

## SCHEDULE 4

## MEDIATION AND ADJUDICATION

## Section 24

*Mediation in financial services disputes*

1. (1) A “**financial services dispute**” is a dispute between —
- (a) an individual or body corporate where that body corporate is a trustee or manager of a self-invested personal pension scheme (“**the complainant**”); and<sup>254</sup>
  - (b) a person who, in or from the Island, has supplied the complainant with financial services (“**the supplier**”),
- where the dispute relates to those services.
- (2) A financial services dispute may be referred to the Isle of Man Office of Fair Trading (“**OFT**”) by the submission of a completed complaint form by the complainant.
- (3) The OFT shall seek to mediate between the parties to a referred financial services dispute by —
- (a) inquiring into the circumstances and cause of the dispute; and
  - (b) offering the parties to the dispute its assistance (which may be by way of mediation or arbitration or by any other means) with a view to bringing about a settlement.
- (4) The OFT may by order amend sub-paragraph (1)(a) to include bodies corporate in such circumstances as may be prescribed.
- (5) This paragraph does not apply in relation to a payment services dispute (see paragraph 1A).<sup>255</sup>

*Mediation in payment service disputes*<sup>256</sup>

- 1A. (1) A “**payment services dispute**” is a dispute, relating to a payment service, between —
- (a) a payment service user who falls within subparagraph (4) or other interested party (“**the complainant**”); and<sup>257</sup>
  - (b) a payment service provider.
- (2) A payment services dispute may be referred to the OFT by the submission to that office of a completed complaint form by the complainant.
- (3) The OFT must seek to mediate between the parties to a payment services dispute which has been referred to it by —
- (a) inquiring into the circumstances and cause of the dispute; and

- (b) offering its assistance to the parties to the dispute (whether by way of mediation or arbitration or any other means) with a view to bringing about a settlement.<sup>258</sup>
- (4) A complainant falls within this subparagraph if (but only if) the complainant is —
  - (a) a consumer within the meaning of the Payment Services Directive; or
  - (b) an individual or a body corporate that is a trustee or manager of a self-invested personal pension scheme.<sup>259</sup>
- (5) The OFT may by order amend subparagraph (4).<sup>260</sup>

*Cases where mediation not available or may not proceed*

2. (1) The OFT may decline or cease to act under paragraph 1(3) or 1A(3) where it appears to it that any of the following conditions is satisfied —
- (a) the complainant has not suffered financial loss, material distress or material inconvenience;
  - (b) the complainant is not directly affected by the subject matter of the complaint;
  - (c) the supplier has already made an offer of compensation which is fair and reasonable in the circumstances;
  - (d) the dispute has been the subject of a decision on the merits in proceedings in any court;
  - (e) the dispute has been properly considered under any enactment or arrangement providing for the resolution of disputes or the investigation of complaints;
  - (f) the dispute would more suitably be dealt with by a court or under an enactment or arrangement referred to in sub-paragraph (e);
  - (g) the dispute relates to the legitimate exercise of the supplier's commercial judgment;
  - (h) the dispute relates to investment performance, except to the extent that the complainant alleges that the supplier has been negligent;
  - (i) the complaint is frivolous, vexatious or is an abuse of the adjudication process;
  - (j) the issues raised by the complaint are such that no reasonable benefit would arise from adjudication;
  - (k) the complainant has not sought compensation under the internal complaints procedure of the supplier or has not exhausted that procedure;
  - (l) that such a decision is consistent with a previous decision by an adjudicator to decline a referred complaint;

(m) the manner in which the complaint is made or pursued by the complainant is abusive or offensive.<sup>261</sup>

(2) The OFT shall decline or cease to act under paragraph 1(3) or 1A(3) where it appears to it that the dispute was referred to it —

(a) more than 2 years after the act or omission giving rise to it came, or ought reasonably have come, to the knowledge of the complainant; and

(b) in any case, more than 6 years after that act or omission.<sup>262</sup>

(3) Where, in any proceedings arising out of a financial services dispute, it appears to the High Court that the OFT is acting under paragraph 1(3) or 1A(3) in relation to the dispute, the Court may stay the proceedings on such terms as it thinks fit.<sup>263</sup>

(4) If it appears to the Treasury that other suitable arrangements have been made for the resolution of disputes with suppliers of financial services of any class or description, the Treasury may by order direct that this Schedule shall not apply to disputes which relate solely or mainly to services of that class or description.

#### *Referral to adjudication*

3. (1) Where —

(a) the OFT has taken any action under paragraph 1(3) or 1A(3) in relation to a financial services dispute; and<sup>264</sup>

(b) it appears to it that the dispute remains unresolved,

the OFT shall, subject to paragraph 8, on the written application of the complainant, refer the dispute to an adjudicator for investigation and adjudication.

(2) The senior adjudicator (see paragraph 4(1)) shall nominate the panel member who shall conduct the adjudication in any case.

(3) Where, in proceedings arising out of a financial services dispute, it appears to the High Court that the dispute has been or may be referred to an adjudicator under sub-paragraph (1), the Court may give such directions as to the conduct of the proceedings, or of any action, by the adjudicator, as it thinks appropriate.

#### *Adjudicators*

4. (1) The Appointments Commission shall appoint and maintain a panel of not more than 8 persons (one of whom shall be designated “**the senior adjudicator**”) appearing to it to be qualified by experience or otherwise to act under this Schedule in relation to financial services disputes or payment service disputes.<sup>265</sup>

(2) But a person who is at that time engaged or employed, or has at any time within the 3 years preceding that time been engaged or employed, in any business consisting of or including the supply of financial services of the same kind as that to

which the dispute relates shall not be qualified to act as an adjudicator in respect of such a dispute.

- (3) The OFT shall make such arrangements —
  - (a) as the Treasury may approve for the payment of remuneration and allowances to adjudicators who are acting under this Schedule; and
  - (b) as the Public Services Commission may approve for the provision of staff to assist such adjudicators.<sup>266</sup>

(4) The OFT may by order amend the maximum number of members of the panel specified in sub-paragraph (1).

#### *Adjudication*

5. (1) The adjudicator who is nominated under paragraph 3(2) shall investigate and determine the dispute and shall comply with directions (if any) made by the High Court under paragraph 3(3).

- (2) The Treasury may make rules with respect to —
  - (a) the practice and procedure which is to be adopted in connection with the reference and investigation;
  - (b) time limits for taking any step or undertaking any procedure in the course of an adjudication;
  - (c) fees to be paid by the complainant and the supplier.

(3) Subject to sub-paragraph (1) and to any provision made by rules under sub-paragraph (2), the procedure for conducting such an investigation shall be such as the adjudicator considers appropriate in the circumstances of the case.

(4) For the purpose of investigating and determining a financial services dispute or a payment services dispute an adjudicator to whom it is referred shall give every party to the dispute an opportunity —

- (a) to make representations with respect to the dispute; and
- (b) to comment on any representations so made by any other party.<sup>267</sup>

#### *Determination and award by adjudicator*

6. (1) The adjudicator may, if satisfied that the complainant has suffered loss or damage by reason of any wrongful or improper act or omission by the supplier, make such award within sub-paragraph (2) as the adjudicator considers proper.

(2) An award under sub-paragraph (1) may comprise either or both of the following —

- (a) a direction to the supplier, within such time as is specified in the award, to take such steps as the adjudicator considers appropriate to remedy the act or omission and are so specified, and

- (b) an award of compensation, to be paid by the supplier to the complainant, of such amount (not exceeding the applicable amount) as the adjudicator considers just and equitable and is specified in the award.<sup>268</sup>

(2A) In sub-paragraph (2) “the applicable amount” is —

- (a) in respect of an act or omission occurring on or after the date of the coming into operation of this Schedule but before 1 April 2012, £100,000; and
- (b) in respect of an act or omission occurring on or after 1 April 2012, £150,000.<sup>269</sup>

(3) Compensation under sub-paragraph (2)(b) may consist of or include an amount specified in the award as payable where a direction under sub-paragraph (2)(a) is not complied with.

(4) Subject to sub-paragraph (6), the determination by an adjudicator of a dispute, and any award made by the adjudicator under sub-paragraph (1), shall be final and binding on the complainant and the supplier but if an application has been made for a review under paragraph 7, the determination and award shall not be final and binding unless confirmed under paragraph 7(3).

(5) An award within sub-paragraph (2)(b) shall be enforceable as if it were an execution issued by the High Court.

(6) An appeal on a point of law shall lie to the High Court from the determination or award of an adjudicator at the instance of the complainant or the supplier.

#### *Review by senior adjudicator*

7. (1) The complainant or the supplier may by written application made within 21 days of a determination of a dispute or any award made by an adjudicator under paragraph 6(1) request that the senior adjudicator carry out a review of the determination and award.

(2) The review by the senior adjudicator shall be informal and such procedure may be adopted as the senior adjudicator considers to be appropriate but the procedure must afford a fair and equal opportunity to the parties involved.

- (3) On completion of a review the senior adjudicator may —
  - (a) confirm the determination or award in question; or
  - (b) make a new determination or award in place of it.

(4) Subject to sub-paragraph (6), the determination by the senior adjudicator of a dispute, and any award made by the senior adjudicator under sub-paragraph (3), shall be final and binding on the complainant and the supplier.

(5) An award under sub-paragraph (3) shall be enforceable as if it were an execution issued by the High Court.

(6) An appeal on a point of law shall lie to the High Court from a decision, determination or award of the senior adjudicator at the instance of the complainant or the supplier.

(7) The Treasury may make rules for the purpose of regulating and prescribing the practice and procedure to be followed by the senior adjudicator in conducting a review under this paragraph.

*Cases where adjudication not available or may not proceed*

8. (1) The OFT shall not refer a financial services dispute or a payment services dispute to adjudication where it appears to it that any of the conditions specified in paragraph 2(1) is satisfied.<sup>270</sup>

(2) The OFT shall not refer a financial services dispute or a payment services dispute to adjudication where proceedings arising out of the dispute have been commenced in the High Court unless the Court —

- (a) gives leave (which may be given on such terms as it thinks fit), or
- (b) stays the proceedings under sub-paragraph (3)(a).<sup>271</sup>

(3) Where, in proceedings arising out of a financial services dispute or a payment services dispute, it appears to the High Court that the dispute has been or may be referred to an adjudicator, the Court may —

- (a) stay the proceedings on such terms as it thinks fit;
- (b) cancel the reference, or direct that no reference be made, as the case may be.<sup>272</sup>

(4) An adjudicator may, at any time before determining a dispute —

- (a) cease to investigate it; or
- (b) decline to determine it,

where it appears to the adjudicator that any of the conditions specified in paragraph 2(1) is satisfied.

*Investigation and adjudication: supplemental powers*

9. (1) For the purposes of an investigation into a financial services dispute or a payment services dispute, an adjudicator may require —

- (a) the supplier of the financial services or the payment service provider in question;<sup>273</sup>
- (b) the complainant; and
- (c) any other person who, in the adjudicator's opinion is able to furnish information or produce documents relevant to the investigation,

to furnish any such information or produce any such documents.<sup>274</sup>

(2) For the purposes of any such investigation an adjudicator shall have the same powers as a court of summary jurisdiction in respect of the attendance and examination of witnesses (including the administration of oaths and affirmations) and in respect of the production of documents.

(3) No person shall be compelled for the purposes of any such investigation to give any evidence or produce any document which that person could not be compelled to give or produce in civil proceedings before the High Court.

(4) If any person without lawful excuse refuses to comply with any summons issued by an adjudicator requiring that person to give evidence or to produce documents, the adjudicator may certify the refusal to a court of summary jurisdiction, which shall inquire into the matter and, after hearing any witnesses who may be produced and any statement that may be offered in defence, may deal with the person in accordance with section 102 of the *Summary Jurisdiction Act 1989* as if that person had disobeyed an order mentioned in that section.

#### *Supplementary*

10. (1) Subject to paragraph 8(3), nothing in this Schedule affects any right of action or liability of any party to a financial services dispute or a payment services dispute but no person may recover both damages in proceedings to enforce any such right or liability and compensation under this Schedule in respect of the same loss or damage.<sup>275</sup>

(2) The *Arbitration Act 1976* shall not apply to any investigation, determination or award under this Schedule.

(3) If it appears to the Treasury expedient to do so having regards to any change in the value of money, the Treasury may by order amend paragraph 6(2A).

An order under this sub-paragraph may include any transitional or consequential provision that appears to the Treasury to be necessary or expedient.<sup>276</sup>

#### *Notice of mediation to customers*

11. (1) The OFT may by regulations make provision requiring financial services suppliers or payment service providers to notify their customers of the availability of mediation and adjudication under this Schedule in such manner and at such times as may be specified in the regulations.<sup>277</sup>

(2) Any person who contravenes regulations made under subparagraph (1) is guilty of an offence.<sup>278</sup>

#### *Schedule 4: definitions*

12. In this Schedule —

“**financial services**” means such regulated activity, insurance business, credit business, pensions business or other financial business as is specified in an order made by the OFT;



“**financial services dispute**” has the meaning given by paragraph 1;

“**the Payment Services Directive**” means the Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market [OJEU No L 319, 5.12.2007, p. 1] as from time to time amended;<sup>279</sup>

“**payment services dispute**” has the meaning given by paragraph 1A;<sup>280</sup>

and references to payment services, payment service providers and payment service users are to be construed in accordance with the Payment Services Directive.<sup>281</sup>