

## **The Hague Court of Arbitration for Aviation**

### MODEL ARBITRATION CLAUSES & AMENDMENT

Pursuant to Arbitration Rules in force as of 31 August 2022



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# THE HAGUE COURT OF ARBITRATION FOR AVIATION

## RULES STANDING COMMITTEE

### MODEL CLAUSES

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#### I. TEXT OF THE MODEL CLAUSES

1. Although the current Netherlands Arbitration Institute Arbitration Rules offer a single recommended arbitration clause text, The Hague Court of Arbitration for Aviation offers two types of recommended model clauses: one for future disputes and one for existing disputes (also sometimes referred to as a ‘submission agreement’). In this way, The Hague Court of Arbitration for Aviation can be used for aviation disputes which relate to a contract concluded prior to the launch of the institution.
2. The two variations of the model clause are as follows:

##### A. *For Future Disputes*

*All disputes arising out of or in connection with the present contract, including any questions regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of The Hague Court of Arbitration For Aviation for the time being in force, which Rules are deemed to be incorporated by reference into this clause.*

*The arbitral tribunal shall be composed of [].*

*The place of arbitration shall be [].*

*The law applicable to the arbitration agreement shall be [].*

*The substantive law governing the merits of the dispute shall be [].*

*The language to be used in the arbitration shall be [].*

##### B. *For Existing Disputes (‘Submission Agreement’)*

*A dispute having arisen between the parties concerning [], the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of The Hague Court of Arbitration For Aviation for the time being in force. This agreement supersedes and replaces any prior dispute resolution agreement between the parties in respect of the dispute.*

*The arbitral tribunal shall be composed of [].*

*The place of arbitration shall be [].*

*The law applicable to the arbitration agreement shall be [].*

*The substantive law governing the merits of the dispute [is/shall be] [].*

*The language to be used in the arbitration shall be [].*

3. Both variations contain the most critical elements that any arbitration agreement should address, namely: (i) the parties’ agreement to submit their disputes to arbitration; (ii) the scope of the disputes submitted to arbitration; and (iii) the choice of the institution and incorporation of its arbitration rules.

#### II. ISSUES TO BE ADDRESSED UNDER THE MODEL CLAUSES

4. The model clauses also contain a number of fundamental elements which are ordinarily found in arbitration agreements, and which are for the parties to choose and complete or otherwise exclude. The square brackets suggesting that these issues are open points to be agreed upon and added by the parties. These issues concern: (i) the number of arbitrators; (ii) the place of the arbitration; (iii) the law applicable to the arbitration agreement; (iv) the substantive law governing the merits of the dispute; and (v) the language of the arbitration. While, in theory, an arbitration agreement may be valid and effective without those elements, the parties are typically well advised to include those determinations in their arbitration agreement in order to avoid problems and delays that may arise during the arbitration.

##### A. *Number of Arbitrators*

5. It should be borne in mind that, as a rule, three arbitrators will cost more than one. If the parties have not agreed the number of arbitrators, their number will be determined by the administrator.
6. Assessing whether the parties should explicitly state the number of arbitrators in the arbitration agreement is not straightforward and depends on the circumstances of the case. On the one hand, if the parties prefer the dispute to be heard by three (or more) arbitrators, the parties should make this clear in their arbitration agreement. On the other hand, if the parties have no strong preference, the best solution regarding the number of the arbitrators will often only appear once the dispute has arisen and its complexity and specific

needs can be assessed. While the parties may always reach an agreement on the number of arbitrators after the dispute has arisen, this rarely happens in practice due to the parties' contentious posture by that time.

#### ***B. Place of Arbitration***

7. If the parties have not agreed the place of arbitration, it will be determined by the Arbitration Rules, which empower the arbitral tribunal to determine the place of arbitration.
8. The determination of the place of arbitration is critical for arbitral proceedings because, among other things, it typically determines: (i) the courts which have jurisdiction to set aside the award; and (ii) the law governing the arbitration (which applies to both the procedure in the arbitration (e.g., evidentiary rules, conduct of the proceedings, ethical standards) and the relationship between the arbitral tribunal and the national courts (e.g., judicial assistance for the formation of the arbitral tribunal, interim and provisional relief, evidence taking)).
9. In selecting an appropriate place of arbitration, the parties should consider several practical concerns including:
  - a. Whether the place of arbitration is situated in a country which has ratified the New York Convention (which governs the enforcement of arbitration agreements and awards).
  - b. Whether the place of arbitration provides for only limited review of the award in annulment proceedings.
  - c. Whether the law of the place of arbitration provides acceptable mandatory procedural laws.
  - d. Whether the national courts at the place of arbitration will readily provide support to the arbitration where needed but not otherwise unduly interfere with the process.

#### ***C. Law Applicable to the Arbitration Agreement***

10. A different law may apply to the arbitration agreement itself (as distinguished from the parties' underlying contract); this is because most legal systems will treat the arbitration agreement as a separate contract, which may not be subject to a substantive choice-of-law clause in the underlying contract. The law governing the arbitration agreement applies to questions regarding its existence, validity and interpretation.
11. By separating the place of arbitration, the substantive law governing the merits of the dispute and the law applicable to the arbitration agreement, the parties can minimize the likelihood of confusion with regard to the parties' intent.

#### ***D. Substantive Law Governing the Merits of the Dispute***

12. It is preferable that the parties choose the law governing the merits of the dispute in a choice-of-law clause, rather than leaving this issue for the arbitral tribunal to decide. This is so for several reasons. First, the applicable substantive law affects the rights and obligations of the parties. The parties themselves are best placed to determine what kind of obligations and rights they want to assume. Second, by designating in advance the applicable substantive law, the parties achieve certainty and avoid surprise decisions regarding the choice of law by the arbitral tribunal. Third, it may be time-consuming and costly to have the arbitral tribunal determine the governing law. Finally, knowing the governing law will help the parties (and the administrator) to choose arbitrator candidates best placed to decide the parties' dispute.
13. The answer as to which law the parties should choose will of course depend on the circumstances of the underlying transaction.

#### ***E. Language of the Arbitration***

14. The proceedings will be conducted in the language agreed by the parties. In the absence of such agreement, the language will be determined by the arbitral tribunal.

### **III. ADDITIONAL OPTIONAL MATTERS THAT MAY BE PROVIDED FOR**

15. The parties may opt to modify or otherwise change the model clauses beyond the elements identified. However, parties should be careful not to introduce conflicting or confusing language dealing with issues already addressed in the Arbitration Rules.
16. Some optional matters which could be addressed in the parties' arbitration agreement include:
  - a. Use the expedited procedure.
  - b. Method of appointment of the tribunal: If the parties wish to agree a different method of appointment, they should include this in the arbitration agreement.
  - c. Qualifications for arbitrators.

- d. Exclusion of the emergency arbitrator provisions.
- e. Modifications to the confidentiality of the proceedings.
- f. Modifications to contractual time limits for procedural steps in the arbitration.
- g. Evidentiary/disclosure rules which apply.
- h. Exclusion of the possibility of consolidation of the arbitral proceedings with other arbitral proceedings.
- i. Application of principles deriving from *ex aequo et bono* or permitting the arbitral tribunal to decide as *amiable compositeur*.
- j. Allocation of legal costs.

**A. Multi-tiered Clause: Mandatory Mediation**

17. In the arbitration agreement, parties sometimes add requirements regarding the notification of disputes or even require mediation as a preliminary step. Such preliminary steps before commencing arbitration aim at encouraging settlements. If the parties wish to adopt a formulation of the arbitration agreement featuring a mandatory reference to mediation as a pre-requisite to arbitration, the parties could use the following variation of the model clause:

*All dispute arising out of or in connection with the present contract, including any questions regarding its existence, validity, or termination, shall be submitted to mediation in accordance with The Hague Court of Arbitration for Aviation Mediation Rules for the time being in force, which Mediation Rules are deemed to be incorporated by reference into this clause.*

*Any mediation shall take place in [city and/or country] and be administered by The Hague Court of Arbitration for Aviation.*

*Any dispute which has not been resolved by mediation within [] days after initiation of the mediation shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of The Hague Court of Arbitration For Aviation for the time being in force, which Arbitration Rules are deemed to be incorporated by reference into this clause.*

*The arbitral tribunal shall be composed of [one arbitrator / three arbitrators].*

*The place of arbitration shall be [city and/or country].*

*The law applicable to the arbitration agreement shall be [city and/or country].*

*The substantive law governing the merits of the dispute shall be [].*

*The language to be used in the arbitration shall be [language].*

**IV. AMENDMENT TO EXISTING DISPUTE RESOLUTION CLAUSE**

18. Bearing in mind that parties may have already entered into contracts featuring dispute resolution clauses, the Hague Court of Arbitration for Aviation offers a model amendment agreement to enable the parties to refer their disputes to arbitration in accordance with the Arbitration Rules of The Hague Court of Arbitration for Aviation. The amendment is included as an Appendix to this document.

\* \* \* \* \*

[31 August 2022]

## ARBITRATION AMENDMENT

### AMENDMENT

dated as of \_\_\_\_\_

to the

[ORIGINAL AGREEMENT]

dated as of \_\_\_\_\_

between

\_\_\_\_\_ and \_\_\_\_\_

(the "Agreement")

The parties have previously entered into the Agreement and have now agreed to amend the Agreement by the terms of this Amendment (this "Amendment"). The purpose of this Amendment is to amend the Agreement on the terms set forth herein to provide, among other things, for arbitration of any disputes arising under or in connection with the Agreement.

Accordingly, in consideration of the mutual agreements contained in this Amendment, the parties agree as follows:

#### 1. Amendment of the Agreement

The Agreement is amended as follows:

A. [Section ] shall be deleted and replaced in its entirety with the following:

**Arbitration.** All disputes arising out of or in connection with the present contract, including any questions regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of The Hague Court of Arbitration For Aviation for the time being in force, which Rules are deemed to be incorporated by reference into this clause.

- (i) The arbitral tribunal shall be composed of [].
- (ii) The place of arbitration shall be [].
- (iii) The law applicable to the arbitration agreement shall be [].
- (iv) The substantive law governing the merits of the dispute shall be [].
- (v) The language to be used in the arbitration shall be [].

#### 2. Representations

- (a) Each party represents to the other party in respect of the Agreement, as amended pursuant to this Amendment, that all representations made by it pursuant to the Agreement are true and accurate as of the date of this Amendment.

- (b) Each party represents that it has the power to execute and deliver this Amendment and has taken all necessary action to authorize such execution and delivery.
- (c) Each party represents that its obligations under the Agreement, as amended by this Amendment, constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms (subject to applicable bankruptcy, reorganization, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law)).

### 3. Miscellaneous

- (a) **Entire Agreement; Restatement.**
  - (i) This Amendment constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto.
  - (ii) Except for the amendments to the Agreement made pursuant to this Amendment, all terms and conditions of the Agreement will continue in full force and effect in accordance with its provisions on the date of this Amendment. References to the Agreement will be to the Agreement, as amended by this Amendment.
- (b) **Amendments.** No amendment, modification or waiver in respect of the matters contemplated by this Amendment will be effective unless made in accordance with the terms of the Agreement.
- (c) **Counterparts.** This Amendment may be executed and delivered in counterparts (including by facsimile transmission), each of which will be deemed an original.
- (d) **Headings.** The headings used in this Amendment are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Amendment.
- (e) **Non-reliance.** Each party acknowledges that in agreeing to this Amendment it has not relied on any oral or written representation, warranty or other assurance from any other party and waives all rights and remedies which might otherwise be available to it in respect thereof, except that nothing in this Amendment will limit or exclude any liability of a party for fraud.
- (f) **Governing Law.** This Amendment will be governed by and construed in accordance with the law specified in the Schedule to the Agreement

IN WITNESS WHEREOF, the parties have executed this Amendment on the respective dates specified below with effect from the date specified first on the first page of this Amendment.

<p>_____</p> <p>(Name of Party)</p>	<p>_____</p> <p>(Name of Party)</p>
<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Date: _____</p>	<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Date: _____</p>