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# **2013 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 either the ISDA 2002 Master Agreement (the “2002 Agreement”) or the ISDA 1992 Master Agreement (Multicurrency – Cross Border) (the “1992 Agreement”) and includes a range of model arbitration clauses. 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”) following a consultation with members. The consultation commenced with a memorandum to members dated January 19, 2011 and entitled “The use of arbitration under an ISDA Master Agreement”. It continued with a further memorandum to members dated November 10, 2011. These memoranda were followed by meetings with members and interested stakeholders in financial centres around the world. This Guide and the model arbitration clauses contained in the Appendices reflect the comments of members and interested stakeholders received during the course of the consultation, drafts of this Guide and each of the model clauses having been circulated for comment prior to being finalised.

The original purpose of the consultation was to gauge members’ interest in using arbitration for disputes arising in connection with derivatives transactions documented under the Master Agreements and to ascertain what steps ISDA might take to assist members. The consultation revealed that there was such interest and that members believed that the publication of model arbitration clauses would be helpful. Responses to the consultation also provided feedback on some of the key choices to be made in preparing the model clauses, such as the seats and rules of arbitration which members wished to see specified in these model clauses. In preparing model arbitration clauses and making such choices, 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, which are set out (in no particular order) in Appendices A to G.

**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.**

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# 2013 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 150 contracting states to the New York Convention. This makes 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

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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 typically include agreement not to expropriate an investor’s investment, 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 suffers loss by virtue of a breach of such a treaty is typically given the right under the treaty to bring arbitral proceedings directly against the offending state. 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 which an aggrieved investor wishes to bring. Investment treaties may therefore provide additional rights and remedies under public international law, in addition to contractual rights and remedies.

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.

- 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 (the principal exception to this is the UNCITRAL Arbitration Rules, which have no administering institution<sup>4</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 (e.g. a choice of London ties the arbitration to the legal jurisdiction of England and Wales). While arbitral hearings are typically (but not always) held at the seat, far more important are the legal consequences of the choice, of which there are three.
  - (a) The arbitration law of the seat will govern the arbitral procedure (e.g. 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 biased. The courts of the seat have jurisdiction to hear an application to annul or set aside an award. The precise

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<sup>4</sup> Although the UNCITRAL Rules do not provide for an administering institution, the parties are able to designate an "appointing authority" to assist with the appointment of the arbitral tribunal. Failing such designation, the Permanent Court of Arbitration in The Hague may be called upon to designate an appointing authority.

scope of the courts' powers differs between countries.<sup>5</sup> In practice, the approach of the courts to the exercise of their powers also varies from country to country: in some jurisdictions, particularly the leading arbitral centres, they will support the arbitral process; in others they may interfere with or undermine it.

- (c) The award will be treated as having been made at the seat. To ensure that the New York Convention applies 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. The model clauses provide for seats in either London, New York, Paris, Hong Kong, Singapore Geneva, Zurich, or The Hague, for which there was particular interest in the consultation with members.

## **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.
- 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, its 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) perception of bias or corruption on the part of a judicial authority;

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<sup>5</sup> With regard to powers to annul awards, see paragraph 2.10 below.

<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.



- (b) delay;
- (c) lack of experience/expertise by 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;
- (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 has a clear advantage over a foreign court judgment at the enforcement stage. This enforcement advantage arises because of the global regime for the cross-border enforcement of arbitral awards under the New York Convention, whereas there is no comparable international regime for court judgments.<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 44/2001 (the “Brussels Regulation”).<sup>9</sup> This regime is 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> In the absence of any formal reciprocal arrangement, a judgment creditor is reliant

<sup>7</sup> The Hague Convention of 30 June 2005 on Choice of Court Agreements may at some time in the future provide an effective regime for enforcing judgments made pursuant to exclusive jurisdiction clauses. However, as of July 2013, only one state (Mexico) has ratified it and it is not yet in force. The text and list of Contracting States is available at [http://www.hcch.net/index\\_en.php?act=text.display&tid=134](http://www.hcch.net/index_en.php?act=text.display&tid=134). See footnote 1 above for a link to the New York Convention text and Contracting States.

<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 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. One member state, Denmark, initially opted out of the Brussels Regulation but it was subsequently extended to Denmark pursuant to the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. A recast version of the Regulation (Regulation (EU) 1215/2012) has been enacted but does not come into force until July 10, 2015. Denmark has indicated that it will apply the recast version of the Regulation. The texts of these instruments are available at:

[http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001R0044&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001R0044&model=guichett) (Brussels Regulation);

[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l\\_299/l\\_29920051116en00620070.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_299/l_29920051116en00620070.pdf) (Agreement with Denmark);

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

<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:

<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=true&treatyId=7481>

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

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 150 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 Many counterparties in emerging markets are 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, and may only be annulled for reasons going to the jurisdiction of the tribunal or a failure of due process. 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.
- (a) The English Arbitration Act 1996 permits a challenge on jurisdictional grounds or on the basis of a serious procedural irregularity giving rise to substantial injustice.<sup>13</sup> 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.<sup>14</sup>

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<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> See sections 67 and 68 of the Arbitration Act 1996. These rights of challenge may not be excluded by agreement.

<sup>14</sup> Section 69 of the Arbitration Act 1996. Of the rules chosen for London-seated arbitrations in this Guide, the ICC Rules and LCIA Rules contain provisions excluding this right of appeal; the P.R.I.M.E. Finance rules do not.

- (b) Arbitration awards made in New York are presumptively binding with only limited grounds for judicial review under 9 U.S.C. § 10 (such as where the award was procured by corruption or fraud, where there was evident partiality or corruption in the arbitrators, where the arbitrators were guilty of misconduct, or where the arbitrators exceeded their powers).
- (c) In France, international arbitration awards may only be set aside in limited circumstances (such as where the arbitral tribunal has wrongly upheld or declined jurisdiction, where there was lack of due process or where recognising or enforcing the award would violate international public policy).<sup>15</sup> The parties may, by way of a specific agreement, expressly waive their right to bring an action to set aside an award.<sup>16</sup>
- (d) In Hong Kong, international arbitration awards may only be set aside in limited circumstances (such as where the arbitration clause is not valid or the dispute did not fall within the terms of the arbitration clause, or where the constitution of the tribunal or the arbitral procedure was not in accordance with the parties agreement or the law).<sup>17</sup> International arbitration awards are not subject to appeal unless the parties have agreed to adopt the domestic arbitration regime. For domestic arbitrations, an appeal on a question of law concerning an award is allowed only with the leave of court.
- (e) In Singapore, international arbitral awards may only be set aside in limited circumstances (such as where the arbitration clause is not valid or the dispute did not fall within the terms of the arbitration clause, or where the making of the award was affected by fraud or corruption or there was a breach of natural justice in connection with the rendering of the award).
- (f) In Switzerland, an international arbitral award may only be set aside in limited circumstances (such as where the arbitration clause is not valid or the dispute did not fall within the scope of the arbitration clause, or where the making of the award was affected by serious procedural irregularity or the award itself violates international public policy). If neither party has its domicile, habitual residence or place of business in Switzerland, the parties may, by way of a specific agreement, expressly waive their right to apply for setting aside of arbitral awards.<sup>18</sup>
- (g) In the Netherlands, international arbitral awards may only be set aside in limited circumstances (such as where the arbitration clause is not valid, or where the arbitral tribunal was constituted in violation of the applicable rules or the award violates public policy). There is currently a proposal to amend the Dutch arbitration law to allow the

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<sup>15</sup> Articles 1518 and 1520 of the Code of Civil Procedure.

<sup>16</sup> Article 1522 of the Code of Civil Procedure. Although not yet tested before a French court, it is understood that the requirement for a specific agreement would not be satisfied by a general waiver of the right to seek annulment (such as the waiver provision set out in Article 34.6 of the ICC Rules). Parties who have agreed to waive their right to apply to set aside an award may nevertheless still challenge an order of a French court for the enforcement of an award on the same grounds as are available to set aside an award.

<sup>17</sup> Section 81 of the Arbitration Ordinance.

<sup>18</sup> The requirement of an express and specific waiver is not satisfied by a mere reference in arbitration rules to the finality or binding nature of arbitral awards or a duty of the parties to comply with any award (such as Articles 15.7 and 32.2 of the Swiss Arbitration Rules).

parties to agree to waive the right to appeal in cassation before the Supreme Court in annulment proceedings, thereby limiting the annulment proceedings to a single instance before the Court of Appeal.

### **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 the number and qualifications<sup>19</sup> of arbitrators, the location of the hearings or the language of the proceedings. 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>20</sup> Hong Kong<sup>21</sup> or Singapore.<sup>22</sup> There is no such duty in arbitration proceedings conducted in New York,<sup>23</sup> France,<sup>24</sup> Switzerland,<sup>25</sup> or The Netherlands,<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>
- 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

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<sup>19</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>20</sup> While confidentiality is not expressly provided for in the Arbitration Act 1996, it is implied as a matter of English law.

<sup>21</sup> Arbitration proceedings and arbitral awards are confidential pursuant to section 18 of the Hong Kong Arbitration Ordinance.

<sup>22</sup> A duty of confidentiality in respect of arbitral proceedings is not expressly contained within the International Arbitration Act, but a duty is implied under the common law.

<sup>23</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>24</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>25</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>26</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>27</sup> The LCIA Rules (Art 30), HKIAC Rules (Art 42), the SIAC Rules (Rule 35) and the Swiss Arbitration Rules (Art 44(1)) all contain a general duty of confidentiality, subject to exceptions.

<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 (Art 22).

interim relief or at the enforcement stage. It may also be difficult to effectively enforce 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. Arbitration laws and rules do not provide for such procedures. This can mean that 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 This disadvantage 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 courts are the comparator.
- 2.18 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 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**

- 2.19 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.
- 2.20 Evidential matters 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 may be influenced by the legal background of the arbitrators and counsel concerned. Nevertheless, 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>29</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**

- 2.21 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.
- 2.22 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. 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. Some institutional arbitral rules also provide for the appointment of an "emergency arbitrator".<sup>30</sup> 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**

- 2.23 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 also give rise to potential 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.

### **Related parties**

- 2.24 In general, only the parties to the agreement containing the arbitration clause will be bound by it and entitled to enforce it. Where multiple legal entities within a group are concerned with the

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<sup>29</sup> See [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#takeevidence](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takeevidence).

<sup>30</sup> See, for example, the rules of the ICC, AAA-ICDR, HKIAC, SIAC, and P.R.I.M.E. Finance, and the Swiss Arbitration Rules.

negotiation of a Master Agreement or of Transactions which are to be governed by it, some such entities may not be party to a legally enforceable dispute resolution clause and may, therefore, be sued or have to sue in whichever court will take jurisdiction. Members who operate in this way may wish to consider concluding separate agreements containing dispute resolution clauses or to ensure that all relevant entities become party to the Master Agreement, if only for the purposes of being party to the arbitration clause.

### **3. THE MODEL CLAUSES**

3.1 The clauses in the Appendices to this Guide are primarily designed for use with the 2002 Agreement, but additional wording is also provided for the 1992 Agreement. Each model clause is drafted in 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 draft clause, there is a governing law provision which specifies the governing law of the Master Agreement and of the arbitration clause. 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>31</sup> The governing law of the arbitration clause (as distinct from the governing law of the Master Agreement) can potentially be relevant in issues including the substantive validity of the agreement to arbitrate or the termination of an agreement to arbitrate.
- (b) The next 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,

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<sup>31</sup> This approach has been taken for the Hong Kong and Singapore seat clauses. 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 governing law. 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 no separate governing law has been specified in those cases.

and the final provision amends the definition of Proceedings, which is used at several points in Section 13.

3.3 The clauses provide for the following combinations of governing laws, arbitral rules and seats of arbitration.

Appendix A: Rules of Arbitration of the International Chamber of Commerce (“ICC Rules”)

Part 1: London seat; Governing law – English law

Part 2: New York seat; Governing law – New York law

Part 3: Paris seat; Governing law – choice of English law or New York law

Appendix B: Arbitration Rules of the London Court of International Arbitration (“LCIA Rules”); London seat; Governing law – English law

Appendix C: International Arbitration Rules of the American Arbitration Association – International Centre for Dispute Resolution (“AAA-ICDR Rules”);<sup>32</sup> New York seat; Governing law – New York law

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

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

Appendix F: Swiss Rules of International Arbitration; choice of Zurich or Geneva seat (“Swiss Arbitration Rules”);<sup>33</sup> Governing law – choice of English law or New York law

Appendix G: Panel of Recognised International Market Experts in Finance Arbitration Rules (“P.R.I.M.E. Finance Rules”)

Part 1: London seat; Governing law – English law

Part 2: New York seat; Governing law – New York law

Part 3: The Hague seat; Governing law – choice of English law or New York law, arbitration clause governed by Dutch law

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<sup>32</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>33</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.



- 3.4 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 would require adaptation for use with other seats and/or rules and parties considering doing so are encouraged to seek legal advice.
- 3.5 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. Parties are free to modify the model clauses as they wish. Among the matters that parties may wish to take into account are the location of the counterparty and its assets, and whether any amendment or addition to the clause is helpful for the purpose of obtaining recognition, or the agreement to arbitrate, or enforcement of an award in these particular jurisdictions.
- 3.6 **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.**

## 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*
- *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) 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 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>34</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>35</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>36</sup>]

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

(v) The language used in the arbitral proceedings shall be English.<sup>37</sup>

( ) Section 13(c) of the 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>38</sup>

( ) Section 13(d) of the 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>34</sup> Article 12(3) of the ICC Rules provides that the parties 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>35</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>36</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>37</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>38</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>39</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>40</sup>

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<sup>39</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>40</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)”.

## 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*
- *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) 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 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 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 New York.

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

( ) Section 13(c) of the 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 including in relation to any arbitral award obtained pursuant to such arbitration proceedings”.<sup>45</sup>

( ) Section 13(d) of the 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 the parties 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>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 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>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)”.

## 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*
- *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 of one or the other should be made).<sup>48</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>49</sup>

( ) Section 13(b) 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

<sup>48</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>49</sup> Amend as necessary.



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 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>50]</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>51]</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>52]</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 34.4 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>53</sup>”

( ) Section 13(c) of the 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

<sup>50</sup> Article 12(3) of the ICC Rules provides that the parties 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>51</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>52</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>53</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 (see paragraph 2.10(c) of the Guide above).

(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 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>54</sup>

( ) Section 13(d) of the 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>55</sup>

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<sup>54</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>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)”.

## APPENDIX B

### MODEL CLAUSE FOR LCIA RULES

*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*
- *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) 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 London Court of International Arbitration (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.<sup>56</sup> The parties shall jointly nominate the sole arbitrator.<sup>57</sup> 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>58</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 chairman of the Arbitral Tribunal) shall be selected and appointed by the LCIA Court.<sup>59</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 chairman of the Arbitral Tribunal. If no such nomination is made within that time limit, then the LCIA Court shall select and appoint the chairman of the Arbitral Tribunal.<sup>60</sup>]

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

(v) The language used in the arbitral proceedings shall be English.<sup>61</sup>

( ) Section 13(c) of the 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>62</sup>

( ) Section 13(d) of the 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>56</sup> The default position under the LCIA Rules is appointment of a sole arbitrator (Rule 5 of the Rules).

<sup>57</sup> Article 1 of the LCIA Rules provides that a party may include its proposal on the number of arbitrator and their qualifications or identities in its Request for Arbitration. Article 2 of the LCIA Rules provides that a party may include its comments on such matters in its Response.

<sup>58</sup> The LCIA Court will appoint the sole arbitrator unless the parties have agreed that they are to nominate the arbitrator. In such a case, the parties’ nomination will be treated as an agreement to nominate the arbitrator and will only be appointed by the LCIA Court if it is satisfied of his/her independence and impartiality (Articles 7 and 5 of the LCIA Rules).

<sup>59</sup> The parties may each nominate an arbitrator, who will then be appointed by the LCIA Court if it is satisfied of his/her independence or impartiality (Articles 7 and 5 of the LCIA Rules). The parties are to make their nominations in the Request for Arbitration and Response (Articles 1 and 2). The chairman of the Tribunal shall be appointed by the LCIA Court (LCIA Article 5).

<sup>60</sup> The purpose of this provision is to give the two co-arbitrators (nominated by the parties) the right to nominate the chairman of the Tribunal.

<sup>61</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 otherwise. Article 17 provides that once the tribunal has been constituted, and unless the parties agree the language of the arbitration, the Tribunal shall decide on the language of the arbitration.

<sup>62</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 London. 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>63</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>64</sup>

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<sup>63</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>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 C

### MODEL CLAUSE FOR AAA-ICDR RULES

*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*
- *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) 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 (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>65</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 statement of defense. 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>66</sup>]

[Option 3: The claimant shall appoint one arbitrator in the notice of arbitration. The respondent shall appoint one arbitrator in the statement of defense. 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>67</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>68</sup>

( ) Section 13(c) of the 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>69</sup>

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

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<sup>65</sup> Article 2 of the AAA International Arbitration Rules provides that a party may include its proposal on the means of designating and the number of arbitrators in its notice for arbitration. Article 3 of the AAA International Arbitration Rules provides that a party may provide its response to any proposal on the number and designation of arbitrators in its statement of defence and counterclaim. Article 5 of the AAA International Arbitration Rules provides that where the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the administrator (i.e. the AAA) determines that three arbitrators are appropriate. Article 6(3) of the AAA International Arbitration Rules provides that if within 45 days after the commencement of the arbitration, all of the parties have not agreed on the designation of the arbitrator(s), the administrator, shall at the written request of any party, appoint the arbitrator(s) and designate the presiding arbitrator.

<sup>66</sup> The purpose of this provision is to exercise the parties’ right to agree a procedure for appointing the tribunal. Each party is to appoint an arbitrator. The presiding arbitrator is appointed by the AAA.

<sup>67</sup> The purpose of this provision is to exercise the parties’ right 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>68</sup> Article 14 of the AAA 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>69</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.

- (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>70</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>71</sup>

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<sup>70</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>71</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

*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*
- *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>72</sup>

( ) Section 13(b) 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

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<sup>72</sup> Amend as necessary.

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 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.

(iii) [**Option 1:** The arbitral tribunal shall consist of one arbitrator. The arbitrator shall be appointed in accordance with the Rules.<sup>73]</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>74]</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>75]</sup>

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

(v) The language used in the arbitral proceedings shall be English.<sup>76]</sup>

( ) Section 13(c) of the 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>77]</sup>

( ) Section 13(d) of the 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>73</sup> Article 7.1 of the HKIAC Rules provides that where 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 later of (a) the date when the Notice of Arbitration was received by the Respondent(s) and (b) the date the parties agreed that the dispute should be referred to a sole arbitrator.

<sup>74</sup> Article 8.1 of the HKIAC Rules provides that 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>75</sup> The purpose of this provision is to vary the 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>76</sup> Article 16.1 of the HKIAC Rules provide that unless the parties agree, the arbitral tribunal shall determine the language to be used in the proceedings.

<sup>77</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.

(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>78</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>79</sup>

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<sup>78</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>79</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

*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*
- *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>80</sup>

( ) Section 13(b) 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

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<sup>80</sup> Amend as necessary.

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 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>81</sup>.

[**Option 2:** The Tribunal shall consist of three arbitrators. The members of the Tribunal shall be appointed in accordance with the Rules.<sup>82</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>83</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>84</sup>

(v) The language used in the arbitral proceedings shall be English.<sup>85</sup>

( ) Section 13(c) of the 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>86</sup>

<sup>81</sup> Rule 7.1 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 7.2 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.

<sup>82</sup> Rule 8.1 of the SIAC Rules provides that each party shall nominate one arbitrator. Rule 8.2 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 8.3 provides that the President of SIAC shall appoint the third arbitrator unless parties have agreed another procedure for appointing the third arbitrator or if the agreed procedure does not result in a nomination.

<sup>83</sup> The purpose of this provision is to exercise the parties’ right under Rule 8.3 of the SIAC Rules (see previous footnote) to agree a different procedure for the appointment of the presiding arbitrator and give the two party-nominated arbitrators the right to nominate the third arbitrator.

<sup>84</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 being those 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>85</sup> Rule 19.1 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>86</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.

( ) Section 13(d) of the 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>87</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>88</sup>

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<sup>87</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>88</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)”.

## MODEL CLAUSE FOR SWISS ARBITRATION RULES

*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*
- *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>89</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>90</sup>

( ) Section 13(b) 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>89</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. The clause makes no choice of law for the arbitration clause separate from that of the underlying agreement as a whole.

<sup>90</sup> Amend as necessary.

(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>91</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>92</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>93</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>94</sup>

(v) The language used in the arbitral proceedings shall be English.<sup>95</sup>

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

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

(ii) 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

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<sup>91</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.

<sup>92</sup> Article 8(1) of the Swiss Arbitration Rules provides that, if a party fails to make a designation within the time-limit set by the Arbitration Court of the Swiss Chambers Arbitration Institute (the "Court") or resulting from the arbitration clause, the Court shall appoint the arbitrator. Article 8(2) provides that the Court shall appoint the third arbitrator unless the parties have agreed another procedure for appointing the third arbitrator and if the two arbitrators first appointed fail to designate the third arbitrator within 30 days.

<sup>93</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 by the two party-nominated arbitrators.

<sup>94</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, whereas Part 3 of the Code of Civil Procedure (**CPC**) applies to domestic arbitrations being those 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>95</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.



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>96</sup>.

( ) Section 13(d) of the 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>97</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>98</sup>

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<sup>96</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>97</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>98</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)”.

**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*
- *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) 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 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>99</sup>]

[Option 2: The arbitral tribunal shall consist of three arbitrators, who shall be selected in accordance with the Rules.<sup>100</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>101</sup>]

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

(v) The language used in the arbitral proceedings shall be English.<sup>102</sup>,

( ) Section 13(c) of the 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>103</sup>

( ) Section 13(d) of the 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>99</sup> Article 8(1) of the P.R.I.M.E. Finance Arbitration Rules provides that the parties may, by agreement, jointly nominate the arbitrator from among P.R.I.M.E. Finance’s approved list of arbitrators. It 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 joint nomination, the sole arbitrator shall be appointed by the appointing authority in accordance with Article 8(2). 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. The appointing authority is the Secretary General of the Permanent Court of Arbitration, unless the parties agree otherwise.

<sup>100</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 nominate one arbitrator from among P.R.I.M.E. Finance’s approved list of arbitrators. 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)). 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>101</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>102</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>103</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 London. 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>104</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>105</sup>

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<sup>104</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>105</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)”.

**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*
- *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) 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 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>106]</sup>

[**Option 2:** The arbitral tribunal shall consist of three arbitrators, who shall be selected in accordance with the Rules.<sup>107]</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>108]</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>109</sup>

( ) Section 13(c) of the 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>110</sup>

( ) Section 13(d) of the 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>106</sup> Article 8(1) of the P.R.I.M.E. Finance Arbitration Rules provides that the parties may, by agreement, jointly nominate the arbitrator from among P.R.I.M.E. Finance’s approved list of arbitrators. It 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 joint nomination, the sole arbitrator shall be appointed by the appointing authority in accordance with Article 8(2). 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. The appointing authority is the Secretary General of the Permanent Court of Arbitration, unless the parties agree otherwise.

<sup>107</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 nominate one arbitrator from among P.R.I.M.E. Finance’s approved list of arbitrators. 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)). 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>108</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>109</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>110</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>111</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>112</sup>

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<sup>111</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>112</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)”.

## MODEL CLAUSES 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*
- *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>113</sup>

( ) Section 13(b) 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

<sup>113</sup> Amend as necessary.



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 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>114</sup>]

[**Option 2:** The arbitral tribunal shall consist of three arbitrators, who shall be selected in accordance with the Rules.<sup>115</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>116</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>117</sup>

( ) Section 13(c) of the 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 (“*gokozen woonplats*”), 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>118</sup>

<sup>114</sup> Article 8(1) of the P.R.I.M.E. Finance Arbitration Rules provides that the parties may, by agreement, jointly nominate the arbitrator from among P.R.I.M.E. Finance’s approved list of arbitrators. It 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 joint nomination, the sole arbitrator shall be appointed by the appointing authority in accordance with Article 8(2). 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. The appointing authority is the Secretary General of the Permanent Court of Arbitration, unless the parties agree otherwise.

<sup>115</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 nominate one arbitrator from among P.R.I.M.E. Finance’s approved list of arbitrators. 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)). 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>116</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>117</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>118</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:

- ( ) Section 13(d) of the 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>119</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>120</sup>

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

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

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

<sup>119</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>120</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)”.