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# **The Arbitration Agreement**

RA Mag Dr Désirée Prantl, LLM (NYU) | Innsbruck Arbitration Day | 7 June 2022

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# Arbitration

## Introduction

- ④ Arbitration agreement as foundation for an arbitration
- ④ Different types of arbitration agreements
- ④ Generally agreed understanding of the term "arbitration"
  - It is a process by which **parties consensually** submit a dispute to a **non-governmental decision-maker**, selected by or for the parties, to render a binding decision resolving a dispute in accordance with **neutral, adjudicatory procedures** affording each party an opportunity to present its case.

# Arbitration Agreement

## Different forms of arbitration agreements



Foundation of arbitral proceedings – obstacle to court proceedings

- Inter parties
- Third parties



Terms of the arbitration clause – determines power of the arbitral tribunal

- Midnight clauses



Different forms – examples

- Multi-tiered clause
- Sole-option clause / Asymmetric arbitration clause
- Optional arbitration agreement

# Arbitration Agreements

## Multi-tiered arbitration clause

If a dispute, controversy or claim arises out of or relates to this contract, or the breach, termination or invalidity thereof, and if the dispute cannot be settled through negotiation, the parties agree **first** to try in good faith to **settle the dispute by mediation under** [*reference to relevant mediation rules*] **for a period of** [*number of days/months*], **before resorting to arbitration** as provided for below.

[...]



# Arbitration Agreements

## Sole-option clause

**1.1** If either Party considers that there is a dispute arising out of or in connection with the validity, effect, termination, interpretation, or performance of this Agreement, it shall promptly notify the other Party in writing of the existence of such dispute.

**1.2** The English courts shall have **exclusive jurisdiction** in relation to all disputes (including claims for set-off and counterclaim) arising out of or in connection with this Agreement, including, without limitation, disputes arising out or in connection with: (i) the creation, effect or interpretation of, or the legal relationships established by, this Agreement; and (ii) any non-contractual obligations arising out of or in connection with. this agreement

**1.3** Notwithstanding the provisions of clause 1.2, any dispute may, at the **option of the Lender only**, be referred to and finally resolved by **arbitration** under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be three. The seat of arbitration shall be London. The language to be used in the arbitral proceedings shall be English. If the Lender wishes to exercise this option, it shall notify the Borrower in writing with [X] days of the date of a written notice pursuant to clause 1.1.

# Arbitration Agreements

## Asymmetric arbitration clause

**1.1** The **courts** in Mediterraneo have **exclusive jurisdiction** over any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, subject to the **BUYER's right to go to arbitration** pursuant to paragraph 2.

**1.2** The **BUYER** has the right to refer any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, to **arbitration** under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

- 1.3**
- The number of arbitrators shall be three.
  - Each Party has the right to nominate one arbitrator while the presiding arbitrator shall be appointed by the LCIA.
  - The seat, or legal place, of arbitration shall be Vindobona, Danubia.
  - The language to be used in the arbitral proceedings shall be English.
  - The governing law of the contract shall be the substantive law of Danubia.

# Arbitration Agreements

## Optional arbitration agreement



Die Vertragsparteien vereinbaren für sämtliche Streitigkeiten aus oder in Zusammenhang mit diesem Vertrag, auch betreffend das Zustandekommen und die Beendigung, und der Wirksamkeit dieser **Gerichtsstandsklausel** die **ausschließliche Zuständigkeit** des für **Wien Innere Stadt sachlich zuständigen Gerichts**. Hiervon abweichend ist **jede Partei** berechtigt, ein **Schiedsgericht** anzurufen; diesfalls gilt die Schieds – und Schlichtungsordnung des Internationalen Schiedsgerichts der Wirtschaftskammer Österreich in Wien (Wiener Regeln) und wird das Verfahren von drei gemäß diesen Regeln ernannten Schiedsrichtern endgültig entschieden.

[Jurisdiction clause in favor of the competent court of Wien Innere Stadt + both parties right to choose arbitration (Vienna Rules)]



# Arbitration Agreements

## Key requirements

### MUST BE IN WRITING

#### Article II (New York convention)

Each Contracting State shall recognize an **agreement in writing** under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

### SUBJECT MATTER MUST BE ARBITRABLE

#### NOT Arbitrable

- Criminal Law
- Family Law
- Bankruptcy of an individual or insolvency of an individual or company
- Real Estate title issues
- Regulatory matters including patents
- Bribery/anti-corruption

### MUST DESCRIBE THE MATTERS SUBJECT TO ARBITRATION

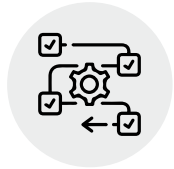
'all claims, disputes and controversies arising out of or in connection with the contract'

or

'all claims, disputes or controversies arising out of or relating to the contract'

# Arbitration Agreements

The arbitration clause shall include



Institution /  
ad hoc procedure



Number of  
arbitrators



[Rules governing  
special requirements  
for arbitrators]



Place of  
arbitration



Language



Applicable substantive  
law [vs law governing  
the contract]

# Arbitration Agreements

Key DON'Ts when drafting or choosing an arbitration clause



Do not equivocate



Do not use shorthand  
or ambiguous  
terminology



Do not agree to  
unworkable  
compromises

# Pathological Arbitration Clauses

## (Non-)performing arbitration clauses



Referring to a non-existent institution, an institution which ceased to exist or an indefinite institution

### Example

- All disputes to be resolved through arbitration by **AA**.

*UAB AK "Aviabaltika" v Flight Test Aerospace Inc. (Case no BYLA 3K-3-431/2013)* – Supreme Court of Lithuania upheld pathological clause



Nominating an arbitration institution to administer the arbitration under the rules of another institution

### Examples

- Arbitration, if any, by LCIA under ICC Rules in London.

*Russian Federation v I.M. Badprim SRL, (Case no T2454-14)* - Svea Court of Appeal in Stockholm decided that arbitration agreement was enforceable

- Arbitration in the **Arbitration Court of Moscow**, under **UNCITRAL Rules**, with arbitrators appointed by **the president of the International Chamber of Commerce** of Paris.

*CJSC Ural Energo Gaz v ABB Electroengineering LLC* – Supreme Court upheld decision of lower courts that clause is pathological

# Arbitration Agreements

## Particularities and example of a model clause



### Arbitration Clause

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Any dispute or claim arising out of or relating to this Agreement, including any dispute as to its validity, breach, termination or nullity, are finally decided according to the rules of arbitration (Vienna Rules) of the International Arbitration Institution of the Austrian Federal Economic Chamber (VIAC) by one or three arbitrators appointed according to these rules.

#### Optional supplementary agreements on:

- 1) the number of arbitrators (one or three) (Article 17 Vienna Rules)
- 2) the language(s) to be used in the arbitral proceedings (Article 26 Vienna Rules);
- 3) the substantive law applicable to the contractual relationship, the substantive law applicable to the arbitration agreement (both Article 27 Vienna Rules), and the rules applicable to the proceedings (Article 28 Vienna Rules);
- 4) the applicability of the provisions on expedited proceedings (Article 45 Vienna Rules);
- 5) the design of the confidentiality provision for arbitrators (Article 16(2) Vienna Rules) and its extension to parties, representatives and experts.

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**Thank you!**

**Questions ?**

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