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# **2018 ISDA Arbitration Guide**

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**International Swaps and Derivatives Association, Inc.**

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## INTRODUCTION

This Guide provides guidance on the use of an arbitration clause with different forms of the ISDA Master Agreement. It includes a range of model clauses which may be used with either the ISDA 2002 Master Agreement (English/New York law) (the “2002 Agreement”) or the ISDA 1992 Master Agreement (Multicurrency – Cross Border) (the “1992 Agreement”). The Guide also includes a model clause which may be used with the ISDA 2002 Master Agreement (Irish law) (the “Irish Law Agreement”). This Guide is supplemental to and, in relation to Section 13 of the 2002 Agreement and 1992 Agreement, respectively, amends the guidance in the ISDA User’s Guide to each of those forms.

This Guide is issued by the International Swaps and Derivatives Association, Inc. (“ISDA”). The Guide is one way in which ISDA provides guidance and model clauses for the resolution of disputes arising in relation to transactions documented under the different forms of the ISDA Master Agreement. Members may also wish to have regard for the 2018 ISDA Choice of Court and Governing Law Guide, which provides guidance on the drafting of jurisdiction clauses and governing law provisions for use with the 1992 and 2002 Agreements.

This is the second edition of the Guide and may be referred to as the 2018 ISDA Arbitration Guide. It follows the first edition, published in 2013 (the “2013 Guide”). This second edition has been produced following a consultation with members. The consultation commenced with a memorandum to members dated June 19, 2018 and entitled “Proposed update to the 2013 ISDA Arbitration Guide”. The memorandum was followed by conference calls with members and interested stakeholders in different regions. This second edition of the Guide, including the model arbitration clauses contained in the Appendices, reflects the comments of members and interested stakeholders received during the course of the consultation.

Responses to the consultation showed continued support from members for the Guide and the model arbitration clauses in it. The responses were generally consistent with ISDA’s view that no major amendments to the Guide or its model clauses were required. Rather, the main purposes of the second edition of the Guide are (i) to ensure that the model clauses remain up to date (for example, in light of changes to the arbitral rules referred to in the model clauses); (ii) to include new model clauses; and (iii) to update the guidance on arbitration and its key features so as to reflect developments in the arbitration market since the first edition. In revising and expanding the list of model arbitration clauses, ISDA has been led by the responses it has received from members, rather than by any preference of ISDA itself.

This Guide contains, in Sections 1 and 2 respectively, an overview of arbitration and an explanation of the key features of arbitration. Section 3 provides an introduction to the model clauses. Clauses for use with the 2002 Agreement and the 1992 Agreement are set out (in no particular order) in Appendix A to Appendix K. The model clause for use with the Irish Law Agreement is in Appendix L.

ISDA has published two further arbitration clauses which are not to be found in the Guide. First, the ISDA/IIFM Tahawwut Master Agreement, published jointly by ISDA and the International Islamic Finance Market, allows for arbitration in either London or New York under the ICC Rules or such other rules of arbitration as may be specified in the Schedule. Second, the form of Schedule to the ISDA 2002 Master Agreement (French law) (the “French Law Agreement”) contains a model clause providing for arbitration in Paris under the ICC Rules as an alternative to the jurisdiction provisions in Section 13 of

that Agreement. Since these clauses are published in the instruments with which they are intended to be used, they are not repeated in this Guide.

**THIS GUIDE DOES NOT PURPORT AND SHOULD NOT BE CONSIDERED TO BE A GUIDE OR EXPLANATION OF ALL RELEVANT ISSUES OR CONSIDERATIONS IN A PARTICULAR TRANSACTION OR CONTRACTUAL RELATIONSHIP. PARTIES SHOULD THEREFORE CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER THEY DEEM APPROPRIATE PRIOR TO USING ANY ISDA STANDARD DOCUMENTATION. ISDA ASSUMES NO RESPONSIBILITY FOR ANY USE TO WHICH ANY OF ITS DOCUMENTATION OR ANY DEFINITION OR PROVISION CONTAINED THEREIN MAY BE PUT.**

Copies of any of the published ISDA standard documentation may be obtained from ISDA's website, [www.isda.org](http://www.isda.org), under "ISDA Bookstore".

## 2018 ISDA ARBITRATION GUIDE

### 1. OVERVIEW OF ARBITRATION

#### Nature of arbitration

- 1.1 Arbitration is a method of dispute resolution by a privately constituted tribunal, typically made up of one or three arbitrators, which culminates in an arbitral award that binds the parties. The binding nature of an arbitral award means that arbitration is a true alternative to the resolution of disputes by litigation in a court. This feature distinguishes arbitration from some forms of alternative dispute resolution, such as mediation, which may be used before or in addition to court litigation, and which do not result in a binding outcome.
- 1.2 The arbitral award can be enforced against a party or its assets by invoking the coercive power of a court. As explained further below, the cross-border enforcement of arbitral awards is underpinned by an international treaty, the 1958 New York Convention (the “New York Convention”),<sup>1</sup> under which contracting states accept obligations to recognise and enforce arbitral awards subject to limited exceptions. There are approximately 160 contracting states to the New York Convention. This can make arbitration particularly attractive for resolving disputes arising out of international transactions.
- 1.3 A choice of court agreement (a jurisdiction clause) is not always necessary for a court to have jurisdiction over a party or dispute: the court may have inherent jurisdiction by virtue of its rules of civil procedure. In contrast, arbitration is based on consent. An arbitral tribunal’s jurisdiction over the parties and the dispute is always based on an arbitration agreement.<sup>2</sup> Typically, the agreement to arbitrate is found in a clause in the substantive contract between the parties which provides that all disputes arising out of or in connection with the contract shall be arbitrated (rather than litigated in a court).<sup>3</sup> The model clauses provided with this Guide are intended to be inserted into the Schedule to a Master Agreement and so to form part of that agreement.

#### Arbitral rules and institutions

- 1.4 While arbitrators are obliged to act fairly and impartially in deciding the dispute and to give each party an opportunity to present its case, proceedings before an arbitral tribunal do not have to (and typically do not) follow court procedure. Instead, parties may make provision in their arbitration clause as to how the arbitration should be conducted and may agree to arbitrate under rules published by arbitral institutions.

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<sup>1</sup> United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958. The text and list of Contracting States is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

<sup>2</sup> The terms “arbitration clause” and “arbitration agreement” are often used interchangeably by arbitration specialists. In this Guide, for consistency, “arbitration clause” is used.

<sup>3</sup> It is possible to conclude a stand-alone agreement to arbitrate disputes, either before or after a dispute has arisen, but this is much less common. Note also that this Guide is not concerned with investment treaty arbitration. Contracting states to investment treaties agree to observe certain obligations with respect to investments in their territory by investors of the other party or parties to the treaty. These obligations often include a prohibition against expropriation unless conditions are met (notably, compensation), to guarantee “fair and equitable treatment” and “full protection and security” for the investment and equality of treatment with that given to the state’s own nationals or third state investors. An investor who claims a breach of such a treaty is typically given the right under the treaty to bring arbitral proceedings directly against the host state of the investment. This right to arbitrate is not dependent upon a pre-existing agreement to arbitrate, but rather upon the state’s open offer in the investment treaty to arbitrate any claim – an offer which an aggrieved investor may accept so as to bring such a claim. Investment treaties may therefore provide additional rights and remedies under public international law, in addition to contractual rights and remedies.

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- 1.5 Arbitral rules provide a procedural framework for the arbitration, including conferring procedural powers on the tribunal. Arbitral rules are much briefer than court rules, and leave much to the tribunal's discretion unless the parties are able to agree a matter.
- 1.6 Arbitral rules are published by a range of arbitral institutions, and a choice of rules usually also constitutes a choice of that institution to administer the arbitration.<sup>4</sup> (The principal exception to this is the UNCITRAL Arbitration Rules, which have no administering institution.<sup>5</sup>) The institution will not decide the dispute; rather its role is to assist with the appointment of the tribunal (including selecting arbitrators where a party fails to exercise a right to do so, or where the parties are unable to agree), and the administration of the proceedings (for example, hearing challenges to arbitrators, taking deposits on account of the arbitration costs and fixing the arbitrators' fees, reminding parties and tribunals of deadlines, or making arrangements for hearing facilities).

### **Seat of arbitration**

- 1.7 The arbitral proceedings will also be subject to the arbitration law of the jurisdiction chosen as the "seat" of arbitration (sometimes called the "legal place" or simply the "place" of arbitration). The courts of the seat will also have a range of powers (which vary from country to country) in relation to the arbitration.
- 1.8 The seat of arbitration is a legal concept tying the arbitration into a legal jurisdiction. The seat is typically expressed as a city, but the key aspect is the jurisdiction in which the seat is located. (For example, a choice of London ties the arbitration to the legal jurisdiction of England and Wales.) While arbitral hearings are often held at the seat, they may usually be held elsewhere. The true importance of the choice of a seat lies in its legal consequences, of which there are three:
- (a) The arbitration law of the seat will govern the arbitral procedure. (For example, in England, the Arbitration Act 1996 will apply.) Modern arbitration laws typically provide default rules which apply unless the parties have agreed otherwise (either in their arbitration clause, or by choosing to arbitrate under arbitral rules which deal with the issue), but will also impose some mandatory provisions designed to underpin the fairness of the proceedings (such as an obligation for the tribunal to be impartial).
  - (b) The courts of the seat will have certain powers in relation to the arbitration, set out in the arbitration law of the seat. For example, in many countries the courts of the seat have jurisdiction to hear a challenge to an arbitrator alleged to be lacking in independence. The courts of the seat have jurisdiction to hear an application to annul or set aside an award. The precise scope of the courts' powers differs between countries. The approach of the courts to the exercise of those powers also varies from country to country: in some jurisdictions, particularly the leading arbitral centres, the courts will tend to support the

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<sup>4</sup> But see paragraph 3.8 below.

<sup>5</sup> Although the UNCITRAL Rules do not provide for an administering institution, the parties are able to designate an "appointing authority" (usually an arbitral institution) to assist with the appointment of the arbitral tribunal and sometimes also to administer the arbitration. Failing such designation, the Permanent Court of Arbitration in The Hague may be called upon under the UNCITRAL Rules to designate an appointing authority.

arbitral process and not to intervene any further than is necessary; in other jurisdictions, the courts may interfere with or even undermine the arbitral process.

- (c) The award will be treated as having been made at the seat. For the New York Convention to apply to the award, it must be made in a state which is party to the Convention.

1.9 The choice of seat is therefore important. Based on feedback from members, the model clauses provide for seats (in no particular order) in London, New York, Paris, Hong Kong, Singapore, Geneva, Zurich, The Hague, Frankfurt, Stockholm, Vienna, the Dubai International Finance Centre (or DIFC) or Dublin.

1.10 When opting for a jurisdiction clause, parties often prefer to match the jurisdiction with the governing law of the transaction. This is generally sensible because (for example) an English judge is more likely to apply the law accurately for a transaction which is governed by English law, whereas there is a higher risk that a judge in another jurisdiction may not do so. By contrast, when opting for an arbitration clause, parties will often choose a seat (for example, Paris) that does not match the governing law of the transaction (for example, English law). While a judge in France will be a French-qualified lawyer, an arbitral tribunal seated in Paris need not comprise French-qualified lawyers but could (for example) be made up of English-qualified lawyers. The Guide contains a number of clauses where the seat and the governing law of the underlying transaction do not match.

## **2. KEY FEATURES OF ARBITRATION**

2.1 This Section describes some of the key features of arbitration, in particular some of the factors often cited as advantages or disadvantages of arbitration. The importance attached to any of these factors may vary from party to party and even from transaction to transaction. As explained below, the disadvantages can often be mitigated by the inclusion of additional provisions in the arbitration clause.

### **Key reasons for considering using arbitration**

2.2 Historically, international financial transactions have tended to be documented under agreements governed by English or New York law and which contain jurisdiction clauses conferring jurisdiction on the English or New York courts. These are, of course, the options provided for in Section 13 of the 1992 and 2002 Agreements.<sup>6</sup> The courts of both these jurisdictions have a reputation for probity and experience of resolving disputes arising out of derivative transactions, and they can generally be relied upon to do so with reasonable despatch. Today, however, many parties to such transactions are based in emerging jurisdictions in which it is difficult (or sometimes impossible) to enforce a foreign judgment. Succeeding on the merits of a dispute may prove to be a pyrrhic victory if it is not possible to enforce the resulting judgment.

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<sup>6</sup> The ISDA/IIFM Tahawwut Master Agreement published jointly by ISDA and the International Islamic Finance Market provides for English or New York courts or (if the parties so specify in the Schedule) for arbitration under the ICC Rules or such other rules as may be specified in the Schedule. ISDA has also now published Master Agreements governed by Irish law and French law.

- 2.3 One way for a party to mitigate the enforcement risk is to agree to litigate disputes in the courts of the place where its counterparty has its assets (often, but not always and not only, this will be the counterparty's place of incorporation). In many jurisdictions, however, this may give rise to other risks in relation to the proceedings to decide the merits of the dispute:
- (a) bias or corruption on the part of a judicial authority (or a perception to that effect);
  - (b) delay;
  - (c) lack of experience or expertise on the part of local lawyers and judges in dealing with derivatives contracts;
  - (d) failure by the court to respect a foreign governing law;
  - (e) lack of familiarity with a foreign governing law;
  - (f) lack of consistency in decision-making; and/or
  - (g) having to litigate in an unfamiliar and/or inconvenient language (giving rise to a need to translate documents and evidence).
- 2.4 Agreeing to arbitration allows a party to avoid having to litigate in a jurisdiction in whose courts it does not have confidence, while producing an arbitral award which may have an advantage over a foreign court judgment at the enforcement stage in many jurisdictions. This enforcement advantage arises because of the global regime for the cross-border enforcement of arbitral awards under the New York Convention. There is not yet an international regime of comparable reach for the enforcement of court judgments, although this position may change in time as ratifications of the Hague Convention on Choice of Court Agreements of 30 June 2005 (the "Hague Convention") increase. The Hague Convention provides for the enforcement in contracting states of judgments in civil and commercial matters rendered in another contracting state pursuant to an exclusive jurisdiction clause. The Convention is now in force and currently has over thirty contracting parties.<sup>7</sup>
- 2.5 The starting point for assessing enforcement risk is to consider whether there is any arrangement for reciprocal enforcement between (a) the country of the chosen court<sup>8</sup> or of the seat of arbitration, and (b) the likely place of enforcement.
- 2.6 Within the European Union, judgments in civil and commercial matters can be enforced relatively easily under EU Regulation 1215/2012 (the "Recast Brussels Regulation").<sup>9</sup> Similar rules are

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<sup>7</sup> See footnote 1 above for a link to the New York Convention text and a list of Contracting States. The Hague Convention of 30 June 2005 on Choice of Court Agreements came into force in October 2015. This provides a framework of rules relating to jurisdiction agreements (also known as forum selection clauses) in civil and commercial matters, and the subsequent recognition and enforcement of a judgment given by a court of a contracting state designated in a choice of court agreement. 31 states have now acceded to the Hague Convention including all EU Member States. For an up-to-date list of contracting states see here: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>

<sup>8</sup> Most relevant to users of the Master Agreements are the arrangements for enforcement of English and New York judgments, since it is those courts which are specified in the standard form of the Master Agreements.

<sup>9</sup> Council Regulation (EC) No 1215/2012 of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This came into force on July 2015 and repeals EU Regulation 44/2001 (the "Brussels Regulation", referred to in the 2013 Guide). The Brussels Regulation continues to apply to judgments given in proceedings instituted before 10 January 2015. One Member State, Copyright © 2018 by International Swaps and Derivatives Association, Inc.

extended to Norway, Switzerland and Iceland by the Lugano Convention.<sup>10</sup> Beyond this area, however, formal reciprocal arrangements are patchy, typically depending upon bilateral treaties,<sup>11</sup> subject to the Hague Convention referred to above. In the absence of any formal reciprocal arrangement, a judgment creditor is reliant entirely on local law at the place of enforcement. This does not necessarily mean that a foreign judgment will be unenforceable, but the procedure will often be more complex and, in the worst cases, the court may effectively rehear the merits of the case.

- 2.7 In contrast, nearly 160 states are party to the New York Convention. The New York Convention imposes an obligation on the courts of signatory states to recognise and enforce an arbitral award subject only to specific and limited grounds for refusal, which do not include a review of the merits of the dispute. Some states undoubtedly have a better record than others in complying with their obligations under the New York Convention. However, it may often be easier to enforce an award under the New York Convention than to enforce a foreign court judgment where no reciprocal arrangement exists.<sup>12</sup>

### **Neutrality**

- 2.8 When neither contracting party is prepared to submit to the jurisdiction of its counterparty's local courts, arbitration in a third country may be an acceptable, neutral forum. The neutrality of arbitration is often particularly attractive to state entities and international organisations. This is a factor which sometimes prompts the use of arbitration in derivative transactions.
- 2.9 Counterparties in emerging markets can be increasingly reluctant to accept that any dispute will be resolved in the English or New York courts; arbitration is often a more acceptable alternative.

### **Finality**

- 2.10 Unlike a court judgment, an arbitral award is generally not subject to appeal on the merits,<sup>13</sup> and may generally be annulled only for reasons going to the jurisdiction of the tribunal, a failure of due process or public policy. The greater finality of awards may be attractive to parties. Challenges to awards are heard by the courts of the seat and governed by the arbitration law of the seat. There are differences between jurisdictions in the extent of a party's right to apply to set aside awards, whether such a right may be validly waived, the time limits for making such an application, what the court's scope of review is and how many levels of court review there are.

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Denmark, opted out of the Brussels Regulation, but Denmark has implemented the Recast Brussels Regulation. The texts of these instruments are available at:

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF> (Brussels Regulation);

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:En:PDF> (Recast Brussels Regulation).

<sup>10</sup> The Lugano Convention 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The text of and further information for the Lugano Convention is available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22007A1221%2803%29>

<sup>11</sup> The United States, for example, has not entered into any such treaties. The United Kingdom has a number of such treaties, principally with other Commonwealth countries.

<sup>12</sup> Note also that bilateral treaties may contain restrictions upon the enforcement of judgments that are not found in the New York Convention for the enforcement of arbitral awards. For example, the UK's bilateral treaties are restricted to the enforcement of judgments for a sum of money and do not, therefore, provide for the enforcement of an order for the return of property or for specific performance.

<sup>13</sup> Where an arbitration is seated in England, a party may also appeal an award on a point of English law, subject to a number of limitations. However, this right of appeal may be excluded by agreement, and the rules of a number of arbitral institutions provide for such an exclusion. No equivalent right exists at any of the other seats referred to in the model clauses below.

## Procedural flexibility

- 2.11 Arbitral procedures can be tailored to the circumstances of the transaction or dispute much more readily than court procedures. For example, the parties can agree, among other matters, the number and qualifications<sup>14</sup> of arbitrators; the location of the hearings; the language of the proceedings; or the scope of document production. In the absence of party agreement, the arbitral tribunal typically has a great deal of discretion in procedural matters.

## Privacy and confidentiality

- 2.12 Arbitral proceedings are always private (in the sense that, unlike court proceedings in most jurisdictions, third parties have no right of access to them) and may also be confidential (in the sense that the parties themselves may be obliged to keep the contents of the proceedings and the award confidential).
- 2.13 Unless otherwise agreed, there is a duty of confidentiality in arbitration proceedings conducted in England,<sup>15</sup> Hong Kong,<sup>16</sup> Dubai,<sup>17</sup> or Singapore.<sup>18</sup> There is no such duty in arbitration proceedings conducted in New York,<sup>19</sup> France,<sup>20</sup> Switzerland,<sup>21</sup> The Netherlands,<sup>22</sup> Germany,<sup>23</sup> Sweden,<sup>24</sup> Ireland,<sup>25</sup> or Austria,<sup>26</sup> so if parties wish to ensure confidentiality they must therefore provide for it in the arbitration clause or choose arbitral rules containing such provisions. Some institutional arbitration rules contain provisions on confidentiality,<sup>27</sup> but not all do so.<sup>28</sup>

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<sup>14</sup> For example, parties may provide in the arbitration clause that arbitrators must be lawyers qualified in the laws of a particular jurisdiction, or must have relevant industry expertise. However, the advantages of stipulating such a requirement must be weighed against: (a) the relatively small pool of arbitrators with specialist derivatives experience; and (b) the resulting risk that that arbitrator may more frequently be challenged due to an alleged lack of the requisite level of expertise. Where qualifications are included in an arbitration clause, they should be set out clearly and, where possible, by reference to objective criteria.

<sup>15</sup> While confidentiality is not expressly provided for in the Arbitration Act 1996, it is implied as a matter of English law.

<sup>16</sup> Arbitration proceedings and arbitral awards are confidential pursuant to section 18 of the Hong Kong Arbitration Ordinance.

<sup>17</sup> Article 14 of the DIFC Arbitration Law 2008 (No. 1 of 2008) states that “[u]nless otherwise agreed by the parties, all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an order of the DIFC Court”.

<sup>18</sup> A duty of confidentiality in respect of arbitral proceedings is not expressly contained within the Singapore International Arbitration Act, but a duty is implied under the common law.

<sup>19</sup> The US Federal Arbitration Act does not expressly address the confidentiality of arbitration proceedings and there is no implied duty of confidentiality in arbitration proceedings.

<sup>20</sup> The “principle of confidentiality” of the arbitration, as applicable in domestic arbitration (Article 1464 of the Code of Civil Procedure), does not apply to international arbitrations.

<sup>21</sup> In Switzerland, the Private International Law Act does not expressly address the confidentiality of arbitration proceedings. It is generally held that arbitrators assume a duty of confidentiality with the acceptance of their mandate. However, there is no clear duty of confidentiality for parties in the absence of a specific agreement.

<sup>22</sup> In The Netherlands, there is no specific provision for confidentiality in arbitration in the Dutch Code of Civil Proceedings, although it is a generally accepted principle. Parties would therefore be wise to enter into separate confidentiality agreements.

<sup>23</sup> The German Arbitration Act does not provide for the confidentiality of arbitral proceedings. If parties wish proceedings to be confidential, a separate confidentiality agreement should be considered. (However, Article 44 of the DIS Rules provides that proceedings administered by the DIS are confidential.)

<sup>24</sup> In Sweden, unless otherwise agreed, the parties do not have a duty of confidentiality, but the arbitral proceedings are private.

<sup>25</sup> There is no express statutory provision in the Ireland Arbitration Act 2010 that arbitration proceedings are to be confidential or that the parties are subject to an implied duty of confidentiality.

<sup>26</sup> The Austrian Arbitration Act does not contain an express provision of confidentiality for arbitration. Parties are advised to consider entering into a confidentiality agreement if they wish their arbitration proceedings to be confidential.

<sup>27</sup> The LCIA Rules (Article 30), the HKIAC Rules (Article 45), the SIAC Rules (Rule 39), the DIFC-LCIA Rules (Article 30), the DIS Rules (Article 44) and the Swiss Arbitration Rules (Article 44(1)) all place the parties under a duty of confidentiality, subject to exceptions. These confidentiality rules vary in what they provide. Under the SCC Rules (Article 3), the ICDR Rules (Article 36.1) and the VIAC Rules (Articles 2(4), 4(4) and 16(2)), the arbitral institution and the arbitral tribunal are subject to a duty of confidentiality, but not the parties.

<sup>28</sup> The ICC Rules do not impose a general duty of confidentiality, although the arbitral tribunal may make orders on confidentiality at the request of any party (Article 22.3). The ICDR Rules (Article 16.2) contain an equivalent provision. The P.R.I.M.E Finance Rules contain no confidentiality provision.

- 2.14 Privacy and confidentiality are often important reasons for the use of arbitration, although it may be that privacy or confidentiality are lost if an application is made to court, for example for interim relief or at the enforcement stage. It may also be difficult to enforce effectively a duty of confidentiality against a party determined to breach it.
- 2.15 Arbitral awards, although binding upon the parties to the arbitration, do not have wider precedent value, as common law judgments do. Since most awards remain private, they do not even give rise to any persuasive precedent value.

### **No default or summary judgment procedures**

- 2.16 The civil procedure rules of some jurisdictions (such as England and New York) permit the courts to grant default judgment on a claim if a defendant does not take part in proceedings, or to grant summary judgment if a claim or defence has no real prospect of success, without a full trial. Historically, arbitration laws and rules have not provided for such procedures. The reason generally given for the absence of such procedures is a concern that the unsuccessful party's due process rights might be infringed. Many arbitration laws and rules provide that each party must be given a reasonable opportunity to present its case; it has been argued that default or summary judgment might contravene such provisions. Where arbitration laws and rules do not provide for such procedures, undefended claims or claims that face only hopeless defences can take longer to resolve than they would do in the English or New York courts.
- 2.17 It is usually accepted that default judgment is not available in arbitration; a claimant faced with a non-participating respondent must instead persuade the arbitral tribunal to render an award on the merits in its favour. With regard to summary judgment, however, it has been argued that arbitral tribunals would not necessarily infringe due process rights if they decided cases sensibly on summary grounds (e.g. if the claim would fail in law even if the claimant's version of the facts were assumed to be true). In any event, some arbitration laws and rules now expressly empower arbitral tribunals to decide cases on a summary basis,<sup>29</sup> although the test in arbitration<sup>30</sup> is usually more onerous than in court litigation.<sup>31</sup>
- 2.18 Moreover, the availability of summary judgment in court litigation can be overstated. Defendants to straightforward claims may raise complex defences which have little real merit but are sufficient to avoid summary judgment. Even without summary judgment procedures, an arbitration may often provide a quicker resolution of the claim than would be possible in what may be the only alternative forum for obtaining an enforceable decision – the counterparty's local courts. Any comparison naturally depends upon which court is the comparator.
- 2.19 Separately, some institutional rules allow for arbitration under accelerated timelines, typically where the amount in dispute is below a certain threshold value, in cases of urgency, or where the

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<sup>29</sup> For example, if a claim is “manifestly without legal merit” pursuant to Rule 29 of the SIAC Rules.

<sup>30</sup> For instance, under Article 29.1 of the SIAC Rules, a party applying for summary judgment (“early dismissal”) must establish that the claim/defence is “manifestly without legal merit” or “manifestly outside the jurisdiction of the Tribunal”. In contrast, under Article 39(5) of the SCC Rules, a Tribunal may make an order for a summary procedure having “regard to all relevant circumstances, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute”.

<sup>31</sup> Under the English Civil Procedure Rules (2018), the court may give summary judgment against one of the parties only if it considers that the party has “no real prospect of success” in pursuing/defending the claim and “there is no other compelling reason why the case or issue should be disposed of at a trial” (CPR 24.2).

parties agree to shorten the timelines. These provisions may be helpful in some cases but are not intended to (and do not) replicate summary judgment. Parties are also free to draft their own bespoke “fast track” provisions for their arbitration clauses, which may be helpful to expedite the proceedings. Care should be taken, however, to ensure that all parties are able to present their case, and to avoid unrealistic or inflexible deadlines: if a deadline for rendering an award cannot be extended and is missed, any subsequent award may be vulnerable to challenge.

### **Documents and evidence**

- 2.20 The extent to which a party to litigation is entitled to obtain the production of documents from its opponent differs markedly between jurisdictions. (As is well known, common law jurisdictions typically allow much greater “disclosure” or “discovery” of documents than continental European jurisdictions.) Likewise, the evidence of factual and expert witnesses is handled in a variety of ways: experts may be instructed by the court or the parties, and factual witnesses may or may not be deposed in advance of trial, may give their evidence in chief (direct evidence) orally or in written witness statements, and may be cross-examined primarily by opposing counsel or by the judge.
- 2.21 Subject to due process standards, evidential matters in arbitration are in the first instance for the parties to agree (either in the arbitration agreement or during the arbitration itself), or alternatively they fall within the arbitral tribunal’s procedural discretion. The approach in any particular case varies according to the preferences of the parties and their lawyers (particularly if all parties are in broad agreement) and also the arbitral tribunal, and may be influenced by the legal background of the arbitrators and counsel concerned. Parties sometimes take advantage of the procedural flexibility available to them in arbitration by, for example, agreeing on the scope of document production. Subject to any such agreement in a particular case, a degree of convergence has emerged in international arbitration. Evidence in chief tends to be given by way of written statements, and parties are typically permitted to cross-examine opposing witnesses and instruct their own experts. The International Bar Association’s Rules for the Taking of Evidence in International Arbitration (the “IBA Rules”<sup>32</sup>) are often used as guidance or expressly adopted by the parties or tribunal, particularly with regard to the production of documents, on which they seek to establish a compromise between common law and civil law practice. The IBA Rules allow a party to request the production of a specific document or a narrow and specific category of documents that are relevant and material to the outcome of the case. This approach may be a tactical advantage or disadvantage for a party in any given case, but is designed to avoid the costs associated with large discovery exercises.

### **Interim relief**

- 2.22 The availability of interim relief to parties pending a final award is an important feature of international arbitration. Typically, arbitral tribunals have broad powers to grant appropriate interim measures, including orders to prohibit actions that cause imminent harm or to preserve assets to satisfy an award.

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<sup>32</sup> See [https://www.ibanet.org/ENews\\_Archive/IBA\\_30June\\_2010\\_Enews\\_Taking\\_of\\_Evidence\\_new\\_rules.aspx](https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx)  
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- 2.23 Where a tribunal has not yet been appointed (and sometimes thereafter) parties may apply to the national courts of the seat (or other competent jurisdiction) for interim relief. The precise scope of the court’s powers to grant such relief in connection with an arbitration varies between jurisdictions.<sup>33</sup> In some cases parties may need to demonstrate why it is appropriate for the court, rather than the arbitral tribunal, to deal with the application. In addition, all of the arbitral rules incorporated into the model clauses in the Appendices to this Guide provide for the appointment of an “emergency arbitrator”. The emergency arbitrator can be appointed at short notice and is empowered to grant interim relief prior to constitution of the arbitral tribunal.

### **Optional arbitration clauses**

- 2.24 Optional arbitration clauses give one (or more) parties the ability to make a choice after a dispute has arisen whether to arbitrate or litigate that dispute. Such clauses are typically found in loan agreements and related documentation, but are rare in derivatives contracts and have not been included in this Guide. Such clauses may also give rise to enforcement risks: in some countries, courts have refused to give effect to such clauses and in many jurisdictions the enforceability of such clauses is untested. In jurisdictions where such clauses are, in principle, effective, careful drafting is required.

### **Multiple parties and multiple agreements**

- 2.25 Complications may arise in arbitration where multiple parties are involved in a transaction or where a transaction involves multiple related agreements. This is because, as starting principles, only the parties to the specific arbitration agreement will be bound by it and entitled to enforce it, and an arbitral tribunal only has jurisdiction over the parties to the arbitration proceedings being adjudicated by that tribunal. These matters can give rise to difficulties in relation to joinder (i.e. joining a further party to an existing arbitration) and consolidation (i.e. combining related proceedings into a single arbitration). Some sets of arbitration rules now contain provisions which address these challenges. Nevertheless, multi-party or multi-contract transactions providing for dispute resolution by way of arbitration will often warrant specialist legal advice on drafting the relevant arbitration agreement(s). As a starting point, it is generally useful to ensure that separate, but related, agreements contain consistent dispute resolution clauses or that all relevant entities become parties to the same agreement for the purpose of dispute resolution.

## **3. THE MODEL CLAUSES**

- 3.1 Most of the clauses in the Appendices to this Guide are primarily designed for use with the 2002 Agreement, with additional wording also provided for use with the 1992 Agreement. In addition, one clause is included for use with the Irish Law Agreement.<sup>34</sup> Each model clause is drafted in

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<sup>33</sup> The decision of the English High Court in *Gerald Metals v Timis* [2016] EWHC 2327 (Ch) has cast some doubt on the power of the English High Court to grant interim relief in connection with an arbitration before the full arbitral tribunal is constituted, where the applicable arbitration rules allow an application to be made for the appointment of an emergency arbitrator. (The same issue may arise in other jurisdictions too where the arbitration law provides that the court may only grant interim relief when the tribunal is unable to act effectively.) Following this decision, some parties are known to disapply emergency arbitrator provisions in their arbitration clauses when they choose a seat in England so that they are sure of preserving the possibility of applying to the English court for interim relief before the full tribunal is constituted. The lead of these parties has not been followed in the model clauses in this Guide because responses from members to ISDA’s consultation revealed mixed views about the effect of the *Gerald Metals* decision and no settled market practice on this point.

<sup>34</sup> A clause for use with the French Law Agreement is found in Part 4 of the form of Schedule to the French Law Agreement and is therefore not included in this Guide.

a consistent format (subject to such variations as are required in light of the chosen arbitral rules or the law of the chosen seat), and is intended to form part of the Schedule to the Master Agreement. The clauses have been drafted on the assumption that parties will include them when entering into a new Master Agreement; parties amending existing agreements will need to include additional wording reflecting that fact.

### 3.2 The clauses provide for the following:

- (a) In each model clause for use with the 2002 Agreement (or the 1992 Agreement), there is a governing law provision which specifies the governing law of the Master Agreement and of the arbitration clause. (No such provision is needed for the clause to be used with the Irish Law Agreement, since Section 13(a) in that agreement specifies the governing law). Where the seat of arbitration is not the same as the parties' choice of governing law for the Master Agreement (for example, a Hong Kong-seated arbitration, but an English law-governed Master Agreement), there may be uncertainty as to which law was supposed to be the governing law of the arbitration clause in the absence of a specific governing law for the arbitration clause. To avoid this uncertainty, where appropriate, a governing law of the separable arbitration clause has been included.<sup>35</sup> The governing law of the arbitration clause (as distinct from the governing law of the Master Agreement) can potentially be relevant to issues including the substantive validity of the agreement to arbitrate or the termination of an agreement to arbitrate.
- (b) Each model clause deletes the jurisdiction clause (Section 13(b) of the Master Agreement) and replaces it with an arbitration clause. It is important to delete the existing Section 13(b): a failure to do so would leave the Master Agreement as a whole with both jurisdiction and arbitration clauses, which may be a source of confusion as to the parties' true intentions and might prejudice the effectiveness of the arbitration clause in some jurisdictions.
- (c) The provisions that follow amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction, and the final provision amends the definition of Proceedings, which is used at several points in Section 13.

### 3.3 The clauses in Appendix A to Appendix K are intended for use with the 2002 Agreement (or the 1992 Agreement). They provide for the following combinations of governing laws, arbitral rules and seats of arbitration.

- (a) **Appendix A:** Rules of Arbitration of the International Chamber of Commerce (**ICC Rules**):

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<sup>35</sup> However, in France, the validity of an international arbitration clause is assessed by reference to "substantive principles of international law" developed by the French courts, rather than by reference to any domestic governing law (Article 1507 of the Code of Civil Procedure). In Switzerland, an arbitration clause is treated as valid if it is valid under the law chosen by the parties, under the law applicable to the substance of the dispute (i.e. the governing law of the contract) or Swiss law (see Article 178(2) of the Swiss Private International Law Act). The governing law of the arbitration clause is therefore of less significance for arbitrations seated in France and Switzerland, and so no separate governing law for the arbitration clause has been specified in those cases.

- (i) Part 1: London seat; Governing law – English law;
  - (ii) Part 2: New York seat; Governing law – New York law; and
  - (iii) Part 3: Paris seat; Governing law – choice of English law or New York law.
- (b) **Appendix B:** Arbitration Rules of the London Court of International Arbitration (**LCIA Rules**); London seat; Governing law – English law.
- (c) **Appendix C:** International Arbitration Rules of the American Arbitration Association – International Centre for Dispute Resolution (**AAA-ICDR Rules**);<sup>36</sup> New York seat; Governing law – New York law.
- (d) **Appendix D:** Administered Arbitration Rules of the Hong Kong International Arbitration Centre (**HKIAC Rules**); Hong Kong seat; Governing law – choice of English law or New York law; arbitration clause governed by Hong Kong law.
- (e) **Appendix E:** Arbitration Rules of the Singapore International Arbitration Centre (**SIAC Rules**); Singapore seat; Governing law – choice of English law or New York law; arbitration clause governed by Singapore law.
- (f) **Appendix F:** Swiss Rules of International Arbitration; choice of Zurich or Geneva seat (**Swiss Arbitration Rules**);<sup>37</sup> Governing law – choice of English law or New York law.
- (g) **Appendix G:** Panel of Recognised International Market Experts in Finance Arbitration Rules (**P.R.I.M.E. Finance Rules**):
- (i) Part 1: London seat; Governing law – English law;
  - (ii) Part 2: New York seat; Governing law – New York law; and
  - (iii) Part 3: The Hague seat; Governing law – choice of English law or New York law, arbitration clause governed by Dutch law.
- (h) **Appendix H:** Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (**SCC Rules**); Stockholm seat; Governing law – choice of English or New York law; arbitration clause governed by Swedish law.
- (i) **Appendix I:** Arbitration Rules of the German Arbitration Institute (**DIS Rules**); Frankfurt seat; Governing law – choice of English or New York law; arbitration clause governed by German law.

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<sup>36</sup> The AAA publishes a number of sets of arbitration rules. Given the likely cross-border use of the clauses, the International Arbitration Rules were considered most appropriate for these purposes.

<sup>37</sup> The parties are free to choose either one of these two seats as the legal regime for international arbitration is the same in both cantons.  
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- (j) **Appendix J:** DIFC-LCIA Arbitration Rules (**DIFC-LCIA Rules**); Dubai International Financial Centre seat; Governing law – choice of English or New York law; arbitration clause governed by DIFC law.
  - (k) **Appendix K:** Rules of Arbitration of the Vienna International Arbitration Centre (**VIAC Rules**); Vienna seat; Governing law – choice of English or New York law, arbitration clause governed by Austrian law.
- 3.4 In addition, **Appendix L** contains a model clause to be used with the Irish Law Agreement. It provides for arbitration under the LCIA Rules with a seat in Dublin.
- 3.5 As noted above, ISDA has also published two other model arbitration clauses. Since these clauses are published in the specific agreements in which they are intended to be used, they are not set out in this Guide:
- (a) The ISDA/IIFM Tahawwut Master Agreement, published jointly by ISDA and the International Islamic Finance Market, allows in Section 13(c) for arbitration in either London or New York under the ICC Rules or such other rules of arbitration as may be specified in the Schedule.
  - (b) The form of Schedule to the French Law Agreement contains a model clause providing for arbitration in Paris under the ICC Rules as an alternative to the jurisdiction provisions in Section 13 of that Agreement.
- 3.6 The clauses have been drafted primarily with cross-border transactions in mind and based upon member feedback. In particular, the choices of seats and arbitral institutions have been determined on the basis of members’ comments as to which to prioritise; inclusion in this Guide is not an endorsement of these seats and institutions to the exclusion of others, and parties are, of course, free to choose other seats and rules if they wish. There are other reputable seats and institutions and ISDA does not rule out preparing additional clauses in the future. Parties should note, however, that the model clauses have been tailored to the specific seats and rules indicated; they might require adaptation for use with other seats and/or rules and parties considering doing so are encouraged to seek legal advice.
- 3.7 The model clauses below are provided to assist parties with the framework of their dispute resolution clauses. These clauses are not boilerplate clauses and may have to be tailored specifically to the transaction concerned.
- 3.8 It is possible that even these model clauses may have to be amended for them to be valid in certain jurisdictions. For example, as this second edition of the ISDA Arbitration Guide was being prepared in late 2018, the Russian Supreme Court rendered a decision<sup>38</sup> which appears to hold that a clause providing for arbitration under the ICC Rules would lack certainty under Russian law if it were to fail to state expressly in the arbitration clause that the ICC International Court of Arbitration would administer the arbitration. If this remains the position under Russian law, it would be advisable in any transaction with a Russian nexus to identify the administering arbitration

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<sup>38</sup> *Dredging and Maritime Management SA v. InjTransStroy AO*, case number № 305-ЭС18-11934  
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institution expressly in the arbitration clause. This recommendation would apply to any clause providing for administered arbitration where a Russian nexus exists, and not just clauses providing for ICC arbitration. The same approach has also been advised for transactions with a connection to China.<sup>39</sup>

- 3.9 Parties are free to modify the model clauses as they wish. Among the matters that parties may wish to take into account are: whether any amendment or addition to the clause is helpful for the purpose of obtaining recognition of the agreement to arbitrate, or enforcement of an award, in any particular jurisdiction; whether joinder or consolidation provisions should be included because there are more than two parties or relevant contracts; whether to require the arbitrators to have certain qualifications or experience; whether to provide for confidentiality where the law of the seat or the arbitration rules do not ensure this; whether to agree on how, and to what extent, an award can be challenged, where this is open to the parties to agree; whether to agree on evidential matters such as the scope of document production; and whether to agree on the power of the arbitral tribunal (or the courts of the seat) to grant interim relief.
- 3.10 As noted in the Introduction, this Guide merely provides guidance and model clauses. Parties should always seek appropriate legal advice and any other relevant advice necessary to ensure that arbitration is an appropriate form of dispute resolution for the specific contractual relationship under consideration and, if so, that the relevant arbitration clause chosen is appropriate and properly drafted for that purpose in relation to that specific relationship.

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See <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>

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## APPENDIX A

### MODEL CLAUSES FOR ICC RULES

#### PART 1

#### MODEL CLAUSE FOR ICC RULES (LONDON SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)*
- *The institutional rules are the ICC Rules<sup>40</sup>*
- *The seat of arbitration is London*
- *The underlying agreement is governed by English law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is primarily designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for English governing law. The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) ***Governing Law.*** This Agreement (including Section 13(b) (Arbitration)) and any non- contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with English law.

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) ***Arbitration***

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

<sup>40</sup> Explanatory comments in the footnotes refer to the 2017 ICC Rules of Arbitration.

(ii) The arbitration shall be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce (the “ICC”) (the “Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.

(iii) [**Option 1:** The arbitral tribunal shall consist of one arbitrator, who shall be appointed in accordance with the Rules.<sup>41</sup>]

[**Option 2:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules.<sup>42</sup>]

[**Option 3:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules, save that the president of the arbitral tribunal shall be nominated by the two co-arbitrators. If no such nomination is made within the time limit set out in the Rules, the president shall be appointed in accordance with the Rules.<sup>43</sup>]

(iv) The seat, or legal place of arbitration, shall be London.

(v) The language used in the arbitral proceedings shall be English.<sup>44</sup>

( ) Section 13(c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit, action or proceedings before the English courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>45</sup>

( ) Section 13(d) of this Agreement is hereby amended:

(a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;

(b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and

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<sup>41</sup> Article 12(3) of the ICC Rules provides that, where the parties have agreed that the dispute be resolved by a sole arbitrator, they may, by agreement, nominate the arbitrator for confirmation. It also provides that, if the parties fail to nominate a sole arbitrator within 30 days from the receipt of the Request for Arbitration by the respondent, the sole arbitrator will be appointed by the ICC Court.

<sup>42</sup> Article 12(4) of the ICC Rules provides that where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate, in the Request and the Answer respectively, one arbitrator for confirmation. Article 12(5) provides that the third arbitrator, who will act as the president, will be appointed by the ICC Court unless the parties have agreed another procedure.

<sup>43</sup> The purpose of this provision is to give the two co-arbitrators (nominated by the parties) the right to nominate the president of the tribunal. If they fail to make a nomination within 30 days of their confirmation or appointment by the ICC, then the president will be appointed by the ICC Court under Article 12(5) of the ICC Rules.

<sup>44</sup> Article 20 of the ICC Rules provides that in the absence of an agreement by the parties, the arbitral tribunal shall determine the language of the arbitration, giving regard to all the relevant circumstances, including the language of the contract.

<sup>45</sup> Note that, in the event it is necessary to seek interim measures from a court before a tribunal is appointed, it is useful if a process agent has been appointed. The process agent should be an entity in England and Wales. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

- (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>46</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>47</sup>

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<sup>46</sup> If using the 1992 Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>47</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## PART 2

### MODEL CLAUSE FOR ICC RULES (NEW YORK SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)*
- *The institutional rules are the ICC Rules<sup>48</sup>*
- *The seat of arbitration is New York*
- *The underlying agreement is governed by New York law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is primarily designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for New York governing law. The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) **Governing Law.** This Agreement (including Section 13(b) (Arbitration)) and any non- contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with New York law (excluding conflict of laws principles).

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) **Arbitration**

(ii) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

(iii) The arbitration shall be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce (the “ICC”) (the “Rules”). Capitalised terms used

<sup>48</sup> Explanatory comments in the footnotes refer to the 2017 ICC Rules of Arbitration.

in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.

- (iv) [**Option 1:** The arbitral tribunal shall consist of one arbitrator, who shall be appointed in accordance with the Rules.<sup>49</sup>]

[**Option 2:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules.<sup>50</sup>]

[**Option 3:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules, save that the president of the arbitral tribunal shall be nominated by the two co-arbitrators. If no such nomination is made within the time limit set out in the Rules, the president shall be appointed in accordance with the Rules.<sup>51</sup>]

- (v) The seat, or legal place of arbitration, shall be New York.

- (vi) The language used in the arbitral proceedings shall be English.<sup>52</sup>

( ) Section 13(c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit action or proceedings before the New York courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>53</sup>

( ) Section 13(d) of this Agreement is hereby amended:

- (a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;
- (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and
- (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

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<sup>49</sup> Article 12(3) of the ICC Rules provides that where the parties have agreed that the dispute be resolved by a sole arbitrator, they may, by agreement, nominate the arbitrator for confirmation. It also provides that if the parties are unable to agree on a nomination within 30 days from the receipt of the Request for Arbitration by the respondent, the sole arbitrator will be appointed by the ICC Court.

<sup>50</sup> Article 12(4) of the ICC Rules provides that where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer respectively, one arbitrator for confirmation. Article 12(5) provides that the third arbitrator, who will act as the president, will be appointed by the ICC Court unless the parties have agreed another procedure.

<sup>51</sup> The purpose of this provision is to give the two co-arbitrators (nominated by the parties) the right to nominate the president of the tribunal. If they fail to make a nomination within 30 days of their confirmation or appointment by the ICC, then the president will be appointed by the ICC Court under Article 12(5) of the ICC Rules.

<sup>52</sup> Article 20 of the ICC Rules provides that in the absence of an agreement by the parties, the arbitral tribunal shall determine the language of the arbitration, giving regard to all the relevant circumstances, including the language of the contract.

<sup>53</sup> Note that, in the event it is necessary to seek interim measures from a court before a tribunal is appointed, it is useful if a process agent has already been appointed. The process agent should be an entity in New York. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>54</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i)”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>55</sup>

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<sup>54</sup> If using the 1992 Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>55</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## PART 3

### MODEL CLAUSE FOR ICC RULES (PARIS SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)*
- *The institutional rules are the ICC Rules<sup>56</sup>*
- *The seat of arbitration is Paris*
- *The underlying agreement is governed by English law or New York law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is primarily designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for English or New York governing law (a choice one or the other should be made).<sup>57</sup> The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) ***Governing Law.*** This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with [English law/New York law (excluding conflict of laws principles)].<sup>58</sup>

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) ***Arbitration***

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

<sup>56</sup> Explanatory comments in the footnotes refer to the 2017 ICC Rules of Arbitration.

<sup>57</sup> We have not specified the law governing the arbitration clause for arbitration because the French courts would assess the validity of an arbitration clause by reference to “substantive principles of international law” developed by the French courts.

<sup>58</sup> Amend as necessary.

(ii) The arbitration shall be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce (the “ICC”) (the “Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.

(iii) [**Option 1:** The arbitral tribunal shall consist of one arbitrator, who shall be appointed in accordance with the Rules.<sup>59]</sup>

[**Option 2:** The arbitral tribunal shall consist of three arbitrators. The members of the Tribunal shall be appointed in accordance with the Rules.<sup>60]</sup>

[**Option 3:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules, save that the president of the arbitral tribunal shall be nominated by the two co-arbitrators. If no such nomination is made within the time limit set out in the Rules, the president shall be appointed in accordance with the Rules.<sup>61]</sup>

(iv) The seat, or legal place of arbitration, shall be Paris.

(v) The language used in the arbitral proceedings shall be English.

(vi) [**Option 1:** The parties hereby agree, pursuant to Article 1522 of the French Code of Civil Procedure, to waive their right to apply to set aside an arbitral award.]

[**Option 2:** For the avoidance of doubt, notwithstanding Article 35.6 of the ICC Rules, the parties reserve the right to apply to set aside of an arbitral award pursuant to Articles 1518 to 1520 of the French Code of Civil Procedure.]<sup>62</sup>

( ) Section 13(c) of this Agreement is hereby amended by:

(a) deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit action or proceedings before the French courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”; and

(b) adding, at the end of Section 13(c), the words “The Process Agent shall act as the legal representative of the Party that appointed him for all purposes necessary in connection with this Section 13(c). By appointing a Process Agent, the Parties consent to “elect

<sup>59</sup> Article 12(3) of the ICC Rules provides that, where the parties have agreed that the dispute be resolved by a sole arbitrator, they may, by agreement, nominate the arbitrator for confirmation. It also provides that if the parties are unable to agree on a nomination within 30 days from the receipt of the Request for Arbitration by the respondent, the sole arbitrator will be appointed by the ICC Court.

<sup>60</sup> Article 12(4) of the ICC Rules provides that where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer respectively, one arbitrator for confirmation. Article 12(5) provides that the third arbitrator, who will act as the president, will be appointed by the ICC Court unless the parties have agreed another procedure.

<sup>61</sup> The purpose of this provision is to give the two co-arbitrators (nominated by the parties) the right to nominate the president of the tribunal. If they fail to make a nomination within 30 days of their confirmation or appointment by the ICC, then the president will be appointed by the ICC Court under Article 12(5) of the ICC Rules.

<sup>62</sup> Include Option 1 if the parties wish to waive their right to apply to the French courts to set aside an award or Option 2 if they wish to make clear that they do not waive that right.

domicile” (“*élire domicile*”) at the Process Agent and irrevocably waive their right to the “*délais de distance*” under Article 643 of the French Code of Civil Procedure”.<sup>63</sup>

- ( ) Section 13(d) of this Agreement is hereby amended:
- (a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;
  - (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and
  - (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i)”.; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>64</sup>

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<sup>63</sup> The concept “*délais de distance*” is the rule that, with some exceptions, a foreign party who does not have a legal representative in France is entitled to additional time to respond to French court proceedings. This is not stated to be a mandatory provision, but there is no clear authority that the additional time may be waived as this provision seeks to do.

<sup>64</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## APPENDIX B

### MODEL CLAUSE FOR LCIA RULES (LONDON SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)*
- *The institutional rules are the LCIA Rules<sup>65</sup>*
- *The seat of arbitration is London*
- *The underlying agreement is governed by English law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is primarily designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for English governing law. The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) ***Governing Law.*** This Agreement (including Section 13(b) (Arbitration)) and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with English law.

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) ***Arbitration***

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.
- (ii) The arbitration shall be conducted in accordance with the LCIA Arbitration Rules (the “Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.

<sup>65</sup> Explanatory comments in the footnotes refer to the 2014 LCIA Arbitration Rules.

(iii) [**Option 1:** The Arbitral Tribunal shall consist of one arbitrator. The parties shall jointly nominate the sole arbitrator. If the arbitrator is not nominated in accordance with the terms of this Subsection by no later than the date for service of the Response the arbitrator shall be selected and appointed by the LCIA Court.<sup>66]</sup>

[**Option 2:** The Arbitral Tribunal shall consist of three arbitrators. The claimant shall nominate one arbitrator. The respondent shall nominate one arbitrator. The third arbitrator (who shall be presiding arbitrator of the Arbitral Tribunal) shall be selected and appointed by the LCIA Court.<sup>67]</sup>

[**Option 3:** The Arbitral Tribunal shall consist of three arbitrators. The claimant shall nominate one arbitrator. The respondent shall nominate one arbitrator. The two persons so nominated shall, within 14 days of the second of them confirming to the LCIA that he or she is willing and able to accept appointment, nominate a third arbitrator who shall act as presiding arbitrator of the Arbitral Tribunal. If no such nomination is made within that time limit, then the LCIA Court shall select and appoint the presiding arbitrator of the Arbitral Tribunal.<sup>68]</sup>

(iv) The seat, or legal place of arbitration, shall be London.

(v) The language used in the arbitral proceedings shall be English.<sup>69</sup>

( ) Section 13(c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit, action or proceedings before the English courts relating to the arbitration clause or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>70</sup>

( ) Section 13(d) of this Agreement is hereby amended:

(a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;

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<sup>66</sup> Article 5 of the LCIA Rules provides that the LCIA Court shall appoint the Arbitral Tribunal but that it shall do so with due regard for any particular method or criteria of selection agreed in writing by the parties. Article 7 of the LCIA Rules provides that, where the parties have agreed that they are to nominate the arbitrator, the arbitrator will only be appointed by the LCIA Court if it is satisfied of his/her independence and impartiality in accordance with Article 5 of the LCIA Rules.

<sup>67</sup> Article 5 of the LCIA Rules provides that the LCIA Court shall appoint the Arbitral Tribunal but that it shall do so with due regard for any particular method or criteria of selection agreed in writing by the parties. Article 7 of the LCIA Rules provides that the parties may each nominate an arbitrator, but that the nominated candidate will only be appointed by the LCIA Court if it is satisfied of his/her independence and impartiality in accordance with Article 5 of the LCIA Rules. The parties are to make their nominations in the Request for Arbitration and Response (Articles 1 and 2). The presiding arbitrator of the Arbitral Tribunal shall be appointed by the LCIA Court (Article 5).

<sup>68</sup> The purpose of this provision is to give the two co-arbitrators (nominated by the parties) the right to nominate the presiding arbitrator of the Arbitral Tribunal. In such a case, such nomination will be treated as an agreement to nominate the presiding arbitrator and the presiding arbitrator will only be appointed by the LCIA Court if it is satisfied of his/her independence and impartiality in accordance with Article 5 of the LCIA Rules.

<sup>69</sup> Article 17 of the LCIA Rules provides that the initial language of the arbitration shall be the language of the arbitration clause unless the parties have agreed in writing otherwise. Article 17 provides that, once the Arbitral Tribunal has been constituted, and unless the parties agree the language of the arbitration, the Arbitral Tribunal shall decide on the language of the arbitration.

<sup>70</sup> Note that in the event it is necessary to seek interim measures from a court before a tribunal is appointed, it is useful if a process agent has already been appointed. The process agent should be an entity in England and Wales. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

- (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and
- (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>71</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>72</sup>

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<sup>71</sup> If using the 1992 Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>72</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## APPENDIX C

### MODEL CLAUSE FOR AAA-ICDR RULES (NEW YORK SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)*
- *The institutional rules are the AAA-ICDR Rules<sup>73</sup>*
- *The seat of arbitration is New York*
- *The underlying agreement is governed by New York law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is primarily designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for New York governing law. The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) ***Governing Law.*** This Agreement (including Section 13(b) (Arbitration)) and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with New York law (excluding conflict of laws principles).

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) ***Arbitration***

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.
- (ii) The arbitration shall be conducted in accordance with the International Arbitration Rules of the American Arbitration Association – International Centre for Dispute Resolution

<sup>73</sup> Explanatory comments in the footnotes refer to the 2014 AAA-ICDR International Arbitration Rules.  
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(the “Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.

- (iii) [**Option 1:** The Tribunal shall consist of one arbitrator, who shall be appointed in accordance with the Rules.<sup>74</sup>]

[**Option 2:** The Tribunal shall consist of three arbitrators. The claimant shall appoint one arbitrator in the Notice of Arbitration. The respondent shall appoint one arbitrator in the Answer. If any party fails to make its nomination pursuant to this clause then the Administrator shall appoint an arbitrator on its behalf. The third arbitrator, who shall be the presiding arbitrator, shall be appointed by the Administrator.<sup>75</sup>]

[**Option 3:** The claimant shall appoint one arbitrator in the Notice of Arbitration. The respondent shall appoint one arbitrator in the Answer. If any party fails to make its nomination pursuant to this clause then the Administrator shall appoint an arbitrator on its behalf. The two arbitrators so appointed shall, within 14 days of the appointment of the second of them, appoint the third arbitrator, who shall be the presiding arbitrator. If the third arbitrator has not been appointed within this time limit, the third arbitrator shall be appointed by the Administrator.<sup>76</sup>]

- (iv) The seat, or legal place of arbitration, shall be New York.

- (v) The language used in the arbitral proceedings shall be English.<sup>77</sup>

( ) Section 13(c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit, action or proceedings before the New York courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>78</sup>

( ) Section 13(d) of this Agreement is hereby amended:

- (a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;
- (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and

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<sup>74</sup> Article 12(3) of the AAA-ICDR International Arbitration Rules provides that if, within 45 days after the commencement of the arbitration (i.e. the date on which the Administrator receives the Notice of Arbitration; see Article 2(2)), all of the parties have not agreed on the designation of the arbitrator(s) or a procedure for appointing them, the Administrator (i.e. ICDR) shall, at the written request of any party, appoint the arbitrator(s) and designate the presiding arbitrator.

<sup>75</sup> The purpose of this provision is to exercise the parties’ right under Article 12(1) of the AAA-ICDR International Arbitration Rules to agree a procedure for appointing the tribunal. Each party is to appoint an arbitrator. The presiding arbitrator is appointed by the ICDR.

<sup>76</sup> The purpose of this provision is to exercise the parties’ right under Article 12(1) of the AAA-ICDR International Arbitration Rules to agree a procedure for appointing the tribunal. Each party is to appoint an arbitrator. The presiding arbitrator is appointed by the two party-appointed arbitrators.

<sup>77</sup> Article 18 of the AAA-ICDR International Arbitration Rules provides that, if the parties have not agreed otherwise, the language of the arbitration shall be that of the documents containing the arbitration clause, subject to the power of the arbitral tribunal to determine otherwise.

<sup>78</sup> Note that in the event it is necessary to seek interim measures from a court before a tribunal is appointed, it is useful if a process agent has already been appointed. The process agent should be an entity in New York. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

- (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>79</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>80</sup>

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<sup>79</sup> If using the 1992 Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>80</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## APPENDIX D

### MODEL CLAUSE FOR HKIAC RULES (HONG KONG SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)*
- *The institutional rules are the HKIAC Rules<sup>81</sup>*
- *The seat of arbitration is Hong Kong*
- *The underlying agreement is governed by English law or New York law*
- *The governing law of the arbitration clause is Hong Kong law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is primarily designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for English or New York governing law (a choice of one or the other should be made), save that the arbitration clause is to be governed by Hong Kong law. The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) ***Governing Law.*** This Agreement (except for Section 13(b) (Arbitration), which shall be governed by Hong Kong law) and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with [English law/New York law (excluding conflict of laws principles)].<sup>82</sup>

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) ***Arbitration***

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

<sup>81</sup> Explanatory comments in the footnotes refer to the 2018 HKIAC Administered Arbitration Rules.

<sup>82</sup> Amend as necessary.

- (ii) The arbitration shall be conducted in accordance with the Hong Kong International Arbitration Centre Administrated Arbitration Rules (“the Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.

[**Option 1:** The arbitral tribunal shall consist of one arbitrator. The arbitrator shall be appointed in accordance with the Rules.<sup>83</sup>]

[**Option 2:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules.<sup>84</sup>]

[**Option 3:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules, save that the presiding arbitrator shall be appointed by the HKIAC.<sup>85</sup>]

- (iii) The seat, or legal place of arbitration, shall be Hong Kong.
- (iv) The language used in the arbitral proceedings shall be English.<sup>86</sup>

( ) Section 13(c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with “suit, action or proceedings before the Hong Kong courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>87</sup>

( ) Section 13(d) of this Agreement is hereby amended:

- (a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;
- (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and
- (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

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<sup>83</sup> Article 7.1(a) of the HKIAC Rules provides that where parties have agreed before the arbitration commences that the dispute shall be referred to a sole arbitrator, they shall jointly designate the sole arbitrator within 30 days from the date when the Notice of Arbitration was received by the Respondent.

<sup>84</sup> Article 8.1(a) and (d) of the HKIAC Rules provides that, where the parties have agreed before the arbitration commences that the dispute shall be referred to three arbitrators, each party shall designate, in the Notice of Arbitration and the Answer to the Notice of Arbitration respectively, one arbitrator and the two arbitrators shall designate a third arbitrator who shall act as the presiding arbitrator.

<sup>85</sup> The purpose of this provision is to vary the HKIAC Rules (see the previous footnote) so as to provide that the presiding arbitrator will be appointed directly by the HKIAC, rather than the two co-arbitrators designated by the parties designating the presiding arbitrator.

<sup>86</sup> Article 15.2 of the HKIAC Rules provides that, unless the parties agree, the arbitral tribunal shall determine the language to be used in the proceedings.

<sup>87</sup> Note that in the event it is necessary to seek interim measures from a court before a tribunal is appointed, it is useful if a process agent has already been appointed. The process agent should be an entity in Hong Kong. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>88</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>89</sup>

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<sup>88</sup> If using the 1992 Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>89</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## APPENDIX E

### MODEL CLAUSE FOR SIAC RULES (SINGAPORE SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)*
- *The institutional rules are the SIAC Rules<sup>90</sup>*
- *The seat of arbitration is Singapore*
- *The underlying agreement is governed by English law or New York law*
- *The governing law of the arbitration clause is Singapore law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is primarily designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for English or New York governing law (a choice of one or the other should be made), save that the arbitration clause is to be governed by Singapore law. The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) ***Governing Law.*** This Agreement (except Section 13(b) (Arbitration), which shall be governed by Singapore law) and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with [English law/New York law (excluding conflict of laws principles)].<sup>91</sup>

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) ***Arbitration***

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

<sup>90</sup> Explanatory comments in the footnotes refer to the 2016 SIAC Arbitration Rules.

<sup>91</sup> Amend as necessary.

(ii) The arbitration shall be conducted in accordance with the SIAC Rules (“the Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.

(iii) [**Option 1:** The Tribunal shall consist of one arbitrator, who shall be appointed in accordance with the Rules.<sup>92]</sup>

[**Option 2:** The Tribunal shall consist of three arbitrators. The members of the Tribunal shall be appointed in accordance with the Rules.<sup>93]</sup>

[**Option 3:** The Tribunal shall consist of three arbitrators. The members of the Tribunal shall be appointed in accordance with the Rules, save that the third arbitrator, who shall act as presiding arbitrator, shall be nominated by the other two arbitrators. If no such nomination is made within 14 days of the appointment of the second of the arbitrators, the third arbitrator shall be appointed by the President.<sup>94]</sup>

(iv) The seat, or legal place of arbitration, shall be Singapore. Except as modified by the provisions of this Section 13(b) and the Rules, Part II of the International Arbitration Act (Cap. 143A), as amended from time to time, shall apply to any arbitration proceedings commenced under this Section 13(b).<sup>95</sup>

(v) The language used in the arbitral proceedings shall be English.<sup>96</sup>

( ) Section 13(c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit, action or proceedings before the Singapore courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>97</sup>

( ) Section 13(d) of this Agreement is hereby amended:

(a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;

<sup>92</sup> Rule 10.1 of the SIAC Rules provides that, if a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom would serve as the sole arbitrator. Rule 10.2 of the SIAC Rules provides that if within 21 days after receipt by the Registrar of the Notice of Arbitration, the parties have not reached an agreement on the nomination of a sole arbitrator, or if at any time either party so requests, the President of SIAC shall make the appointment as soon as practicable. Rule 9.3 provides that, in all cases, an arbitrator nominated by the parties shall be subject to appointment by the President of SIAC in his discretion.

<sup>93</sup> Rule 11.1 of the SIAC Rules provides that, where three arbitrators are to be appointed, each party shall nominate one arbitrator. Rule 11.2 provides that, if a party fails to make a nomination within 14 days of another party’s nomination, the President of SIAC shall appoint an arbitrator on its behalf. Rule 11.3 provides that, absent an agreement of the parties otherwise, the President of SIAC shall appoint the third arbitrator.

<sup>94</sup> The purpose of this provision is to exercise the parties’ right under Rule 11.3 of the SIAC Rules to agree a different procedure for the appointment of the presiding arbitrator by giving the two party-nominated arbitrators the right to nominate the third arbitrator.

<sup>95</sup> Singapore has a dual arbitration regime: the International Arbitration Act (Cap 143A) (IAA) applies to international arbitrations, whereas the Arbitration Act (Cap. 10) applies to domestic arbitrations those being arbitrations that do not have an international dimension. Parties are free to opt for the international arbitration regime under the IAA where it would otherwise not apply (Section 5 of the IAA). This wording will ensure that the international arbitration regime applies (even if it would not otherwise do so).

<sup>96</sup> Rule 22.1 of the SIAC Rules provides that unless the parties have agreed otherwise, the Tribunal shall determine the language to be used in the proceedings.

<sup>97</sup> Note that in the event it is necessary to seek interim measures from a court before a tribunal is appointed, it is useful if a process agent has already been appointed. The process agent should be an entity in Singapore. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

- (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and
- (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>98</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>99</sup>

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<sup>98</sup> If using the 1992 Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>99</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## APPENDIX F

### MODEL CLAUSE FOR SWISS ARBITRATION RULES (ZURICH OR GENEVA SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)*
- *The institutional rules are the Swiss Arbitration Rules<sup>100</sup>*
- *The seat of arbitration is Zurich or Geneva*
- *The underlying agreement is governed by English law or New York law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for English or New York governing law (a choice of one or the other should be made).<sup>101</sup> The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) **Governing Law.** This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by [English law/New York law (excluding conflict of laws principles)].<sup>102</sup>

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) **Arbitration**

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and

<sup>100</sup> Explanatory comments in the footnotes refer to the 2012 Swiss Rules of International Arbitration.

<sup>101</sup> Pursuant to Article 178(2) Private International Law Act (PILA) the arbitration clause is valid if it complies either with the law chosen by the parties to govern the arbitration clause, the law applicable to the merits of the dispute (i.e. English law or New York law depending on the choice made for the law governing the underlying agreement), or Swiss law. This means that it is unnecessary to make a choice of law for the arbitration clause separate from the choice of law for the underlying agreement as a whole.

<sup>102</sup> Amend as necessary.

any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

- (ii) The arbitration shall be conducted in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers’ Arbitration Institution (the “Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.
- (iii) [**Option 1:** The arbitral tribunal shall consist of one arbitrator, who shall be appointed in accordance with the Rules.<sup>103]</sup>

[**Option 2:** The arbitral tribunal shall consist of three arbitrators. The members of the tribunal shall be appointed in accordance with the Rules. The parties’ designations of arbitrators shall be made in the Notice of Arbitration and Answer to the Notice of Arbitration.<sup>104]</sup>

[**Option 3:** The arbitral tribunal shall consist of three arbitrators. The members of the tribunal shall be appointed in accordance with the Rules, save that the third arbitrator, who shall act as the presiding arbitrator, shall be appointed by the Court.<sup>105]</sup>

- (iv) The seat, or legal place of arbitration shall be [Zurich/Geneva (a choice of one or the other should be made)]. Except as modified by the provisions of this Section 13(b) and the Rules, Chapter 12 of the Private International Law Act, as amended from time to time, shall apply to any arbitration proceedings commenced under this Section 13(b) to the exclusion of any provisions of the Swiss Code of Civil Procedure.<sup>106</sup>
- (v) The language used in the arbitral proceedings shall be English.<sup>107</sup>

( ) Section 13(c) of this Agreement is hereby amended by:

- (a) after the word “process” in the second line thereof, inserting the words “(i.e. to act as its *Zustellungsdomizil/domicile de notification/recapito*)”; and

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<sup>103</sup> Articles 7(1) and 7(3) of the Swiss Arbitration Rules provide that where the parties have agreed that the dispute shall be referred to a sole arbitrator, they shall jointly designate the sole arbitrator within 30 days from the date on which the Notice of Arbitration was received by the respondent. If the parties fail to designate the sole arbitrator within this time-limit, the sole arbitrator will be appointed by the Arbitration Court of the Swiss Chambers Arbitration Institute (the “Court”).

<sup>104</sup> Articles 8(1) and 8(2) of the Swiss Arbitration Rules provides that, if a party fails to make a designation within the time-limit set by the Court or resulting from the arbitration clause, the Court shall appoint the arbitrator. Article 8(2) provides that the two arbitrators designated by the parties (or, if that process fails, appointed by the Court) shall designate the presiding arbitrator within 30 days from the confirmation of the second arbitrator. Failing such designation, the Court shall appoint the third arbitrator.

<sup>105</sup> The purpose of this provision is to vary the Swiss Arbitration Rules (see previous footnote) so that the presiding arbitrator is appointed directly by the Arbitration Court of the Swiss Chambers Arbitration Institute and not designated by the two party-nominated arbitrators.

<sup>106</sup> Switzerland has a dual arbitration regime: Chapter 12 of the Private International Law Act (**PILA**) applies to international arbitrations as defined in Article 176(1) PILA (although a draft bill to revise Chapter 12 was published for public consultation in January 2017), whereas Part 3 of the Code of Civil Procedure (**CPC**) applies to domestic arbitrations those being arbitrations which are not international. For domestic proceedings, the parties are free to opt for Chapter 12 of the PILA, instead of the CPC (Article 353(2) CPC). The wording will ensure that the international arbitration regime applies (even if it would not otherwise do so).

<sup>107</sup> Article 17(1) of the Swiss Arbitration Rules provides that, unless the parties have agreed otherwise, the Tribunal shall determine the language or languages to be used in the proceedings.

- (b) deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit, action or proceedings before the Swiss courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”<sup>108</sup>
- ( ) Section 13(d) of this Agreement is hereby amended:
- (a) after the words “jurisdiction of any court” in the third line, by adding the words “or arbitral tribunal”;
  - (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and
  - (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>109</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>110</sup>

<sup>108</sup> Note that in the event it is necessary to seek interim measures from a court before a tribunal is appointed, it is useful if a process agent has already been appointed. The process agent should be an entity in Switzerland. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

<sup>109</sup> If using the 1992 Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>110</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## APPENDIX G

### MODEL CLAUSES FOR P.R.I.M.E. FINANCE RULES

#### PART 1

#### MODEL CLAUSE FOR P.R.I.M.E. FINANCE RULES (LONDON SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)*
- *The institutional rules are the P.R.I.M.E. Finance Rules<sup>111</sup>*
- *The seat of arbitration is London*
- *The underlying agreement is governed by English law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for English governing law. The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) ***Governing Law.*** This Agreement (including Section 13(b) (Arbitration)) and any non-contractual obligations arising out of or in connection with it shall be governed by English law.

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) ***Arbitration***

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

<sup>111</sup> Explanatory comments in the footnotes refer to the 2016 P.R.I.M.E. Finance Arbitration Rules.  
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(ii) The arbitration shall be conducted in accordance with the P.R.I.M.E. Finance Arbitration Rules (the “Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.

(iii) [**Option 1:** The arbitral tribunal shall consist of one arbitrator, who shall be appointed in accordance with the Rules.<sup>112]</sup>

[**Option 2:** The arbitral tribunal shall consist of three arbitrators, who shall be selected in accordance with the Rules.<sup>113]</sup>

[**Option 3:** The arbitral tribunal shall consist of three arbitrators, who shall be selected in accordance with the Rules, save that the third arbitrator, who shall act as presiding arbitrator, shall be appointed by the appointing authority.<sup>114]</sup>

(iv) The seat, or legal place of arbitration, shall be London.

(v) The language used in the arbitral proceedings shall be English.<sup>115</sup>

( ) Section 13(c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit, action or proceedings before the English courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>116</sup>

( ) Section 13(d) of this Agreement is hereby amended:

(a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;

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<sup>112</sup> Article 8(1) of the P.R.I.M.E. Finance Arbitration Rules provides that a sole arbitrator shall be jointly appointed by the parties from the P.R.I.M.E. Finance List of Experts (i.e. a list of arbitrators approved by P.R.I.M.E. Finance). This is subject to Article 10a, pursuant to which the parties may also appoint arbitrators not included on the P.R.I.M.E. Finance List of Experts. Article 8(1) also provides that if, within 30 days from the receipt by all other parties, and P.R.I.M.E. Finance, of a proposal for the appointment of a sole arbitrator, the parties have not reached agreement on a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority from the P.R.I.M.E. Finance List of Experts in accordance with Article 8(2). The appointing authority is the Secretary General of the Permanent Court of Arbitration, unless the parties agree otherwise. Article 10a provides that the appointing authority may also appoint arbitrators not included on the P.R.I.M.E. Finance List of Experts. Article 8(2) provides for the appointing authority to provide a list of candidates to the parties, who may delete candidates to whom they object and list the remaining candidates in order of preference. The appointing authority may appoint an arbitrator in its discretion if the appointment cannot be made in accordance with the list procedure. Article 8(2) further provides that the list procedure will not be used if the parties agree or if the appointing authority determines in its discretion that the list procedure is not appropriate for the case.

<sup>113</sup> Article 9(1) of the P.R.I.M.E. Finance Arbitration Rules provides that, where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall appoint one arbitrator from among P.R.I.M.E. Finance’s approved list of arbitrators. This is subject to the right of each party under Article 10a to appoint an arbitrator who is not on the P.R.I.M.E. Finance List of Experts. If, within 30 days from the receipt of a party’s notification, the other party fails to notify the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator (Article 9(2)). The appointing authority will appoint an arbitrator who is on the P.R.I.M.E. Finance List of Experts, subject to its entitlement under Article 10a to appoint an arbitrator who is not on the list. Article 9(3) provides that the two party-selected arbitrators may within 30 days agree on the presiding arbitrator, failing which the appointment will be made by the appointing authority in the same manner as it would appoint a sole arbitrator (see previous footnote).

<sup>114</sup> The purpose of this provision is to vary the rules (see previous footnote) so that the presiding arbitrator is appointed by the appointing authority using the list system rather than by the two party-nominated arbitrators.

<sup>115</sup> Article 19 of the P.R.I.M.E. Finance Arbitration Rules provides that, in the absence of an agreement by the parties, the arbitral tribunal shall determine the language of the arbitration.

<sup>116</sup> Note that in the event it is necessary to seek interim measures from a court before a tribunal is appointed, it is useful if a process agent has already been appointed. The process agent should be an entity in England and Wales. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

- (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and
- (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>117</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>118</sup>

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<sup>117</sup> If using the 1992 Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>118</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## PART 2

### MODEL CLAUSE FOR P.R.I.M.E. FINANCE RULES (NEW YORK SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)*
- *The institutional rules are the P.R.I.M.E. Finance Rules<sup>119</sup>*
- *The seat of arbitration is New York*
- *The underlying agreement is governed by New York law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for New York governing law. The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) ***Governing Law.*** This Agreement (including Section 13(b) (Arbitration)) and any non-contractual obligations arising out of or in connection with it shall be governed by New York law (excluding conflict of laws principles).

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) ***Arbitration***

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

<sup>119</sup> Explanatory comments in the footnotes refer to the 2016 P.R.I.M.E. Finance Arbitration Rules.  
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(ii) The arbitration shall be conducted in accordance with the P.R.I.M.E. Finance Arbitration Rules (the “Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.

(iii) [**Option 1:** The arbitral tribunal shall consist of one arbitrator, who shall be appointed in accordance with the Rules.<sup>120]</sup>

[**Option 2:** The arbitral tribunal shall consist of three arbitrators, who shall be selected in accordance with the Rules.<sup>121]</sup>

[**Option 3:** The arbitral tribunal shall consist of three arbitrators, who shall be selected in accordance with the Rules, save that the third arbitrator, who shall act as presiding arbitrator, shall be appointed by the appointing authority.<sup>122]</sup>

(iv) The seat, or legal place of arbitration, shall be New York.

(v) The language used in the arbitral proceedings shall be English.<sup>123</sup>

( ) Section 13(c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit, action or proceedings before the New York courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>124</sup>

( ) Section 13(d) of this Agreement is hereby amended:

(a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;

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<sup>120</sup> Article 8(1) of the P.R.I.M.E. Finance Arbitration Rules provides that a sole arbitrator shall be jointly appointed by the parties from the P.R.I.M.E. Finance List of Experts (i.e. a list of arbitrators approved by P.R.I.M.E. Finance). This is subject to Article 10a, pursuant to which the parties may also appoint arbitrators not included on the P.R.I.M.E. Finance List of Experts. Article 8(1) also provides that if, within 30 days from the receipt by all other parties, and P.R.I.M.E. Finance, of a proposal for the appointment of a sole arbitrator, the parties have not reached agreement on a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority from the P.R.I.M.E. Finance List of Experts in accordance with Article 8(2). The appointing authority is the Secretary General of the Permanent Court of Arbitration, unless the parties agree otherwise. Article 10a provides that the appointing authority may also appoint arbitrators not included on the P.R.I.M.E. Finance List of Experts. Article 8(2) provides for the appointing authority to provide a list of candidates to the parties, who may delete candidates to whom they object and list the remaining candidates in order of preference. The appointing authority may appoint an arbitrator in its discretion if the appointment cannot be made in accordance with the list procedure. Article 8(2) further provides that the list procedure will not be used if the parties agree or if the appointing authority determines in its discretion that the list procedure is not appropriate for the case.

<sup>121</sup> Article 9(1) of the P.R.I.M.E. Finance Arbitration Rules provides that, where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall appoint one arbitrator from among P.R.I.M.E. Finance’s approved list of arbitrators. This is subject to the right of each party under Article 10a to appoint an arbitrator who is not on the P.R.I.M.E. Finance List of Experts. If, within 30 days from the receipt of a party’s notification, the other party fails to notify the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator (Article 9(2)). The appointing authority will appoint an arbitrator who is on the P.R.I.M.E. Finance List of Experts, subject to its entitlement under Article 10a to appoint an arbitrator who is not on the list. Article 9(3) provides that the two party-selected arbitrators may within 30 days agree on the presiding arbitrator, failing which the appointment will be made by the appointing authority in the same manner as it would appoint a sole arbitrator (see previous footnote).

<sup>122</sup> The purpose of this provision is to vary the rules (see previous footnote) so that the presiding arbitrator is appointed by the appointing authority using the list system rather than by the two party-nominated arbitrators.

<sup>123</sup> Article 19 of the P.R.I.M.E. Finance Arbitration Rules provides that, in the absence of an agreement by the parties, the arbitral tribunal shall determine the language of the arbitration.

<sup>124</sup> Note that, in the event it is necessary to seek interim measures from a court before a tribunal is appointed, it is useful if a process agent has already been appointed. The process agent should be an entity in New York. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

- (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and
- (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>125</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>126</sup>

<sup>125</sup> If using the 1992 Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>126</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

### PART 3

#### MODEL CLAUSE FOR P.R.I.M.E. FINANCE RULES (THE HAGUE SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)*
- *The institutional rules are the P.R.I.M.E. Finance Rules<sup>127</sup>*
- *The seat of arbitration is The Hague*
- *The underlying agreement is governed by English law or New York law*
- *The governing law of the arbitration clause is Dutch law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for English or New York governing law (a choice of one or the other should be made) save that the arbitration clause is governed by Dutch law. The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) **Governing Law.** This Agreement (except for Section 13(b) (Arbitration), which shall be governed by Dutch law) and any non-contractual obligations arising out of or in connection with it shall be governed by [English law/New York law (excluding conflict of laws principles)].<sup>128</sup>

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) **Arbitration**

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

<sup>127</sup> Explanatory comments in the footnotes refer to the 2016 P.R.I.M.E. Finance Arbitration Rules.

<sup>128</sup> Amend as necessary.

(ii) The arbitration shall be conducted in accordance with the P.R.I.M.E. Finance Arbitration Rules (the “Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.

(iii) [**Option 1:** The arbitral tribunal shall consist of one arbitrator, who shall be appointed in accordance with the Rules.<sup>129]</sup>

[**Option 2:** The arbitral tribunal shall consist of three arbitrators, who shall be selected in accordance with the Rules.<sup>130]</sup>

[**Option 3:** The arbitral tribunal shall consist of three arbitrators, who shall be selected in accordance with the Rules, save that the third arbitrator, who shall act as presiding arbitrator, shall be appointed by the appointing authority.<sup>131]</sup>

(iv) The seat, or legal place of arbitration, shall be The Hague.

(v) The language used in the arbitral proceedings shall be English.<sup>132</sup>

( ) Section 13(c) of this Agreement is hereby deleted in its entirety and replaced with the following: “**Choice of domicile for service.** Each party irrevocably chooses as its domicile for service in The Netherlands in accordance with article 1:15 of the Dutch Civil code (“*gekozen woonplaats*”), if any, the domicile specified opposite its name in the Schedule to receive at that domicile service of process in any suit, action or proceedings before the Dutch courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings. The parties irrevocably consent to service of process given in the manner provided for notices in Section 12(a)(i), 12(a)(iii) or 12(a)(iv). Nothing in this Agreement will affect the right of either party to service process in any other manner permitted by applicable law.”<sup>133</sup>

<sup>129</sup> Article 8(1) of the P.R.I.M.E. Finance Arbitration Rules provides that a sole arbitrator shall be jointly appointed by the parties from the P.R.I.M.E. Finance List of Experts (i.e. a list of arbitrators approved by P.R.I.M.E. Finance). This is subject to Article 10a, pursuant to which the parties may also appoint arbitrators not included on the P.R.I.M.E. Finance List of Experts. Article 8(1) also provides that if, within 30 days from the receipt by all other parties, and P.R.I.M.E. Finance, of a proposal for the appointment of a sole arbitrator, the parties have not reached agreement on a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority from the P.R.I.M.E. Finance List of Experts in accordance with Article 8(2). The appointing authority is the Secretary General of the Permanent Court of Arbitration, unless the parties agree otherwise. Article 10a provides that the appointing authority may also appoint arbitrators not included on the P.R.I.M.E. Finance List of Experts. Article 8(2) provides for the appointing authority to provide a list of candidates to the parties, who may delete candidates to whom they object and list the remaining candidates in order of preference. Article 8(2) further provides that the list procedure will not be used if the parties agree or if the appointing authority determines in its discretion that the list procedure is not appropriate for the case.

<sup>130</sup> Article 9(1) of the P.R.I.M.E. Finance Arbitration Rules provides that, where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall appoint one arbitrator from among P.R.I.M.E. Finance’s approved list of arbitrators. This is subject to the right of each party under Article 10a to appoint an arbitrator who is not on the P.R.I.M.E. Finance List of Experts. If, within 30 days from the receipt of a party’s notification, the other party fails to notify the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator (Article 9(2)). The appointing authority will appoint an arbitrator who is on the P.R.I.M.E. Finance List of Experts, subject to its entitlement under Article 10a to appoint an arbitrator who is not on the list. Article 9(3) provides that the two party-selected arbitrators may within 30 days agree on the presiding arbitrator, failing which the appointment will be made by the appointing authority in the same manner as it would appoint a sole arbitrator (see previous footnote).

<sup>131</sup> The purpose of this provision is to vary the rules (see previous footnote) so that the presiding arbitrator is appointed by the appointing authority using the list system rather than by the two party-nominated arbitrators.

<sup>132</sup> Article 19 of the P.R.I.M.E. Finance Arbitration Rules provides that, in the absence of an agreement by the parties, the arbitral tribunal shall determine the language of the arbitration.

<sup>133</sup> Note that in the event it is necessary to seek interim measures from a court before a tribunal is appointed, it is useful if the parties have chosen a domicile for service in The Netherlands. Note also that Part 4(b) of the Schedule in which details of process agents would ordinarily be set out should be amended to read:

Choice of domicile for service. For the purpose of Section 13(c) of this Agreement:

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- ( ) Section 13(d) of this Agreement is hereby amended:
- (a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;
  - (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and
  - (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>134</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>135</sup>

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“Party A chooses as its domicile for service: [not applicable] [.....]  
 Party B chooses as its domicile for service: [not applicable] [.....]”

<sup>134</sup> If using the 1992 Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>135</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## APPENDIX H

### MODEL CLAUSE FOR SCC RULES (STOCKHOLM SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (as defined below) (see footnotes for suggested amendments for use of the 1992 Agreement (as defined below))*
- *The institutional rules are the SCC Rules<sup>136</sup>*
- *The seat of the arbitration is Stockholm*
- *The underlying agreement is governed by English or New York law*

*Where not all of the above conditions are met, this clause may require adaption.*

The following clause is primarily designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for English or New York governing law (a choice of one or the other should be made), save that the arbitration clause is governed by Swedish law. The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Section 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) **Governing Law.** This Agreement (except Section 13(b) (Arbitration), which shall be governed by Swedish law) and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with [English law/New York law (excluding conflict of laws principles)].<sup>137</sup>

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) **Arbitration**

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

<sup>136</sup> Explanatory comments in the footnotes refer to 2017 SCC Arbitration Rules.

<sup>137</sup> Amend as necessary.

(ii) The arbitration shall be conducted in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC”) (the “Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.

(iii) [**Option 1:** The arbitral tribunal shall consist of one arbitrator, who shall be appointed in accordance with the Rules.<sup>138]</sup>

[**Option 2:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules.<sup>139]</sup>

[**Option 3:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules, save that the president of the arbitral tribunal shall be appointed by the two co-arbitrators. If no such appointment is made within 30 days of appointment of the second co-arbitrator, the president shall be appointed in accordance with the Rules.<sup>140]</sup>

(iv) The seat, or legal place of arbitration, shall be Stockholm.

(v) The language used in the arbitral proceedings shall be English.<sup>141</sup>

( ) Section 13(c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit, action or proceedings before the Swedish courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>142</sup>

( ) Section 13(d) of this Agreement is hereby amended:

(a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;

(b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and

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<sup>138</sup> Article 17(3) of the SCC Rules provides that where the arbitral tribunal is to consist of a sole arbitrator, the parties shall be given 10 days within which to jointly appoint the arbitrator. If the parties fail to make the appointment within this time period, the arbitrator shall be appointed by the Board of the SCC.

<sup>139</sup> Article 17(4) of the SCC Rules provides that where the arbitral tribunal is to consist of more than one arbitrator, each party shall appoint, in the Request for Arbitration and the Answer respectively, an equal number of arbitrators and the president of the arbitral tribunal shall be appointed by the Board of the SCC. Where a party fails to appoint arbitrator(s) within the stipulated time period, the Board of the SCC shall make the appointment.

<sup>140</sup> The purpose of this provision is to give the two co-arbitrators (appointed by the parties) the right to appoint the president of the tribunal. If they fail to make an appointment within the time period agreed by the parties (30 days), then the president will be appointed by the Board of the SCC under Article 17(2) and (4) of the SCC Rules.

<sup>141</sup> Article 26(1) of the SCC Rules provides that unless agreed upon by the parties, the arbitral tribunal shall determine the language(s) of the arbitration having due regard to all relevant circumstances and shall give the parties an opportunity to submit comments.

<sup>142</sup> Note that in the event that it is necessary to seek interim measures from a court before a tribunal is appointed (or otherwise), it is useful if a process agent has already been appointed. The process agent should be a physical person (*i.e.* not a legal entity) in Sweden. However, a process agent is not necessary for the purpose of the arbitration proceedings themselves.

- (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions in the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>143</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)””.<sup>144</sup>

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<sup>143</sup> If using the 1992 Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>144</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## APPENDIX I

### MODEL CLAUSE FOR DIS RULES (FRANKFURT AM MAIN SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 ISDA Master Agreement (see footnotes for suggested amendments for use with a 1992 ISDA Master Agreement)*
- *The institutional rules are the DIS Rules<sup>145</sup>*
- *The seat of arbitration is Frankfurt/Main*
- *The underlying agreement is governed by English law or New York law*
- *The law governing the arbitration clause is German law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is primarily designed for use with a 2002 ISDA Master Agreement. Section 13 of the 1992 ISDA Master Agreement equals Section 13 of the 2002 ISDA Master Agreement in the parts relevant to the amendments made by this model clause. However, Section 14 of the 1992 ISDA Master Agreement does not define the term “Proceedings”; please note, therefore, the alternative wording suggested for insertion in Part 5 of the Schedule where using the 1992 ISDA Master Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law clause provides for English or New York law to govern the ISDA Master Agreement (a choice of one or the other should be made). The arbitration clause, however, is governed by German law.<sup>146</sup> The next clause replaces the Jurisdiction clause (Section 13(b)) of the ISDA Master Agreement. In sub-clause (iii), include one of Options 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) ***Governing Law.*** This Agreement (except for Section 13(b) (Arbitration) which shall be governed by German law) and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with [English law/New York law (excluding conflict of laws principles)].<sup>147</sup>

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) ***Arbitration***

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity,

<sup>145</sup> Explanatory comments in the footnotes refer to the DIS Arbitration Rules 2018.

<sup>146</sup> German arbitration law does not contain specific provisions concerning the law governing the arbitration agreement. It is common understanding that the law of the seat, i.e. German law if the place of arbitration is in Frankfurt/Main, applies unless the parties agreed otherwise. In order to avoid ambiguities, it is nevertheless recommended to expressly agree on the law governing the arbitration clause.

<sup>147</sup> Amend as necessary.

interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

- (ii) The arbitration shall be conducted in accordance with the Arbitration Rules of the German Arbitration Institute (the “DIS”; the “Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.
- (iii) [**Option 1:** The arbitral tribunal shall consist of one arbitrator, who shall be appointed in accordance with the Rules.<sup>148</sup>]

[**Option 2:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules.<sup>149</sup>]

[**Option 3:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules, save that the -president of the arbitral tribunal shall be nominated by the DIS Appointing Committee.<sup>150</sup>]

- (iv) The seat or legal place of arbitration shall be Frankfurt/Main, Germany.
- (v) The language used in the arbitral proceedings shall be English.<sup>151</sup>

( ) Section 13(c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit, action or proceedings before the German courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>152</sup>

( ) Section 13(d) of this Agreement is hereby amended:

- (a) after the words “jurisdiction of any court” in the third line by adding the words “or arbitral tribunal”;

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<sup>148</sup> Pursuant to Article 10.2 of the Rules, if the parties have not agreed upon the number of arbitrators, any party may submit a request to the DIS that the arbitral tribunal shall be comprised of a sole arbitrator. If no such request has been made, or if such request has not been granted, the arbitral tribunal shall be comprised of three arbitrators. Article 11 of the Rules provides that where the arbitral tribunal is to consist of a sole arbitrator and the parties do not reach agreement on a sole arbitrator within a time limit fixed by the DIS, the DIS Appointing Committee shall select and appoint the sole arbitrator pursuant to Article 13.2 of the Rules.

<sup>149</sup> Where the arbitral tribunal is comprised of three arbitrators, Articles 5.2 and 12.1 of the Rules provide that the claimant shall appoint one co-arbitrator with the Request for Arbitration whilst the respondent shall appoint one arbitrator within 21 days after receipt of the Request for Arbitration (Article 7.1 of the Rules). If a party fails to nominate a co-arbitrator, such co-arbitrator shall be selected by the Appointing Committee pursuant to Article 12.1 of the Rules. The co-arbitrators shall jointly nominate the President of the arbitral tribunal (Article 12.2 of the Rules). If they do not nominate the President within 21 days after being requested to do so, under Article 12.3 of the Rules, the Appointing Committee shall select and appoint the President pursuant to Article 12.3 of the Rules.

<sup>150</sup> This is a deviation from section 12.2 of the Rules which provides for a nomination of the President by the two party-appointed arbitrators.

<sup>151</sup> If the parties have not agreed on the language of the arbitration, the arbitral tribunal shall fix the language of the arbitration (Article 23 of the Rules).

<sup>152</sup> Note that, in the event it is necessary to seek interim measures from a court before a tribunal is constituted, it is useful if a process agent has been appointed. The process agent should be an individual or an entity in Germany. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

- (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line by adding the words “or arbitral award”; and
- (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the ISDA Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>153</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)””.<sup>154</sup>

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<sup>153</sup> If using the 1992 ISDA Master Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>154</sup> If using the 1992 ISDA Master Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## APPENDIX J

### MODEL CLAUSE FOR DIFC-LCIA RULES (DIFC SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)*
- *The institutional rules are the DIFC-LCIA Rules<sup>155</sup>*
- *The seat of arbitration is DIFC (Dubai International Financial Centre)*
- *The underlying agreement is governed by English law or New York law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is primarily designed for use with a 2002 Agreement. Section 13 of the 1992 Agreement is in the same terms as Section 13 of the 2002 Agreement, insofar as is material to the amendments made by this model clause. However, Section 14 of the 1992 Agreement does not contain the term “Proceedings”; please note, therefore, the alternative suggested wording for insertion in Part 5 of the Schedule where using the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law provision provides for English law or New York law as governing law (a choice of one or the other should be made). The next clause replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement. In sub-clause (iii), include one of Option 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) **Governing Law.** This Agreement (except for Section 13(b) (Arbitration), which shall be governed by DIFC law) and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with [English law or New York law (excluding conflict of laws principles)]<sup>156</sup>.

( ) Section 13 (b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) **Arbitration**

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

<sup>155</sup> Explanatory comments in the footnotes refer to the 2016 DIFC-LCIA Arbitration Rules.

<sup>156</sup> Amend as necessary.

- (ii) The arbitration shall be conducted in accordance with the DIFC-LCIA Arbitration Rules (the “Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.
- (iii) **[Option 1:** The Arbitral Tribunal shall consist of one arbitrator. The parties shall jointly nominate the sole arbitrator. If the arbitrator is not nominated in accordance with the terms of this Subsection by no later than the date for service of the Response the arbitrator shall be selected and appointed by the LCIA Court.<sup>157]</sup>

**[Option 2:** The Arbitral Tribunal shall consist of three arbitrators. The claimant shall nominate one arbitrator. The respondent shall nominate one arbitrator. The third arbitrator (who shall be presiding arbitrator of the Arbitral Tribunal) shall be selected and appointed by the LCIA Court.<sup>158]</sup>

**[Option 3:** The Arbitral Tribunal shall consist of three arbitrators. The claimant shall nominate one arbitrator. The respondent shall nominate one arbitrator. The two persons so nominated shall, within 14 days of the second of them confirming to the DIFC-LCIA that he or she is willing and able to accept appointment, nominate a third arbitrator who shall act as presiding arbitrator of the Arbitral Tribunal. If no such nomination is made within that time limit, then the LCIA Court shall select and appoint the presiding arbitrator of the Arbitral Tribunal.<sup>159]</sup>

- (i) The seat, or legal place of arbitration, shall be Dubai International Financial Centre.
- (ii) The language used in the arbitral proceedings shall be English.<sup>160</sup>

( ) Section 13 (c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit, action or proceedings before the [English/New York] courts relating to the arbitration clause or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>161</sup>

<sup>157</sup> Article 5 of the DIFC-LCIA Rules provides that the LCIA Court shall appoint the Arbitral Tribunal but that it shall do so with due regard for any particular method or criteria of selection agreed in writing by the parties. Article 7 of the DIFC-LCIA Rules provides that, where the parties have agreed that they are to nominate the arbitrator, the arbitrator will only be appointed by the LCIA Court if it is satisfied of his/her independence and impartiality in accordance with Article 5 of the DIFC-LCIA Rules).

<sup>158</sup> Article 5 of the DIFC-LCIA Rules provides that the LCIA Court shall appoint the Arbitral Tribunal but that it shall do so with due regard for any particular method or criteria of selection agreed in writing by the parties. Article 7 of the DIFC-LCIA Rules provides that the parties may each nominate an arbitrator, but that the nominated candidate will only be appointed by the LCIA Court if it is satisfied of his/her independence and impartiality in accordance with Article 5 of the DIFC-LCIA Rules). The parties are to make their nominations in the Request for Arbitration and Response (Articles 1 and 2). The presiding arbitrator of the Arbitral Tribunal shall be appointed by the LCIA Court (Article 5).

<sup>159</sup> The purpose of this provision is to give the two co-arbitrators (nominated by the parties) the right to nominate the presiding arbitrator of the Arbitral Tribunal. In such a case, such nomination will be treated as an agreement to nominate the presiding arbitrator and the presiding arbitrator will only be appointed by the LCIA Court if it is satisfied of his/her independence and impartiality in accordance with Article 5 of the DIFC-LCIA Rules.

<sup>160</sup> Article 17 of the Rules provides that the initial language of the arbitration shall be the language of the arbitration clause unless the parties have agreed otherwise. Article 17 provides that once the Arbitral Tribunal has been constituted, and unless the parties agree the language of the arbitration, the Arbitral Tribunal shall decide on the language of the arbitration.

<sup>161</sup> Note that in the event it is necessary to seek interim measures from a court before a tribunal is appointed, it is useful if a process agent has already been appointed. The process agent should be an entity in England and Wales/New York. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

- ( ) Section 13 (d) of this Agreement is hereby amended:
- (a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;
  - (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and
  - (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgement or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>162</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13 (b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>163</sup>

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<sup>162</sup> If using the 1992 Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>163</sup> If using the 1992 Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## APPENDIX K

### MODEL CLAUSE FOR VIAC RULES (VIENNA SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 ISDA Master Agreement (see footnotes for suggested amendments for use with a 1992 ISDA Master Agreement)*
- *The institutional rules are the VIAC Rules<sup>164</sup>*
- *The seat of arbitration is Vienna*
- *The underlying agreement is governed by English law or New York law*
- *The law governing the arbitration clause is Austrian law*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is designed for use with a 2002 ISDA Master Agreement. Section 13 of the 1992 ISDA Master Agreement corresponds to Section 13 of the 2002 ISDA Master Agreement in those parts that are material to the amendments made by this model clause. However, Section 14 of the 1992 ISDA Master Agreement does not contain a definition of the term “Proceedings”; note, therefore, the alternative wording suggested for insertion in Part 5 of the Schedule where using the 1992 ISDA Master Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The Governing Law clause provides for English or New York governing law (a choice of one or the other should be made), save that the arbitration clause is governed by Austrian law.<sup>165</sup> The next clause replaces the Jurisdiction clause (Section 13(b)) of the ISDA Master Agreement. In sub-clause (iii), include one of Options 1, 2 or 3. The following provisions amend the Process Agent and Waiver of Immunity clauses (Sections 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

( ) **Governing Law.** This Agreement (except for Section 13(b) (Arbitration) which shall be governed by Austrian law) and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with [English law/New York law (excluding conflict of laws principles)].<sup>166</sup>

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) **Arbitration**

(iii) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and

<sup>164</sup> Explanatory comments in the footnotes refer to the 2018 VIAC Arbitration Rules.

<sup>165</sup> Austrian arbitration law does not contain a specific provision concerning the law governing the arbitration agreement. In order to avoid any ambiguity, it is recommended to expressly agree on that law.

<sup>166</sup> Amend as necessary.

any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.

- (iv) The arbitration shall be conducted in accordance with the Rules of Arbitration (the “Rules”) of the Vienna International Arbitral Centre (the “VIAC”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.
- (ii) [**Option 1:** The arbitral tribunal shall consist of one arbitrator, who shall be appointed in accordance with the Rules.<sup>167]</sup>

[**Option 2:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules.<sup>168]</sup>

[**Option 3:** The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules, save that the chairperson of the arbitral tribunal shall be nominated by the Board of the VIAC.<sup>169]</sup>

- (iii) The seat or legal place of arbitration shall be Vienna, Austria.
- (iv) The language used in the arbitral proceedings shall be English.<sup>170</sup>

( ) Section 13(c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit, action or proceedings before the Austrian courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>171</sup>

( ) Section 13(d) of this Agreement is hereby amended:

- (a) after the words “jurisdiction of any court” in the third line by adding the words “or arbitral tribunal”;

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<sup>167</sup> Pursuant to Article 17(1) and (2) of the Rules, the parties may agree whether the arbitral proceedings will be conducted by a sole arbitrator or a panel of three arbitrators. Absent agreement on the number of arbitrators, the Board of the VIAC shall determine whether the dispute will be decided by a sole arbitrator or by a panel of three arbitrators. Article 17(3) of the Rules provides that if the dispute is to be resolved by a sole arbitrator, the parties shall jointly nominate a sole arbitrator within 30 days after receiving the Secretary General’s request. If such nomination is not made within this time period, the sole arbitrator shall be appointed by the Board of the VIAC.

<sup>168</sup> Article 17(4) of the Rules provides that if the dispute is to be resolved by a panel of arbitrators, each party shall nominate, in the Statement of Claim and the Answer to the Statement of Claim respectively, an arbitrator. If a party fails to do so (also after 30 days have passed since receiving a respective request by the Secretary General of the VIAC to make a nomination), that arbitrator shall be appointed by the Board of the VIAC. Article 17(5) of the Rules stipulates that the co-arbitrators shall jointly nominate a chairperson. If such nomination is not made within 30 days after the Secretary General has requested them to make a nomination, the chairperson shall be appointed by the Board of the VIAC.

<sup>169</sup> This provision operates to amend Article 17(5) of the Rules (which provides that the co-arbitrators shall jointly nominate a chairperson). This amendment is permissible pursuant to Article 17(1) of the Rules.

<sup>170</sup> Pursuant to Article 26 of the Rules, absent party agreement on the language or languages of the arbitration, immediately after transmission of the file the arbitral tribunal shall determine the language or languages, having due regard to all circumstances, including the language of the contract.

<sup>171</sup> Note that in the event it is necessary to seek interim measures from a court before an arbitral tribunal is appointed, it might be useful if a process agent has been appointed. The process agent should be an individual or an entity in Austria. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

- (b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line by adding the words “or arbitral award”; and
- (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line and replacing them with “suit, action or proceedings relating to any Dispute in the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the ISDA Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.<sup>172</sup>
- (d) Section 14 of the Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13(b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.<sup>173</sup>

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<sup>172</sup> If using the 1992 ISDA Master Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

<sup>173</sup> If using the 1992 ISDA Master Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.

## APPENDIX L

### MODEL CLAUSE FOR LCIA RULES (DUBLIN SEAT)

*This arbitration clause is intended for use where:*

- *The underlying agreement is a 2002 Agreement (Irish law)*
- *The institutional rules are the LCIA Arbitration Rules<sup>174</sup>*
- *The seat of arbitration is Dublin*

*Where not all of the above conditions are met, this clause may require adaptation.*

The following clause is primarily designed for use with a 2002 Agreement (Irish law). There is no version of the 1992 Agreement governed by Irish law and so no alternative wording is suggested for this clause for it to be used with the 1992 Agreement.

**The following provisions should be included in Part 4 of the Schedule.** The clause first replaces the Jurisdiction clause (Section 13(b)) of the Master Agreement). In sub-clause (iii), include one of Option 1, 2 or 3.

The following provisions amend the Process Agent and Waiver of Immunity clauses (Section 13(c) and (d)) to reflect the choice of arbitration, rather than court jurisdiction.

Section 13(a) of the 2002 Agreement (Irish law) provides for the Governing Law to be Irish law, so there is no need to include a Governing Law provision in the Schedule.

( ) Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

“(b) ***Arbitration***

- (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a “Dispute”), shall be referred to and finally resolved by arbitration.
- (ii) The arbitration shall be conducted in accordance with the LCIA Arbitration Rules (the “Rules”). Capitalised terms used in this Section which are not otherwise defined in this Agreement have the meaning given to them in the Rules.
- (iii) [**Option 1:** The Arbitral Tribunal shall consist of one arbitrator. The parties shall jointly nominate the sole arbitrator. If the arbitrator is not nominated in accordance with the

<sup>174</sup> Explanatory comments in the footnotes refer to the 2014 LCIA Arbitration Rules.

terms of this Subsection by no later than the date for service of the Response the arbitrator shall be selected and appointed by the LCIA Court.<sup>175]</sup>

**[Option 2:** The Arbitral Tribunal shall consist of three arbitrators. The claimant shall nominate one arbitrator. The respondent shall nominate one arbitrator. The third arbitrator (who shall be presiding arbitrator of the Arbitral Tribunal) shall be selected and appointed by the LCIA Court.<sup>176]</sup>

**[Option 3:** The Arbitral Tribunal shall consist of three arbitrators. The claimant shall nominate one arbitrator. The respondent shall nominate one arbitrator. The two persons so nominated shall, within 14 days of the nomination of the second of them, nominate a third arbitrator who shall act as presiding arbitrator of the Arbitral Tribunal. If no such nomination is made within that time limit, then the LCIA Court shall select and appoint the presiding arbitrator of the Arbitral Tribunal.<sup>177]</sup>

(iv) The seat, or legal place of arbitration, shall be Dublin.

(v) The language used in the arbitral proceedings shall be English.<sup>178</sup>

( ) Section 13(c) of this Agreement is hereby amended by deleting the word “Proceedings” in the first sentence of that Section and replacing it with the words “suit, action or proceedings before the Irish courts relating to the arbitration clause set out in Section 13(b) or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.<sup>179</sup>

( ) Section 13(d) of this Agreement is hereby amended:

(a) after the words “jurisdiction of any court” in the third line thereof, by adding the words “or arbitral tribunal”;

(b) after the word “judgment” in Sub-Sections (iv) and (v) in the fifth line thereof, by adding the words “or arbitral award”; and

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<sup>175</sup> Article 5 of the LCIA Rules provides that the LCIA Court shall appoint the Arbitral Tribunal but that it shall do so with due regard for any particular method or criteria of selection agreed in writing by the parties. Article 7 of the LCIA Rules provides that, where the parties have agreed that they are to nominate the arbitrator, the arbitrator will only be appointed by the LCIA Court if it is satisfied of his/her independence and impartiality in accordance with Article 5 of the LCIA Rules.

<sup>176</sup> Article 5 of the LCIA Rules provides that the LCIA Court shall appoint the Arbitral Tribunal but that it shall do so with due regard for any particular method or criteria of selection agreed in writing by the parties. Article 7 of the LCIA Rules provides that the parties may each nominate an arbitrator, but that the nominated candidate will only be appointed by the LCIA Court if it is satisfied of his/her independence and impartiality in accordance with Article 5 of the LCIA Rules. The parties are to make their nominations in the Request for Arbitration and Response (Articles 1 and 2). The presiding arbitrator shall be appointed by the LCIA Court (Article 5).

<sup>177</sup> The purpose of this provision is to give the two co-arbitrators (nominated by the parties) the right to nominate the presiding arbitrator of the Arbitral Tribunal. In such a case, such nomination will be treated as an agreement to nominate the presiding arbitrator and the presiding arbitrator will only be appointed by the LCIA Court if it is satisfied of his/her independence and impartiality (Articles 7 and 5 of the Rules).

<sup>178</sup> Article 17 of the Rules provides that the initial language of the arbitration shall be the language of the arbitration clause unless the parties have agreed otherwise. Article 17 provides that, once the Arbitral Tribunal has been constituted, and unless the parties agree the language of the arbitration, the Arbitral Tribunal shall decide on the language of the arbitration.

<sup>179</sup> Note that in the event it is necessary to seek interim measures from a court before a tribunal is appointed, it is useful if a process agent has already been appointed. The process agent should be an entity in Ireland (excluding, for the avoidance of doubt, Northern Ireland). However, a process agent is not necessary for the purpose of the arbitration proceedings themselves.

- (c) by deleting the words “Proceedings in the courts of any jurisdiction” in the sixth line thereof and replacing them with “suit, action or proceedings relating to any Dispute before the courts of any jurisdiction or before any arbitral tribunal (“Proceedings”)”.

**The following provisions should be included in Part 5 of the Schedule.** These provisions make necessary amendments to other provisions of the Master Agreement to make them reflect the choice of arbitration.

- (a) Section 8(b) of this Agreement shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.
- (b) Section 8(c) of this Agreement shall be amended by adding the words “or arbitral award” after the word “judgment”.
- (c) Section 9(h) of this Agreement shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.
- (d) Section 14 of this Agreement shall be amended by:
  - (i) adding the following definition of “Dispute”: ““Dispute” has the meaning specified in Section 13 (b)(i).”; and
  - (ii) in the definition of “Proceedings”, deleting the words “Section 13(b)” and replacing them with the words “Section 13(d)”.