

SOUTHERN AFRICAN GRAIN ARBITRATION SERVICES ASSOCIATION (SAGAS)

MEDIATION RULES

Approved by the Governing Committee of SAGAS and adopted to be effective as from:

1 October 2009.

In all mediations under these rules SAGAS shall act as the secretariat for administrative and procedural purposes.

RULE 1. PRELIMINARY

- 1.1 Any dispute arising out of a contract incorporating these Rules, or where both parties to a dispute do so agree, shall be referred to mediation in accordance with the following provisions:-
- 1.2 Mediations shall take place in Pretoria, or elsewhere if mutually agreed to by the parties.
- 1.3 The mediation proceedings shall be governed by these Rules, subject to South African law, and shall be conducted in the following manner:
 - (a) The mediation and any statements made during the mediation proceedings shall be treated as confidential by all participants in terms of these Rules.
 - (b) All statements made during such a mediation are privileged against use in any other proceedings relating to the dispute, even in cross-examination.
 - (c) Notes taken by any person at or in connection with the mediation must be destroyed at the conclusion of the mediation proceedings, except for the final agreement reached between the parties.
 - (d) Any mediator(s) shall not be called as a witness or be otherwise involved in any ongoing arbitration or litigation, should the mediation not result in a final agreement between the parties.
- 1.4 In these Rules:
 - (a) "Council" means the Governing Committee of SAGAS.
 - (b) "Mediation" means an informal, non-binding conference or conferences between the parties in which a mediator will seek to guide the parties to a resolution of the dispute in question.

- (c) "Officers" means the Chairperson, the Vice-Chairperson or any Council Member of SAGAS.
- (d) "SAGAS" means the Southern African Grain Arbitration Services Association.
- (e) The masculine gender shall include the feminine gender.

1.5 Any party engaging in a mediation pursuant to these Rules, whether or not a member of SAGAS, is deemed to agree to abide by these Rules and to agree to be liable to SAGAS (jointly and severally with the other parties to the mediation) for all costs and expenses incurred in connection with the mediation, which costs and expenses shall, upon notification by SAGAS, become a debt due to SAGAS.

RULE 2. PROCEDURE FOR INITIATING MEDIATION

- 2.1 Where a dispute arises between two or more parties who specifically incorporated these Rules in their contract terms and they agree to mediation in terms thereof, or where both parties to a dispute agree to mediation in terms of these Rules, they can initiate mediation by filing a request for mediation at the Administrator or Secretary of SAGAS
- 2.2 Parties agreeing to mediation shall, within nine consecutive days from the date of such agreement, appoint a mediator in accordance with Rule 3.
- 2.3 Lapse of Mediation Agreement

If neither party submits a statement of his case in writing to the mediator appointed by or for him, with a copy to the other party, within a period of 12 months from the date of the appointment of the first named mediator, then the agreement of mediation shall be deemed to have lapsed on the expiry of the period of 12 months; unless before that date the agreement is renewed by both parties notifying each other in writing at least 30 consecutive days prior to the expiry date. The agreement to mediate may be thus renewed for a further period of 12 months from the date of giving notice only and shall be deemed to lapse on expiry of that further period unless a statement of his case has been submitted by either party during that time.

In the event of failure to submit a statement of case as provided in this Rule the agreement to mediate shall be deemed to have been withdrawn and abandoned.

RULE 3. SELECTION AND APPOINTMENT OF MEDIATORS

- 3.1 Only persons approved by SAGAS may act as mediators under these Rules. In all cases a mediator appointed under these Rules shall either be a professionally qualified mediator accredited by SAGAS, or have occupied a senior position in the grains industry for a period of at least five years.
- 3.2 Parties agreeing to mediation shall within the time limit specified in Rule 2 either:

- (a) Mutually appoint a mediator, as the case may be –
 - (i) from the list of mediators maintained by SAGAS; or
 - (ii) who has the required experience in the grains industry as stipulated in Rule 3.1 above and who has been approved by SAGAS; or
- (b) Each individually appoint a mediator, as the case may be –
 - (i) from the list of mediators maintained by SAGAS; or
 - (ii) who has the required experience in the grains industry as stipulated in Rule 3.1 above and who has been approved by SAGAS; or
- (c) Apply to SAGAS for the appointment of a mediator, or a third mediator in terms of these Rules, whatever the case may be.

3.3 When two mediators have been appointed SAGAS shall appoint a third mediator when so requested by the parties in terms of Rule 3.2 above. The third mediator shall be the Chairperson of the Tribunal so formed.

Any appointment by SAGAS under Rule 3.2 or 3.3 shall be made at the absolute discretion of any two of the Officers of the SAGAS Council.

3.4 It shall be the duty of the sole mediator or the Chairperson of the Tribunal to ensure the prompt progress of the mediation. Any delay in the proceedings on the part of the Tribunal or mediator may be notified to SAGAS and, if appropriate, SAGAS may, after consultation with the Tribunal or mediator, set down dates for proceeding with the mediation.

3.5 An appointment of a mediator shall be valid provided that:

- (a) the mediator has signified his acceptance of the appointment to the parties appointing him, or to SAGAS, as the case may be, prior to the mediation; or, if the originally appointed mediator is unwilling or unable to act, and a substitute has confirmed in writing to the appointing parties or to SAGAS, as the case may be, his acceptance of the appointment prior to the mediation, and
- (b) in the case of a third mediator, when his acceptance has been communicated to SAGAS.

3.6 If a mediator dies, refuses to act, resigns his appointment, becomes incapable of acting, fails to proceed with the mediation, or is found to be ineligible, the parties appointing such mediator shall forthwith appoint a substitute in accordance with the provisions of Rule 3.2 above.

3.7 The mediator/s may call upon either party to deposit with SAGAS such sum or sums as he/they consider appropriate on account of fees, costs and expenses, prior to the commencement of the mediation proceedings. SAGAS may also, in its discretion, request either party prior to the commencement of the mediation proceedings to provide security, in a manner that SAGAS deems appropriate, on account of costs and expenses incurred by SAGAS.

- 3.8 If the mediation is abandoned or suspended before the mediation is concluded the parties shall be jointly and severally liable to pay to SAGAS the costs and expenses of SAGAS.

RULE 4. MEDIATION PROCEDURES

- 4.1 All statements and evidence provided for hereunder shall in every case be delivered by each party, by means of recorded delivery mail, as follows:
- (a) One copy to the other party.
 - (b) One copy to each of the appointed mediator(s).
- 4.2 The claimant shall draw up a clear and concise statement of his case which, together with a copy of the contract and all supporting documents, shall be delivered as required under this Rule. Reasons for his case have to be provided in the statement.
- 4.3 The respondent shall, within 30 consecutive days of receipt of the claimant's case and documents, draw up a clear and concise statement of his defence (and counterclaim, if any) which, together with all supporting documents, shall be delivered as required under this Rule. Reasons for each and every denial must be provided.
- 4.4 The claimant shall have the right within 30 consecutive days of receipt of the respondents defence or claim to submit further written comments and/or documents in reply, such to be delivered as required by this Rule 4.
- 4.5 The mediator/s may admit further supporting documents from either party upon its being delivered as required by this Rule 4.
- 4.6 Nothing in this Rule shall prevent the respondent from delivering his statement and supporting documents before receiving documents/statements from the claimant.
- 4.7 No person other than the parties, their representatives (who shall not, subject to any agreement to the contrary between the parties and subject further to the discretion of the mediator, be an attorney or advocate, or other legally qualified person who was at any time wholly or principally engaged in private practice or was accredited at any time to a recognised law society), and witnesses, shall be permitted to attend the mediation proceedings, unless the mediator(s) otherwise decides on application made in writing. Any party to a mediation intending to have as their representative an attorney or advocate or legally qualified person other than those excluded in terms of this Rule 4, shall declare this fact to the other party and to the Chairperson of the Tribunal (or sole mediator) not less than 14 consecutive days prior to the date set for the mediation proceedings.
- 4.8 Any party or his representative (as defined in Rule 4.7 above), shall at the proceedings be entitled to make further submissions orally or in writing in addition to those made and exchanged under this Rule 4.

RULE 5. ROLE OF THE MEDIATOR(S)

- 5.1 The parties appoint the mediator(s) to mediate the dispute, which means that the role is to assist the parties to reach their own resolution of the dispute.
- 5.2 Save as otherwise provided for in these Rules, the mediator(s) shall not make decisions or impose decisions on the parties.
- 5.3 Each party is entitled to retain representation in order to be properly counselled about his interests and obligations, save as excluded in terms of Rule 4 above. The role of the mediator is not to offer legal or any other advice to the parties or to either one of them.

RULE 6. CONDUCT OF MEDIATION

- 6.1 The parties agree:
- (a) to negotiate and participate in the mediation process in good faith for the resolution of the dispute;
 - (b) to co-operate with the mediator(s) in the conduct of the mediation;
 - (c) to use their best endeavours to comply with requests made by the mediator(s) to promote the efficient resolution of the dispute;
 - (d) if the mediator(s) considers it to be beneficial for purposes of resolving the dispute in question, to submit to each other and to the mediator(s), additional documents or evidence pertaining to the dispute;
 - (e) to meet with the mediator(s) at mutually agreed premises on a date or dates to be agreed on;
 - (f) to promptly pay all costs and expenses owing to SAGAS and fees owing to the mediator(s);
 - (g) that they will not at any time before, during or after the mediation call the mediator(s) as a witness in any arbitration, legal or administrative proceedings concerning the dispute.
- 6.2 The mediator(s) may meet with the parties together or with one party alone in his/their own discretion.
- 6.3 The mediator(s) shall not disclose to any person (including any of the parties) information disclosed by one of the parties to the mediator(s) alone, without obtaining the prior written consent of the disclosing party, other than information that, in the opinion of the mediator(s), may indicate that a party, or a party's representative, or the mediator(s), may be at risk of intimidation.

- 6.4 The mediator(s) shall not disclose to any person information obtained during the mediation without prior written consent of the parties being obtained, unless compelled to do so by law.
- 6.5 A party shall not disclose to any person other than to the representative of that party for the purposes of mediation, any information obtained during the mediation without the prior written consent of the other party unless compelled to do so by law.

RULE 7. AUTHORITY OF THE PARTIES

Each party to the mediation must declare whether it is represented at any negotiation session during the mediation process by a person(s) with full authority to settle the dispute and, if the representatives of parties do not have such full authority, the limits of their authority must be disclosed to the other party and to the mediator(s).

RULE 8. EFFECT OF THE MEDIATION

- 8.1 If the parties cannot resolve the dispute during the course of or as a result of the mediation, the rights of the parties in any subsequent court of law, administrative or arbitration proceedings remain unaffected by the mediation process.
- 8.2 For the purposes of any subsequent proceedings, the mediation is to be regarded as a *without prejudice* conference and nothing said or done during the course of the mediation process may be given in evidence in any subsequent proceedings and no documents created for the purposes of the mediation may be tendered in evidence or required to be produced in any such proceedings, except for the production of any written document confirming the terms of settlement if it is required for the purposes of enforcing that document by the party so entitled.

RULE 9. PAYMENT OF COSTS AND FEES

- 9.1 Subject to the provisions of Rules 1.5 and 3.7 above, the parties to the mediation agree:
- (a) to pay in equal shares the fees of the mediator(s), including preparation time and any reasonable out-of-pocket expenses actually incurred by the mediator(s);
 - (b) to pay the account of the mediator(s) within 14 days of it being rendered;
 - (c) to bear the full cost, if any, in equal shares of separate rooms that were used for the purposes of the mediation.
- 9.2 If, despite the provisions of Rules 1.3; 6.1; 6.5 and 8.2 above, the mediator(s) receives a subpoena or an order of similar effect ("subpoena") from a party or entity who, in the opinion of the mediator(s), represents or has the same interests as a party to the mediation, that party shall:

- (a) pay all the costs incurred by the mediator(s) on an indemnity basis in relation to that subpoena, including all legal costs incurred in opposing the subpoena;
- (b) pay to the mediator(s) the hourly rate of that mediator(s) for mediation services, for each hour spent by the mediator(s) in relation to the subpoena, plus any reasonable out-of-pocket expenses actually incurred by the mediator(s);
- (c) indemnify and hold harmless the mediator(s) in respect of all orders for costs that may be made against the mediator(s) in relation to the subpoena.

RULE 10. DISCLOSURE AND ACKNOWLEDGEMENT

- 10.1 The mediator(s) shall, to the best of his or her knowledge, disclose the facts of which he or she is aware regarding any prior or existing relationship between the mediator(s) and any one of the parties to the mediation or with any business associates of any of the parties.
- 10.2 Each of the parties to the mediation acknowledges that the mediator(s) or the firm(s) of which the mediator(s) is a member(s) or employee(s) may have had dealings with the parties or their business associates (other than in relation to the dispute in question) and agree that the mediator(s) may conduct the mediation notwithstanding such other dealings.

RULE 11. EXCLUSION OF LIABILITY AND INDEMNITY

- 11.1 SAGAS, its Council or Officers, or the mediator(s) is not liable for any damages suffered (directly or indirectly) by any party arising in any way whatsoever out of any act done or omitted to be done (including, but not limited to, acts of negligence done or omitted to be done) by SAGAS, its Council or Officers, or the mediator(s) in the performance of their obligations in terms of these Rules of Mediation. This is deemed to be accepted by all parties applying for mediation under these Rules, also those having previously consented to mediation with reference to them.
- 11.2 Each of the parties jointly and severally indemnify and hold harmless SAGAS, its Council, any Officers and the mediator(s) against all claims arising out of, or in any way referable to, any act or omission (including, but not limited to, acts of negligence done or omitted to be done) by the mediator(s) or by SAGAS, its Council or Officers, in the performance of their obligations in terms of these Rules of Mediation.

RULE 12. RESTRAINTS UPON THE MEDIATOR(S)

- 12.1 The mediator(s) shall not accept appointment as an arbitrator or act as a solicitor or provide any form of professional or other advice to a party in relation to the dispute in question in which he is to act or have acted as a mediator.

- 12.2 The mediator(s) undertakes to refrain from acting for any party to the mediation in any capacity, of whatsoever nature, for the purposes of any subsequent proceedings, legal or otherwise, related to the dispute in question.

RULE 13. TERMINATION

- 13.1 Any party to the mediation may, at any time during the mediation proceedings, withdraw from or terminate the mediation by written notice to the other party and to the mediator(s).
- 13.2 The mediator(s) may terminate the mediation proceedings at any time by written notice to both parties, if he or she is of the opinion that the negotiations are no longer productive or are not worthwhile to proceed with. This provision in no way detracts from or limits the right of the mediator(s) to terminate the mediation proceedings for any other valid reasons in the discretion of the mediator(s), such as becoming aware of a conflict of interest.

RULE 14. NOTICES

- 14.1 All notices, consent or other communication in terms of these Mediation Rules are only effective if it is in writing, signed and sent as stated in Rule 14.2.
- 14.2 All notices given under these Rules, except where explicitly stated otherwise, shall be given by letter, telex, telegram or by other rapid written communication (including fax and e-mail) and shall be deemed to be properly given if proved to have been dispatched within the required time limits.
- 14.3 Whenever it shall appear to SAGAS that by reason of a state of war, war-like operation, strike, lock-out, riot or civil commotion, the parties to the mediation may be prevented from giving notice within the required time limits, SAGAS shall have, and shall be deemed always to have, the power to, from time to time, extend any of such time limits at any time and to any extent necessary to enable mediation to effectively take place between the parties. Such extension may be made generally or with reference to any particular dispute.

Any extension of time by SAGAS under Rule 14.3 shall be made at the absolute discretion of any two of the Officers of the SAGAS Council.

