

International Sales Terms

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interim measures in the form of an order (Art 29 (2) ICC Arbitration Rules 2017) that is with respect to any question, issue or dispute determined in the order, however, not binding for the arbitral tribunal, Art 29 (3) ICC Arbitration Rules 2017. Any of these **measures must be recognized and enforced by the competent courts** of the state in which their enforcement is sought. This procedure can cost a considerable amount of time and hence deprive such interim measures of their essential advantage.⁷¹⁰ Furthermore, given that any order for interim or conservatory measures (either by the tribunal or an emergency arbitrator) will not constitute an arbitral award pursuant to the New York Convention, domestic procedural laws may (and often will) deny recognition and enforcement at all.⁷¹¹ It is therefore clearly desirable that the parties retain the right to apply to competent courts for intermediary relief, as their property, trade secrets or other rights may otherwise not be successfully protected.

In line with the suggestion made by the UNCITRAL model arbitration law⁷¹², many domestic arbitration laws permit the parties to seek interim or conservatory relief through the courts of law.⁷¹³ However, considering that some national procedural rules do not provide the courts with explicit permission to that effect⁷¹⁴, the parties are well advised to clarify that any competent **domestic courts** should, notwithstanding the arbitration agreement, remain entitled to take preliminary measures. A judgment of a German Higher Regional Court illustrates the need for such a clarification: In the underlying case, the claimant (a German contractor for the engineering, construction and commissioning of a brewery in Algeria) had requested an interim injunction by a German court in order to prevent an allegedly unjustified drawing of a performance bond by the Algerian employer. Notwithstanding the explicit permission to issue interim orders pursuant to § 1033 of the German Code of Civil Procedure, the Higher Regional Court Nürnberg held that the choice of arbitration to be conducted in Switzerland expressed the parties' intention to exclude the jurisdiction of German courts in its entirety.⁷¹⁵

These risks are non-existing if the parties agree (as it is suggested here) on the application of the **ICC Arbitration Rules**. Art 28 (2) of the ICC Arbitration Rules 2017 provides explicitly that the parties may apply to any competent judicial authority for interim or conservatory measures.⁷¹⁶ Accordingly, a choice of the ICC Rules without any further qualification will also incorporate Art 28 (2) into the arbitration clause. Against this background, the suggested subparagraph 2 is of a mere declaratory character and strictly speaking not necessary.

⁷¹⁰ RA Schütze, *Schiedsgericht und Schiedsverfahren* (2007) para 253.

⁷¹¹ P Hauser, "Eilrechtsschutz nach der neuen ICC-Schiedsordnung: Der "Emergency Arbitrator", *RIW* 2013, 364 (366). For further disadvantages compared to domestic court proceedings also J Grierson and A v Hooft, *Arbitrating under the 2012 ICC Rules* (2012) 63.

⁷¹² See Art 17 UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

⁷¹³ See for instance in Germany: § 1033 Code of Civil Procedure; England: Art 44 Arbitration Act 1996; Switzerland: Art 183 PILA.

⁷¹⁴ With regard to remaining ambiguities in US Law JK Schäfer, "Ende eines Sonderweges: Gerichtlicher Eilrechtsschutz im Staat New York in internationalen Schiedsverfahren", *SchiedsVZ* 2006, 191.

⁷¹⁵ OLG Nürnberg (27 October 2004), *SchiedsVZ* 2005, 51.

⁷¹⁶ Once the file has been transmitted to the arbitral tribunal, this right is subject to the existence of "appropriate circumstances". In any event, both application and any measures taken by a national court or other judicial authority must be notified to the ICC-Secretariat without delay.

b) The alternative clause: Agreement on jurisdiction

Subparagraph 1 and 2

- 393 § 14 (1) of the alternative clause contains an **agreement on jurisdiction** (respectively a “forum selection clause” or “choice of court agreement”) providing for the exclusive jurisdiction of courts that remain to be selected by the seller. The seller can in particular either specify an individual court of first instance residing in a member state of the EU/EEA or choose the jurisdiction of the courts in one member state of the EU/EEA in general without further specifications.⁷¹⁷
- 394 At least within the EU (and the EEA, with the exception of Liechtenstein), all domestic courts must accept an exclusive forum selection clause if only the requirements of Art 25 Brussels Ia Regulation (or, as the case may be, Art 23 of the Lugano Convention) are fulfilled. Art 25 (1) lit a requires an agreement in writing, respectively the confirmation of an oral agreement in writing (or in a form which either accords with practices which the parties have established between themselves or are widely known and regularly observed usages of international trade that the parties are or ought to have been aware of). The **written-form requirement** is clearly fulfilled if the buyer countersigns the main contract document and thereby declares his explicit acceptance of the International Sales Terms – a specific reference to the jurisdiction clause within the countersigned document (though suggested by the model form) is strictly speaking not necessary.⁷¹⁸

Subparagraph 2

- 395 If the parties choose a venue outside the EU/EEA, the applicable national procedural laws of this jurisdiction will be decisive as to the scope and effect of a forum selection clause. This also holds true with regard to the effect of an exclusive agreement on jurisdiction providing for a venue within the EU in non-EU member states respectively with regard to an enforcement of a judgment rendered by a court within the EU outside the European Union as non-EU courts are not bound by the Brussels Ia Regulation. If the seller nevertheless prefers litigation over arbitration in this event, it is undoubtedly advisable to either opt for a **non-exclusive venue clause** or – as suggested by § 14 (2) – to provide for **an additional optional right** of the seller to bring an action before the courts located at the buyer’s place of business. Otherwise, the seller may end up in a situation where he can neither enforce a judgment rendered by the chosen court in his home jurisdiction abroad nor bring an action against the buyer before a court in any other jurisdiction, as this court may deny its jurisdiction based on the exclusive forum selection clause.⁷¹⁹
- 396 According to the prevailing opinion⁷²⁰, a unilateral forum selection clause is perfectly valid pursuant to the Brussels Ia Regulation and should accordingly be respected by any court within the EU. That having said, however, the **French Cour de cassation** has in

⁷¹⁷ U Magnus in U Magnus and P Mankowski (eds), Brussels I Regulation (2011) Art 23 para 72.

⁷¹⁸ ECJ (8 March 2018) C-64/17 – *Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA* para 27: “(...) it must be observed that where a jurisdiction clause is stipulated in the general conditions, the Court has already held that such a clause is lawful where the text of the contract signed by both parties itself contains an express reference to general conditions which include a jurisdiction clause”.

⁷¹⁹ See eg BGH (13 December 1967), NJW 1968, 356: In this case, the German Federal Court of Justice denied the jurisdiction of German courts due to a choice of court agreement providing for the exclusive jurisdiction of Iranian courts even though judgments of Iranian courts were not enforceable in Germany.

⁷²⁰ *Commerzbank AG v Liquimar Tankers Management* [2017] EWHC 161 (Comm) para 79.

2012 taken the opposite view⁷²¹ by invalidating a corresponding agreement *inter alia* based on the assumption that an unilateral option should be considered as being contrary to the objectives of Art 25 Brussels Ia Regulation. Though this decision concerned a consumer contract, the reasoning of the court may also apply to B2B contracts.⁷²² Even though this judgment seems to be fundamentally flawed (all the more given that the Cour de cassation did not even deem it necessary to refer the matter to the European Court of Justice), the seller may also for this reason want to use the **suggested non-exclusive jurisdiction clause** instead.

§ 14 (2) can and should also be deleted in its entirety if and when recognition and enforcement of the resulting judgment will in all likelihood be sought in accordance with the **Hague Convention** of 30 June 2005 on Choice of Courts Agreements.⁷²³ The latter may become particularly relevant in relation to sales transactions between parties domiciled in a EU member state on the one and the UK on the other hand: It is to be expected that the UK will accede to the Hague Convention (which can be done unilaterally) after the Brexit⁷²⁴ in order to safeguard the enforcement of judgments rendered by English courts in the remainder of the EU once the latter is no longer possible in accordance with the Brussels Ia Regulation or a similar legal framework yet to be agreed between the EU and the UK. Given that the Convention applies in line with its wording⁷²⁵ and in accordance with the prevailing opinion⁷²⁶ however only in case of unfettered exclusive choice of court agreements (to the exclusion of asymmetric jurisdiction clauses), all of its benefits would otherwise be lost.

Subparagraph 3

Whether an exclusive forum selection clause also contains the parties' intention to derogate the jurisdiction of other courts even for **interim or conservatory measures** remains highly controversial.⁷²⁷ Accordingly, the parties are for their mutual benefit well advised to explicitly keep that option open.

⁷²¹ Cour de Cassation (26 September 2012) File No. 11–26.022 – *Mme X v Banque Privée Edmond de Rothschild Europe (Société)*. A more recent decision of the Court de Cassation has however reached a different conclusion and upheld an asymmetric jurisdiction agreement, see Court de Cassation (7 October 2015) File No. 14-16898 – *Société eBizcuss.com v Apple*.

⁷²² See R Fentiman, "Unilateral Jurisdiction Agreements in Europe", CLJ 2013, 24 who provides an excellent critical review of this ill-judged decision.

⁷²³ The Hague Convention must be applied instead of the Brussels Ia Regulation (even) by a court based in the EU if one of the parties has its residence in a state that is a member state of the Convention but not of the EU, s. Art 26 (6) Hague Convention.

⁷²⁴ G Rühl, "Judicial Cooperation in Civil and Commercial Matters after Brexit: Which Way Forward?", ICLQ 2018, 99 (127).

⁷²⁵ See Art 3 lit a Hague Convention: "For the purposes of this Convention a) 'exclusive choice of court agreement' means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of **any other courts**" [emphasis added].

⁷²⁶ L Merrett, "The Future Enforcement of Asymmetric Jurisdiction Agreements", ICLQ 2018, 37 (57); P Huber, "Das Haager Übereinkommen über Gerichtsstandsvereinbarungen", IPRax 2016, 197 (199).

⁷²⁷ See eg BG (17 September 1999) BGE 125 III 451, 453: Exclusive forum selection clause ousts in principle (subject to certain exceptions) the jurisdiction of otherwise competent courts (pursuant to the Lugano Convention) also in relation to interim measures.



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APPENDIX

I. The sales documentation put together

SALES CONTRACT	
between	
1. [...] (hereinafter "Seller")	
2. [...] (hereinafter "Buyer")	
Seller and Buyer in the following also individually referred to as "Party" and collectively referred to as "Parties"	
Seller agrees to deliver and Buyer agrees to purchase the following products including the scope of supply as further described in the enclosed specifications pursuant to the terms and conditions below.	
Contractual Products:	[...]
Contract Price:	EUR [...] plus VAT (if applicable). The Parties agree that the Buyer is not entitled to pay the contract price in any other currency. Place of performance for payment of the Contract Price is the Seller's place of business.
Payment Terms:	Payment shall become due upon delivery of the Contractual Products in accordance with the Delivery Terms set forth below. Payment shall be effected by means of a letter of credit against presentation of the following documents pursuant to § 2 (3) of the International Sales Terms: 1. Commercial Invoice 2. [...]
Delivery Terms:	[...] (INCOTERMS © 2010) subject to any amendments set forth in the International Sales Terms (see below).
Delivery Period:	[...]
Country of Use:	[...]
Terms & Conditions:	The attached International Sales Terms (including in particular the arbitration agreement stipulated in Art 14 of the International Sales Terms) [alternatively: including the forum selection clause stipulated in Art 14 of the International Sales Terms] shall apply to this sales transaction to the exclusion of any other terms and conditions.
<div>Seller</div>	<div>Buyer</div>
<div>Place, Date</div>	<div>Place, Date</div>

INTERNATIONAL SALES TERMS

§ 1 GENERAL PROVISIONS

(1) The following International Sales Terms shall apply to the supply of the contractual goods and related services (if any) by the Seller (hereinafter collectively referred to as the “Products”) and shall together with the written Sales Contract signed by both parties and the agreed technical specifications of the Products (if any) collectively constitute the entire contract between the parties (hereinafter the “Contract”). No other terms and conditions shall apply, including the terms contained in the Buyer’s general terms and conditions or referred to by the Buyer, whether or not such terms conflict with or supplement these International Sales Terms and regardless of whether or not the Seller has explicitly objected to such terms.

(2) The International Sales Terms shall apply to the present Contract with the Buyer. They shall by means of a framework agreement also apply to all future contracts concluded with the Buyer, whose preponderant object is the supply of Products or related spare parts.

(3) The International Sales Terms shall not apply if the Products are intended for personal, family or household use by the Buyer.

§ 2 TERMS OF PAYMENT

(1) The stipulated contract price is exclusive of Value-Added Tax. The Buyer shall at Seller’s request provide the Seller with the necessary documentation required by the competent tax authorities as evidence of an export tax exemption. The Buyer shall reimburse the Seller for any Value-Added Tax levied on the Seller in the country of dispatch or the country of destination due to either the agreed terms of delivery, any failure to duly provide the requested documentation referred to above or any other circumstances attributable to the Buyer. Any taxes, fees, duties and other charges which are levied on the Seller in connection with the performance of the Contract in the country of destination of the Products (if any) shall be solely borne by the Buyer and the Buyer agrees to pay or reimburse the Seller for any such taxes which the Seller is required to pay.

(2) If the Parties have not agreed on other terms of payments, all payments shall be made to the bank account notified by the Seller without any reservation or deduction. All bank charges and fees shall be borne by the Buyer.

(3) If the Contract provides for payment by means of a letter of credit, the Buyer shall within two (2) weeks after the conclusion of the Contract open an irrevocable and transferable letter of credit in accordance with and subject to the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce (UCP 600) in favor of the Seller in the amount of the Contract Price, confirmed by a first class European bank with a branch at Seller’s place of business and available at sight payment against the presentation of the documents further described in the Contract. The letter of credit shall have an expiry date of at least four (4) months from the contractual delivery date respectively the end of the contractual delivery period. All bank charges and fees shall be at the Buyer’s expense.

(4) If the Seller does not receive payment from the Buyer when such payment has become due, the Seller is entitled to charge interest at an annual rate of eight (8) percentage points above the rate for main refinancing operations of the European Central Bank (ECB) (www.ecb.europa.eu/stats/policy_and_exchange_rates/key_ecb_interest_rates/html/index.en.html) as applicable throughout the period of delay. This provision shall apply mutatis mutandis if a letter of credit is not opened in time. Any further rights and remedies of the Seller provided by the Contract or in accordance with the applicable governing law shall remain unaffected.

I. The sales documentation put together

(5) Without prejudice to any further requirements of the applicable law, the Buyer may only set off claims against the Seller that are owed in the same currency as the corresponding claim of the Seller arising out of the Contract and that are either undisputed between the Parties or have been finally adjudicated. The aforementioned rule shall apply *mutatis mutandis* to any right of retention of the Buyer.

§ 3 TERMS OF DELIVERY

(1) The Seller may withhold delivery until due payments have been made (or, as the case may be, a letter of credit has been opened) by the Buyer in accordance with the Contract and all other obligations owed by the Buyer under the Contract that are necessary for the performance of the delivery of the Products have been discharged.

(2) Partial deliveries of the Products shall be permitted throughout the delivery period.

(3) In case of a delay in delivery or any other performance owed by the Seller under the Contract, the Seller shall only be liable for damages if the delay has either intentionally or negligently been caused. The Seller's liability for any damages shall in this case be limited to an amount of 0.5 % of the Contract Price for the Products (net) for each full week of delay up to a maximum amount of 5 % of the Contract Price (net) in the aggregate. Any claim for damages shall also be capped at this maximum amount if the Buyer declares the avoidance of the Contract due to the delay. This limitation of liability shall not apply in any of the events stipulated in § 6 (5)¹ of the present International Sales Terms.

(4) The time of delivery agreed by the Parties shall not be of the essence. Accordingly and subject to any further prerequisites of the applicable governing law of this Contract, the Buyer is only entitled to declare the Contract avoided by reason of any delay if the delay is attributable to the Seller, the Buyer has threatened the Seller with avoidance in writing after the date of delivery and an additional period of time of reasonable length, at least however [...] weeks, set by the Buyer has not resulted in the delivery of the Products. § 10 (Force Majeure) shall remain unaffected.

(5) If delivery is delayed at the Buyer's request or otherwise for reasons attributable to the Buyer by more than fourteen (14) days after notice was given of the readiness for dispatch by the Seller, the Seller may charge the Buyer liquidated storage costs for each commenced month thereafter amounting to 0.5 % of the Contract Price of the Products up to a maximum of 5 % of the Contract Price. The Seller remains entitled to claim further proven general damages in excess of the liquidated amount. Other rights and remedies provided by this Contract and/or applicable governing law, in particular the right to declare the Contract avoided, shall remain unaffected.

(6) Unless otherwise explicitly agreed in writing by the Seller, the Buyer shall be solely responsible for the installation and erection of the Products.

[alternatively]

§ 3 TERMS OF DELIVERY

(1) *The Seller may withhold delivery until due payments have been made by the Buyer (or, as the case may be, a letter of credit has been opened) in accordance with the Contract and all other obligations owed by the Buyer under the Contract that are necessary for the performance of delivery have been discharged.*

(2) *Partial deliveries of the Products shall be permitted throughout the delivery period.*

¹ This reference must be replaced with a reference to § 6 (2) International Sales Terms if the second alternative of § 6 is used (see below).

Appendix

(3) In case of a delay in delivery or any other performance owed under the Contract that has either intentionally or negligently been caused by the Seller, the Seller shall pay liquidated damages amounting to 0.5 % of the Contract Price for the Products (net) for each full week of delay up to an overall maximum of 5 % of the Contract Price (net) in the aggregate for any event of delay provided the Buyer can prove that he has suffered any loss at all. The liquidated damages payable under this clause shall be subject to § 3 (4) below constitute the sole and exclusive remedy of the Buyer for delay. This limitation of liability shall not apply in any of the events stipulated in § 6 (5) of these International Sales Terms below.

(4) The time of delivery agreed by the Parties shall not be of the essence. Accordingly and subject to any further prerequisites of the applicable governing law of this Contract, the Buyer is only entitled to declare the Contract avoided by reason of any delay if the delay is attributable to the Seller, the Buyer has threatened the Seller with avoidance in writing after the date of delivery and an additional period of time of reasonable length, at least however [...] weeks, set by the Buyer has not resulted in the delivery of the Products. In case of an avoidance of the contract pursuant to this § 3 (4), the Buyer is entitled to claim further proven general damages in excess of the liquidated damages payable up to a maximum amount of 5 % of the Contract Price. For the avoidance of doubt, all damage claims (liquidated plus general damage claims) shall in the aggregate be capped at an amount of 10 % of the Contract Price. § 10 (Force Majeure) shall remain unaffected.

(5) If delivery is delayed at the Buyer's request or otherwise for reasons attributable to the Buyer by more than fourteen (14) days after notice was given of the readiness for dispatch by the Seller, the Seller may charge the Buyer liquidated storage costs for each commenced month thereafter amounting to 0.5 % of the Contract Price of the respective Products up to a maximum of 5 % of the Contract Price. The Seller remains entitled to claim further proven general damages in excess of the liquidated amount. Other rights and remedies provided by this Contract and/or applicable governing law, in particular the right to declare the Contract avoided, shall remain unaffected.

(6) Unless otherwise explicitly agreed in writing by the Seller, the Buyer shall be solely responsible for the installation and erection of the Products.

§ 4 TRANSFER OF TITLE

(1) Title to the Products shall not pass to the Buyer until the Seller has unconditionally received the full amount of the contract price due under this Contract. The transfer of risk shall remain unaffected by this retention of title.

(2) Until title to the Products has passed to the Buyer pursuant to the foregoing, the Buyer shall insure the Products with a reputable insurance company for their full replacement value against all risks and shall keep the Products in good repair and condition. Until transfer of title, the Buyer is not entitled to pledge, transfer ownership as security, lease or otherwise dispose of the Products without Seller's prior written approval. The Buyer may however resell the Products in the ordinary course of business provided he receives payment from his customer or retains title so that the property is transferred to Buyer's customer only after fulfillment of the customer's obligation to pay.

(3) If the relevant domestic property laws do not recognize a retention of title or provide for additional requirements such as but not limited to registration requirements etc., the Buyer undertakes to support the Seller at Seller's request in order to either fulfill any of these requirements or to establish a comparable security interest for the Seller in relation to the Products. Costs reasonably incurred by the Seller in this regard shall be borne by the Buyer.