|  |
| --- |
| [\_\_\_\_] Parts in need of further processing or references in need of being checked[\_\_\_\_] Alternative clauses and comments by industry partners [\_\_\_\_] Alternative clauses and comments by the research institution(\_\_\_\_) Guidance for input fields, options, alternativesDISPUTE RESOLUTION CLAUSE – LONG FORM |
| 1. **DISPUTE RESOLUTION**
	1. In this context, escalation shall be understood as the delegation of a matter to a higher hierarchy level (escalation level). This will apply regularly in cases where the escalating level does not have sufficient means or leeway or powers to initiate actions. The Parties agree that escalation shall be used primarily to clarify ambiguous situations and to resolve disputes. Where this is not possible at the lower escalation level, the matter in question shall be escalated to the next level in accordance with the rules set out below.
	2. Dispute resolution shall be based on a three-level model, the roles or bodies of the first level (which may also comprise several escalation steps) being defined within the scope of the deliverable.
	3. Escalation level 1: The Parties shall first of all try to settle any and all disputes on the operating level. The relevant item on the agenda shall be explicitly designated as an escalation item. Disputes shall be jointly discussed orally, and relevant information shall be gathered and analysed. If the dispute cannot be resolved within two meetings where the dispute was on the agenda, but in any case within no longer than twenty-five (25) work days, any Party shall have the right to escalate the dispute to escalation level 2 by means of a written notice (escalation notice).
	4. Escalation level 2: Within the scope of the further processing of an escalation notice at level 2, the Party submitting the escalation notice shall provide or state, in writing, within five (5) work days of submission of the escalation notice:
* a brief description of the type, scope and basis of the dispute;
* a description of how the dispute came about;
* the amount in dispute in EUR, if applicable;
* any matters as may have been agreed upon, and the positions of each of the parties to the dispute.

The level-2 body shall, within a month of receipt of the escalation notice, schedule one or two specific meetings to assess and discuss the dispute and try to arrive at a consensual resolution. Positions assumed and information disclosed during pertinent talks in this context shall (i) in no way prejudice the legal position of a Party (non-prejudicial effect) and (ii) be in no way construed in such a manner that a Party will, at any time or in any way, be prevented from initiating arbitration or court proceedings or otherwise exercising rights due to it or resort to legal remedies. * 1. Expert audit: As soon as an escalation notice is being processed on level 2, each of the Parties shall have the right to demand and initiate an expert audit if the Parties are not agreed on a specific existing technical or commercial question. In such an event, the Party intending to initiate the expert audit must have first requested the other Party in writing, stating reasons and setting a reasonable deadline, to settle the dispute, or (if the dispute is about work or services to be provided by the other Party) to deliver the work or services in conformity with the contract. Once this deadline has expired, the Party having requested settlement of the dispute or delivery in conformity with the contract shall have the right to demand and initiate an expert audit. Said Party shall also have the right to suspend or cancel any expert audit already initiated. The expert audit functions as (out-of-court) expert evidence. In addition, the level-2 body shall also have the option to agree, when an expert audit is initiated, to treat the outcome of the expert audit in the same way as a binding expert determination. Expert audits must be carried out by an independent court-certified (<https://sdgliste.justiz.gv.at>) expert (auditor) in a field that is as closely related as possible to the matter at issue. The auditor must be subjected to a comprehensive non-disclosure obligation. The auditor shall be appointed by the level-2 body, by general consensus if possible. If the Parties fail to reach agreement on an auditor within 10 work days of initiation of the expert audit, the following shall apply:
* The Principal shall have the right to submit to the contract partner a shortlist of three candidates from which the contract partner may select an auditor within five (5) work days. If the contract partner fails to do so, the auditor shall be appointed by the Principal.
* If the Principal fails to submit the three-candidate shortlist within ten (10) work days from the date the lack of consensus was established, the contract partner shall have the right to submit to the Principal a three-candidate shortlist as described above within ten (10) work days from which the Principal may select an auditor within five (5) work days. If the Principal fails to do so, the auditor shall be appointed by the contract partner.
* Section 586 Code of Civil Procedure (*ZPO*) in conjunction with sections 19 and 20 Court Jurisdiction Act (*JN*) shall apply to the rejection of auditors. A justified rejection of even only one of the auditor candidates in a shortlist shall require a new three-party shortlist to be submitted.
	1. The expert audit comprises findings, an expert opinion, and (where the findings and the expert opinion require this) recommendations for actions to take (expert recommendations). The auditor’s expert recommendations must indicate specific actions intended to achieve (restore) the target status, and set reasonable deadlines for taking such actions. The auditor shall draw up the expert recommendations as promptly as possible, and make them available to both Parties at the same time, if possible.
	2. The Parties shall contribute to and assist with the expert audits and provide as much support as possible to the auditor in fulfilling this task and supply to the auditor all materials, declarations and documentations and give the auditor access to suitable infrastructure and staff members as necessary for or conducive to the audit. The auditor may – following the Parties’ consent in terms of who shall bear the costs – also consult further experts, who have to be subjected to a non-disclosure obligation, with respect to certain special areas of expertise. Both the auditor and such further experts shall be granted access and inspection rights in the largest possible extent as required for the audit.
	3. Having heard the Parties, the auditor shall determine who shall bear the costs of the expert audit (cost of the auditor and of any further experts consulted by the auditor) subject to the prevailing party principle; in cases of doubt, the auditor shall determine that the costs have to be shared equally between the Parties. Where a Party aborts or cancels the expert audit, it must bear the full costs having been incurred up to that point in time. In all other respects, each Party shall bear its own cost arising in the context of audits.
	4. Expert audits, whether started or completed, shall not prevent court proceedings to be initiated (no proceedings pending, not a matter decided with final legal effect). While court proceedings are pending, no expert audits shall take place in relation to the dispute in question; expert audits having already been started in the matter shall be discontinued; in such a case, cost reimbursement shall be governed based on who prevails in the court proceedings.
	5. Where the dispute cannot be settled consensually in the level 2 body within three months from receipt of the escalation notice by the other Party (Clause 1.3) (the time from initiation to completion of an expert audit in the matter not being taken into account, i.e. suspending the above deadline) or, where an expert audit is aborted, cancelled or not implemented, either of the Parties shall have the right to initiate conciliation proceedings at escalation level 3. In addition, either Party shall, following expiry of 14 days from service of the expert recommendations, have the right to initiate [conciliation proceedings / mediation proceedings] at escalation level 3.
	6. Escalation level 3: [Prior to initiating arbitration or court proceedings, it is mandatory to initiate conciliation proceedings, which shall be conducted by the Conciliation Board. The Conciliation Board shall have three members (hereinafter referred to as conciliators). Each Party shall appoint a conciliator from a field that is as closely related as possible to the matter at issue. Where a representative of a Party from the level-2 bodies plans to initiate conciliation proceedings, such representative shall notify the other contract party thereof in writing and shall name a conciliator in such notice. The notice must also specify the purpose of the conciliation proceedings in concrete terms. The second conciliator shall be named by the other Party in writing within fifteen (15) work days from service of the written notice. Once both conciliators have been appointed, they shall, within fifteen (15) work days, appoint a third conciliator. Should the two conciliators appointed by the Parties fail to reach agreement on a third conciliator, such conciliator shall be appointed by the Board of the Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC). Upon appointment of the third conciliator, the Conciliation Board shall be deemed constituted. Following its constitution, the Conciliation Board shall set the Parties a reasonable deadline of no more than twenty (20) work days to present their points of views and documents; failure of a Party/the Parties to do so shall not prevent the continuation of the conciliation proceedings. The conciliation proceedings shall be conducted by the Conciliation Board at its discretion, in conformity with the principles of impartiality, equity and justice. The Conciliation Board shall have the right to request further information, materials, recommendations and, in general, further input as it sees fit or necessary to understand, assess and try to resolve the dispute. The Conciliation Board shall discuss the dispute with the Parties and try, within sixty (60) work days from having been constituted, to present proposals for an amicable resolution of the dispute. If a Party refuses to take part in the conciliation proceedings or fails to name a second conciliator within the deadline set for such purpose, the conciliation proceedings shall be deemed to have failed. Failure of such proceedings shall not constitute a breach of contract by the respective Party. Likewise, the conciliation proceedings shall end if, within sixty (60) work days from the Conciliation Board having been constituted, (i) the Parties have reached agreement, in writing, with respect to the dispute, (ii) the Conciliation Board has decided, in writing, that the conciliation proceedings were futile, or (iii) one Party informs the Conciliation Board, in writing, that it wishes to discontinue the conciliation proceedings. The conciliators must not act as representatives of or advisers to a Party or act as arbitrators in any subsequent arbitration or court proceedings. The Conciliation Board shall make a proposal on splitting the cost of the conciliation proceedings, based as far as possible on the prevailing party principle. If it is not established who shall bear the costs in what ratio, the costs shall be borne equally by both Parties. However, where a Party aborts the conciliation proceedings, such Party shall bear the full costs having been incurred up to that point in time. In all other respects, each Party shall bear its own cost arising in the context of the conciliation proceedings.] [If the dispute cannot be settled during the duration of escalation level 2, the Parties shall strive to do so by resorting to mediation. To initiate mediation, one Party must notify the other Party in writing, demanding mediation proceedings (mediation notice). Such proceedings shall be conducted based on the Rules of Mediation of the Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC)(Vienna Mediation Rules). If the dispute has not been settled amicably or the relevant claims been clarified within a period of 60 days from initiation of proceedings under the Vienna Mediation Rules, court proceedings shall be initiated. None of the Parties shall have the right to initiate court proceedings in respect of a dispute as long as such Party has not tried to resolve the dispute by means of mediation and the mediation proceedings were either terminated or the other Party failed to take part in such proceedings. / VIAC MEDIATION CLAUSE: <https://www.wko.at/branchen/information-consulting/unternehmensberatung-buchhaltung-informationstechnologie/it-dienstleistung/Optionale_Zusatzvereinbarung_-_Mediationsklausel.pdf> ]
	7. During the time dispute settlement is attempted by way of the respective mechanisms, limitation of all claims in this context shall be suspended. Positions assumed and information disclosed during dispute resolution shall (i) in no way prejudice the legal position of a Party (non-prejudicial effect) and (ii) be in no way construed in such a manner that a Party will, at any time or in any way, be prevented from initiating arbitration or court proceedings or otherwise exercising rights due to it or resort to legal remedies. Dispute resolution proceedings, whether started or completed, shall not prevent court proceedings to be initiated (no proceedings pending, not a matter decided with final legal effect). While court proceedings are pending, no dispute resolution shall take place in relation to the dispute in question; any dispute resolution proceedings having already been started shall be discontinued. Any statements or declarations made by the Parties within the scope of dispute resolution proceedings (except for any agreement reached by the Parties within the scope of such proceedings) shall not be binding in the course of subsequent arbitration or court proceedings.
	8. An arbitral tribunal as set out in the VIAC Rules of Arbitration consisting of three arbitrators appointed in accordance with the said rules shall be competent to decide on any and all disputes arising out of or in connection with the contract (and also on its having effectively come into existence and remaining in effect). The venue of the arbitral tribunal shall be Vienna. The language to be used in arbitration proceedings shall be German. The arbitral agreement shall be governed by the laws of Austria excluding the conflict of laws rules. Multi-party proceedings shall be admissible. The arbitral tribunal shall have the power to impose, upon application by a Party, conservatory and interim measures.
	9. Where – for any reason whatsoever – it is not possible to initiate arbitration proceedings, exclusive jurisdiction for decisions on any and all disputes arising out of or in connection with this contract (including the question of such contract having effectively come into existence and remaining in effect) shall lie with the court competent for [Vienna’s first district / the venue] in terms of amount in dispute (jurisdiction of ordinary courts of law).
	10. Without prejudice to any dispute pending before a court or tribunal or continuing with respect to the deliverable and/or the compensation or formal or informal attempts by the Parties to settle such dispute, the Parties must continue to fulfil their tasks and obligations under the contract.
	11. In any event, Austrian law shall apply excluding the conflict of laws rules and the UN Convention on Contracts for the International Sale of Goods.
 |