UNIVERSITY OF OSLO

INTERPRETATION OF CONTRACTS IN ARBITRATION

Mandatory fields are marked with an asterisk*

Thank you for participating in this survey. Your experience as an international arbitrator is a perfect basis for answering the questionnaire.

You will be presented with 10 different simple cases, together with 5 possible solutions for each case. You should choose the option that best matches your thinking or inclination, even if it is not a perfect representation of the solution you would reach. It should take you about half an hour to complete the form.

This consent form asks you to allow the researchers to record, view, analyze and publish in scientific papers the data generated by the answers to this questionnaire, with the aim of understanding the interpretation of contracts in international contexts.

The research project is led by Giuditta Cordero-Moss, University of Oslo, who is responsible for the personal data processed in the project. The personal data we collect are name and IP address.

Your name will be included in the list of participants in the study, unless you object to it. The list will be published in publications on international arbitration, together with the analysis of the answers to the questionnaire.

Any other information that is obtained in connection with this study and that can be identified with you will remain confidential.

In particular, in the published material your name will not be linked to any particular response. Your name will not be linked to information about your education and professional experience either.

The data will be processed in accordance with applicable legislation on data protection and will be archived in the University of Oslo One Drive.

We process your information for purposes related to scientific research, and because the research project is considered to be in the public interest. Your rights: As long as you can be identified in the data material, you have the right to object, request access, and to have the information we process about you corrected and deleted. You will then hear from us within one month. We will give you a good reason if we believe that you cannot be identified, or that your rights cannot be exercised. You also have the right to complain to the Norwegian Data Protection Authority about how we process your information.

Please be aware that participation in this study is completely voluntary, and you may stop participating at any time.

If you have any questions, or would like a copy of this consent letter, please contact project assistant Margrete Malmgård at margrmal@uio.no

Data protection - how we store and use your personal data

The questionnaire, including the names of the respondents, IP address, their answers, and the personal information about their background, will be stored in the University of Oslo One Drive. The estimated date for when the data will be anonymized is 1st December 2025.

Only the project leader and the project assistant will have access to the full questionnaire with the names.

In the material that will be analyzed, your name and contact details will be replaced with a code that is stored on a list of names separate from other data.

The anonymized answers and their background information will be analysed by the project team consisting of Giuditta Cordero-Moss, Diego Fernandez Arroyo, Gary Bell, Franco Ferrari, Cristiano Zanetti, Bruno Laeng, Michele Miozzo, and Margrete Malmgård. The analysis will be the object of publication and dissemination in relevant fora.

In sum, by consenting to participate in the study, you agree that we collect your name and IP address. In addition, your name will be included in the list of study participants unless you object to it.

I agree to participate in the research study. I understand the purpose and nature of this study and I am participating voluntarily. I understand that I can withdraw from the study at any time.*

- [ ] Yes
- [ ] No

The cases

1.Adjustment of costs

The contract clause:

Paradise Vacation Resort SpA leases a group of holiday apartments to Dream Holidays GmbH. The lease is for 40 years. Under the contract, Dream Holidays has the right to use Paradise Vacation's infrastructure.

As compensation for the use of the infrastructure, Article 16 of the contract states:

"As consideration for the use of the Infrastructure, Dream Holidays shall pay to Paradise Vacation, on the first day of each quarter and for the duration of this Agreement, the Cost Compensation Fee, in the amount of xxx. This amount shall be increased by 10% on an annual basis."

The facts:

At the time when the contract was entered into, the inflation rate was of approximately 10% per year. In the decades since, the inflation rate has dropped significantly, while the amount due for the Cost Compensation Fee has continued to increase by 10% per year.

As a result, the amounts due are much higher than the value they are meant to compensate, and payment is extremely onerous for Dream Holidays.

Dream Holidays requests that Article 16 be read as referring to the rate of inflation.

One party's interpretation:

Dream Holidays argues that the contractual provision cannot be interpreted literally. A literal interpretation leads to results that bear no relation to the actual value of the costs. They are also unreasonably burdensome and do not reflect the true intention of the parties.

The other party's interpretation:

Paradise Vacation Resort maintains that the contract is binding and that its language is clear. It insists on a strict application of its terms.

The question:*

As an arbitrator, would you find that Article 16 should be applied so as to avoid a 10% annual increase of the Cost Compensation Fee and instead be understood as a reference to the rate of inflation?

You have to select one option.

- ☐ **No, the agreed interest rate shall not be adjusted:** The contract must be interpreted in the light of internationally recognized principles. It is well established in international contract practice that detailed contractual terms between professional parties must be interpreted literally. Each party is expected to have made its own calculations and to have assessed the risks associated with the agreed arrangement. Each party must accept the consequences of the arrangements it has made.

- ☐ **It depends:** The contract alone does not provide an answer, the outcome depends on the governing law.

- ☐ **Yes, the agreed interest rate shall be adjusted:** The contract must be interpreted in the light of internationally recognized principles. The principles of good faith and proportionality are generally accepted and prevent abuse of contractual rights. Article 16 cannot be read as applying literally under these circumstances.

- ☐ **No, the agreed interest rate shall not be adjusted:** The language of the contract is clear: there is no need to look beyond the language of the contract. Each party is expected to have made its own calculations and have assessed the risks associated with the agreed arrangement. Each party must accept the consequences of the arrangements it has made.

- ☐ **Yes, the agreed interest rate shall be adjusted:** The rights and obligations of the parties are set out in the contract, and where the language of the contract is clear, it is the only applicable source. The language shall be read in the context of the parties' intentions and the balance of their interests. The intent of the parties was to ensure the value of the costs over time despite inflation, not to burden one party

with excessive payments and create an unexpected windfall for the other party.

2. Repayment of a loan

The contract clause:

City Consultancy Ltd enters into a contract to provide certain services to Urban Development AS. On the same day, the parties enter into a Loan Agreement pursuant to which Urban Development lends a certain amount to City Consultancy for the purpose of supporting certain initial investments related to the performance of the Service Contract.

According to Article 18 of the Loan Agreement:

“Repayment of the Loan shall be made by way of set off: Urban Development shall deduct an amount equal to the interest and principal of the Loan from the fee owed to City Consultancy under the Service Contract, in accordance with the schedule in Annex A.

Repayment of the Loan shall commence one year after the date hereof.”

The facts:

Six months after the date of the Loan Agreement, City Consultancy lawfully terminates the Service Contract.

Urban Development demands immediate repayment of the Loan.

One party’s interpretation:

Urban Development affirms that the loan was made to enable initial investments for the purpose of fulfilling the contract. The contract having been terminated, the basis for the loan ceased to exist and the loan should be repaid.

The other party’s interpretation:

City Consultancy asserts that the wording of the Loan Agreement does not provide for repayment of the Loan in the event that the Service Contract is lawfully terminated before the expiration of one year.

In any event, repayment will be made by offsetting the fees. Since no fees are due under the terminated contract, the loan is not repayable.

The question:*

As an arbitrator, would you find that Article 18 should be applied to require repayment of the Loan if the Service Contract is terminated before one year has elapsed?

You have to select one option.

☐ **Yes, the Loan shall be repaid:** The contract must be interpreted in the light of internationally accepted principles. There is a generally accepted principle of fair dealing and reasonableness. If no obligation to repay the Loan is implied, the borrower will have an unexpected windfall, which cannot have been the intention of the parties.

☐ **Yes, the Loan shall be repaid:** The rights and obligations of the parties are set out in the contract, and where the language of the contract is clear, it is the only applicable source. The language must be read in the context of the parties' intentions and the balance of their interests. The parties probably did not consider the possibility of an early termination when they drafted the Loan Agreement. If they had, they would have provided for a repayment obligation.

☐ **No, the Loan shall not be repaid:** The contract must be interpreted in the light of internationally accepted principles. It is generally accepted in international contract practice that detailed contractual terms between professional parties must be interpreted literally. Each party is expected to have carefully assessed the risks associated with the agreed arrangements. There is no room for second-guessing the will of the parties as expressed in the contract.

☐ **No, the Loan shall not be repaid:** The language of the contract is clear: there is no need to look beyond the language of the contract. If the parties had intended for the Loan to be repaid immediately in the event of early termination of the Service Contract, they would have stated so in writing. In the absence of such a provision, there is no basis for implying a repayment obligation. There is nothing irrational about agreeing to a Loan that may not have to be repaid under certain circumstances.

☐ **It depends:** The agreement alone does not give an answer, the outcome depends on the governing law.

3. Sole Remedy

The contract clause:

Steel Supply AS enters into a Supply Agreement, under which it shall deliver to Industrial Production SA on the first day of each month for a period of five years a volume of steel specified in Industrial Production's orders within a certain volume range.

The Agreement contains a minimum purchase requirement for Industrial Development.

Article 20 contains a Sole Remedy clause, which provides:

"For any month in which Industrial Production fails to meet the Minimum Volume Purchase Obligation, Steel Supply's sole and exclusive remedy shall be to levy a surcharge for such month calculated as set out in Annex A."

The facts:

The price of steel drops dramatically, and Industrial Production reduces its purchases under the contract well below the Minimum Volume Purchase Obligation.

The surcharge due under Article 20 is less than the difference between the contract price and the price that Industrial Production pays to third parties for the steel that it does not purchase under the contract. Therefore, it is profitable for Industrial Production to breach its Minimum Volume Purchase Obligations.

Steel Supply claims damages from Industrial Production to compensate it for the losses it suffers as a result of not being able to follow its production plan and having to sell undelivered steel to third parties at the low market price.

One party's interpretation:

According to Steel Supply, the Sole Remedy clause was not intended to apply when a party intentionally breaches the contract. Industrial Production should not be allowed to abuse the contractual mechanism for speculative purposes, and Steel Supply is entitled to damages for Industrial Production's breach of its Minimum Volume Purchase Obligation.

The other party's interpretation:

Industrial Production relies on the Sole Remedy clause and rejects any remedy other than the agreed-upon payment of a surcharge.

The question:*

As an arbitrator, would you find that Article 20 should be applied to allow recovery of damages?

You have to select one option.

- ☐ **No, damages shall not be recovered:** The contract must be interpreted in the light of internationally accepted principles. It is generally accepted in international contract practice that detailed contractual terms between professional parties must be interpreted literally. Each party is expected to have carefully assessed the risks connected with the agreed arrangement. There is no room for second-guessing the will of the parties as expressed in the contract.

- ☐ **Yes, damages shall be recovered:** The rights and obligations of the parties are set out in the contract, and where the language of the contract is clear, it is the only applicable source. The language must be read in the context of the parties' intentions and the balance of their interests. A party should not be allowed to abuse its contractual rights to the detriment of the other party's interests.

- ☐ **It depends:** The Supply Agreement alone does not provide the answer, the outcome depends on the governing law.

- ☐ **Yes, damages shall be recovered:** The contract must be interpreted in the light of internationally accepted principles. The principle of good faith is generally accepted and prevents abuse of contractual rights. The clause cannot have been drafted to apply under these circumstances and to permit a willful breach.

- ☐ **No, damages shall not be recovered:** The language of the contract is clear: there is no need to look beyond the language of the contract.

The parties agreed that there would be only one remedy for failure to meet the volume obligation, and there is no basis for seeking other remedies.

4. No waiver

The contract clause:

Iron Supply SA enters into a Supply Agreement under which it shall deliver on the first day of each quarter for a period of five years a certain quantity of iron to Manufacturing Ltd.

The Agreement contains a termination clause under which Manufacturing Ltd may terminate the Agreement with immediate effect if delivery is delayed by more than one week.

In addition, the Agreement contains a No Waiver clause, which states:

“Failure by Manufacturing Ltd to exercise any of the remedies set out in this Agreement shall not constitute a waiver thereof.”

The facts:

The first delivery under the Supply Agreement is delayed by more than one week. Manufacturing Ltd does not react to the delay. Its own production has been delayed by technical problems, therefore the delay in delivery has no consequences.

Manufacturing Ltd’s technical problems continue, and after several weeks the company decides to discontinue the production of iron products.

Iron Supply is unaware of Manufacturing Ltd’s loss of interest in the contract and prepares its deliveries as per the Supply Agreement.

One day before the second delivery, Manufacturing Ltd terminates the Supply Agreement under the termination clause, invoking the old default.

One party’s interpretation:

Iron Supply opposes termination, arguing that Manufacturing Ltd did not react within a reasonable time to the delay in the first delivery, which led Iron Supply to assume that the first delay would not be invoked to terminate

the contract.

The other party's interpretation:

Manufacturing Ltd invokes the No Waiver clause and argues that it did not loose its right to terminate the agreement even though it did not immediately exercise it.

The question:*

As an arbitrator, would you find that the No Waiver clause should be applied to require that contractual remedies be exercised within a reasonable time?

You have to select one option.

- ☐ **It depends:** The agreement alone does not provide the answer, the outcome depends on the governing law.
- ☐ **Yes, remedies shall be exercised within reasonable time:** The contract must be interpreted in the light of internationally accepted principles. The principle of good faith is generally accepted and prevents abuse of contractual rights. The supplier would not be able to plan its activities, if the buyer could terminate the contract at any time.
- ☐ **Yes, remedies shall be exercised within reasonable time:** The rights and obligations of the parties are set out in the contract, and where the language of the contract is clear, it is the only applicable source. The language must be read in the context of the parties' intentions and the balance of their interests. It cannot be the intention of the parties that there should be no limitation on the possibility of terminating the contract. Therefore, it should be implied that the right of termination must be exercised within a reasonable time.
- ☐ **No, there are no limits to the exercise of remedies:** The language of the contract is clear: there is no need to look beyond the language of the contract. If the parties intended that remedies could only be exercised within a certain time after the event triggering them, they would have written that limitation into the contract.
- ☐ **No, there are no limits to the exercise of remedies:** The contract must be interpreted in the light of internationally accepted principles. It is generally accepted in international contract practice that detailed contractual terms between professional parties must be interpreted

literally. Each party is expected to have carefully assessed the risks associated with the agreed arrangements. There is no room for second-guessing the will of the parties as expressed in the contract.

5. Termination

The contract clause:

Magnesium Supply AS enters into a Supply Agreement under which it shall deliver on the first day of each quarter for a period of five years a certain quantity of magnesium to Producer Ltd.

To permit compliance with the delivery schedule, Producer Ltd must confirm the quantities ordered by 12 a.m. CET on the 25th of each month (or the previous working day if the 25th falls on a holiday).

The Agreement contains in Article 13 a termination clause, which states:

“Time is of the essence. Either Party shall be entitled to terminate this Supply Agreement with immediate effect in the event of any delay in the performance of any of the Parties’ obligations under this Agreement.”

The facts:

After the contract was concluded the price of magnesium increased significantly. It would be more profitable for Magnesium Supply to sell magnesium on the spot market, rather than selling it under the contract.

The order for a particular month arrives at 12.30 a.m., instead of at 12.00 a.m. Magnesium Supply invokes Article 13 and terminates the contract.

One party’s interpretation:

Producer Ltd. disputes that there is a basis for termination. A 30 minute delay had no impact on Magnesium Supply’s planning. The real reason for termination is that Magnesium Supply wants to profit from the market change, and invoking the termination clause is an abuse of contractual rights.

The other party’s interpretation:

Article 13 is clear and applies to both parties. It allows the innocent party to terminate the contract in the event of delay, and there was a delay. Article 13 does not add that termination is allowed only if the delay has had material consequences for the innocent party, and the reasons for exercising a contractual right are irrelevant.

The question:*

As an arbitrator, would you find that Article 13 should be applied so as to permit termination regardless of the delay and the reasons for termination?

You have to select one option.

- ☐ **It depends:** The agreement alone does not provide the answer, the outcome depends on the governing law.
- ☐ **Yes, the contract may be terminated:** The contract must be interpreted in the light of internationally accepted principles. It is generally accepted in international contract practice that detailed contractual terms between professional parties must be interpreted literally. Each party is expected to have carefully assessed the risks associated with the agreed arrangements. There is no room for second-guessing the will of the parties as expressed in the contract.
- ☐ **No, the contract may not be terminated:** The rights and obligations of the parties are set out in the contract, and where the language of the contract is clear, this shall be the only applicable source. The language must be read in the context of the parties' intentions and the balance of their interests. It cannot be the intention of the parties that agreed clauses should be used for speculative purposes. Therefore, it should be implied that the right to terminate should be exercised reasonably.
- ☐ **Yes, the contract may be terminated:** The language of the contract is clear: there is no need to look beyond the wording of the contract. If the parties had intended that the right to terminate could only be exercised for reasons related to the delay, they would have written that limitation into the contract.
- ☐ **No, the contract may not be terminated:** The contract must be interpreted in the light of internationally accepted principles. The principle of good faith is generally accepted and prevents abuse of contractual rights.

6. Representations and Warranties

The contract clause:

A company purchases the majority of the shares of Target Co.

The Share Purchase Agreement contains a long list of Representations and Warranties, the relevant portion of which reads as follows:

“Seller represents and warrants to and for the benefit of Purchaser as follows:

1. […]

2. […]

3. […]

4. […]

5. There is no commercial litigation or proceeding pending against Target Co. and, to the knowledge of Seller, no commercial controversy is threatened which would affect the commercial or financial position of Target Co.

6. […]

7. […]”

The facts:

Shortly after the closing, tax authorities notify Target Co. of their decision rejecting Target Co.’s tax returns for the prior two years and requiring payment of past due taxes and a penalty. The tax authorities and Target Co. had been in negotiations for at least a year, and it was not unexpected that the audit would result in a claim and penalty. Target Co. is appealing the tax assessment.

The amounts are significant and have a material effect on Target Co.'s financial position.

However, during the negotiations with Purchaser, Seller did not disclose the threatened litigation – there was no mention of the tax litigation. The Representations are silent on the tax litigation.

One party's interpretation:

Purchaser alleges that Seller breached its duty to provide information material to the Purchaser's evaluation of the transaction.

Representation No 5 related to pending or threatened commercial litigation and therefore did not cover tax litigation. However, this does not restrict the contractual duty to act loyally and to provide relevant information during the negotiations.

The other party's interpretation:

The parties have carefully negotiated a long and detailed list of Representations and are aware of the scope of each of the Representations.

As a result, the parties agreed that Seller would assume liability for the matters covered by the Representations, while Purchaser would assume the risk for all other matters.

By drafting Representation No 5 to cover only commercial litigation, the parties have excluded tax litigation from the list.

The question:*

As an arbitrator, would you find that the contract should be applied so that Seller had a duty to inform Purchaser about pending or threatened tax litigation?

You have to select one option.

☐ **It depends:** The agreement alone does not provide the answer, the outcome depends on the governing law.

☐ **No, there is no duty to give information on tax litigation**: The language of the contract is clear: there is no need to look beyond the language of the contract. The parties are free to regulate their interests and allocate risks between themselves in the contract. If Seller has assumed only liability for commercial litigation, this means that Purchaser has assumed the risk for other types of litigation.

☐ **Yes, there is a duty to give information on tax litigation: In** international arbitration, international contracts should be interpreted in the light of transnational principles, and the principle of good faith during negotiations requires a seller to disclose material information that may have an impact on the other party's interest in the contract.

☐ **Yes, there is a duty to give information on tax litigation:** The rights and obligations of the parties are set out in the contract, and where the language of the contract is clear, it is the only applicable source. The language must be read in the context of the parties' intentions and the balance of their interests. It is not reasonable to interpret Seller's Representation on commercial litigation as excluding all other types of litigation.

☐ **No, there is no duty to give information on tax litigation:** In international arbitration, international contracts should be interpreted in the light of transnational principles, and the principle of pacta sunt servanda prevents arbitrators from supplementing the agreed terms.

7. Notices

The contract clause:

A company purchases the majority of the shares of NewCo Ltd.

The Share Purchase Agreement contains a long list of Representations and Warranties that specify Seller's responsibility for a number of matters.

Article 11 provides as follows:

"Seller shall not be liable for any claim for breach of representations and warranties unless written notice summarizing the nature of the claim and, to the extent reasonably practicable, the amount claimed, has been given to Seller by or on behalf of Buyer …"

The facts:

After purchasing the shares, Buyer discovered that NewCo's revenues were significantly lower than expected based on the accounts and records provided during the due diligence stage.

Buyer claims an amount for breach of three representations and warranties: (i) the accuracy of the records, (ii) the absence of a material adverse change in the turnover, and (iii) the absence of a material adverse change in the prospects.

Buyer quantifies the total amount claimed, but does not break it down in respect of each breach.

One party's interpretation:

According to Seller, the notice does not comply with the requirements of Article 11. This provision requires the quantification of each claim, and a claim that merely states the aggregate amount is not sufficient.

The other party's interpretation:

The notice provided the aggregate amount claimed and it was not necessary to break down the amount to achieve the objective of the provision. The substance is that the warranties were breached, and Seller must be held liable for that.

The question:*

As an arbitrator, would you find that Article 11 should be applied so that a claim for breach of representations and warranties must quantify the claim for each breach in order to be successful?

You have to select one option.

☐ **Yes, each claim must be quantified:** The language of the contract is clear: there is no need to look beyond the language of the contract. Article 11 requires a description and quantification of each claim, and expressly excludes Seller's liability if the notice does not meet the agreed requirements.

☐ **No, an aggregate quantification is sufficient:** The rights and obligations of the parties are set out in the contract, and where the language of the contract is clear, it is the only applicable source. The language must be read in the context of the parties' intentions and the balance of their interests. It cannot be the intention of the parties that liability for breach is excluded solely on the basis of a formalistic consideration of the notice.

☐ **It depends:** The agreement alone does not provide the answer, the outcome depends on the governing law.

☐ **Yes, each claim must be quantified:** The contract must be interpreted in the light of internationally accepted principles. It is generally accepted in international contract practice that detailed contractual terms between professional parties must be interpreted literally. Each party is expected to have carefully assessed the risks associated with the agreed arrangements. There is no room for second-guessing the parties' will as expressed in the contract.

☐ **No, an aggregate quantification is sufficient:** The contract must be interpreted in the light of internationally accepted principles. The principle of good faith is generally accepted and prevents abuse of contractual rights. As long as the purpose of the notice can be achieved, it would be unreasonable to insist on a formalistic application of Article 11.

8. Non-assignment

The contract clause:

Storage AG rents the premises of Commercial Rental SA for its commercial activity.

The lease has the duration of ten years and contains a No-assignment clause in Article 17, which reads as follows:

"This Lease Agreement may not be assigned and the Premises may not sublet without the written consent of Commercial Rental."

The facts:

Due to a change in its commercial strategy, Storage AG will no longer use

the leased premises. The lease agreement may not be terminated early, and to finance the cost of the lease Storage AG looks for a third party to take over the lease.

To protect the interests of Commercial Rental, Storage AG offers to remain jointly liable with the proposed sub-tenant and is prepared to issue a performance guarantee. The sub-tenant is engaged in the same type of activity as Storage AG, therefore there is no investment or disadvantage associated with the sub-tenant using the premises.

Commercial Rental hopes to use this situation as a leverage to settle an ongoing dispute it has with Storage AG on a different matter, and does not consent to the sub-letting or assignment of the lease agreement.

One party's interpretation:

Storage AG argues that Commercial Rental has no reason to withhold its consent, and that it is abusing its right.

The other party's interpretation:

Commercial Rental argues that Article 17 requires its consent and does not limit its discretion to withhold consent.

The question:*

As an arbitrator, would you find that Article 17 should be applied so that the discretion to withhold consent is exercised reasonably?

You have to select one option.

☐ **No, consent may be withheld without restrictions:** The contract must be interpreted in the light of internationally accepted principles. It is generally accepted in international contract practice that detailed contractual terms between professional parties must be interpreted literally. Each party is expected to have carefully assessed the risks connected with the agreed arrangements. There is no room for second-guessing the will of the parties as expressed in the contract.

☐ **No, consent may be withheld without restrictions:** The language of the contract is clear: there is no need to look beyond the language of the contract. If the parties had intended to limit the discretion to give consent, they would have written the provision accordingly.

☐ **It depends:** The agreement alone does not provide the answer, the outcome depends on the governing law.

☐ **Yes, there are limits to the right to withhold consent:** The rights and obligations of the parties are set out in the contract, and where the language of the contract is clear, it is the only applicable source. The language shall be read in the context of the parties' intentions and the balance of their interests. It cannot be the intention of the parties that consent may be withheld to pressure a party in negotiations on separate issues.

☐ **Yes, there are limits to the right to withhold consent:** The contract must be interpreted in the light of internationally accepted principles. The principle of good faith is generally accepted and prevents abuse of contractual rights. A requirement of reasonableness must be implied in the clause.

9. Entire Agreement

The contract clause:

Components Producer S.p.A. enters into a contract with Aluminium Supplier AS for the supply of raw materials for the production of components.

The contract specifies the technical specifications and the price to be paid per ton. With respect to the quantities to be purchased, the contract contains a range within which Components Producer may place its orders.

The contract contains an Entire Agreement Clause in Article 37, which states:

"This Agreement constitutes the entire agreement of the parties hereto and supersedes all prior representations, understandings, undertakings or agreements (whether oral or written and whether express or implied) of the parties with respect to the subject matter hereof."

The facts:

The negotiations were long and complicated, and various specifications for the alloy were discussed. In the end, each party agreed to compromise on their respective positions, and the technical specifications and price

contained in the contract reflected the compromise.

As evidenced by the correspondence between the parties, Aluminium Supplier's premise for the compromise was that Components Producer would order the maximum quantity throughout the duration of the contract, thus allowing for scale production.

Shortly after entering into the contract, Components Producer finds an alternative supplier for the same alloy and begins to purchase also from the alternative supplier. As a result, the orders that Components Producer places with Aluminium Supply reflect the minimum volume provided for in the contract.

One party's interpretation:

Aluminium Supplier argues that Components Producer was aware that the agreed contract price was based on the assumption that the maximum volume would be ordered throughout the duration of the contract.

Since Components Producer decided to purchase part of the raw material from another supplier, it has caused a change in circumstances that must be reflected in an increase of price.

The other party's interpretation:

Components Producer argues that the Entire Agreement clause in Article 37 prevents Aluminium Supplier from relying on the prior correspondence between the parties.

The contract specifies the price and gives Component Producer the discretion to order quantities between the contractual minimum and the contractual maximum. Component Producer does not breach its obligations by ordering the minimum quantity.

The question:*

As an arbitrator, would you find that Article 37 should be applied so as to exclude the relevance of Aluminium Supplier's assumptions as expressed in the correspondence?

You have to select one option.

☐ **It depends:** The agreement alone does not provide the answer, the outcome depends on the governing law.

☐ **No, prior correspondence may be considered:** The rights and obligations of the parties are set out in the contract, and where the language of the contract is clear, it is the only applicable source. The language shall be read in the context of the parties' intentions and the balance of their interests. Components Producer's knowledge of Aluminium Supplier's assumptions cannot be ignored.

☐ **Yes, prior correspondence is not relevant:** The contract must be interpreted in the light of internationally accepted principles. It is generally accepted in international contract practice that detailed contractual terms between professional parties must be interpreted literally. Each party is expected to have carefully assessed the risks associated with the agreed arrangements. There is no room for second-guessing the will of the parties as expressed in the contract.

☐ **No, prior correspondence may be considered:** The contract must be interpreted in the light of internationally accepted principles. The principle of good faith is generally accepted and prevents abuse of contractual rights. It cannot have been the intentions of the parties that the expressed assumptions of one party should be ignored.

☐ **Yes, prior correspondence is not relevant:** The language of the contract is clear: there is no need to look beyond the language of the contract. If the parties had intended for prior correspondence to be considered, they would not have written the Entire Agreement clause.

10. Deemed acceptance

The contract clause:

Travel Booking SA engages Software Services AS to develop a software for Travel Booking's activities. The software is developed specifically for Travel Booking's needs. Pursuant to the contract, the software shall be delivered within 9 months from the date of the contract.

According to the contract, Software Services shall issue invoices on a monthly basis detailing the work performed. According to Article 21:

"An invoice shall be deemed accepted unless it is contested by express written notice within 8 business days from the date of the invoice."

The facts:

Development takes more resources and time than expected, in part because the interface with Travel Booking's customers does not meet the expectations.

Throughout the duration of the contract, Travel Booking pays the invoices without expressly disputing them. However, there is abundant correspondence between the parties about the inadequacy of the software and the need for improvement.

When the contract is about to expire, Software Services informs that a few more months will be needed to complete the development of the software and sends an overview of the costs associated with the additional work.

One party's interpretation:

In Travel Booking's view, payment of the monthly invoices issued under the contract constitutes full payment of the agreed-upon contract price. The cost of any additional work required to deliver the product shall have to be borne by Software Services.

The correspondence between the parties shows that the additional work is necessary for Software Services to comply with the agreed specifications, and it is not due to Travel Booking's request for new specifications.

The other party's interpretation:

According to Software Services, the invoices clearly identified the work to which each invoice related, and the description showed that the performance targets for each phase were met.

Travel Booking did not contest the invoices, therefore these were accepted.

Having the invoices being accepted, the correspondence indicates that Travel Booking has additional requirements. The additional work must be remunerated separately, as it is not covered by the contract price.

The question:*

As an arbitrator, would you find that Article 21 should be applied so that the invoices are deemed to have been accepted?

You have to select one option.

☐ **No, the correspondence is sufficient:** The contract must be interpreted in the light of internationally accepted principles. The principle of good faith is generally accepted and prevents abuse of contractual rights. Even though the invoices have not been formally contested, they cannot be considered accepted in light of the correspondence between the parties.

☐ **Yes, the agreed term and form must be complied with:** The language of the contract is clear: there is no need to look beyond the language of the contract. If the parties had intended that correspondence on technical matters would suffice to contest the invoices, they would not have written Article 21.

☐ **Yes, the agreed term and form must be complied with:** The contract must be interpreted in the light of internationally accepted principles. It is generally accepted in international contract practice that detailed contractual terms between professional parties must be interpreted literally. Each party is expected to have carefully assessed the risks associated with the agreed arrangements. There is no room for second-guessing the will of the parties as expressed in the contract.

☐ **No, the correspondence is sufficient:** The rights and obligations of the parties are set out in the contract, and where the language of the contract is clear, it is the only applicable source. The language shall be read in the context of the parties' intentions and the balance of their interests. It cannot be the intention of the parties that invoices are deemed accepted when the parties are discussing compliance with technical specifications.

☐ **It depends:** The agreement alone does not provide the answer, the outcome depends on the governing law.

Participant information

Below follow some questions about your background, that we kindly ask you to answer to complete the questionnaire.

1. What is your name? We will use your name solely to keep track of who responded to the questionnaire. It will not be possible to link any of your answers to your name.*

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2. What is your gender?*

- ☐ Man
- ☐ Woman
- ☐ I do not want to answer

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3. In which country have you received your undergraduate law education?*

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4. In which year have you received your undergraduate law education?*

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5. In which country have you received your master law education?*

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6. In which year have you received your master law education?*

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7. In which country have you received your additional postgraduate law education (if any)?

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8. In which year have you received your additional postgraduate law education (if any)?

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9. In which country have you received your phd education (if any)?

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10. In which year have you received your phd education (if any)?

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11. In which country do you primarily practice?*

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12. In which other countries do you practice or have practiced?*

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13. In which country did you first qualify as a lawyer?*

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14. In which year did you first qualify as a lawyer?*

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15. In which other country did you qualify as a lawyer (if any)?

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16. In which year did you obtain your additional qualification as a lawyer (if any)?

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17. What is the approximate percentage of international work in your practice?*

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18. In how many arbitrations have you sat as an arbitrator (approximately)?*

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19. In how many court cases have you acted as a judge (approximately)?*

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20. In how many arbitrations have you acted as counsel (approximately)?*

21. In how many court cases have you acted as counsel (approximately)?*

22. In how many arbitrations have you acted as an expert (approximately)?*

23. In how many court cases have you acted as an expert (approximately)?*

24. How many commercial contracts have you helped to draft or negotiate (approximately)?*

25. Does your practice specialize in particular sectors, and, if so, in which sectors?*

26. In which countries do you hold an academic or teaching position (if any)?

Thank you!