



## Schedule 8.3 – Dispute Resolution Procedure & Conduct Of Claims

## CHANGE HISTORY

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## **Part A – Dispute Resolution Procedure**

### **1 Dispute Notices**

1.1 If a Dispute arises then:

- (a) the TTL Representative and the Concessionaire Representative shall attempt in good faith to resolve the Dispute; and
- (b) if such attempts are not successful within twenty (20) Working Days, either Party may issue to the other a Dispute Notice.

1.2 A Dispute Notice shall set out:

- (a) the material particulars of the Dispute;
- (b) the reasons why the Party serving the Dispute Notice believes that the Dispute has arisen; and
- (c) the relief sought and the basis for claiming the relief sought (including the provisions of this Agreement that are relevant to the Dispute).

1.3 Subject to Paragraph 1.4, following the issue of a Dispute Notice the Parties shall seek to resolve the Dispute:

- (a) first by commercial negotiation (as prescribed in Paragraph 2) and, if not resolved;
- (b) then by recourse to adjudication (as prescribed in Paragraph 3); and
- (c) lastly by recourse to litigation in accordance with Paragraphs 3.30 or 4 (in accordance with Clause 51 (Governing Law and Jurisdiction)).

1.4 Notwithstanding Paragraphs 1.1 to 1.3 and Paragraph 2, either Party may give notice at any time of its intention to refer a Dispute to adjudication under the procedure set out in Paragraph 3 by serving a Notice of Adjudication to the other Party.

1.5 Unless agreed otherwise in writing, the Parties shall continue to comply with their respective obligations under this Agreement regardless of the nature of the Dispute and notwithstanding any issue of a Dispute Notice, Notice of Adjudication or proceedings under Paragraph 3.30 or Paragraph 4.

### **2 Commercial Negotiation**

2.1 Following the service of a Dispute Notice:

- (a) within ten (10) Working Days of receipt of the Dispute Notice, the receiving Party shall provide a written response to the Party who issued the Dispute Notice; and
- (b) the Parties shall thereafter meet and use reasonable endeavours to resolve the Dispute as soon as possible by commercial negotiations between the TTL Representative and the Concessionaire Representative or such other persons who have the experience, empowerment, expertise and seniority to participate in the commercial negotiations.

- 2.2 If:
- (a) the Parties have met and conducted commercial negotiations in accordance with this Paragraph 2;
  - (b) either Party is of the reasonable opinion that the continuance of commercial negotiations will not result in resolution of the Dispute; and
  - (c) the Parties have not settled the Dispute in accordance with Paragraph 2.1 within ten (10) Working Days after the date of the written response to the Dispute Notice under Paragraph 2.1(a),

either Party may serve a Notice of Adjudication.

- 2.3 Each Party shall bear its own costs and expenses in relation to any reference of a Dispute under this Paragraph 2. Any documents prepared or exchanged in relation to the reference of the Dispute under this Paragraph 2 (including, for the avoidance of doubt, the Dispute Notice and any response under Paragraph 2.1(a)) are without prejudice and the Parties shall not make use of or rely upon any without prejudice statements in any proceedings.

### **3 Adjudication**

- 3.1 If a Notice of Adjudication is served, then immediately thereafter the Parties shall endeavour to agree upon a person whom they consider suitable to act as the Adjudicator.
- 3.2 If the Parties are unable to agree a suitable person to act as the Adjudicator within three (3) days of service of a Notice of Adjudication, the Party who served the Notice of Adjudication may request the Nominating Authority to select a person to act as the Adjudicator.
- 3.3 The Nominating Authority shall communicate the selection of the Adjudicator to the Parties within four (4) days of receiving a request to do so.
- 3.4 Any person requested or selected to act as the Adjudicator in accordance with Part A of this Schedule shall:
- (a) be a natural person acting in their personal capacity;
  - (b) not be an employee or former employee of any Party;
  - (c) not be an employee or former employee of any Sub-contractor or third party that was previously a Sub-contractor; and
  - (d) not have any interest, financial or otherwise, in any:
    - (i) matter relating to the Dispute;
    - (ii) Party; or
    - (iii) Sub-contractor.
- 3.5 The terms of remuneration of the Adjudicator shall be agreed between the Parties and the Adjudicator, with the object of securing the appointment of the Adjudicator within seven (7) days of the Notice of Adjudication. If any Party (but not all Parties) rejects the terms of the remuneration of the Adjudicator, the same are settled (and binding upon the Parties) by

agreement between the Nominating Authority and the Adjudicator (provided that the level of the Adjudicator's remuneration does not exceed the level originally proposed to the Parties by the Adjudicator). If all the Parties reject the terms of remuneration proposed by an Adjudicator then another person shall be selected as an Adjudicator in accordance with Paragraphs 3.1 to 3.3.

- 3.6 Where the Adjudicator has been selected in accordance with Paragraphs 3.1 to 3.3, the Party who served the Notice of Adjudication shall refer the Dispute in writing to the Adjudicator by the Referral Notice in accordance with Paragraphs 3.7 and 3.8 (with a copy to each other Party) within seven (7) days of the date of the Notice of Adjudication. Upon receipt of the Referral Notice, the Adjudicator must inform every Party of the date that it was received.
- 3.7 The Referral Notice shall include:
- (a) the facts relied upon by the Party serving the Referral Notice in support of its claim(s);
  - (b) a statement of the contractual and/or other basis relied upon by the Party serving the Referral Notice in support of its claim(s); and
  - (c) a calculation of the specific monetary amount (if any) that the Party serving the Referral Notice is seeking to recover in relation to each and every claim that is the subject matter of the Dispute.
- 3.8 The Referral Notice shall be accompanied by copies of, or relevant extracts from, this Agreement and such other documents on which the Party serving the Referral Notice relies.
- 3.9 Within fourteen (14) days of the date of the Referral Notice, the Party not serving the Referral Notice may send to the Adjudicator (with a copy to each other Party) a written statement of the contentions on which it relies and any materials it wishes the Adjudicator to consider.
- 3.10 If a matter disputed by the Concessionaire under or in connection with a Sub-contract is also a matter disputed under or in connection with this Agreement, the Concessionaire may, with the consent of TTL (subject to Paragraph 3.11), refer the Sub-contract dispute to the Adjudicator at the same time. The Adjudicator shall then decide the disputes together and references to the "Parties" for the purposes of the Dispute are interpreted as including the Sub-contractor. The Parties agree to consider and endeavour to agree in good faith any reasonable request by the Adjudicator for additional time to decide the dispute relating to this Agreement and the dispute relating to the Sub-contract.
- 3.11 For the purposes of Paragraph 3.10, TTL shall only consent to the Concessionaire referring the Sub-contract dispute to the Adjudicator at the same time provided that the Sub-contract includes provisions which:
- (a) comply with the Dispute Resolution Procedure; and
  - (b) enable the Concessionaire to make such referrals.
- 3.12 The Parties may jointly terminate the Adjudicator's appointment at any time.
- 3.13 The Parties shall appoint a person to replace the Adjudicator in accordance with Paragraphs 3.1 to 3.3 if:
- (a) the Adjudicator fails to give notice of their decision within:

- (i) the period referred to in Paragraph 3.17;
    - (ii) the extended period in accordance with Paragraph 3.17; or
    - (iii) such an extended period agreed by the Parties and the Parties do not jointly further extend the time for their decision to be made in accordance with Paragraph 3.17; or
  - (b) at any time the Adjudicator declines to act or is unable to act as a result of their death, disability, resignation or otherwise.
- 3.14 If the Parties are unable to agree on the joint appointment of a person willing and suitable to act as replacement Adjudicator within three (3) days of the date the Adjudicator's appointment is terminated pursuant to Paragraph 3.10, any Party may apply to the Nominating Authority to appoint a replacement Adjudicator and the provisions of Paragraphs 3.3 to 3.5 shall apply again.
- 3.15 Where the Adjudicator is appointed as a replacement pursuant to Paragraph 3.13, the Parties shall each send to the Adjudicator, as soon as reasonably practicable, copies of all documents supplied by them to the Adjudicator which they have replaced.
- 3.16 The Parties agree that the Nominating Authority and its employees and agents are not liable to any Party for any act or omission unless the act or omission is in bad faith. The Parties also agree that any employee or agent of the Nominating Authority is similarly protected from liability.
- 3.17 The Adjudicator shall reach a decision and give written notice of the decision to the Parties within twenty-eight (28) days of the date of receipt of the Referral Notice sent in accordance with Paragraph 3.6, or such longer period as is agreed by the Parties.
- 3.18 The Parties agree that the Adjudicator may extend the period of twenty-eight (28) days referred to in Paragraph 3.17 by up to fourteen (14) days, with the consent of the Party who served the Referral Notice.
- 3.19 The written notice of the decision referred to in Paragraph 3.17 shall also include:
- (a) a summary of the Adjudicator's findings; and
  - (b) a statement of the reasons for the decision.
- 3.20 The Parties agree that the Adjudicator's decision is binding upon the Parties and the Adjudicator unless and until the Dispute is finally determined by court proceedings or by agreement. The Parties agree that the Adjudicator may on their own initiative or on the application of a Party correct their decision so as to remove a clerical or typographical error arising by accident or omission. Any correction of a decision must be made within five (5) days of the delivery of the decision to the Parties. As soon as possible after correcting a decision in accordance with this Paragraph, the Adjudicator must deliver a copy of the corrected decision to each of the Parties. Any correction of a decision forms part of the decision. The Parties agree that the Adjudicator may in their decision allocate their remuneration and expenses between the Parties in accordance with Paragraph 3.27. If the Adjudicator's decision changes an amount notified as due, payment of the sum decided by the Adjudicator is due not later than twenty-eight (28) days from the date of the decision or the Final Date For Payment of the notified amount whichever is the later.

3.21 The Parties agree that the Adjudicator:

- (a) shall act impartially and as an expert (not as an arbitrator) in the conduct of the reference and in reaching their decision;
- (b) shall consider any relevant information submitted to them by any of the Parties and makes available to them any information to be taken into account in reaching their decision provided in accordance with the procedure (if any) which the Adjudicator may decide;
- (c) shall reach their decision in accordance with Clause 51 (Governing Law And Jurisdiction);
- (d) may take the initiative in ascertaining the facts and the law in relation to the Dispute;
- (e) may review and revise any action or inaction of the TTL Representative or Concessionaire Representative related to the Dispute and/or alter a quotation which has been treated as having been accepted; and
- (f) may, with the consent of the Parties, seek legal or technical advice from consultants whose appointment by the Adjudicator (including terms of remuneration) is subject to the approval of the Parties.

3.22 The Parties agree that the Adjudicator shall decide in their discretion on the procedure to be followed in the adjudication. In particular they may, but is not obliged to:

- (a) convene meetings upon reasonable notice to the Parties at which such Parties and their representatives are entitled to be present;
- (b) submit lists of questions to the Parties to be answered in such meetings or in writing within such reasonable time as they require;
- (c) require the Parties to provide them with such information and other facilities as they reasonably require for the determination of the Dispute;
- (d) otherwise take such action and adopt such procedures as do not conflict with any of the provisions of this Agreement and are reasonable and proper for the just, expeditious and economical determination of the Dispute; and
- (e) inspect any part of the Sites.

3.23 The Parties agree that the Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of their functions as adjudicator unless the act or omission is in bad faith. The Parties also agree that any employee or agent of the Adjudicator is similarly protected from liability.

3.24 All meetings are private and (save as required by Law) the Adjudicator and the Parties shall keep confidential the Dispute, all information of whatever nature provided to the Adjudicator by or on behalf of any Party and the Adjudicator's decision, save to the extent a Party needs to disclose that decision in order to enforce, challenge or appeal against its terms.

3.25 The Parties shall continue to observe and perform all the obligations contained in this Agreement or the Sub-contract (as applicable), notwithstanding any reference to the Adjudicator, and insofar as the same is consistent with any safety review procedures to which

the Parties are bound, give effect forthwith to the Adjudicator's decision in every respect unless and until as hereinafter provided the Dispute is finally determined by court proceedings or by agreement. Any Party may apply to any appropriate court for enforcement of the Adjudicator's decision. Any action to enforce the Adjudicator's decision, any challenge to the enforcement of the Adjudicator's decision and any dispute arising out of or in connection with such enforcement or challenge are not a Dispute for the purposes of Paragraphs 1 to 3 of Part A of this Schedule.

- 3.26 After service of a Notice of Adjudication, the Parties may seek to agree how the Adjudicator allocates the costs and fees (excluding their remuneration and expenses which are dealt with in Paragraph 3.27 below) of the adjudication as between the Parties. If such an agreement is reached between the Parties, they shall notify the Adjudicator who shall then allocate costs and fees in accordance with such agreement. The Parties agree to be bound by the Adjudicator's allocation of costs and fees and to pay such costs and fees in accordance with the Adjudicator's direction unless and until the direction of the Adjudicator is set aside or revised by a court pursuant to any legal proceedings.
- 3.27 Subject to any agreement of the Parties, the Adjudicator shall allocate payment of their remuneration and expenses as between the Parties. Unless the Parties otherwise agree, the Adjudicator shall award the payment of their remuneration and expenses on the general principle that costs should follow the event, except where it appears to the Adjudicator that in the circumstances this is not appropriate in relation to the whole or part of their remuneration or expenses. The Parties agree to be bound by the Adjudicator's allocation of payment of their remuneration and expenses and shall pay such remuneration and expenses in accordance with the Adjudicator's direction unless and until the direction of the Adjudicator is set aside or revised by a court pursuant to any legal proceedings.
- 3.28 All notices, written submissions and any other written communications between the Parties and the Adjudicator may be:
- (a) delivered by hand;
  - (b) sent by email;
  - (c) sent by first class pre-paid post; or
  - (d) recorded delivery,
- and in each case are copied simultaneously (delivered or sent as aforesaid) to each other Party. If the Parties agree, or the Adjudicator directs, copies by way of confirmation of all communications by email between the Parties and the Adjudicator shall also be sent by first class post not later than the next Working Day following the date of the original email.
- 3.29 All information of whatever nature provided to the Adjudicator by any Party shall be copied to each other Party simultaneously.
- 3.30 If any Party is dissatisfied with the Adjudicator's decision, then any Party may, within thirty (30) days after the date on which it received notice of such decision, commence court proceedings for the final determination of the Dispute. Court proceedings may not be commenced unless commenced within thirty (30) days after receipt of the Adjudicator's decision.

## **4 Urgent Relief**

4.1 Either Party may at any time take proceedings or seek remedies before any court of competent jurisdiction:

- (a) for interim or interlocutory remedies in relation to this Agreement or infringement by the other Party of that Party's Intellectual Property Rights; and/or
- (b) where compliance with Paragraphs 1 and 2 and/or referring the Dispute to adjudication may leave insufficient time for that Party to issue proceedings before the expiry of the limitation period.

## **Part B – Conduct of Claims**

### **1 Indemnities**

- 1.1 Part B of this Schedule shall apply to the conduct, by an Indemnifier, of claims made by a third person against a Beneficiary.
- 1.2 If the Beneficiary receives any notice of any Claim, the Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within ten (10) Working Days of receipt of the same.
- 1.3 On the giving of a notice by the Beneficiary, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the Claim, the Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the Claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations relating to the Claim. If the Indemnifier does elect to conduct the Claim, the Beneficiary shall give the Indemnifier all reasonable cooperation, access and assistance for the purposes of such Claim and the Beneficiary shall not make any admission which could be prejudicial to the defence or settlement of the Claim without the prior written consent of the Indemnifier.
- 1.4 With respect to any Claim conducted by the Indemnifier pursuant to Paragraph 1.3:
- (a) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the Claim;
  - (b) the Indemnifier shall not bring the name of the Beneficiary into disrepute;
  - (c) the Indemnifier shall not pay or settle such Claim without the prior written consent of the Beneficiary, such consent not to be unreasonably withheld or delayed; and
  - (d) the Indemnifier shall conduct the Claim with all due diligence.
- 1.5 The Beneficiary shall be entitled to have conduct of the Claim and shall be free to pay or settle any Claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:
- (a) the Indemnifier is not entitled to take conduct of the Claim in accordance with Paragraph 1.3;
  - (b) the Indemnifier fails to notify the Beneficiary in writing of its intention to take conduct of the relevant Claim within ten (10) Working Days of the notice from the Beneficiary or if the Indemnifier notifies the Beneficiary in writing that it does not intend to take conduct of the Claim; or
  - (c) the Indemnifier fails to comply in any material respect with the provisions of Paragraph 1.4.

## **2 Recovery of Sums**

- 2.1 If the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the Claim, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:
- (a) an amount equal to the sum recovered (or the value of the discount, credit, saving, relief, other benefit or amount otherwise obtained) less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering or obtaining the same; and
  - (b) the amount paid to the Beneficiary by the Indemnifier in respect of the Claim under the relevant indemnity.

## **3 Mitigation**

- 3.1 Each of TTL and the Concessionaire shall at all times take all reasonable steps to minimise and mitigate any loss for which the relevant Party is entitled to bring a claim against the other Party pursuant to the indemnities in Part B of this Schedule.