effect of any stay on limitation periods. Suggested wording for a stay, which can be incorporated in the ET Agreement, is:

*"No litigation or arbitration in relation to the Dispute is to be commenced [Any existing litigation or arbitration in relation to the Dispute is to be stayed] from the date of this agreement until the termination of the Executive Tribunal."*

### **Confidentiality - paragraphs 16-18**

Every person involved in the Executive Tribunal will keep confidential and not use for any collateral or ulterior purpose:

- the fact that the Executive Tribunal is to take place or has taken place, other than to inform a court dealing with any litigation relating to the Dispute of that fact; and
- all information (whether given orally, in writing or otherwise) arising out of, or in connection with, the Executive Tribunal, including the fact of any settlement and its terms.

### **Fees, expenses and costs - paragraphs 19-20**

The usual arrangement is for the Parties to share equally the fees and expenses of the procedure, but other arrangements are possible. A party to a dispute which is reluctant to participate in an Executive Tribunal may be persuaded to participate if the other party(ies) agree to bear that party's expenses.

### **International disputes - language and governing law/jurisdiction**

The Model Agreement is designed for domestic disputes but can be easily adapted for international cross-border disputes by the addition of the following paragraphs into the ET Agreement:

#### *"Language*

*The language of the Executive Tribunal will be [English]. Any Party producing Documents or participating in the Executive Tribunal in any other language will provide the necessary translations and interpretation facilities.*

#### *Governing Law and Jurisdiction*

*This Agreement shall be governed by, construed and take effect in accordance with [English] law.*

*The Courts of [England] shall have exclusive jurisdiction to settle any claim, dispute or matter of difference which may arise out of or in connection with the Executive Tribunal."*

Where the law is not English or the jurisdiction not England, the ET Agreement may need to be amended to ensure the structure, rights and obligations necessary for an Executive Tribunal are applicable.