

**Form of Agreement  
for Consulting  
Engineering Services  
July 2003**

**Conditions of Agreement**

**Project:**

*Name*

**Client:**

*Name*

**Consulting Engineer:**

*Name*



## **PRODUCED BY:**

### **CONSULTING ENGINEERS SOUTH AFRICA (CESA)**

CESA is a voluntary organisation of individual consulting firms formed to uphold standards and advance the usefulness of Consulting Engineers by promoting the interests of its members and their Clients.

It is a focal point for contact between Consulting Engineers and allied disciplines, the public, government agencies, private enterprise, professional and government organisations.

CESA publishes a wide variety of documents regularly used by the profession. These include conditions of engagement for various Services, forms of Agreement, an annual directory of member firms, and a variety of guidelines, advisory notes and reports.

The Chief Executive Officer and staff of CESA are available at all times to offer advice to member firms and Client-bodies, and CESA serves as a centre for general information about the profession:

P O Box 68482  
Bryanston 2021  
Tel.: (011) 463 2022  
Fax: (011) 463 7383  
e-mail: [general@saace.co.za](mailto:general@saace.co.za)

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*Issued – July 2003*

# CONSULTING ENGINEERS SOUTH AFRICA (CESA)

## CONDITIONS OF AGREEMENT FOR CONSULTING ENGINEERING SERVICES

### EXPLANATORY NOTES

This Form of **Agreement** has been developed by CESA in response to the needs of **Consulting Engineers** and their **Clients** in respect of the wide range of **services** being handled by members of CESA. This Form replaces all CESA's existing Model Forms of **Agreement** in respect of new Agreements.

The Form of **Agreement** is made up of the following components: -

#### **Agreement and Specific Provisions**

The formal document which will be completed and signed by the two **parties**. Any variations to the **Conditions of Agreement** may be recorded and incorporated into the **Specific Provisions**.

#### **Conditions of Agreement**

The standard clauses defining the responsibilities of the **parties** on matters, which would normally be applicable to all forms of appointment.

#### **Appendix A: Guideline Scope of Services and Remuneration**

The **Client** and **Consulting Engineer** will specify the scope of the **services** which the **Consulting Engineer** has to provide for the **project**, or portion of a **project** and will define the remuneration, or the method of determining the remuneration, to be paid to the **Consulting Engineer** for providing the **services**.

It is recommended that **Appendix A** be created specifically for each **project**, but the Guideline Scope of **Services** and Tariff of Fees for Persons Registered in terms of the Engineering Profession Act 2000 (Act No. 46 of 2000) is provided for standard conditions. This guideline document may be used as is, or suitably amended to suit particular requirements.

This document is produced in a format that allows the sections required to form the **Client/Consulting Engineer Agreement** for a **project** to be bound in a single **project** specific document. Any additional pages required should be attached to the relevant section of the document.

All changes or variations to the standard conditions of this document required for a **project** should be dealt with in the **Specific Provisions** and not by altering the standard wording.

Words or expressions in bold font are defined in Clause 1.1 of the **Conditions of Agreement**.

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# CONDITIONS OF AGREEMENT

## 1. DEFINITIONS & INTERPRETATION

### 1.1. Definitions

The following words and expressions shall have the meanings assigned to them except where the context requires otherwise: -

- (1) "**Agreement**" means this Form of **Agreement** for Consulting Engineering **Services**, including the **Agreement** and **Specific Provisions**, the **Conditions of Agreement**, together with any appendices thereto.
- (2) "**Client**" means the contracting party named in the **Agreement**, who employs the **Consulting Engineer**.
- (3) "**Consulting Engineer**" means the contracting party named in the **Agreement**, who is employed by the **Client** to perform the **services**.
- (4) "**Contract**" means the agreement or agreements between the **Client**, or his designated representative, and the contractor(s) for the execution of all or a portion of the **works** by the contractor(s).
- (5) "**Contract Documents**" means all documents relating to the **works** including those issued by or through the **Consulting Engineer** or the **Lead Consultant**, including, but not limited to, the contract drawings, bills of quantities, specifications and schedules and any amendments thereto.
- (6) "**Contractor**" means any person or legal person under contract to the **Client** to execute the **works** or part thereof and includes any sub-contractor to whom any part of the **works** has been sub-let by a **contractor**.
- (7) "**Cost of the works**" means the total amount, exclusive of value added tax, certified or which would be certified for payment to contractors (irrespective of who actually carries out the **works**) in respect of the **works** designed, specified or administered by the **Consulting Engineer**, before deduction of liquidated damages or penalties, including –
  - (a) a pro-rata portion of all preliminary and general items applicable to the **works**;  
and
  - (b) the costs of new materials, goods or equipment, or a fair evaluation, of such material, goods or equipment as if new whether supplied new or otherwise by, or to, the **Client** and including the cost or a fair evaluation of the cost of installation (the sourcing, inspection and testing of such will comprise additional **services** by the **Consulting Engineer**);

- (8) "**day**" means the period between any one midnight and the next.
- (9) "**month**" means a period of one month according to the Gregorian calendar commencing with any day of the month.
- (10) "**party**" and "**parties**" means the **Client** and the **Consulting Engineer** and "**third party**" means any other person or entity, as the context requires.
- (11) "**Principal Agent or Lead Consultant**" means the party appointed by the **Client** to take overall responsibility for the administration of the **project**, including the work of other **Consulting Engineers**.
- (12) "**Project**" means the **project** named in the **Agreement** for which the **services** are to be provided.
- (13) "**Services**" means the service or services to be performed by the **Consulting Engineer** in accordance with the **Agreement** and comprises Normal Services, Additional Services and Exceptional Services.
- (14) "**Stage**" means either the Report Stage, the Preliminary Design Stage, the Design and Tender Stage, the Construction Stage or any other Stage of the **services** to be performed by the **Consulting Engineer**, as described in this **Agreement**.
- (15) "**Tax**" means Value Added Tax, Sales Tax or any other statutory tax or levy applicable to this **Agreement**.
- (16) "**Works**" means the activities on a **project** for which contractors are under contract to the **Client** to perform or is intended to be performed, including the supply of goods and equipment.

## 1.2. Interpretation

- (1) The headings in the **Agreement** shall not be used in its interpretation.
- (2) The singular includes the plural; the masculine includes the feminine and vice versa where the context requires.
- (3) If there is conflict between any of the provisions of the **Agreement** then the following order of priority shall apply in the interpretation of the **parties'** obligations: -

Additional documents specified in the **Specific Provisions**  
**Appendix A**  
**Specific Provisions**  
**Conditions of Agreement**

- (4) All monetary amounts exclude **tax**.
- (5) Words or expressions in bold font are defined in Clause 1.1.

## 2. OBLIGATIONS OF THE CONSULTING ENGINEER

### 2.1. Duty of Care

The **Consulting Engineer** shall exercise reasonable professional skill, care and diligence in the performance of the **services**.

### 2.2. Exercise of Authority

Where the **services** include the exercise of powers to certify, decide or exercise discretion in terms of a **contract** between the **Client** and any **third party**, then the **Consulting Engineer** shall act in accordance with that **contract**, but as an independent professional acting with reasonable skill, care and diligence.

### 2.3. Designated Representative

The **Consulting Engineer** shall designate in writing a person to act as his representative and such person shall have complete authority to receive instructions and to give information to the **Client** on behalf of the **Consulting Engineer**.

### 2.4. Co-operation with Others

The **Consulting Engineer** shall perform the **services** in conjunction with any other **Consulting Engineers** or specialists who are providing **services** to the **project** and he may make recommendations to the **Client** in respect of such appointments for certain parts of the **project**. The **Consulting Engineer** shall only be responsible for his own performance and the performance of his sub-Consulting Engineers or specialists who have specifically been appointed by the **Consulting Engineer** to assist him with the **services**.

### 2.5. Notice of Change

On becoming aware of any matter which shall materially change or has changed the scope, cost or timing of the **services** or the **works**, the **Consulting Engineer** shall give notice to the **Client**, save that the **Consulting Engineer** is empowered to make minor changes or variations within the overall programme or budget and within such parameters as are defined by the **Client**, provided that such changes are reported timeously to the **Client**.

### 2.6. Construction Stage Services

The **Consulting Engineer** will monitor any construction to the extent described in **Appendix A**.

The **Consulting Engineer** cannot ensure the performance of the **contractor** nor guarantee against any failure by the **Contractor** to perform his work in accordance with the **contract**. The provision of construction stage **services** creates no contractual relationships between the **Consulting Engineer** and the **contractor** and the **Consulting Engineer** has no liability to the **contractor** in any way arising out of such **services**.



### **3. OBLIGATIONS OF THE CLIENT**

#### **3.1. Information**

The **Client** shall timeously provide to the **Consulting Engineer**, free of cost, all information that may be reasonably required for the provision of the **services**. The **Consulting Engineer** shall be entitled to rely on the accuracy and completeness of such information furnished by or on behalf of the **Client**.

#### **3.2. Decisions**

The **Client** shall give his decision on all matters properly referred to him by the **Consulting Engineer** in writing within a reasonable time so as not to delay the **services** or the **contract**.

#### **3.3. Assistance**

The **Client** shall co-operate with the **Consulting Engineer** and shall not interfere with or obstruct the proper performance of the **services**. The **Client** shall as soon as reasonably possible:

- (1) Authorise the **Consulting Engineer** to act as his agent as may be necessary for the performance of the **services**.
- (2) Provide all available maps, plans, record drawings and other relevant information.
- (3) Procure the **Consulting Engineer**'s ready access to the **project** site.
- (4) Obtain all approvals, licences and permits from governmental, regional and municipal authorities having jurisdiction over the **project**, unless otherwise stated in **Appendix A**.
- (5) Designate in writing a person to act with his complete authority to give instructions for and to receive information on his behalf.

#### **3.4. Services of Others**

The **Client** shall at his cost engage such other Consulting Engineers and specialists as may be necessary for the proper completion of the **project**. The **Consulting Engineer** shall co-operate with such Consulting Engineers and specialists, but shall not be responsible for them or for their performance.

#### **3.5. Notice of Change**

On becoming aware of any matter which materially shall change or has changed the scope, cost or timing of the **services** or the **works**, or on becoming aware of any defect or deficiencies in the **services** or the **works**, the **Client** shall give appropriate notice to the **Consulting Engineer**.

### 3.6. Issue of Instructions

Where the **Consulting Engineer** is required to administer the work of others or of any **contract** on behalf of the **Client**, then the **Client** shall only issue instructions related to such work or **contract** through the **Consulting Engineer**. Further, the **Client** shall not enter into any **agreement** or **contract** which describes the duties of the **Consulting Engineer** or imposes obligations on him without first obtaining the **Consulting Engineer**'s written **agreement** thereto.

## 4. DURATION OF AGREEMENT

### 4.1. Commencement

The appointment of the **Consulting Engineer** shall commence from the date of the **agreement** or from the time when the **Consulting Engineer** began to perform any of the **services** provided for in this **agreement**, whichever is the earlier.

### 4.2. Completion

Unless terminated under one of the other clauses, the appointment of the **Consulting Engineer** shall be completed when the **Consulting Engineer** submits the final report or when he renders the closing account, whichever is the later.

### 4.3. Force Majeure

If circumstances arise for which the **Consulting Engineer** is not responsible and which make it impractical or impossible for the **Consulting Engineer** to perform the **services** in the normal manner as contemplated by the **parties** in accordance with the agreement in whole or in part, then the **Consulting Engineer** shall promptly notify the **Client**.

If in those circumstances certain **services** have to be suspended, the time for their completion shall be extended by the extent of the delay plus a reasonable period for their resumption or, if the speed of performing certain **services** has to be reduced, the time for their completion shall be extended as may be necessary due to the circumstances. The **Client** shall pay to the **Consulting Engineer** such additional fees and expenses as may be agreed as appropriate to the work undertaken by the **Consulting Engineer** in providing the necessary additional **services**.

### 4.4. Termination by the Client

The **Client** may suspend all or part of the **Services** or terminate the **agreement** by notice to the **Consulting Engineer** who shall immediately make arrangements to stop the **services** and minimise further expenditure.

#### **4.5. Termination by the Consulting Engineer**

The **Consulting Engineer** may by notice of at least 30 **days** terminate the **agreement**, or at his discretion and without prejudice to the right to terminate, may suspend or continue suspension of performance of the whole or part of the **services**:

- (1) when, 30 **days** after the due date for payment of any invoices, the **Consulting Engineer** has not received payment of that part of it which has not by that time been contested in writing by the **Client**, or
- (2) when the **services** have been suspended under either Clause 4.3 or 4.4 and the period of suspension has exceeded 6 **months**, or it is clear to the **Consulting Engineer** that it will be impossible or impractical to resume the suspended **services** before the period of suspension has exceeded 6 **months**, or
- (3) if the **Client** is in material breach of a term of the **agreement** and fails to rectify such breach within 14 **days** of the receipt of written notice requiring him to do so.

#### **4.6. Payment due upon Suspension or Termination**

Should instructions having been given by the **Client** to the **Consulting Engineer** to proceed with any of the stages of **services** and the whole or part of the **works** is cancelled or abandoned or postponed for a period of more than six **months**, the **Consulting Engineer** shall be remunerated for **services** performed, plus a surcharge of one tenth of the full fee which would have been payable to the **Consulting Engineer** had his **services** been completed in terms of his engagement.

#### **4.7. Rights and Liabilities of the Parties**

Completion, suspension or termination of the **agreement** shall not prejudice or affect the accrued rights or liabilities of the **parties**.

### **5. REMUNERATION – GENERAL**

#### **5.1. Payment**

The **Client** shall remunerate the **Consulting Engineer** for **services** rendered in accordance with the details stated in the **Specific Provisions** which form part of this Form of **Agreement** and shall further pay for any additional or exceptional **services** in accordance with the principles contained in the **Specific Provisions** or at rates and prices agreed between the **Client** and the **Consulting Engineer**. Where a payment schedule has not been agreed then the **Consulting Engineer** will be entitled to render interim monthly invoices, based on progress, throughout the duration of the **services**.

## 5.2. Time for Payment

Amounts due to the **Consulting Engineer** shall be paid in full on the agreed dates or within thirty (30) **days** of the date of issue of any invoice. If the **Consulting Engineer** does not receive payment by the time stated then the **Consulting Engineer** shall be paid interest at the prevailing prime overdraft rate of the **Consulting Engineer's** bank plus 2 percentage points per annum compounded monthly calculated from the due date of payment. A certificate from a duly appointed official of the **Consulting Engineer's** bank shall be prima facie proof of the overdraft rate charged by such bank.

## 5.3. Disputed Invoices

If any item or part of an item in an invoice submitted by the **Consulting Engineer** is disputed by the **Client**, the **Client** shall give notice before the due date of payment with reasons, but shall not delay payment on the remainder of the invoice. Clause 5.2 shall apply to contested amounts which are finally determined to be payable to the **Consulting Engineer**. Where the **Client** inadvertently overpays the **Consulting Engineer** then the **Consulting Engineer** shall refund excess amount on the same basis as in Clauses 5.2 and 5.3.

## 5.4. Reimbursable Expenses

All expenses necessarily incurred by the **Consulting Engineer** in connection with the **services** shall be reimbursed on a monthly basis as an additional charge unless specifically incorporated in the fees and expenses set out in the **Specific Provisions**.

## 5.5. Independent Audit

In the case of **services** carried out on a time charge basis and for all other directly reimbursable expenses the **Consulting Engineer** shall maintain records which clearly identify such time and expenses and shall retain such records for a period of 12 **months** after the completion or termination of the **services**. Within this period the **Client** may, on not less than 14 **days** notice, require that a reputable and independent firm of accountants, nominated by the **Client** and at the **Client's** expense, audit any such time and expenses claimed by the **Consulting Engineer** by attending during normal working hours at the office where the records are maintained.

## 6. LIABILITY AND INSURANCE

### 6.1. Liability of the Consulting Engineer

The **Consulting Engineer** shall only be liable to pay compensation to the **Client** arising out of or in connection with the **agreement** if a breach of Clause 2.1 is established against him.

### 6.2. Liability of the Client

The **Client** shall be liable to the **Consulting Engineer** arising out of or in connection with this **agreement** if a breach of an obligation in terms of this **agreement** is established. The **Consulting Engineer** shall have no separate delictual right of action against the **Client**.

### 6.3. Compensation

If it is established that either **party** is liable to the other, compensation shall be payable only on the following terms: -

- (1) Such compensation shall be limited to the amount of reasonably foreseeable loss and damage suffered as a result of such breach.
- (2) The compensation payable by either **party** shall be reduced by the court/arbitrator/mediator to such extent as is deemed just and equitable having regard to the degree in which the other **party** or any **third party** was at fault in relation to the loss or damage. The liability of the **parties** is not joint and each **party** shall only be liable for that proportion of the compensation, which is attributable to his fault.
- (3) In any event, the amount of such compensation will be limited to the amount specified in Clause 6.5.

### 6.4. Duration of Liability

Notwithstanding the terms of the Prescription Act No 68 of 1969 (as amended) or any other applicable statute of limitation neither the **Client** nor the **Consulting Engineer** shall be held liable for any loss or damage resulting from any occurrence unless a claim is made in terms of Clause 8 within the period stated in the **Specific Provisions**, or, where no such period is stated, within a period of three years from the date of termination or completion of this **agreement**.

### 6.5. Limit of Compensation

The maximum amount of compensation payable by either **party** to the other in respect of liability under this **agreement** is limited to an amount equal to twice the amount of fees payable to the **Consulting Engineer** under this **agreement**, excluding reimbursements and expenses unless otherwise stated in the **Specific Provisions**.

Each **party** agrees to waive all claims against the other in so far as the aggregate of compensation which might otherwise be payable exceeds the aforesaid maximum amount payable.

If either **party** makes a claim for compensation against the other **party** and this is not established, the claimant shall reimburse the other for his reasonable costs incurred as a result of the claim or if proceedings are initiated in terms of clause 8 for such costs as may be awarded.

### 6.6. Insurance for Liability and Indemnity

The **Consulting Engineer** agrees to arrange and maintain professional indemnity insurance cover in respect of the **services** provided under this **agreement** for the duration of the liability period in terms of clause 6.4, and in accordance with the details set down in the **Specific Provisions**.

## **6.7. Indemnity by the Client**

The **Client** shall indemnify the **Consulting Engineer** against all claims by **third parties** which arise out of or in connection with the rendition of the **services** save to the extent that such claims do not in the aggregate exceed the limit of compensation in clause 6.5 or are covered by the insurance's arranged under the terms of clause 6.6.

## **6.8. Exceptions**

Clauses 6.5 and 6.7 shall not apply to claims arising from deliberate misconduct.

## **6.9. Rights of Recourse**

Notwithstanding the provisions of clauses 2.1, 2.6 and 6.1 of the Conditions of **agreement** and any other contractual duty imposed on the **Consulting Engineer** in terms of **contract documents**, the **Client** undertakes to exhaust all its contractual remedies against the **contractor**, before exercising any contractual rights of recourse it may have against the **Consulting Engineer** in the event of the **Client** suffering any damages as a result of any breach by the **Contractor** of his obligations in terms of the **contract documents**.

## **7. GENERAL PROVISIONS**

### **7.1. Governing Law**

This **agreement** shall be governed by the law of the Republic of South Africa.

### **7.2. Changes in Legislation**

If, after the date of the **agreement**, the cost or duration of the **services** is altered as result of changes in, or additions to, any statute, regulation or by-law, or in the requirements of any authority having jurisdiction over any matter in respect of the **project**, then the agreed remuneration and time for completion shall be adjusted in order to reflect the impact of those changes.

### **7.3. Assignments and Sub-Contracts**

- (1) Should the **Consulting Engineer**, being an individual or the last survivor of a partnership or body corporate, die or be prevented by illness or any other circumstances beyond his control from performing the obligations implied by this **agreement**, this **agreement** shall be terminated without prejudice to the accrued rights of either **party** against the other.
- (2) Except as defined in (1) above, each **party** binds itself and its partners, successors, executors, administrators, assigns and legal representatives to the other **party** to this **agreement** and to the partners, successors, executors, administrators, assigns and legal representatives of the other **party** in respect of all obligations and liabilities of this **agreement**.

- (3) Neither **party** shall assign, sublet or transfer any right or obligation under this **agreement** without the written consent of the other **party**, which consent shall not be unreasonably withheld. Unless specifically stated to the contrary in any written consent to an assignment, no assignment shall release or discharge the assignor from any obligation under this **agreement**.
- (4) The **Consulting Engineer** shall not without the written consent of the **Client**, which consent shall not be unreasonably withheld, initiate, vary or terminate any sub-contract for performance of all or part of the **services**.

#### **7.4. Ownership of Data, Designs and Documents**

- (1) In accordance with the relevant clauses of the Copyright Act (Act 98 of 1978) relating to assignment, the **Consulting Engineer** shall retain copyright of all documents prepared by the **Consulting Engineer**. The **Client** shall be entitled to use them or copy them only for the **project** and the purpose for which they are intended and need not obtain the **Consulting Engineer's** permission to copy for such use;
- (2) The ownership of data and factual information collected by the **Consulting Engineer** and paid for by the **Client** shall, after payment by the **Client**, lie with the **Client**;
- (3) The **Client** shall have no right to use any documents referred to in this Clause where any or all of the fees and expenses payable to the **Consulting Engineer** have not been paid in accordance with this **agreement**.
- (4) In the event that the **parties** agree that the copyright in the documents shall be ceded to the **Client** then the **Consulting Engineer** shall not be liable in any way for the use of any of the information other than as originally intended for the **project** and the **Client** hereby indemnifies the **Consulting Engineer** against any claim which may be made against him by any **party** arising from the use of such documentation for other purposes.

#### **7.5. Conflict of Interest and Corruption**

Unless otherwise agreed in writing by the **Client**, the **Consulting Engineer** and his personnel shall have no interest in nor receive remuneration in connection with the **project** except as provided for in the **agreement**. The **Consulting Engineer** shall not engage in any activity, which may conflict with the interests of the **Client** under the **agreement**.

Notwithstanding any damages that may be claimed against the **Consulting Engineer** in law, the **Client** will be entitled to terminate the **agreement** in accordance with Clause 4.4, if it is shown that the **Consulting Engineer** is guilty of:

- (1) offering, giving, receiving or soliciting anything of value with a view to influencing the behaviour or action of anyone, whether a public official or otherwise, directly or indirectly in the selection process or in the conduct of the **agreement**; or

- (2) misrepresentation of facts in order to influence a selection process or the execution of a **contract** to the detriment of the **Client**, including the use of collusive practices intended to stifle or reduce the benefits of free and open competition.

#### 7.6. Notices

Notices under the **agreement** shall be in writing and will take effect from receipt at the physical address stated in the **Specific Provisions**. Delivery may be by registered letter or by hand against written confirmation of receipt or by facsimile.

#### 7.7. Publicity and Publication

Unless otherwise specified in the **Specific Provisions** the **Consulting Engineer** shall not release public or media statements or publish material related to the **services** or **project** within two (2) years of completion of the **services** without the written approval of the **Client**, which approval by the **Client** shall not be unreasonably withheld. The **Client** shall not make premeditated public or media statements relating to the **services** provided by the **Consulting Engineer** without the prior and full knowledge and approval of the **Consulting Engineer**.

#### 7.8. Confidentiality

Both **parties** shall keep all commercially sensitive information obtained by them in the context of the **agreement** confidential and shall not divulge it without the written approval of the other **party**.

#### 7.9. Variations

The **Client** may order variations to the **services** in writing or may request the **Consulting Engineer** to submit proposals, including the time and cost implications, for variations to the **services**;

The reasonable cost of preparation and submission of such proposals and the incorporation into the **agreement** of any variations to the **services** ordered by the **Client**, including any increase in the **Consulting Engineer**'s fees and reimbursable costs, shall be agreed between the **Consulting Engineer** and the **Client**.

#### 7.10. Electronic Communications

The **parties** contract out of the provisions of the Electronic Communications and Transactions Act 25 of 2002, unless otherwise detailed in the **Specific Provisions**.

#### 7.11. Sole Agreement

This **agreement** together with the attachments and appendices detailed in the **agreement** and the **Specific Provisions** constitutes the sole **agreement** for the **services** between the **parties** and no representation not contained herein shall be of any force or effect between the **parties**. No amendments will be of any force and effect unless reduced to writing and signed by both **parties** as expressly intended to form part of the **agreement**.



## **8. SETTLEMENT OF DISPUTES**

### **8.1. Settlement**

The **parties** shall negotiate in good faith with a view to settling any dispute or claim arising out of or relating to this **agreement** and may not initiate any further proceedings until either **party** has, by written notice to the other, declared that such negotiations have failed.

### **8.2. Mediation**

Any such dispute or claim, which cannot be settled between the **parties**, may be referred by the **parties**, without legal representation, to mediation by a single mediator. The mediator shall be selected by **agreement** between the **parties** and, failing such **agreement**, shall be nominated by the President of CESA. The costs of the mediation shall be borne equally between the **parties**.

### **8.3. Arbitration/Litigation**

If either **party** were unwilling to agree to mediation or be dissatisfied with the opinion expressed by the mediator or should the mediation fail then such **party** may:

**8.3.1** Serve process instituting action arising out of such dispute or difference in a competent civil court; or

**8.3.2** With the consent of the other **party** refer the dispute to arbitration by a single arbitrator to be mutually agreed upon or, failing agreement, to be nominated by the President of CESA. The arbitration shall be in accordance with the provisions of the Arbitration Act of 1965 as amended and shall be conducted in accordance with such procedure as may be agreed between the **parties** or, failing such agreement, in accordance with the Rules for the Conduct of Arbitration's published by the Association of Arbitrators current at the date the arbitrator is appointed.

**8.3.3** Service of process under Clause 8.3.1 or referral to arbitration under Clause 8.3.2 shall take place within three calendar **months** of the date of notice from either **party** declaring that the settlement negotiations under Clause 8.1 have failed, or, if mediation is agreed on, within three calendar **months** of the date of the mediator's opinion or the date upon which the mediator declares that the mediation has failed. Claims not brought within the time periods set out herein will be deemed to be waived.