

MODEL CLAUSE FOR VIAC RULES (VIENNA SEAT)*

This arbitration clause is intended for use where:

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

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

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

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

() **Governing Law.** This Agreement (except for Section 13(b) (Arbitration) which shall be governed by Austrian law) and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with [English law/New York law (excluding conflict of laws principles)].²

() 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

* The clause was drafted in co-operation with the Austrian law firms Wolf Theiss and Graf&Pitkowicz and has been reviewed by the International Swaps and Derivatives Association (ISDA).

¹ Austrian arbitration law does not contain a specific provision concerning the law governing the arbitration agreement. In order to avoid any ambiguity, it is recommended to expressly agree on that law.

² Amend as necessary.

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

(ii) The arbitration shall be conducted in accordance with the Rules of Arbitration (the “Rules”) of the Vienna International Arbitral Centre (the “VIAC”). Capitalized 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.^{3]}

[Option 2: The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules.^{4]}

[Option 3: The arbitral tribunal shall consist of three arbitrators. The members of the arbitral tribunal shall be appointed in accordance with the Rules, save that the chairperson of the arbitral tribunal shall be nominated by the Board of the VIAC.^{5]}

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

(v) The language used in the arbitral proceedings shall be English.⁶

() 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 Austrian courts relating to the arbitration clause set out in Section 13(b) above or any arbitration proceedings contemplated thereby or any arbitral award obtained pursuant to such arbitration proceedings”.⁷

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

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

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

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

⁶ Pursuant to Article 26 of the Rules, absent party agreement on the language or languages of the arbitration, immediately after transmission of the file the arbitral tribunal shall determine the language or languages, having due regard to all circumstances, including the language of the contract.

⁷ Note that in the event it is necessary to seek interim measures from a court before an arbitral tribunal is appointed, it might be useful if a process agent has been appointed. The process agent should be an individual or an entity in Austria. However, a process agent is not necessary for the purposes of the arbitration proceedings themselves.

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

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

(a) Section 8(b) shall be amended so that each reference in it to “judgment or order” shall be changed to refer to “judgment, arbitral award or order” and the words “or arbitral tribunal” shall be added after the words “another court”.

(b) Section 8(c) shall be amended by adding the words “or arbitral award” after the word “judgment”.

(c) Section 9(h) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment” each time they appear.⁸

(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)”.⁹

⁸ If using the 1992 ISDA Master Agreement, use the following provision instead of (c): (c) Section 2(e) shall be amended by adding the words “or arbitral award” after the words “before as well as after judgment”.

⁹ If using the 1992 ISDA Master Agreement, use the following provision instead of (d)(ii): (d)(ii) adding the following definition of “Proceedings”: ““Proceedings” has the meaning specified in Section 13(d)”.