

Standard form of Consulting Agreements

SE 9101, SE 9202, CE 9201, RA 9101 and ME 2000

Guidance Note where a consulting engineer intends to enter into a consulting agreement with a consumer

Purpose:

This Guidance Note is designed to advise consulting engineers, who intend to use any of the Engineers Ireland/ACEI's standard forms of consulting agreements (SE 9101, SE 9202, CE 9201, RA 9101 and ME 2000) in an agreement where:

- A) the consulting engineering party is a member of Engineers Ireland; and
- B) the other party is a **consumer** (i.e. a person who buys goods or a service for personal use or consumption from someone whose business it is to sell goods or provide services).

The objective of the guidance set out below is to avoid a potential problem, under the arbitration clause of Engineers Ireland/ACEI's standard forms of consulting agreements, concerning the appointment of an arbitrator in default of the parties' agreement by the President of Engineers Ireland.

Appointment of an Arbitrator under Engineers Ireland/ACEI's standard forms of consulting agreements:

- Conditions of Engagement, Agreement SE 9101, For the appointment of consulting engineers for structural engineering work where an architect has been appointed by the client, May 2007
Clause 4.2: "*In the event of any dispute or difference arising between the parties in connection with or arising from this Agreement then either party may require that the matter be referred to the arbitration of a person to be agreed upon by the parties or, if the parties fail to appoint an arbitrator within one calendar month of either party serving on the other party a written notice to concur in the appointment of an arbitrator, a person to be appointed on the application of either party by the President for the time being of the Institution of Engineers of Ireland. ...*" (emphasis added here).
- Conditions of Engagement, Agreement SE 9202, For the appointment of consulting engineers for structural engineering and related work where the engineer is lead consultant, May 2007
Clause 4.2: as quoted above for Clause 4.2 under Agreement SE 9101.
- Conditions of Engagement, Agreement CE 9201, For the appointment of consulting engineers for civil engineering work, April 2000
Clause 4.2: "*In the event of a dispute or difference arising between the parties in connection with or arising from this Agreement then either party may require that the matter be referred to the arbitration of a person to be agreed upon between the parties. If the parties fail to appoint an arbitrator within one calendar month of either party serving on the other party a written notice to concur in the appointment of an arbitrator, then a person shall be appointed by the President for the time being of the Institution of Engineers of Ireland on the application of either party. ...*" (emphasis added here).
- Conditions of Engagement, Agreement RA 9101, For the appointment of consulting engineers for report and advisory work, April 2000
Clause 4.2: as quoted above for Clause 4.2 under Agreement SE 9101.

- Conditions of Engagement, Agreement ME 2000, For the appointment of consulting engineers for engineering services and associated equipment for buildings and other structures, April 2000
Clause 18.2: as quoted above for Clause 4.2 under Agreement SE 9101.

Background:

In the Irish High Court case of *Derek Healy and Geraldine Healy vs White Park Developments Limited and Paul Feeney* [June 15 2009, as reported in 'Arbitration and ADR Review 2010', page 80 et seq], the plaintiffs were a couple who engaged the first defendant to build their house.

Under the parties' building contract, the arbitration clause provided that, where the parties could not agree the arbitrator, a person was to be appointed by the institutional body of which the defendant was a member (namely, the Construction Industry Federation, CIF).

The question to be determined by the court was whether this was an unfair term within the meaning of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 [S.I. No. 27 of 1995].

Mr Justice Kelly held that the court would not give effect to the parties' arbitration agreement since it fell foul of the Regulations. He noted that it did not appear fair that a plaintiff be forced to arbitrate under an arbitrator who must be approved by a body to which the defendant belonged. He stated that this offended the notion of natural and constitutional justice and, therefore, excluded and/or hindered the consumer's right to take legal action.

In the case of a consulting agreement with a consumer under any of Engineers Ireland/ACEI's standard forms of consulting agreements (SE 9101, SE 9202, CE 9201, RA 9101 and ME 2000), there is strong potential for the same outcome – namely, where the parties cannot reach agreement to an arbitrator, the Arbitrator is appointed by the President of Engineers Ireland of which one of the parties is (very likely to be) a member.

Recommendation:

It is recommended that consulting engineers, who are members of Engineers Ireland and intend to use any of the Engineers Ireland/ACEI's Agreements SE 9101, SE 9202, CE 9201, RA 9101 or ME 2000 in an agreement **where the other party is a consumer**, consider changing the appointing entity in the arbitration clause of the Agreement.

In this regard, it is suggested that "*the President for the time being of the Institution of Engineers of Ireland*" stated in Clause 4.2 of Agreements SE 9101, SE 9202, CE 9201 and RA 9101, and in Clause 18.2 of Agreement ME 2000, could be replaced by:

"the Chair of the Chartered Institute of Arbitrators (Irish Branch)"

or, alternatively: *"the President of the Law Society of Ireland".*