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The ELArb Arbitration Center in Hamburg

1. Genesis

The **ELArb Arbitration Center** in Hamburg is designed for the arbitration of global economic disputes, with a particular focus on **disputes in the European-Latin-American context**. The ELArb Arbitration Center is legally represented by the ELArb European-Latinamerican Arbitration Center GmbH[1], whose sole shareholder is the non-profit ELArb European-Latinamerican Arbitration Association e.V. [2] ("Association").

The purpose of the Association is "to promote science and research in the field of alternative dispute resolution in legal relations between Europe and Latin America, with a focus on arbitration". This statutory purpose has been - and will continue to be - achieved through the development, implementation and continued adaptation of the **"ELArb Arbitration Rules"**, which are available in German, English, Spanish and Portuguese (see www.elarb.org), as well as through publications and conferences. The ELArb-Arbitration Rules have been drawn up by a group of German lawyers familiar with the Latin American specificities, assisted by arbitration experts from other European countries as well as Latin American countries. The ELArb Arbitration Center and the ELArb-Arbitration Rules were presented to the public on 14 October 2016 on the occasion of the Latin America Day in Hamburg as part of an ELArb-workshop and have been operating since then.

The members of the Association include lawyers, legal associations, research institutions and trade associations. Among them particularly to be emphasized are the **Latin America Association** (Lateinamerika Verein) (www.lateinamerikaverein.de) and the **Association Legal Location Hamburg** (Verein Rechtsstandort Hamburg) (www.rechtsstandort-hamburg.de and www.dispute-resolution-hamburg.com), which made the establishment of the Association and the raising of the nominal capital of the GmbH possible as founding members with substantial financial contributions:

[1] Commercial Register of the Hamburg Local Court HRB 138597
[2] Register of Associations of the Hamburg Local Court VR 22434

- The **Lateinamerika Verein e.V.** (Latin America Association) in Hamburg ("LAV") defines itself as a "corporate network and information platform for the German economy with interests in and inside of Latin America". Founded in 1916, it has existed for more than 100 years and has approximately 400 member companies in Europe and Latin America. The LAV recommends its members to use the "ELArb-model arbitration clause"[3] in their contracts and general terms and conditions. The LAV understands its role in establishing and promoting the ELArb-Arbitration Center as an extension of its service portfolio.

- The **Rechtsstandort Hamburg e.V.** was founded in 2009. Its purpose is to promote Hamburg as an international center for legal services with its prestigious courts, jurisprudential research institutions and its good reputation as a German arbitration location with long-standing tradition: the Arbitration Court of the Hamburg Chamber of Commerce is located here, the CEAC-Chinese European Arbitration Center and various branch arbitration courts, including the arbitral tribunal of the Association of cereal traders of the Hamburg Stock Exchange and the Arbitration Court of the German Coffee Association. This is also the home of the "Hamburg Friendly Arbitrage", whose arbitration rules consist of a "Declaration" summarised briefly in "§ 20 of the customary usages for the Hamburg goods trade" and divided into seven sub-items.[4] With its participation in the foundation of the ELArb-Arbitration Center, the Rechtsstandort Hamburg e.V. aims to expand the range of arbitration services available in Hamburg.

The ELArb-Arbitration Center is supported by the **Hamburg Chamber of Commerce** in the administration of arbitration proceedings.

2. Purpose

Most Latin American countries maintain close economic ties with many European countries since they became independent – generally around 200 years ago. These relationships have deepened and expanded over the years on the basis of mutual trust. A significant part of the resulting trade is handled via the port of the Free and Hanseatic City of Hamburg.

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[3] see below at 6.

[4] https://www.hk24.de/produktmarken/beratung-service/recht_und_steuern/schiedsgerichte/hamburger-freundschaftliche-arbitrage/

Where economic relations exist, disagreements are inevitable. It therefore made sense to establish an arbitration institution in Hamburg with its long-standing tradition and therefore indepth knowledge of business practices in Latin America and Caribbean countries. This is because arbitration opens up the possibility of settling disputes quickly and cost-effectively across borders, as it is not integrated into national procedural law, in contrast to state jurisdiction.

It is obvious that there is a need for such a new institution. Not without reason the ICC / Paris installed a case management team in early summer 2017 in its office in São Paulo / Brazil, which has been operating since 2014: Companies from Latin American countries are among its most important customers. The case numbers regularly published by the ICC show that from 966 new arbitration cases registered for 2016, in 123 cases Brazilian parties and in 105 cases Mexican parties, were involved.[5]

Arbitration as an **efficient dispute resolution mechanism in the international context between Europe and Latin America** is thus on the rise. There is therefore room for another arbitration institution to act as an alternative to the ICC with its often too expensive, too complex and too bureaucratic criticized rules of procedure. One such alternative could be the ELArb-Arbitration Rules, with their very flexible rules tailored to Latin American specificities and significantly lower costs than the ICC (see below under point 5).[6]

3. Special features of the ELArb-Arbitration Rules

Reservations against arbitration as a form of dispute resolution have a long tradition in many Latin American countries. Some countries - including Brazil - were regarded as extremely hostile to arbitration until the end of the last century. This has changed in the wake of increasing acceptance of party autonomy, although the codifications in the field of arbitration that have developed in the meantime vary from country to country. However, it should be noted, that the UNCITRAL Model Law has often played a decisive role. It therefore seemed appropriate to orient the ELArb-Arbitration Rules to the requirements of the **UNCITRAL Model Law and the UNCITRAL Model Arbitration Rules (as revised in 2010)**.

In addition, numerous provisions have been incorporated, based on recent developments in international arbitration in general and on the practical experience of the Drafting

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[5] https://iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016/

[6] See cost calculator on the website www.elarb.org.

Committee on Arbitration in Latin America in particular. The result is a very modern **set of Arbitration Rules, tailored to the specifics of business dealings with Latin America**. The most interesting rules are to be outlined below.

a. Optional multilingualism in the introductory phase

The level of foreign language skills in Latin American countries is still relatively modest compared to European standards, despite the increasing internationalization of business and the gradual improvement in foreign language training in schools. In order to facilitate the overcoming of the language barrier for the initiation of arbitration proceedings, the ELArb-Arbitration Rules provide that, unless the arbitration agreement does not expressly specify a language for the proceedings, the Claimant may draw up his **Notice of Arbotration in Spanish, Portuguese, German or English**. The Claimant can therefore begin the proceedings in his or her national language. The same right applies to the Respondent who may defend himself during the initiation phase of the arbitration proceedings, when filing his Response to the Notice of Arbitration, in any of the four languages mentioned. This applies until the Arbitral Tribunal is constituted and has determined the language(s) of the process.

Art. 2 (1) sentence 2 and Art. 3 (1) sentence 2 of the ELArb-Arbitration Rules read as follows:

"Unless the parties have agreed in writing on the language to be used in the arbitral proceedings, the notice of arbitration / the response to the notice of arbitration may be in German, English, Portuguese or Spanish."

b. Free choice of arbitration venue

The parties may freely agree on the place of arbitration. From the point of view of a party from Latin America, this may not be self-evident for an arbitration institution based abroad - here in Hamburg -. It therefore required explicit regulation in the ELArb-Arbitration Rules. Whether the parties choose Hamburg – as the seat of the ELArb-Arbitration Center -, another place in Europe, in Latin America or elsewhere in the world is up to them. This choice should though be well considered since, because of the **principle of territoriality**, it may become important for the parties,

both with regard to the procedural statute of the arbitration proceedings and to the question of whether an arbitral award is to be enforced at a later date.

Article 15 (1) of the ELArb-Arbitration Rules reads as follows:

"If the parties have not agreed on the place of the arbitration, the arbitral tribunal shall determine the place of arbitration. In doing so, the arbitral tribunal shall have regard to the circumstances of the case."

c. Flexibility in process design

Arbitration has recently gained broad acceptance and ground in the countries of Latin America. In the area of international commercial arbitration, the ICC in particular has benefited from this.[7]

As a result, the provisions of the ICC Arbitration Rules are in many Latin American countries considered "state of the art" of arbitration. This certainly includes the - from the point of view of the International Court of Arbitration of the ICC indispensable – regulations on the terms of reference to be drawn up at the beginning of each proceedings and to be signed by the parties ("Terms of Reference").[8]

It can lead to considerable delays in the proceedings if the parties – or one of them - do not participate constructively or refuse to sign the terms of reference. The ELArb-Arbitration Rules therefore deliberately refrain from making the drafting of terms of reference to be signed by all parties mandatory. Instead, the **drafting of terms of reference is** only **facultative**.

Article 10 (5) of the ELArb-Arbitration Rules reads as follows:

"The arbitral tribunal may establish terms of reference, which shall be signed by the parties."

[7] The growing number of Latin American participants in arbitration proceedings administered by the ICC has already been mentioned in paragraph 2 above.
[8] Art. 18 of the ICC-Rules (1998). For regulations in Brazil see Art. 19 § 1 of Lei 9.307/96.

But also in all other respects, the arbitral tribunal is free in its procedural arrangements. Art. 10 (1) of the ELArb-Arbitration Rules provides as follows:

"The arbitral tribunal shall conduct the arbitral proceedings at its own discretion in line with the mandatory provisions on arbitral proceedings in force at the place of arbitration and these Arbitration Rules."

d. Independence of arbitrators in case of process financing

In order to ensure arbitrators' fees, arbitral tribunals generally require **cost advances** from the parties at the beginning of arbitration proceedings. Because of the principle of equal treatment, practically all institutional arbitration rules provide that these advances are to be paid by the parties in equal shares.[9]

As a rule - as in the case of the ELArb-Arbitration Rules - the arbitrators' fees are calculated on the basis of cost tables, depending on the value of the dispute. The cost advances for large-volume disputes can therefore be rather high. It can become a considerable obstacle if one of the parties refuses to fulfil its obligation under the arbitration agreement to pay its share of the advance on costs. In such a case the arbitration proceedings can generally only continue if the other party advances the cost-share of on the defaulting party in addition to its own share.

This is one of the reasons why - at least in cases with high values - more and more **process financing companies** become involved in arbitration proceedings. They often not only pay – on behalf of their clients - the due arbitral cost advances but also influence the select of the legal representation. Moreover they not infrequently **influence the selection of the arbitrator to be nominated by the client**. The ELArb-Arbitration Rules take up this development by expressly stipulating that arbitrators must be independent of such third parties who finance the arbitration proceedings.

Art. 6 (1) 1st half-sentence of the ELArb Arbitration Rules reads as follows:

"Each arbitrator must be independent from the other arbitrators and the parties, their legal representatives and management as well as from third parties who are financing the arbitral proceedings."

[9] This also applies to Art. 10 (3) ELArb-Arbitration Rules.

e. Promotion of amicable settlement

Initiatives by courts (be it public courts or arbitral tribunals) to promote the amicable settlement of disputes is an approach which is familiar to any German lawyer, see § 278 Paragraph 1 German Code of Civil Procedure (ZPO) and the DIS-Rules.[10]

On the contrary, international arbitration practice is very cautious with regard to settlement proposals made by arbitral tribunals. In some jurisdictions, if the proceedings continue after failed settlement discussions, a concern of partiality can be derived from a settlement proposal which was made by the arbitral tribunal. This also applies in Latin America, whose civil procedure codes only rarely know of a judicial duty to promote the amicable settlement of disputes[11], and where the relatively young practice of arbitration is often based on Anglo-American standards. Any international arbitration tribunal dealing with participants from Latin American countries is therefore well advised to submit settlement proposals only at the explicit request of all parties and after their commitment to not derive reasons for partiality in the event of failure.

The ELArb-Arbitration Rules take this up. Art. 18 (8) reads as follows:

"If the parties so wish and if they explicitly authorise the arbitral tribunal to do so, the arbitral tribunal may at any stage of the proceedings seek to encourage an amicable settlement of the dispute and, for this purpose, submit settlement proposals."

f. Suspension option for mediation attempt: Arb-Med-Arb

Hybrid dispute resolution techniques have been increasingly recognized in international arbitration practice for some time. This includes the "Arb-Med-Arb" technique, developed mainly by the Singapore International Arbitration Center (SIAC), in which the parties can unanimously apply for temporary suspension of arbitration proceedings in order to make an attempt of mediation with the assistance of a mediator. In case of success, the result of the mediation, after the

[10] 26 DIS-Rules (2017); formerly § 32.1 DIS-Rules (1998). The DIS is the leading German arbitration institution

[11] In Brazil, this is expressly the case in the new Code of Civil Procedure, see Art. 3 § 3 of Lei 13.105/2015, which requires courts, lawyers, "promotores públicos“ and members of the public administration to promote its amicable settlement at every stage of court proceedings.

reopening of the arbitration proceedings, will be recorded in the form of an **arbitration award on agreed terms**. Otherwise, the arbitration proceedings continue where they stood before the suspension. There is no room for a challenge of the arbitrators because of partiality, as they were not involved in and do not become aware of the course of the mediation proceedings. The mediator must therefore be different from the members of the arbitral tribunal.

The ELArb-Arbitration Rules take up this modern and very efficient dispute resolution technique. Art. 20 (1) reads as follows:

"(1) Once the arbitral tribunal has been constituted, the parties may at any time, by filing concurrent written declarations, request a stay of the arbitral proceedings for the purpose of a mediation attempt. The requests must include a joint nomination of a mediator, a mediation institution and/or mediation rules. Members of the arbitral tribunal cannot be mediators in the same proceeding."[12]

g. Innovative cost regulation

By agreeing on the Arbitration Agreement, the parties (also) undertake to pay in the event of a dispute the cost advances provided for in the Arbitration Rules chosen

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[12] Article 20 reads in full as follows:
"*(1) Once the arbitral tribunal has been constituted, the parties may at any time, by filing concurrent written declarations, request a stay of the arbitral proceedings for the purpose of a mediation attempt. The requests must include a joint nomination of a mediator, a mediation institution and/or mediation rules. Members of the arbitral tribunal cannot be mediators in the same proceeding.*
(2) The concurrent declarations have the effect of extending the existing arbitration agreement between the parties to the mediation. The mediation is, in particular with respect to costs, its own procedure separate from the arbitral proceedings.
(3) Upon receipt of the concurrent declarations, the arbitral tribunal shall stay the arbitral proceedings. The same applies if the mediation attempt relates to parts of the dispute only. The decision has the effect of staying all current time limits of the arbitration proceedings for the period of the stay. The arbitral tribunal shall inform the mediator or the mediation institution about the stay decision and shall enclose, at the request of the parties, the case file with a request to acknowledge receipt of the information. For the purposes of the arbitration proceedings, the date of receipt shall be deemed to be the date of commencement of the mediation.
(4) The decision to stay shall take effect for a period of 8 weeks at maximum, beginning on the date of commencement of the mediation. During this period, the mediation must be finalized. After these 8 weeks, or sooner if the parties, or one of them, report in writing the success or the failure of the mediation to the arbitral tribunal, the arbitral tribunal requests the mediator or mediation institution to return the case files, if applicable.
(5) The arbitral proceedings shall be continued as a whole or with respect to that part of the dispute for which no agreement could be reached in the event that the mediation has failed fully or partially.
(6) If, as a result of the mediation, the parties have reached an agreement regarding the subject matter of the dispute as a whole or regarding a part thereof, the arbitral tribunal shall, upon a concurrent request of the parties, issue an award on agreed terms. Article 22 paragraph (1) applies accordingly."

by them. As stated before and generally speaking, the rule is that the advances have to be paid by the parties in equal parts.[13]

Not always each of the parties fulfils this obligation. If no plausible reason (e.g. poverty) can be claimed, this is the breach of a contractual obligation. In this case, most institutional arbitration rules provide that the other party(ies) is/are entitled to pay the missing part of the advances in order to enable the arbitration proceedings to be continued.[14]

However, none of the known institutional arbitration rules sanction this breach[15] of duty. This is different with the ELArb-Arbitration Rules: with its innovative cost regulation in Art. 26 (3) an efficient sanction is created:

" Where one party does not, within the fixed time limit, pay its full equal share of the securities for costs as requested from the parties by the arbitral tribunal pursuant to Article 10 paragraph (3), that party loses its right to reimbursement of expenses incurred for its legal representation within the meaning of Article 25, paragraph (2) c). The arbitral tribunal shall take this into account when rendering its decision on costs pursuant to Article 25 paragraph (5). In such a case, the other party may pay the unpaid share of any security for costs within 30 days upon notification from the arbitral tribunal."

h. Transparency: Arbitration awards are published anonymously, with an opt-out rule

Arbitration in commercial disputes is usually non-public[16]: only the arbitrators and the parties have access to the arbitration. Therefore only they will be aware of the written pleadings preparing the hearing and the arbitration award terminating the proceedings.

In many coutries this "non-publicity" has given rise to a sometimes very emotional debate about supposedly lack of transparency of arbitration, which has, when

[13] Art. 30 (3) sentence 1 ICC-Rules (1998), Art. 35.2 DIS-Rules (2017; Art. 41.1 Swiss Rules.
[14] Art. 30 (3) sentence 2 ICC Rules (1998), Art. 35.3 of the DIS-Rules (2017); Art. 14.4 Swiss Rules.
[15] The only exception is Article 20 (2) sentence 2 of the Arbitration Rules of the German-Argentine Chamber of Commerce and Industry, http://www.ahkargentina.com.ar/fileadmin/ahk_argentinien/Tribunal_Arbitral/Link2A_-_Verordnung.pdf
[16] Exceptions apply in individual cases where state-owned companies are involved in arbitration proceedings, as expressly stated in Brazil in Art. 2 § 3 of Arbitration Act 9307/96.

soberly considered only one really justified core[17]: if disputes (especially those with legally interesting features) are dealt with and decided in the seclusion of private arbitration proceedings, then the (from the standpoint of the public desirable) development of accessible jurisprudence may be at risk. In arbitration practice, it is therefore increasingly accepted that arbitral awards may be published in an anonymous form (if necessary, shortened to the interesting legal questions) if the parties agree.[18]

The ELArb-Arbitration Rules take a very progressive approach to this issue. Article 27 (4) provides for an "opt-out" rule with the following wording:

"*The ELArb European Latinamerican Arbitration Association may publish, in anonymized form, the arbitral awards rendered in accordance with the ELArb Arbitration Rules, provided that none of the parties objects within a time-limit of 4 (four) weeks after receipt of the award (opt-out)."*

4. The ELArb list of arbitrators

In accordance with Art. 1 of its statutes, the ELArb-Arbitration Center maintains a list of arbitrators published on its website[19]. Members[20] of the ELArb European Latinamerican Arbitration Association with arbitration expertise can be listed there.

5. ELArb-costs order

The ELArb Rules of Costs determine the arbitrators`fees and the processing fee of the ELArb-Arbitration Center, **depending on the value of the dispute**. In terms of amount, it is based on the comparatively moderate rates of the Chinese European Arbitration Center CEAC, which is also based in Hamburg.[21]

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[17] This may in particular be the case when public entities are involved in arbitration proceedings.
[18] So now also the DIS-Rules (2017) in Art. 44.3: *"The DIS may publish statistical or other general information on arbitration proceedings in anonymous form. The DIS may only publish an arbitral award with the consent of the parties."*
[19] www.elarb.org
[20] http://elarb.org/downloads/beitragsordnung.pdf
[21] https://www.ceac-arbitration.com/

6. Model Arbitration Clause

Sample arbitration clauses in Spanish, Portuguese, English and German are available for download on the website www.elarb.org. In English, the model arbitration clause is as follows:

Model arbitration clause

All contractual and extra-contractual disputes arising out of or in connection with this contract, its alterations, supplements and/or other agreements of the parties to which this contract applies, including its/their validity, invalidity, violation or cancellation, shall be finally resolved, without recourse to the ordinary courts of law, by arbitration according to the ELArb Arbitration Rules in force on the date when the Notice of Arbitration is received.

The place of the arbitration shall be ....[1]. The language used in the arbitral proceedings shall be ....[1]. The applicable law for resolving the legal dispute shall be ....[1].

O[2] Deviating from the ELArb Arbitration Rules – which provide that the tribunal shall consist of three arbitrators - it is hereby agreed that the tribunal shall consist of one arbitrator only.

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[1] Please fill out
[2] Mark if applicable

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