



Notion, nature and extent of consent in international arbitration

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QUEEN MARY UNIVERSITY OF LONDON
SCHOOL OF INTERNATIONAL ARBITRATION

**NOTION, NATURE AND EXTENT OF CONSENT
IN INTERNATIONAL ARBITRATION**

by

Andrea Marco Steingruber

Thesis for the degree of Doctor of Philosophy

London, 2009

Under the supervision of:
Professor Loukas A. Mistelis
Professor Julian D.M. Lew

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The completion of a PhD thesis is somewhat like summiting the peak of a mountain. This comparison is not only made because the writer is Swiss, but because often the tendency is—once you reach the top—to forget that you started at the bottom.

Therefore I begin by remembering “Maestra” Angela who was my teacher during the years in which I attended the primary school of Sementina, a village in the Italian-speaking part of Switzerland. She undoubtedly had a lot of patience with me, as I was quite a lively schoolboy, but was also a great teacher. I also spent my secondary school and college years in the Southern part of Switzerland (Ticino) where the teachers and professors of these scholastic institutions are fondly remembered for their great devotion and passion for their profession.

My university years were spent in the German-speaking part of Switzerland—Law studies in Berne and studies in Economics/Business Administration in St. Gallen—this undoubtedly gave me an interdisciplinary and broad view of social sciences.

My interest in arbitration, however, began at the University of Edinburgh where we students benefited from the extensive practical experience of Professor John Murray—he and his team ran a very motivating course in international commercial arbitration. In Edinburgh we international students also experienced and appreciated Scottish hospitality. The year spent at the University of Edinburgh has been a source of inspiration for this thesis. I am grateful for this.

To remain with the mountain imagery: when approaching the summit you are well advised to have an excellent guide. This luck has been the mine. The School of International Arbitration of Queen Mary—founded by Professor Julian D.M. Lew—is undeniably a great place to study arbitration, with a very efficient organisation and friendly team, however, I am primarily indebted to Professor Loukas Mistelis for his excellent supervision. Professor Mistelis is always there to assist his students—despite his many other commitments—with a remarkable altruistic helpfulness and his extensive expertise in arbitration. Heartfelt thanks to him for his constant support. Loukas will always remain a good friend.

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At a personal level my immense gratitude goes to my friends, my brothers—Patrick and Sandro—and, above all, my parents—Monika and Rinaldo—for all that they have done and still do for me. I am very lucky to have such a circle of friends and a marvellous family.

This thesis is dedicated to my family.

Andrea Marco Steingruber

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ABSTRACT

NOTION, NATURE AND EXTENT OF CONSENT IN INTERNATIONAL ARBITRATION

(Thesis for the degree of Doctor of Philosophy)

Andrea Marco Steingruber

Arbitration is a consensual and private mechanism of dispute resolution which leads to an enforceable arbitral award. In the traditional field of commercial arbitration the agreement to arbitrate is considered to be the cornerstone of arbitration. On the other hand, in the international context, arbitration has become increasingly used in other areas, like investment arbitration and sport arbitration, where the consensual nature of arbitration appears to be different.

At the beginning of the study it will be underlined that, when speaking about the consensual nature of arbitration, one needs to differentiate between consensual as one of the essential criteria for arbitration's qualification and consent as a condition for the validity of the arbitration agreement. This differentiation is especially important in sport arbitration where, between the athletes and sport organisations, there is often induced consent rather than bargained consent. By sustaining that the consensual character of arbitration needs to be differentiated, but not abandoned, the thesis clearly takes a contractual, or better, a consensual approach. It is preferable to speak of a consensual approach, because the agreement to arbitrate does not always take the form of an arbitration agreement in the traditional sense. This is particularly the case in investment arbitration.

This thesis is a comparative study. However, not only a comparison of national laws and different arbitration rules will be undertaken, but the thesis will also consider the evolution of arbitration by discussing the implications that evolution has had on the perception of the consensual character of arbitration. Moreover, and above all, the main body of the thesis will be dedicated to a comparison focused on the consent issues of the three main areas where arbitration is nowadays used in an international context: commercial arbitration, investment arbitration and sport arbitration. It will be stressed that, although already in the classical area of commercial arbitration, the structures of arbitrations may be of different types, ranging from bi-party situations to multiparty scenarios, and might play a role when considering the consensual nature of arbitration, this becomes even clearer when one analyses the other fields of arbitration. The thesis then also takes into account that, in the various phases of the arbitral process, the expectations with regard to the consensual character of arbitration may be different.

In the thesis it will be argued that the reason the consensual nature of arbitration evolved over time, and the reason that it is different among the various fields of arbitration, might be seen in the fact that there is an inherent tension between the contractual and the jurisdictional side of arbitration. In this situation of "inherent tension" consent may be perceived as being more or less present. Nevertheless, the "intensity" of consent does not affect the basically consensual character of arbitration. While the four traditional theories (jurisdictional, contractual, mixed/hybrid and autonomous) used to explain the juridical nature of arbitration focus rather on the relationship between State and arbitration, the thesis attempts to indicate other solutions which seem to be more able to explain the use of arbitration in the different areas/fields where arbitration is expected to resolve disputes.

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ABBREVIATIONS

Institutions, Organisations and Rules

AAA	American Arbitration Association
ABA	American Bar Association
AIA	Italian Arbitration Association
ASA	<i>Association Suisse de l'Arbitrage</i> (Swiss Arbitration Association)
ASEAN	Association of Southeast Asian Nations
CAMCA	Commercial Arbitration and Mediation Centre for the Americas
CAS	Court of Arbitration for Sport
CAS-Code	Court of Arbitration for Sport Code
CAS Rules	Court of Arbitration for Sport Rules
CCIG	Chamber of Commerce and Industry of Geneva
CCPIT	China Council for the Promotion of International Trade
CEPANI	Belgian Centre for Arbitration and Mediation
CEPANI Rules	Arbitration Rules of the Belgian Centre for Arbitration and Mediation
CIETAC	China International Economic and Trade Arbitration Commission
CIMAR	Construction Industry Model Arbitration Rules
CMEA	Council for Mutual Economic Assistance (Eastern Europe) (COMECON)
CMI	<i>Comité Maritime International</i>
COMECON	Council for Mutual Economic Assistance
CPR Institute for Dispute Resolution	Center for Public Resources Institute for Dispute Resolution
CRCICA	Cairo Regional Centre For International Commercial Arbitration
CRT	Claims Resolution Tribunal for Dormant Accounts in Switzerland
DAC	Departmental Advisory Committee on Arbitration Law
DIS	<i>Deutsche Institution für Schiedsgerichtsbarkeit</i> (German Institute of Arbitration)
DIS Rules	DIS Arbitration Rules (1998)
EC	European Community
ECAFE	United Nations Economic Commission for Asia and the Far East
ECOSOC	United Nations Economic and Social Council
EDF	European Development Fund
EEC	European Economic Community

EU	European Union
FALCA	Fast and Low Cost Arbitration (LMAA)
FIDIC	<i>Fédération Internationale des Ingénieurs-Conseils</i>
FTAC	Foreign Trade Arbitration Commission
GAFTA	Grain and Feed Trade Association
Geneva Rules	Chamber of Commerce and Industry of Geneva Arbitration Rules (1992)
HKIAC	Hong Kong International Arbitration Centre
IACAC	Inter-American Commercial Arbitration Commission
IBA	International Bar Association
IBA Rules	IBA Rules of Ethics for International Arbitrators
ICA	Indian Council of Arbitration
ICAC	Moscow International Commercial Arbitration Court
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICC Court	International Court of Arbitration of the ICC
ICC Rules	ICC Rules of Arbitration
ICCA	International Council for Commercial Arbitration
ICCA Handbook	International Council for Commercial Arbitration Handbook
ICDR	American Arbitration Association International Center for Dispute Resolution
ICHEIC	International Commission on Holocaust Era Insurance Claims
ICSID	International Centre for the Settlement of Investment Disputes
IFCAI	International Federation of Commercial Arbitration Institutions
JCAA	Japan Commercial Arbitration Association
Korea	Korean Commercial Arbitration Association
Kuala Lumpur	Kuala Lumpur Regional Centre for Arbitration
LCIA	London Court of International Arbitration
LCIA Rules	LCIA Arbitration Rules (1998)
LIA	Law International Arbitration
LMAA	London Maritime Arbitration Association
LMAA	London Maritime Arbitration Association 2002
LME	London Metal Exchange
MAC	Maritime Arbitration Commission
MERCOSUR	Common Market of the Southern Cone pursuant to the Treaty of Asunción of 26 March 1991
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NAI	Netherlands Arbitration Institute
NAI Rules	NAI Arbitration Rules (2001)
NOFOTA	Netherlands Oil, Fats and Oilseeds Trade Association
OECD	Organisation for Economic Co-operation and Development
OHADA	Organization for the Harmonization of Business Law in Africa

PCA	Permanent Court of Arbitration (The Hague)
SCC	Stockholm Chamber of Commerce Arbitration Institute
SCC Rules	Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (1999)
SIAC	Singapore International Arbitration Centre
Swiss Rules	Swiss Rules of International Arbitration (2004)
UN	United Nations
UNCC	United Nations Compensation Commission
UNCITRAL	United Nations Commission for International Trade Law
UNCITRAL Model Law	Model law on International Commercial Arbitration, adopted by UNCITRAL on June 21, 1985
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commission for Europe
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDROIT	International Institute for the Unification of Private Law
Venice	Venice Arbitration Court Rules 1998
Vienna Rules	Rules of Arbitration and conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber (2001)
WIPO	World Intellectual Property Organisation
WIPO Rules	WIPO Arbitration Rules
Zurich Rules	International Arbitration Rules of Zurich Chamber of Commerce (1989)

General Abbreviations

AC	Law Reports, House of Lords (Appeal Cases)
ADR	Alternative Dispute Resolution
ADRLJ	Arbitration and Dispute Resolution Law Journal
AG	Aktiengesellschaft
All ER	All England Law Reports
ALR	Australian Law Reports
Am. J. Comp. L	American Journal of Comparative Law
Am. J. Int'l. L	American Journal of International Law
Am Rev Int'l Arb	American Review of International Arbitration
Am U Int'l L Rev	American University International Law Review
Ann IDI	<i>Annuaire de l'Institut de droit international</i>

Annot.	Annotation
ARB	Arbitration
Arb Int	Arbitration International
Arbitration	Arbitration, Journal of the Chartered Institute of Arbitrators
art. / arts.	article / articles
ASA Bulletin	Swiss Arbitration Association Bulletin
Asian DR	Asian Dispute Review
ATF	<i>Arrêts du Tribunal Fédéral Suisse</i>
ATP	Association of Tennis Professionals
B.C.	Before Christ
Betriebs-Berater	<i>Der Betriebs-Berater</i> (German journal)
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code)
BGE	<i>Entscheidungen des schweizerischen Bundesgerichts</i>
BGH	<i>Bundesgerichtshof</i> (German Supreme Court)
BGHZ	<i>Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen</i>
BIT / BITs	Bilateral Investment Treaty / Bilateral Investment Treaties
BJM	<i>Basler Juristische Mitteilungen</i>
BLR	Business Law Review
Boston U Int'l L J	Boston University International Law Journal
BSK-IPRG-Name	<i>Basler Kommentar</i> (Basel Commentary) on the Swiss PIL / author
BT-Drs	<i>Bundestags-Drucksache</i>
BverfGE	<i>Entscheidungen des Bundesverfassungsgerichts</i>
BYBIL	British Yearbook of International Law
CA	Court of Appeal of England and Wales / <i>Cour d'Appel</i>
CAA	China Arbitration Act
Cal.	California
Cap.	<i>Caput</i> , chapter
Cas.	French <i>Cour de cassation</i>
Cass. Civ.	French <i>Cassation civil</i>
Case W Res J Int'l L	Case Western Reserve Journal of International Law
CC	Swiss Civil Code
CCAS	<i>Camera di conciliazione e di arbitrato per lo sport</i>
CCI	Chamber of Commerce and Industry of the Russian Federation
CCP	Code of Civil Procedure
Ch.	Chapter
ChD	Chancery Division
CIF	Cost, insurance, freight
Cir.	Circuit
CISG	United Nations Convention on the International Sale Goods
Civ.	Civil

CJ	<i>Cour de justice</i> (Geneva)
CLR	Commonwealth Law Reports
Clunet	<i>Journal de droit international</i>
CMAC	China Maritime Arbitration Committee
CO	Swiss Code of Obligations
Columbia J Transnat'l L	Columbia Journal of Transnational Law
Comm	Commercial
CONI	<i>Comitato olimpico nazionale italiano</i>
Con LR	Construction Law Reports
Consid.	Consideration
Copenhagen Declaration	Copenhagen Declaration on Anti-Doping in Sport
CPR	Civil Procedure Rules (England)
CRB	Contract Recognition Board
Croat Arbit Yearb	Croatian Arbitration Yearbook
DAC	Departmental Advisory Committee
Décisions et rapports	<i>Décisions et rapports</i> of the European Court of Human Right
DFT	Decision of the Swiss Federal Tribunal
DIS-Materialien	DIS collection of materials on arbitration
Disp Res J	Dispute Resolution Journal
DLR	Dominion Law Reports
Doc.	Document
DR	<i>Décisions et rapports</i> of the European Court of Human Right
DZwiR	<i>Deutsche Zeitschrift für Wirtschaftsrecht</i>
EC	European Community
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Communities
ECR	Report of Cases before the Court of Justice of the European Communities
ECT	EC Treaty
éd.	<i>édition</i>
ed. / eds.	Edition, editor / editors
EDNY	Eastern District of New York
<i>e.g.</i>	<i>exempli gratia</i> , for instance
EHRR / Eur. H.R. Rep.	European Human Rights Reports
EJCL	Electronic Journal of Comparative Law
ER	English Reports
<i>et al.</i>	<i>et alii</i> / and others
etc.	<i>et cetera</i> , and so on
<i>et seq.</i>	<i>et sequitur</i>
European Convention	European Convention on International Commercial Arbitration 1961 (Geneva)

European Comm. HR	European Commission of Human Rights
European Ct. HR	European Court of Human Rights
EWCA Civ	Neutral citation for England and Wales Court of Appeal civil division decisions
EWHC	England and Wales High Court
EWiR	Entscheidungen zum Wirtschaftsrecht
F 2d	The Federal Reporter Second Series
F 3d	The Federal Reporter Third Series
FAA	United States Federal Arbitration Act
Fair Empl Prac Cas	Fair Employment Practice Cases
FCEC	Federation of Civil Engineering Contractors
FEI	<i>Fédération Equestre Internationale</i> (International Equestrian Federation)
FFG	<i>Fédération Française de Gymnastique</i>
FIA	<i>Fédération Internationale de l'Automobile</i>
FIBA	<i>Fédération Internationale de Basketball Amateur</i> (International Basketball Federation)
FIFA	Fédération Internationale de Football Association
FINA	<i>Fédération Internationale de Natation</i> (International Swimming Federation)
FIS	<i>Fédération Internationale de Ski</i> (International Ski Federation)
FJS	<i>Fiches juridiques suisses</i>
Fn.	Footnote
FOB	Free on board
FOSFA	Federation of Oils, Seeds and Fats Associations
FS	<i>Festschrift</i>
FSLA	<i>Fédération Suisse de Lutte Amateur</i> (Swiss Amateur Wrestling Federation)
F Supp	Federal Supplement
GAFTA	Grain & Feed Trade Association
Gaz. Pal.	<i>Gazette du Palais</i>
GDR	German Democratic Republic
GE	<i>Genève / Geneva</i>
Geo Wash J Int'l L & Eco	George Washington University Journal of International Law and Economics
Hastings Int'l & Comp L Rev	Hastings International and Comparative Law Review
HKC	Hong Kong Court
HKHC	Hong Kong High Court
HKLJ	Hong Kong Law Journal
HKLR	Hong Kong Law Report
HL	House of Lords
IAAF	International Association of Athletics Federations

IBA Rules	IBA Rules on the taking of Evidence in International Commercial Arbitration, 1999
<i>Ibid.</i>	<i>Ibidem</i> , in the same place
IBF	International Boxing Federation
ICAS	International Council of Arbitration for Sport
ICC Bulletin	International Chamber of Commerce International Court of Arbitration Bulletin
ICE	Institution of Civil Engineers
ICJ	International Court of Justice
ICJ Reports	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly.
ICSID Reports	International Centre for the Settlement of Investment Disputes Reports
ICSID Review-FILJ	ICSID Review – Foreign Investment Law Journal
<i>i.e.</i>	<i>id est</i> , that is
IECL	International Encyclopedia of Comparative Law
IF/IFs	International federation / International federations
INCOTERMS	ICC International Commercial Terms
Int. ALR	International Arbitration Law Review
Int'l	International
Int'l Bus Law	International Business Lawyer
Int'l Fin L Rev	International Financial Law Review
Int'l Law	International Lawyer
ILA	International Law Association
ILM	International Legal Materials
ILR	International Law Reports
IOC	International Olympic Committee
IPRax	<i>Praxis des internationalen Privat- und Verfahrensrechts</i>
<i>IPRG</i>	<i>Internationales Privatrecht Gesetz / Swiss PIL</i>
IPRspr	<i>Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre</i>
Iran-US CTR	Iran-US Claims Tribunal Reports
ITA	International Trade Administration
J./J	Judge
JBL	Journal of Business Law
JCP	<i>Juris-Classeur Périodique, La Semaine Juridique</i>
J Int'l Arb	Journal of International Arbitration
<i>Journal des Tribunaux</i>	(Belgian) <i>Journal des Tribunaux</i>
Juris-Classeur Proc Civ	<i>Juris-Classeur (procedure civile)</i>
JWIT	Journal of World Investment & Trade
KTS	<i>Konkurs-Treuhand und Schiedsgerichtswesen</i>
Law & Policy in Int'l Bus	Law & Policy in International Business

LDIP	<i>Loi fédéral sur le droit international privé</i>
LIA	Law on International Commercial Arbitration
LJ	Lord Justice of Appeal
LJJ	Lords Justice of Appeal
Lloyd's Rep.	Lloyd's Law Reports
Lloyd's MCLQ	Lloyd's Maritime and Commercial Law Quarterly
LNTS	League of Nations Treaty Series
Louisiana L Rev	Louisiana Law Review
Mealey's IAR	Mealey's International Arbitration Reports
MBL	Major League Baseball
MFN	Most-favoured-nation
Minn L Rev	Minnesota Law Review
MIT / MITs	Multilateral Investment Treaty / Multilateral Investment Treaties
MITIs	Multilateral investment treaties or instruments
Model Law	UNCITRAL Model Law on International Commercial Arbitration adopted 21 June 1985
MR	Master of the Rolls
NADA	<i>Nationale Anti Doping Agentur</i> (German Anti-Doping Agency)
NBA	National Basketball Association
NCAA	National Collegiate Athletic Association
NCPC	<i>Nouveau Code de Procédure Civile</i> (French Code of Civil Procedure)
NE	North East Reporter
Ned Jur	Nederlands Jurisprudentie
Netherlands CCP	Netherlands Code of Civil Procedure
New L J	New Law Journal
New York Convention	1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NFL	National Football League
NHL	National Hockey League
NJW	<i>Neue Juristische Wochenschrift</i>
No. / no.	Number / number
Nos. / nos.	Numbers / numbers
NOC/NOCs	National Olympic Committee/National Olympic Committees
NSWLR	New South Wales Law Reports
NW J Int'l L & Bus	Northwestern Journal of International Law and Business
NYAD	New York Appellate Division
NYC	New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958)
NYLJ	New York Law Journal
NY L Sch J Int'l & Comp L	New York Law School Journal of International and Comparative Law

NYSE	New York Stock Exchange
OJ	Official Journal of the European Communities
p. / pp.	page / pages
para. / paras	paragraph / paragraphs
PC	Privy Council
PCIJ	Permanent Court of International Justice
PGA	Professional Golf Association
PIL	Private International Law
PRC	People Republic of China
Proc.	Procedure
PWC	PriceWaterhouseCoopers
QB	Queen's Bench
QBD	Queen's Bench Division
RabelsZ	<i>Rabels Zeitschrift für ausländisches und internationales Privatrecht</i>
RCADI	<i>Recueil des Cours de l'Académie de Droit International de la Haye</i> / Collected Courses of the Hague Academy of International Law
RDAI/IBLJ	<i>Revue de droit des affaires internationales</i> / International Business Law Journal
Rep.	Report
Rev. arb.	<i>Revue de l'arbitrage</i>
Rev. crit. dip.	<i>Revue critique de droit international privé</i>
RHDI	<i>Revue hellénique de droit international</i>
Riv. dell'arb.	<i>Rivista dell'arbitrato</i>
RIW	<i>Recht der Internationalen Wirtschaft</i>
Rome Convention	EC (Rome) Convention on the Law Applicable to Contractual Obligations 1980
RPS	<i>Recht und Praxis der Schiedsgerichtsbarkeit</i>
RSDIE	<i>Revue Suisse de droit international et de droit européen</i>
RUAA	Revised Uniform Arbitration Act 2000
Rutgers L Rev	Rutgers Law Review
s.	Section
SAR	Stockholm Arbitration Report
SchiedsVZ	<i>Zeitschrift für Schiedsverfahren</i> (German Arbitration Journal)
SchwZIER	<i>Schweizerische Zeitschrift für internationales und europäisches Recht</i>
S Ct	Supreme Court of the United States
SDNY	Southern District of New York
SJ	<i>La Semaine Judiciaire</i> , Geneva
SLT	Scots Law Times Reports
SLR	Singapore Law Reports
SOCOG	Sydney Organising Committee for the Olympic Games

SpuRt	<i>Sport und Recht (Zeitschrift für Sport und Recht)</i>
Subs.	subsection
Swiss PIL	Swiss Private International Law Act of 1987
TAS	<i>Tribunal arbitral du sport</i>
Texas Int'l LJ	Texas International Law Journal
TGI	French <i>Tribunal de Grande Instance</i>
Tulane L Rev	Tulane Law Review
UCC	Uniform Commercial Code
UCI	<i>Union Cycliste Internationale</i>
U Cin L Rev	University of Cincinnati Law Review
UCP 500	Uniform Customs and Practices relating to Documentary Credits – ICC publication no. 500
UEFA	Union of European Football Associations
U Ill L Rev	University of Illinois Law Review
UK	United Kingdom
UKPC	Neutral citation for decisions of the Privy Council
U Miami Inter-Am L Rev	University of Miami Inter-American Law Review
UNCITRAL Notes	UNCITRAL Notes on Organizing Arbitral Proceedings
UNTS	United Nations Treaty Series
US	United States
USA	United States of America
USADA	United States Anti-Doping Agency
USOC	US Olympic Committee
USSR	Union of Soviet Socialist Republics
v.	<i>versus</i>
Vanderbilt L Rev	Vanderbilt Law Review
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
vs.	<i>versus</i>
WADA	World Anti-Doping Agency
WADA-Code	World Anti-Doping Agency Code 2009
WADA-Code 2003	World Anti-Doping Agency Code 2003
WAMR	World Arbitration and Mediation Report
Washington Convention	Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965
WBA	World Boxing Association
WBC	World Boxing Council
WIPO Expedited Rules	WIPO Expedited Rules
WL	Westlaw
WLR	The Weekly Law Reports
WM	<i>Wertpapier-Mitteilungen</i>
WTAM	World Trade and Arbitration Materials

WTO	World Trade Organisation
WuB	<i>Entscheidungssammlung zum Wirtschafts- und Bankrecht</i>
Yale LJ	Yale Law Journal
YBCA	Yearbook of Commercial Arbitration
ZBB	<i>Zeitschrift für Bankrecht und Bankwirtschaft</i>
ZfRV	<i>Zeitschrift für Rechtsvergleichung</i>
ZIP	<i>Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis</i>
ZK-IPRG-Name	<i>Zürcher Kommentar zum IPRG (Zurich Commentary) on the Swiss PIL/ author</i>
ZPO	<i>Zivilprozessordnung (German Code of Civil Procedure)</i>
ZVglRwiss	<i>Zeitschrift für vergleichende Rechtswissenschaften</i>

(all Laws and Rules in the list of Abbreviations and in the thesis refer to the ones at present in force)

INTRODUCTION

This thesis will examine the notion, nature and extent of consent in international arbitration.

Arbitration, and in particular commercial arbitration, is a consensual and private mechanism for dispute resolution which leads to an enforceable arbitral award. The contractual foundations of arbitration constitute the fundamental difference between arbitration and litigation.¹ An important cornerstone for the “consensual” characterisation of international commercial arbitration is undoubtedly the New York Convention which, despite its title, also deals with the recognition of arbitration agreements.² However several issues with regard to the parties’ consent to arbitrate arise already in the classic field of commercial arbitration:

- different courts and arbitral tribunals may have distinct approaches to the interpretation of arbitration agreements;
- different national laws may be applicable to the substantive validity of the arbitration agreements;
- the procedural needs may be in conflict with the parties’ consent to arbitrate exclusively with a particular other party; and
- although according to the New York Convention and to most national arbitration laws arbitration agreements have to be “in writing”, the question about extending them to non-signatories may arise.

Moreover, especially when considering other areas in which this alternative dispute resolution mechanism is becoming more and more applied, the consensual nature of arbitration is debated and even questioned. Indicative of this tendency is the following passage quoted from an article about “Formula 1 Racing and Arbitration: the FIA Tailor-Made System for Fast Track Dispute Resolution”:

“More and more, the classical concept of arbitration based on consent is being supplemented by other concepts of arbitration which largely ignore this requirement. This is so especially in the areas of sport, consumer transactions, and investment arbitrations based on treaties or national statutes. This is only natural, as arbitration becomes the most common method for settling international disputes. One may choose to cling to the dogma of consent and when no true and meaningful consent exists, rely

¹ At least when the forum of litigation is not based on a jurisdictional clause.

² See Article II(1) NYC.

on a fiction of consent. But if we merely preserve the appearance of consent, this justification for arbitration is no longer compelling. Indeed, it may be more accurate and intellectually honest to simply admit that arbitration without consent exists. Having made that admission, one can then investigate the requirements that have come to replace consent”.³

Purposes of the thesis

This thesis seeks a) to demonstrate that the qualification of arbitration as a “consensual” mechanism for dispute resolution needs to be differentiated and b) to analyse if, perhaps, it should even be abandoned.

On the one hand it seems that a differentiation has to be made because there are *different types of arbitration*. While commercial arbitration has been the traditional domain of arbitration, in the past decades other important fields of arbitration have appeared and developed. Not all of these new areas have the same features as “classical” commercial arbitration and the same “consensual intensity”. The characterisation as “consensual” has therefore to be questioned or, at least, filled with a different content. Furthermore, *the structure of arbitrations can differ*. The structural variety is large. It ranges from bi-party situations to multiparty scenarios, which in their turn can be of a different nature (*e.g.* a multiparty arbitration from the outset or it becomes such due to procedural mechanisms that arise in a later stadium of the arbitral proceeding), from a horizontal type of arbitration (*e.g.* between two or more private corporations in commercial arbitration) to a vertical one (*e.g.* the State–investor relationship in investment arbitration or the relations between athletes and sport organisations in the field of sport). These structural differences possibly require the qualification of “consensual” to be differentiated.

On the other hand, while the asserted consensual nature of arbitration is of relevance from the outset of a proceeding, and for this reason there are significant parts of the thesis devoted to analysing how consent to arbitration is given at the beginning, it also seems to be important to analyse *whether the expectation of the consensual character of arbitration has to be upheld in equal measure throughout all phases of the arbitration process*, or if there are other needs which, possibly, make it appear less important.

³ Kaufmann-Kohler/Peter, p. 186.

The starting point of the differentiation seems at first to be quite theoretical. However, on the basis of theoretical reflection, the thesis will examine questions which are of practical relevance, for instance:

- how consent to arbitrate is given;
- which law shall govern the arbitration agreement or, more particularly, consent as an element of the substantive validity of it; and, conversely, according to which law will a possible lack of consent be judged;
- how consent should be interpreted;
- which relationship exists between consent as part of the substantive validity of an arbitration agreement and its formal validity (requirement to be “in writing”);
- which, if any, are the implied terms when consenting to arbitration;
- how consent to arbitrate influences procedural mechanisms like joinder and intervention of third parties or consolidation of arbitral proceedings, and which solutions adopted (or to be adopted) by treaties, national laws or arbitral rules are, or would be, the most respectful of parties’ consent in this respect.

Even more theoretically, the other goal of the thesis is to discuss whether the qualification of arbitration as a “consensual” mechanism for dispute resolution should be abandoned or not. However, this question, which may at first sight be deemed even more academic, does have a practical side. In fact, to abandon the characterisation “consensual” does not mean that parties’ consent could not be relevant to other aspects. Some of these aspects have just been mentioned. Furthermore, another issue which is often considered in order to put in doubt the existence of parties’ consent is the unequal bargaining power of the parties to the arbitration agreement. Therefore the process of concluding the arbitration agreement, particularly the forces and interests which are at stake in the process, but also the specific needs arising in arbitration areas other than commercial arbitration, will be analysed. Here the (substantive) validity of the arbitration agreement will be scrutinised.

To reach its objective the thesis also discusses the historical evolution of the concept of arbitration and the juridical nature of it, both with particular regard to issues concerning consent.

Summarising, the thesis will thus examine the notion, nature and extent of consent from different perspectives:

- the definition perspective;
- the historical perspective;

- the scope/extent perspective;
- the chronological perspective with regard to the course of the proceeding; and
- the structural perspective.

Methodology

The basic methods employed in this study will be research and qualitative analysis of primary and secondary legal sources; these will include national and international laws and rules, the case law of national courts and arbitral tribunals, and academic treatises.

The most important arbitration conventions, many arbitration laws and rules, the practice of the main arbitration institutions and of the courts of various States, as well as the views of several commentators will be critically assessed. However, with regard to the arbitration laws and the practice of the State courts, more attention will be given to those of England, France and Switzerland. And with respect to the arbitration institutions and their rules the focus will also be on institutions based in the aforementioned countries, *i.e.* the LCIA, the ICC and the Swiss Chambers of Commerce. This preponderance is justified mainly on objective reasons: it is for example impossible to discuss the “group of companies” doctrine without considering the ICC and respectively France, or sport arbitration without bearing in mind that the CAS has its seat in Lausanne, Switzerland. On the other hand England, where the dispute resolution mechanism of arbitration has always played an important role, is not only the home of another major arbitration institution, the LCIA, but is, most notably, a common-law country. The choice of countries upon which greater attention will be focused in the thesis thus also permits a comparison between jurisdictions with a civil law (France and Switzerland) or common law (England) legal background. Moreover, England, France and Switzerland are three arbitration-friendly nations with a long and important tradition in the field of arbitration.

Notwithstanding the fact that the focus will be on the jurisdictions of England, France and Switzerland, and respectively on the arbitration institutions based in these three countries (LCIA, ICC and the Swiss Chambers of Commerce), other countries will be considered when they are of interest to the analysis of the consensual nature of arbitration. For instance, when discussing consolidation in commercial arbitration the focus will be broadened to include Australia, Hong Kong, the Netherlands, New

Zealand and the United States of America—because these jurisdictions have experienced interesting solutions when dealing with this procedural mechanism.

The analysis of laws and rules is not limited to a comparative assessment of different jurisdictions and institutions, but has a historical dimension as well. Indeed, with particular respect to the discussion of the relevance of parties' consent to procedural mechanisms in commercial arbitration a comparison is drawn between the old arbitration rules of the Swiss Chambers of Commerce and the Swiss Rules in force now for international arbitration.

Finally, it is evident that a comparison of the different applications on fields of arbitration is of paramount importance. This comparative assessment will be conducted through all the study. In the First Part the comparison will have the starting point of commercial arbitration, in the Second part the three international areas where arbitration is established as a dispute resolution mechanism—commercial arbitration, investment arbitration and sport arbitration—will then be analysed separately.

Delimitation of the thesis

Given the wide range of issues covered by the thesis, it would be sensible to indicate how the scope of it will be delimited by focusing on the relevance of parties' consent. The delimitation is detailed below, taking two important topics of the study as examples:

- While the thesis will deal with the extension of arbitration clauses to non-signatories, its goal is not to agree or disagree with the “group of companies” doctrine or with different advocated solutions (this subject has already been written about and debated extensively). The intermediate objective of this study will be, after analysing the different solutions or tendencies, to answer the question of what the role played by the parties' consent to arbitrate is. Of relevance in this context will be the analysis of the interplay between the formal (requirement to be “in writing”) and the substantive conditions of arbitration agreements' validity.
- With regard to procedural mechanisms, and in particular consolidation, it will not be argued whether consolidation provisions should be implemented or not. The intermediate aim of the thesis in this context will rather be, after pointing out other needs which have to be considered and different solutions which have already been adopted in practice, to suggest a way to implement consolidation provisions while

taking into account the fact that in commercial arbitration the parties will usually have signed different arbitration agreements and, for that reason, there is the important issue of parties' consent to arbitration. Or, in other words, to propose a way forward which appears to be the most respectful of parties' consent. Furthermore, with the analysis of the consolidation provisions contained in the NAFTA, but also in some recent BITs, a comparison will be made and the question answered if, and possibly why, in investment arbitration the issue of parties', and in particular investors', consent is less relevant.

Structure of the thesis

The thesis is divided into two Parts, each of which is sub-divided into three chapters. While the First Part discusses rather the theoretical aspects related to "Consent", the Second Part analyses and compares the consensual character of arbitration in the three main areas of international arbitration: commercial, investment and sport arbitration.

The First Part consists of three chapters:

- I. deals with "Consent";
- II. deals with "The phenomenon of arbitration"; and
- III. deals with "The arbitration agreement".

In Chapter I. the thesis begins by making a brief historical/philosophical overview of "Consent" (section 1.), then the diverse understandings of the instrument through which "Consent" is expressed, *i.e.* the contract, are pointed out (section 2.). After that the consensual nature, as one of the essential criteria for arbitration's qualification (section 3.), is discussed and, finally, the concept of "Consent" as a condition for the substantive validity of the arbitration agreement (section 4.) is analysed.

Chapter II. consists of four sections. It begins with the classical characterisation of arbitration (section 1.), then it examines the historical evolution of the concept of arbitration (section 2.), and finally the juridical nature of arbitration is discussed (section 3.).

The last Chapter (III.) of the First Part begins with a definition of the arbitration agreement (section 1.), and a description of the effects of the arbitration agreement (section 2.). After that the law governing the arbitration agreement (section 3.), and the

determination of jurisdiction (section 4.) are discussed. Finally, the requirements for the validity of the arbitration agreement are analysed (section 5.).

The Second Part consists of three chapters:

- IV. deals with “Commercial arbitration”;
- V. deals with “Investment arbitration”; and
- VI. deals with “Sport arbitration”.

In this part of the thesis the different areas in which arbitration currently plays a significant role in an international context will be discussed and compared.

Chapter IV. begins by making some general remarks on the consensual character of commercial arbitration and the possible exception of arbitration with the Chambers of Commerce of (former) communist countries (section 1.). Then it turns to discuss the content of the arbitration agreement (section 2.). After that the determination of the existence of parties’ consent and its scope is analysed (section 3.). Later, agency and consent (section 4.), as well as the transfer of the arbitration agreement and consent (section 5.), are considered. A longer section is then devoted to parties’ consent with regard to the extension of arbitration agreements, in particular within groups of companies (section 6.). Finally, the relevance of parties’ consent with respect to procedural mechanisms is examined (section 7.).

In Chapter V. the thesis gives a brief historical overview of the evolution of the use of arbitration clauses included in States’ contracts (section 1.), and turns then to explain national investment laws (section 2.) and BITs (section 3.). Later, ICSID arbitration and other forms of arbitration contained in multilateral treaties are briefly discussed (section 4.) and, subsequently, the requirement of consenting “in writing” in investment arbitration is concisely mentioned (section 5.). A more extensive section is then dedicated to the many ways consent to arbitration can be expressed (section 6.). Afterwards the temporal sequence of consent to arbitration and the relevance of the time of consent (section 7.), as well as the amicable negotiation period (section 8.), and the interpretation of consent (section 9.) are discussed.

After treating the differences between treaty and contract claims (section 10.), section 11. deals with the essential criteria for arbitration under ICSID, the role of consent in defining them and its expansion. Subsequently, the scope of consent and its limitations (section 12.) will be discussed and the irrevocability of consent (section 13.) analysed.

Afterwards, an important section is devoted to the scrutiny of the expansion of consent because of treaties provisions, *i.e.* the most-favoured-nation and the umbrella clauses (section 14.). And, finally, the relevance of parties' consent with regard to procedural mechanisms is discussed (section 15.).

The last Chapter (VI.) of the Second Part discusses sport arbitration. It begins with a description of the structural organisation of sport (section 1.) and a portrayal of the main arbitral instances in the sport's field (section 2.). Then the use of arbitration for resolving sport disputes (section 3.) and the different types of arbitration agreements in sport are analysed (section 4.). After that the substantive validity of the arbitration agreement with regard to issues related to parties' consent (section 5.) and the case of mandatory arbitration (section 6.) are discussed. And, finally, the relevance of parties' consent with regard to procedural aspects is considered (section 7.).

Having international commercial arbitration as the starting point of the comparison is justified by the fact that it is the classical arbitration form which rests on an arbitration agreement of the parties. And it is precisely the arbitration agreement which shows that the parties have consented to resolve their dispute by the mean of arbitration—ousting States' courts.

Organisational notes

In order to facilitate easier reading of the thesis, the provisions contained in conventions, national laws, arbitration rules, standard forms, charters and codes cited in the main body of this study are reproduced as an annex.

The accentuations in the thesis in ***cursive and bold*** are the author's. These accentuations should facilitate the understanding and the arguments of the text by highlighting important words/sentences.

The accentuations in the thesis in *cursive* are used for the emphasis of cited authors/passages or for foreign words/sentences.

The use of the forms he/him in the text are to be treated as gender neutral and equally applicable to she/her.

FIRST PART

The First Part will deal with the two main concepts which are of relevance for this thesis, *i.e.* “Consent” (Chapter I.) and “The phenomenon of arbitration” (Chapter II.), as well as the foundation of the expression of consent to arbitration, *i.e.* “The arbitration agreement” (Chapter III.).

I. CONSENT

1. BRIEF HISTORICAL/PHILOSOPHICAL OVERVIEW

The most important, universally accepted, and considered in all legal systems the fundamental, condition of a contract is: consent of the parties, *i.e.* the mutual will of the parties that a contract with a particular content shall regulate their legal relationship.⁴ Will in the legal sense as a social phenomenon is almost impossible to separate from the expression of that will, as only the externalised will can be of social relevance.⁵

In archaic legal systems it was the spoken (formal) word which was of relevance;⁶ the inner will remained unconsidered.⁷ Statements were made by the means of rigid formulas⁸ which displayed their effect without considering the true will of the parties.⁹ An opposite position was later taken by the Enlightenments’ “voluntarism”. Pursuant to the ideas of this movement the form of the statement had to give way to the subjective will.¹⁰ This view continued to be present in the “will theory”,¹¹ according to which the true reason for recognising and enforcing contractual obligations is that they are “willed” by the obligor,¹² and, therefore, when concluding a contract, the true internal will of the parties has to be considered.¹³ On the other hand, the contrary view was

⁴ Bucher E., *OR*, p. 110.

⁵ *Ibid.*, footnote 2.

⁶ See, *e.g.* the ancient Germanic law diction “*Ein Mann—ein Wort*” (“One man—one word”), cited by Bucher E., *OR*, p. 122, footnote 42 (my own translation).

⁷ Bucher E., *OR*, p. 121.

⁸ The formulas were often accompanied by formal, ritual acting. This formalism fulfilled the need of visualisation for primitive people (see, *e.g.* for old Roman law Kaser, p. 39).

⁹ Bucher E., *OR*, pp. 121–122.

¹⁰ *Ibid.*

¹¹ *Willenstheorie* of the German *Pandektistik*.

¹² Zweigert/Kötz, p. 326.

¹³ Bucher E., *OR*, p. 122.

taken by the “declaration theory”¹⁴ which sustained that, in the interest of certainty in commerce, the external should rather be relied on, for the statement’s addressee apparent, declaration.¹⁵ Thus, you would be bound not so much by what you actually meant as by what your addressee reasonably supposed you intended.¹⁶

Nowadays consensual agreements, which in Roman contract law were restricted to some clearly defined types of contracts,¹⁷ **are considered to be the general principle.**¹⁸ Therefore, as formal requirements are generally no longer necessary or, at least, less important, it is recognised today that the parties can conclude a contract by expressing their will not only explicitly but also in an implied way.¹⁹ While the underlying theory is that a contract is the outcome of “consenting minds”, each party being free to accept or reject the terms of the other, in order to determine whether an agreement has come into existence an objective standard is normally applied.²⁰

2. DIVERSE UNDERSTANDINGS OF THE INSTRUMENT THROUGH WHICH CONSENT IS EXPRESSED: THE CONTRACT

The primary rule that governs the law, practice, and regulation of arbitration in the vast majority of national jurisdictions is the freedom of contract.²¹ Freedom of contract²² allows the parties to write their own rules of arbitration—indeed, it permits them to have the agreement establish the law of arbitration for that particular transaction: the parties can customise the arbitral process to fit their needs, eliminate legal rules or trial techniques that might prove inconvenient or unsuitable, and maintain procedural elements they believe necessary to achieving fairness, finality, and functionality.²³

¹⁴ *Erklärungstheorie*.

¹⁵ Bucher E., *OR*, p. 122.

¹⁶ Zweigert/Kötz, p. 326.

¹⁷ “*Emptio venditio*”, “*locatio conductio*”, “*mandatum*” and “*societas*” (see Kaser, pp. 190 *et seq.*).

¹⁸ Bucher E., *OR*, p. 116.

¹⁹ See, *e.g.* Bucher E., *OR*, p. 113.

²⁰ See, *e.g.* for English law *English Private Law*, para. 8.01, and for Swiss law Bucher E., *OR*, pp. 123-124.

²¹ See Carbonneau, *Arbitration*, p. 369.

²² Which has not always been accepted as a legal principle—far from it, as it is also captured in Sir Henry Maine’s famous phrase: “the movement of the progressive societies has hitherto been a movement from Status to Contract”. (Zweigert/Kötz, p. 325).

²³ Carbonneau, *Arbitration*, p. 369.

Although it has been observed that the general principles of interpretation of arbitration agreements are very similar under the various national laws,²⁴ on the other hand it has been sustained that the idea of *contract—the object of interpretation—illustrates the gap that can exist between legal systems* and methods.²⁵ Common law lawyers and courts revere the contract, which they consider the establishment of the law between the parties—their rights and obligations; the contract is seen as the final expression of the parties' intent, and, unless the document fails to express the parties' basic agreement, the courts must not supplement or supplant it.²⁶ Conversely, lawyers trained in codified law²⁷ have often seen the detail and complexity of contracts drafted by common law lawyers as unnecessary, counterproductive and lacking synthetic quality.²⁸

These differences are also reflected in the way common lawyers and civil lawyers draft arbitration agreements. The former, generally, try to cover every eventuality, hoping the wording will extend to unseen or unexpected situations, and if not that a court or tribunal will imply a term by analogy to what is provided expressly in the agreement.²⁹ The latter, by contrast, rely on and expect the law to regulate the situation; they deal only with specific issues which are covered in the contract itself.³⁰

To Asian lawyers, the contract has minor significance and it is considered nothing more than a relatively perfunctory documentary reflection of the parties' commercial relationship.³¹ From the point of view of a US commentator, lawyers, courts and contracts are not as sacrosanct in Japan as they are in the United States,³² and the Western observer is surprised to find how tenaciously the Japanese cling to their old practices despite all the changes in the circumstances of life.³³

Notwithstanding the existing differences among legal systems with regard to the understanding of the instrument of "contract", with respect to *international arbitration agreements* another *tendency* can be observed: a move *towards harmonisation and uniformity*. On the one hand, the effect of international conventions on arbitration, such

²⁴ Poudret/Besson, para. 304.

²⁵ Carbonneau, *Arbitration*, p. 3.

²⁶ *Ibid.* It has been observed that if contractors made explicit arrangements for every imaginable contingency which might arise in the agreed exchange only one rule would be needed: "*pacta sunt servanda*" (Zweigert/Kötz, p. 327).

²⁷ *E.g.* in Europe, the continental lawyers, for instance the French or German ones.

²⁸ Carbonneau, *Arbitration*, p. 3.

²⁹ Lew/Mistelis/Kröll, para. 8-4.

³⁰ *Ibid.*

³¹ Carbonneau, *Arbitration*, p. 3.

³² *Ibid.*

³³ Zweigert/Kötz, p. 300.

as the 1923 Geneva Protocol on Arbitration Clauses and the New York Convention,³⁴ has been to establish what is usually required for a valid international arbitration agreement and to indicate the parameters within which such an agreement will operate, and, on the other hand, arbitration institutions recommend model arbitration clauses which are often inserted by the parties in commercial contracts as a mere formality.³⁵

3. THE CONSENSUAL NATURE AS ONE OF THE ESSENTIAL CRITERIA FOR ARBITRATION'S QUALIFICATION

Each notion can be recognised by lawyers through an intellectual operation called qualification.³⁶ The qualification is effected by a variable number of criteria, in function of the considered notion and of its degree of understanding's difficulty for the lawyer.³⁷ Arbitration is considered to be a consensual dispute resolution mechanism.³⁸ Indeed, the "*origine volontaire de la mission de l'arbitre*"³⁹ is regarded as *one of the essential criteria to qualify arbitration*.⁴⁰ However, not only is "parties' consent" a criterion to qualify the notion "arbitration", but "*consent*" is itself a notion.

While according to one view the concepts (notions) are to be given the same meaning as they have in substantive national law, according to the theory of qualification developed by Rabel⁴¹ they are to be understood in the light of comparative law, independently of the *lex fori*.⁴²

3.1. Qualification

The delimitation of arbitration's borders is the result of the lawyers' well known intellectual operation called qualification; to qualify is to link the studied object to a

³⁴ The New York Convention has been described as "the single most important pillar on which the edifice of international arbitration rests" (Wetter, *Present Status*, p. 93).

³⁵ See Redfern/Hunter/Blackaby/Partasides, paras 3-02 *et seq.*, who also consider that the arbitration clauses are often "midnight clauses", *i.e.* the last clauses to be considered in contract negotiations.

³⁶ See Jarrosson, *Notion*, p. 246.

³⁷ *Ibid.*

³⁸ See, *e.g.* Lalive/Poudret/Reymond, No. 2 *ad* Article 176 Swiss PIL, p. 291, who speak of "*mode conventionnel de règlement des litiges*" referring to the notion of arbitration as commonly understood under Swiss law.

³⁹ Jarrosson, *Frontières*, p. 21, prefers to use the adjective "*volontaire*" instead of "*conventionnel*", because it is more precise permitting to include the type of arbitration based on a last will which is contained in a testament.

⁴⁰ Jarrosson, *Frontières*, p. 20.

⁴¹ Rabel, *Das Problem der Qualifikation*, *RabelsZ* 5 (1931) 241.

⁴² Zweigert/Közl, pp. 6 *et seq.*

notion.⁴³ Although the terminology used by the parties may represent a first indication in the process of qualification, this indication is nevertheless not decisive.⁴⁴ To qualify a dispute resolution mechanism as arbitration implies very classically that in a particular situation the existence of a number of essential criteria has cumulatively to be fulfilled. The absence of one of the criteria brings with it the disqualification of arbitration.⁴⁵

Often avoided in the doctrine, the question as to whether a particular dispute resolution mechanism qualifies itself as “arbitration” is however not simply a semantic “amusement”.⁴⁶ Indeed, only the process of qualification can determine whether the regime of arbitration will be applicable or not.⁴⁷ The question of qualification can be of relevance throughout the arbitral proceeding.⁴⁸

3.2. Notion

For philosophers “notion” is the object of knowledge.⁴⁹ Notion has also been defined as the general idea of the object proposed to the work of the spirit, and juridical notion has been considered the highest degree of development to which the juridical spirit aspires.⁵⁰ The question has been raised as to whether notion should be distinguished from concept.⁵¹ Generally, scholars seem to use the two terms without giving them a different meaning.⁵² “Arbitration” and “Consent” are both notions (or concepts).⁵³

Yet a juridical concept does not remain immobile, it changes when the reality evolves.⁵⁴ Moreover, the juridical notion is relative, *i.e.* it is variable.⁵⁵ The juridical notion does not only vary in the space, but it varies also in a relative manner, *i.e.* with regard to other notions.⁵⁶ The notion of arbitration, which was at the beginning quite a strict and

⁴³ Jarrosson, *Frontières*, p. 20.

⁴⁴ Rigozzi, para. 464.

⁴⁵ Jarrosson, *Frontières*, p. 20.

⁴⁶ Rigozzi, para. 462.

⁴⁷ See, *e.g.* Mustill/Boyd, *Arbitration*, under “why does it matter”, p. 31.

⁴⁸ See also Rigozzi, para. 463.

⁴⁹ See Jarrosson, *Notion*, p. 216 citing Lalande, *V° Notion*.

⁵⁰ See Jarrosson, *Notion*, pp. 217 and 219 citing Geny.

⁵¹ *Ibid.*

⁵² The term “notion” is, *e.g.* used by Lalive/Poudret/Reymond, see, *e.g.* the title “*La notion d’arbitrage*”, No. 2 *ad* Article 176 Swiss PIL, p. 291. The term “concept” is, *e.g.* used by Kaufmann-Kohler/Peter, see, *e.g.* p. 186. Both terms are, *e.g.* used by Rigozzi, see, *e.g.* paras 314 *et seq.* See also Jarrosson, *Notion*, p. 217.

⁵³ About the notion of “Consent”, see under I.4.

⁵⁴ Jarrosson, *Notion*, p. 219.

⁵⁵ On this understanding of relativity of the notion being variable, see Periphanakis, p. 74.

⁵⁶ See Jarrosson, *Notion*, p. 228.

conceptual notion has, as a result of different types of arbitrations, during the time considerably developed. This process has in particular been facilitated by the fact that the notion of arbitration has a tendency to expansionism which is frequently supported by a *principle in favour of arbitration*.⁵⁷ This principle can be found in most countries which have adopted a pro-arbitration policy.⁵⁸

The notion of arbitration has become a wide one, which applies to more and different hypotheses, and leads to a modification of its content from where its characterisation as a notion with a variable content⁵⁹ was derived.⁶⁰ On the other hand, the variable content of arbitration leads to problems when searching for a unique criterion and therefore it may be necessary to make recourse to *more* criteria.⁶¹

3.3. Criterion

The notion cannot be studied without its corollary: the criterion. Indeed each notion needs signs of recognition⁶² which allow the lawyer to know whether a particular situation with which he is confronted leads to this or that notion, and this is precisely the role of the criteria. The criterion is, in other words, an element which links a situation to a notion.⁶³

After considering the “*origine volontaire de la mission de l’arbitre*” as one of the essential criteria to qualify arbitration, Jarrosson observed that renouncing to parties’ consent when making recourse to arbitration excludes the qualification as arbitration.⁶⁴ Therefore, compulsory arbitration can, in his opinion, not be deemed true arbitration, but rather a variety of exception jurisdiction.⁶⁵

⁵⁷ See Jarrosson, *Notion*, p. 228. In particular, the US courts have consistently held that arbitration agreements must be interpreted *in favour of arbitration*, as was the case in *Mitsubishi v. Soler* (*Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346, 3355 *et seq.*, 1985).

⁵⁸ See Karrer/Kälin-Nauer, p. 31; Raeschke-Kessler/Berger, paras 282 *et seq.* (Lew/Mistelis/Kröll, para. 7-61).

⁵⁹ Comparative law also creates notion with variable content, as a particular notion can have a different content according to different national laws (Jarrosson, *Notion*, p. 225). Indeed, when the qualification is done in accordance to the *lex fori*, the concepts are to be given the same meaning as they have in the substantive national law (see Zweigert/Közl, pp. 6 *et seq.*).

⁶⁰ Jarrosson, *Notion*, p. 242.

⁶¹ *Ibid.*

⁶² Intellectual means.

⁶³ See Jarrosson, *Notion*, p. 244.

⁶⁴ Jarrosson, *Frontières*, pp. 20-21.

⁶⁵ *Ibid.* See also, *e.g.* DFT 115 II 366 (also cited by Jarrosson, *Frontières*, footnote 42).

4. CONSENT AS A CONDITION FOR THE SUBSTANTIVE VALIDITY OF ARBITRATION AGREEMENTS OR THE NOTION OF CONSENT

Given that arbitration is a consensual dispute resolution method, the cornerstone of arbitration is the agreement of the parties.⁶⁶ An arbitration agreement is substantively valid when it fulfils the ordinary requirements for the conclusion of a contract.⁶⁷ Therefore, consent to arbitration is given when the parties have reached agreement with regard to the essential elements of the arbitration agreement and their agreement is not vitiated by related external factors (*e.g.* error, duress, misrepresentation).

4.1. Reaching agreement: offer and acceptance

The process by which parties reach agreement is commonly understood as the acceptance by one party of an offer made by the other.⁶⁸ This is the classical arbitration schema based on an offer (of arbitration) and an acceptance of it.⁶⁹

4.1.1. Offer

An offer is an expression of willingness to contract on the terms stated in it as soon as those terms are accepted by the party to whom the statement is made, and it can be made either expressly or by conduct but most probably not by mere inactivity since this, standing alone, is normally equivocal and so unlikely to induce one party to believe that the other intends to be bound.⁷⁰ An offer must be certain and cannot be vague. It may only be accepted by a person to whom it has been made.

Particular kinds of offers are those contained in BITs.⁷¹ In the majority of cases they constitute a unilateral offer by the State involved to all investors from the other State party to settle disputes by arbitration, which is solely revocable by means of an

⁶⁶ See, *e.g.* Abdulla, p. 15.

⁶⁷ See, *e.g.* Lew/Mistelis/Kröll, para. 7-34.

⁶⁸ See also *English Private Law*, para. 8.05.

⁶⁹ See also Rigozzi, para. 468.

⁷⁰ *English Private Law*, para. 8.05.

⁷¹ On the ways of expressing consent to arbitration in investment arbitration, see more in detail under V.6.

instrument of equal ranking.⁷² Some, however, merely contain declarations of intent to make such offers in the future.⁷³

4.1.2. Acceptance

Acceptance is a final and unqualified expression of assent to the terms of an offer. Assuming that an offer has been made an agreement comes into existence when the offer is accepted either expressly (by words of acceptance) or implied by conduct.⁷⁴

4.1.3. Essential elements of the arbitration agreement

The *essentialia negotii* of an arbitration agreement⁷⁵ are twofold—an agreement between the parties that any dispute between them will be resolved by arbitration, and an indication of the dispute or legal relationship, which will be the subject matter of arbitration.⁷⁶ On these two aspects consent must be reached by the parties to have a substantive valid arbitration agreement.⁷⁷

4.2. Intent, expression of the intent, interpretation of the intent

In order to determine the *existence of parties' consent*, arbitrators will resort—particularly in commercial arbitration—to the general *principles of contractual interpretation*.⁷⁸ Of importance therefore is the question as to which law should govern the arbitration agreement. National contract laws adopt either a subjective theory, where investigation into the intentions of the parties prevails, or an objective theory, which relies primarily on the meaning of the text, or sometimes a mixed approach, where the meaning of the text is merely taken into consideration if and to the extent that the intentions of the parties cannot be established.⁷⁹ If it is not possible to establish the true and common intent of the parties, or should such intent differ, the parties' declarations

⁷² Cremades, p. 162.

⁷³ Lew/Mistelis/Kröll, para. 28-22.

⁷⁴ *English Private Law*, para. 8.07.

⁷⁵ About the essential elements of the arbitration agreement, see also under IV.2.

⁷⁶ Abdulla, p. 18 with references to Poudret/Besson, paras 155-156, and *BSK-IPRG-Wenger*, paras 28 *et seq.* ad Article 178 Swiss PIL. So also, *e.g.* DFT 129 III 675.

⁷⁷ See, *e.g.* Berger/Kellerhals, paras 270 *et seq.*

⁷⁸ See also Abdulla, p. 18.

⁷⁹ Kaufmann-Kohler, *Interpretation*, para. 13-11; Fontaine/De Ly, p. 120.

will normally be interpreted following an objective standard. *Similar rules of interpretation are to be found in public international law.*⁸⁰

4.2.1. Contract as the outcome of “consenting minds”

During the conduct of contractual negotiations a differentiation has to be made between the negotiation of the terms of the agreement and the decision of the parties’ intention to create a legal relationship.⁸¹ However, while the underlying theory is that a contract is the outcome of “consenting minds”—each party being free to accept or reject the terms of the other—to speak of “consenting minds” may be misleading. Indeed, parties are judged by what they have said, written or done, not by what is in their minds—in other words an objective standard is applied, as is the case under English⁸² or Swiss law.⁸³

4.2.2. Objective test under English law

In determining whether an agreement has come into existence, the law normally applies an “objective” test: if A so conducts himself as to induce B reasonably to believe that A has agreed to terms proposed by B, then A will generally be bound by those terms even though he may not in fact have intended to agree to them.⁸⁴ Under the objective test, a statement by A can be an offer if it induces B reasonably to believe that A intended to be bound by it on acceptance, even though A had no such intention. A will not, however, be so bound if B knew that A had no such intention, nor, probably, if B simply had no view on this question.⁸⁵

4.2.3. Principle of confidence under Swiss law

Under Swiss law, in ascertaining whether an agreement has been concluded, one must first seek the true and common intent of the parties beyond the wording they actually used.⁸⁶ Therefore, it is necessary to examine not only the wording of the contract but also the whole set of circumstances surrounding the contract, *inter alia*, the context of

⁸⁰ See, e.g. Kaufmann-Kohler, *Interpretation*, para. 13-11.

⁸¹ Bucher E., *OR*, p. 112.

⁸² As an example of common law jurisdiction.

⁸³ As an example of civil law jurisdiction.

⁸⁴ *English Private Law*, para. 8.02.

⁸⁵ *English Private Law*, para. 8.05.

⁸⁶ Abdulla, p. 18.

the conclusion of the contract, the conduct of the parties before and after the conclusion of the contract, the interests at stake, as well as commercial/trade usage.⁸⁷ If it is not possible to determine the true and common intent of the parties or should such intent differ, the parties' declarations will be construed pursuant to the "principle of confidence".⁸⁸ In this second phase of interpretation, the judge or the arbitrators must construe the declarations or behaviour of a party as they would be understood *bona fide* by the addressee in light of all of the circumstances.⁸⁹ The "principle of confidence" thus implies that a party is bound by the objective meaning of its declarations or conduct, even though such a meaning may be at odds with the actual intent of the party.⁹⁰

4.2.4. *Interpretation in public international law*

Similarly, there are different schools of thought for interpretation in public international law: according to the subjective school the goal of the interpretation is to determine the intent; pursuant to the objective school, the goal of interpretation must be to ascertain the meaning of the text, there being a presumption that the parties' intent is reflected in this text; and in the teleological school, the focus is primarily placed on the object and purpose of the treaty.⁹¹

The concept of consent is, in any event, in investment arbitration a difficult one. Indeed, given the absence of a meeting of the minds between investor and host State, consent has to be constructed from the *standing consent given by the State by treaty* and the subsequent consent given by the investor at the time the claim is submitted to arbitration.⁹²

4.2.5. *Where does one look for consent to arbitration?*

Traditionally, *i.e.* in commercial arbitration, the place where consent to arbitration has been expressed is in an arbitration agreement. Therefore, it has been argued that since in all national jurisdictions, as well as in the public international law sphere, arbitration is

⁸⁷ Abdulla, p. 18.

⁸⁸ On this principle ("*Vertrauenprinzip*"), which materialises more or less the "declaration theory", see, *e.g.* Bucher E., *OR*, pp. 122 *et seq.*

⁸⁹ See, *e.g.* DFT 69 II 322 or DFT 95 II 328/329.

⁹⁰ Abdulla, p. 19.

⁹¹ Kaufmann-Kohler, *Interpretation*, para. 13-11; Sinclair I., pp. 114 *et seq.*; Brownlie, pp. 602 *et seq.*

⁹² McLachlan/Shore/Weiniger, para. 7.168.

considered to be consensual in nature (save for exceptional statutory schemes⁹³), the *arbitration agreement is the ultimate foundation of the arbitral process*.⁹⁴ Particularly in commercial arbitration the arbitration agreement often takes, but not always, the form of an arbitration clause contained in the document that regulates the main contract. With regard to non-signatories it has been observed that the generally-accepted notion of the arbitration agreement being “separable” from the main agreement gives rise to the question of whether the parties must have consented to the non-signatory being bound by the arbitration agreement itself, or whether this can be inferred from consent to be bound by the contract as a whole.⁹⁵

On the other hand, when considering *investment arbitration* it has also been argued that we are now in “the era of arbitration without contractual relationships”.⁹⁶ Indeed, while in investment arbitration consent to arbitration expressed through direct agreement between the parties—as happens in commercial arbitration—is not unknown, often there is *no arbitration agreement in the traditional sense* and consent to arbitration is given by the host State through its State legislation, through bilateral investment treaties, or multilateral treaties.

4.2.6. Difference in interpretation of consent between commercial and investment arbitration

An *arbitration agreement in a contract is specific by its very nature*, as it is shaped to meet the needs of a given transaction.⁹⁷ Moreover, both drafters are present in the arbitration and may thus explain their intentions. Whatever the contents of the applicable law, the arbitration will take ample account of these intentions.⁹⁸ Therefore, it has been observed that when contracts are interpreted in international commercial arbitration one may venture to say that the search for the real intentions dominates.⁹⁹ However, when it is not possible to establish the true and common intent of the parties, the parties’ declarations will normally be interpreted following an objective standard.

⁹³ And, possibly, for cases where arbitration is forced/induced. On “induced arbitration”, see under II.2.3.2.

⁹⁴ Wetter, *Connection*, p. 333.

⁹⁵ See Hosking, p. 302.

⁹⁶ Werner, *Trade Explosion*, pp. 5 *et seq.*

⁹⁷ Kaufmann-Kohler, *Interpretation*, para. 13-12.

⁹⁸ Kaufmann-Kohler, *ICSID Awards*, p. 206.

⁹⁹ Kaufmann-Kohler, *Interpretation*, para. 13-12.

Furthermore, the search for the real intention may be difficult where non-signatories are involved.

In contrast, dispute resolution provisions in *treaties define jurisdiction in the abstract for an unlimited number of future investments*. As in treaty arbitration proceedings only one of the drafters is the respondent State, whilst for the claimant (the investor) the dispute resolution provision is *res inter alios acta*—it has been argued that more objective criteria will by essence prevail and the subjective element will play a lesser role.¹⁰⁰

5. COMMENTS

Among legal scholars the views about consent differ. For some scholars the “*origine volontaire de la mission de l’arbitre*” is one of the essential criteria to qualify arbitration.¹⁰¹ For others, the classical concept of arbitration based on consent is being supplemented by other concepts of arbitration which largely ignore this requirement and they speak of the “dogma of consent” which should no longer be a justification for arbitration when consent is merely a fiction.¹⁰² They argue that it may be more accurate and intellectually honest to simply admit that arbitration without consent exists.¹⁰³ In between these two positions, and considering in particular arbitration in the domain of the resolution of sport-related disputes, it has also been suggested that there should be a shift in the question of consent from the stage of qualification to the validity of the arbitration agreement.¹⁰⁴ The advantage of such an approach is that, while the question of arbitration’s qualification has always to be examined *ex officio*, the validity of the arbitration agreement has only to be considered when it is contested by one of the parties involved in the dispute.¹⁰⁵

With regard to the consensual nature of arbitration, it has to be observed that ***with the growing acceptance of arbitration as a dispute resolution mechanism and its use in areas other than the traditional one of commercial arbitration, the consensual character of arbitration tends to decrease***. This is mainly due to the fact that the

¹⁰⁰ Kaufmann-Kohler, *Interpretation*, para. 13-12.

¹⁰¹ Jarrosson, *Frontières*, p. 20. See, e.g. also Lalive/Poudret/Reymond, No. 2 *ad* Article 176 Swiss PIL, p. 291, who speak of “*mode conventionnel de règlement des litiges*” referring to the notion of arbitration as commonly understood under Swiss law.

¹⁰² See, e.g. Kaufmann-Kohler/Peter, p. 186.

¹⁰³ *Ibid.*

¹⁰⁴ See Rigozzi, para. 478.

¹⁰⁵ *Ibid.*

relationships between the parties in investment dispute arbitration and sport arbitration have another structure, when compared to commercial arbitration, with the consequence that the process of reaching an agreement to arbitrate appears to be different. The most extreme position is, however, represented by the case of mandatory arbitration, where arbitration is seen as such an accepted mechanism for dispute resolution that the State itself recognises that arbitration is the most sensible method to resolve disputes in a particular area of life and obliges the parties to make recourse to it.

In legal writings a *distinction* has also been made between *specific consent* (arbitration as a contract, which is to be found in commercial arbitration) and *general consent* (arbitration as a governing arrangement, which is to be found in investment arbitration):¹⁰⁶

- With regard to specific consent it has been observed that where consent is given after the dispute has arisen¹⁰⁷ it is specific to the dispute, whereas when consent is given in advance¹⁰⁸ it is specific to the relationship between the private parties.¹⁰⁹ The degree of specificity of the consent to arbitration affects the breadth of the jurisdiction of an arbitral tribunal and the degree to which the disputing parties have conceded their right to adjudicate a particular dispute in the courts.¹¹⁰ It has also been observed that, in principle, arbitration that is authorised by an agreement to arbitrate, based on a specific consent, cannot go beyond the private relationship between the disputing parties, *i.e.* the subject-matter of the dispute cannot affect the interests of either third parties or the State in the regulatory sphere because neither third parties nor the State (acting in a sovereign capacity) have consented to the arbitration.¹¹¹
- On the other hand it has been sustained that under investment treaties States consent generally to the compulsory arbitration of disputes with foreign investors as a group.¹¹²

However, in my opinion, while in investment arbitration the condition of consent is placed in a new light which is different from the traditional contractual concept of arbitration, treaty-based arbitration has to be seen as a consensual dispute resolution mechanism. Nevertheless, in my view, distinct types of consent to arbitration have to be

¹⁰⁶ See Van Harten, pp. 62 *et seq.*

¹⁰⁷ *Compromis arbitral* or submission agreement.

¹⁰⁸ Arbitration clause.

¹⁰⁹ *Ibid.*

¹¹⁰ See, *e.g.* Redfern/Hunter/Blackaby/Partasides, para. 1-13.

¹¹¹ Van Harten, p. 62.

¹¹² See Van Harten, p. 63.

differentiated. For this classification of different forms of consent two aspects have to be distinguished:

- on the one hand, consent to arbitration can be directed to a **defined** person, *i.e.* be individual, or be addressed to a **group** of persons who are still not individualised (identified), *i.e.* be general;¹¹³
- on the other hand, consent to arbitration can be expressed **after** a dispute has arisen or can be given **before** and for the case of the breaking out of a dispute, *i.e.* consent can refer either to a concrete (existing¹¹⁴) dispute or to an abstract (future¹¹⁵) one.

By combining the two sides, it is therefore suggested that there are different types of consent which can be classified as follows:

a. Individual-concrete consent

This type of consent is one that can be found in submission agreements¹¹⁶ where consent is given by the defined parties after the dispute has arisen.

b. Individual-abstract consent

This type of consent is one that can be found in arbitration clauses where consent is given by the defined parties before the dispute has arisen.

c. General-abstract consent

This type of consent is one that can be found in investment arbitration in what has been called “public offer of arbitration”¹¹⁷ and which encompasses “consent through host State legislation”, “consent through BITs” or “consent through multilateral treaties”. The *State gives its consent to a group (investors) to arbitrate possible future disputes before the disputes themselves have arisen.*¹¹⁸ Furthermore, it can also be found in

¹¹³ Considering the issue of non-signatories, it can however be asked whether this division is so clear-cut.

¹¹⁴ Expression used by Redfern/Hunter/Blackaby/Partasides, para. 3-02.

¹¹⁵ *Ibid.* I think the word “abstract” has to be preferred, because when signing an arbitration clause the breaking out of a dispute is not certain (this is clearly also underlined in Redfern/Hunter/Blackaby/Partasides, para. 3-02 : “the parties to a contract may agree to an arbitration clause, they hope that there will be not need to invoke it”).

¹¹⁶ On the particular importance of the “*compromiso*” or specific submission in Latin America, see Grigera Naón, *Freshfields*, pp. 150 *et seq.*

¹¹⁷ Cremades, pp. 149 *et seq.*

¹¹⁸ The State even gives its consent before the investor has made his investment in the host country, providing thus the investor with a certainty in respect to the dispute resolution mechanism.

sport arbitration, when a sport organisation gives its consent to submit to arbitration disputes of which it does not know the exact nature and importance with parties about whom it does not even know the identity.¹¹⁹

d. General-concrete consent

While this type of consent seems at first sight less obvious, examples can be found where special purpose tribunals¹²⁰ are established to undertake resolution of certain types of dispute. For instance, a number of claims commissions or claims tribunals have been set up in order to deal with the legal and economic consequences of nationalisations, revolutions, wars or other events affecting a large number of parties in the same way.¹²¹ Contrarily to the cases of investment arbitrations considered under c), here the *State gives its consent when the consequences affecting a large number of parties have already arisen*. Often compensation is payable to successful claimants from a special fund.¹²² The arbitration tends therefore to be a method to allocate resources to a group of persons who have been affected by a same event. In these sorts of arbitrations there is generally no formal arbitration agreement between the claimants and the parties against whom claims are brought in this type of tribunal, but parties who have a claim falling within the declared jurisdiction of such a tribunal have the right to submit their claims to those tribunals.¹²³

The foregoing categorisation of different types of consent could have several advantages—for example it could permit:

- a better explanation of the reach of an agreement to arbitrate where there is no horizontal and bi-polar situation, like in the traditional situations of commercial arbitration;
- to distinguish different types of consent in investment arbitration¹²⁴ and sport arbitration;¹²⁵ and
- the making of a distinction as to how consent has to be interpreted.¹²⁶

¹¹⁹ See Rigozzi, para. 332.

¹²⁰ See, e.g. the United Nations Compensation Commission or the Claims Resolution Tribunal for Dormant Accounts (“CRT”) in Switzerland. On the CRT, see “The Claims Resolution Process on Dormant Accounts in Switzerland” (January 2000), ASA Special Series No. 13, edited by Pierre A. Karrer.

¹²¹ Lew/Mistelis/Kröll, para. 3-39.

¹²² See, e.g. the special fund that receives a percentage of the proceeds from sales of Iraqi oil in the case of the United Nations Compensation Commission.

¹²³ Lew/Mistelis/Kröll, paras 3-39 and 3-41.

¹²⁴ See, e.g. between consent given through a direct arbitration agreement or through treaties.

¹²⁵ See, e.g. between consent given through arbitration clauses in sport-related contracts, licences, athletes’ declarations or in regulations of sport organisations.

Finally, it has to be observed that due to the fact that arbitration “becomes the most common method for settling international disputes”¹²⁷ or the “natural forum for international disputes”,¹²⁸ there is sometimes a tendency to assume consent to arbitration where in fact there is not really such consent.¹²⁹

II. THE PHENOMENON OF ARBITRATION

1. CLASSICAL CHARACTERISATION OF ARBITRATION

This part of the thesis will deal with the classical characterisation of the notion of arbitration. This characterisation is *still influenced by* the form of arbitration which is considered to have existed since the dawn of commerce¹³⁰ and which for many years has been the predominant one: *commercial arbitration*. It has been pointed out that there is no legal definition for arbitration.¹³¹ Indeed, as arbitration is a dynamic dispute resolution mechanism varying according to law and international practice, national laws do not attempt a final definition of it.¹³² At most, a definition can be inferred from the provisions defining the arbitration agreement contained in the various legislations.¹³³ On the other hand, definitions of “arbitration” have been provided by legal authors.¹³⁴

Arbitration can be characterised as a private and consensual alternative (to national courts) dispute resolution mechanism which leads to a final and binding determination of parties’ rights and obligations.¹³⁵ Lalive has observed that a broad conception of arbitration is particularly justified in the international field, where arbitration is the only means of assuring an effective resolution of disputes.¹³⁶

¹²⁶ *E.g.* between consent given through arbitration agreements and consent given through treaties.

¹²⁷ See Kaufmann-Kohler/Peter, p. 186.

¹²⁸ See Lionnet, p. 606.

¹²⁹ See, *e.g.* in particular the case law of French State courts related to the extension of arbitration agreements within the groups of companies discussed later on in this thesis under IV.6.2.3.1. and IV.6.3.

¹³⁰ See, *e.g.* Mustill, *History*, p. 43.

¹³¹ Jarrosson, *Notion*, para. 779.

¹³² Lew/Mistelis/Kröll, para. 1-6.

¹³³ Poudret/Besson, para. 1.

¹³⁴ See, *e.g.* the comparative overview given by Poudret/Besson, para. 2.

¹³⁵ See Lalive/Poudret/Reymond, No. 2 *ad* Article 176 Swiss PIL, p. 291; Lew/Mistelis/Kröll, paras 1-7 *et seq.*

¹³⁶ Lalive, *FJS* 946, Ch. I.1, p. 2.

1.1. A private mechanism for dispute resolution

Arbitration is a mechanism for dispute resolution by private individuals. Arbitrators do not hold public office and are not vested with pre-existing jurisdictional powers, which they acquire only because of the parties' consent.¹³⁷ The parties may, within the limits of the relevant law, confer powers upon the arbitral tribunal directly or indirectly.¹³⁸ They have the ultimate power to determine the form, structure, system and other details of the arbitration.¹³⁹ However, while the jurisdictional function of the arbitrators is fundamentally analogous to that of judges,¹⁴⁰ arbitrators have no capability to make use of the coercive powers over property and persons that are conferred by the State upon a national court when exercising their function.¹⁴¹ The reason for this is that the source of the jurisdictional authority of arbitral tribunals is strictly private.¹⁴²

1.2. The consensual nature of arbitration

The principal characteristic of arbitration is that it is chosen by the parties¹⁴³ by concluding an agreement to arbitrate. This is considered the foundation stone of international commercial arbitration, as it records the consent of the parties to submit to arbitration—a consent which is indispensable to any process of dispute resolution outside national courts.¹⁴⁴ Such processes depend for their very existence upon the agreement of the parties. Thus, this element of consent is essential, as without it, there can be no valid arbitration.¹⁴⁵

It has been rightly sustained that the contractual arrangement must be understood broadly in the sense that the parties' consent can be given in different ways and successively.¹⁴⁶ Thus, while in investment arbitration there is no arbitration agreement in the traditional sense, the arbitrators' jurisdiction nevertheless stems from the initial consent of the State or public entity (expressed in the signing of the treaty) and the subsequent consent of the claimant, who accepts the arbitrator's jurisdiction by starting

¹³⁷ Poudret/Besson, para. 7.

¹³⁸ According to rules of arbitration, whether institutional or *ad hoc*.

¹³⁹ Lew/Mistelis/Kröll, para. 1-11.

¹⁴⁰ See Clay, pp. 103 *et seq.*

¹⁴¹ See Redfern/Hunter/Blackaby/Partasides, para. 5-07.

¹⁴² Rigozzi, para. 479.

¹⁴³ Lew/Mistelis/Kröll, para. 1-11.

¹⁴⁴ Redfern/Hunter/Blackaby/Partasides, para. 3-01.

¹⁴⁵ See also Redfern/Hunter/Blackaby/Partasides, para. 1-09.

¹⁴⁶ Poudret/Besson, para. 4.

the arbitration.¹⁴⁷ Therefore, the contractual nature of arbitration does not entail that the arbitration agreement must be “mutual”, *i.e.* give the parties the same right to refer disputes to arbitration.¹⁴⁸ Indeed, it is possible to confer upon one party the unilateral¹⁴⁹ right to initiate an arbitration proceeding.¹⁵⁰ Notwithstanding these particularities, also in investment arbitration—like in commercial arbitration—the attempt to emancipate arbitration from a State justice system is clear und unavoidable.¹⁵¹

It has also been observed¹⁵² that continental European jurists¹⁵³ in particular attach great importance to the wishes of the parties—*l'autonomie de la volonté*.¹⁵⁴ In so doing they appear to suggest that this consent, together with an appropriate set of rules, is sufficient to turn international arbitration into an autonomous, delocalised process that takes place independently of national law.¹⁵⁵ Although for many this goes too far, as it attaches too much importance to the wishes of the parties and not enough to the framework of national laws within which the arbitral process must take place, the ***consent of the parties remains the essential basis of a voluntary system of international commercial arbitration***.¹⁵⁶ However, while on the one hand the (over-?) emphasis of the *autonomie de la volonté* has led some scholars to consider compulsory arbitration as not true arbitration,¹⁵⁷ on the other hand with regard to ***fields of arbitration other*** than commercial arbitration, the ***consensual nature of arbitration has even been questioned***.¹⁵⁸

1.3. An alternative to national courts

By agreeing to arbitration the parties remove their relationships and disputes from the jurisdiction of national courts altogether. In fact, the parties not only choose not to submit their disputes to the default national courts, but by refusing to conclude a jurisdiction agreement they also choose not to submit the disputes to alternative national courts. However, this aspect of the characterisation of arbitration has, with regard to

¹⁴⁷ Lew/Mistelis/Kröll, para. 5-21.

¹⁴⁸ Poudret/Besson, para. 4.

¹⁴⁹ On unilateral arbitration, see, *e.g.* Prujiner.

¹⁵⁰ Poudret/Besson, para. 4.

¹⁵¹ See Lew/Mistelis/Kröll, para. 5-21.

¹⁵² Redfern/Hunter/Blackaby/Partasides, para. 3-01.

¹⁵³ Especially the French ones.

¹⁵⁴ See, *e.g.* Jarrosson, *Frontières*.

¹⁵⁵ Redfern/Hunter/Blackaby/Partasides, para. 3-01. On this development followed, in particular, by the French State courts, see under III.3.3.2.2. and also III.4.3.2.2.

¹⁵⁶ *Ibid.*

¹⁵⁷ See, *e.g.* Jarrosson, *Frontières*, p. 20.

¹⁵⁸ See, *e.g.* Kaufmann-Kohler/Peter, p. 186; Paulsson, *Sport disputes*, p. 361.

international arbitration, been criticised as well. Lalive argued that to speak of removal of the dispute from ordinary State jurisdiction has no or, at least, another sense *in international arbitration*, where *one of the essential scopes* of the arbitration agreement is precisely to *prevent the conflict of jurisdictions* and to remedy the extreme incertitude which in general reigns with regard to the determination of this “ordinary judge”, *i.e.* the competent judge—of which State?¹⁵⁹ Moreover, it has been observed that while a forum selection clause is concerned with the rules that determine which forum may hear a dispute, the *arbitration agreement is an act which vests jurisdictional power* in a given jurisdiction in the first place (here, a specified arbitral tribunal).¹⁶⁰ Therefore, arbitration agreements, contrarily to jurisdiction agreements which keep the dispute within the boundaries of the jurisdiction of national courts, take it to a different adjudicatory forum.¹⁶¹

The result of this difference in the nature of the arbitration agreement is that certain assumptions have been made regarding the parties’ presumed intent in including such a clause in their contractual relations.¹⁶² Indeed, because of the specific nature and far-reaching consequences of choosing an arbitration clause, there is a presumption that the level of intent—the *volitional intensity—from parties who consent to insert such clauses is greater* than the level of intent in selecting a mere forum selection clause.¹⁶³ The aforesaid view has, however, recently been challenged by arguing that, despite their notable differences, both arbitration and jurisdiction agreements are essentially the same in nature and have the same objective—therefore arbitration and jurisdiction agreements should constitute equal alternatives to the default jurisdiction rather than hierarchically ordered dispute resolution clauses.¹⁶⁴

This critic is surely justified, in particular with regard to the lack of a coherent international framework securing the enforcement of jurisdiction agreements.¹⁶⁵ However, while, at least in commercial arbitration, a bigger and fairer competition among *fora*, *i.e.* in particular between arbitral tribunals and State courts¹⁶⁶ is undeniably desirable, we will see later on that in other fields of arbitration there is not really an

¹⁵⁹ Lalive/Poudret/Reymond, p. 271.

¹⁶⁰ Chang, p. 806.

¹⁶¹ Brekoulakis, *Notion*, p. 354.

¹⁶² Chang, p. 806.

¹⁶³ *Ibid.*

¹⁶⁴ Brekoulakis, *Notion*, pp. 355 *et seq.*

¹⁶⁵ *Ibid.*

¹⁶⁶ So in particular Brekoulakis, *Notion*, p. 364.

alternative to this dispute resolution method, mainly because of the wish for neutrality¹⁶⁷ and the perceived need of a consistent case law.¹⁶⁸

1.4. The final and binding determination of parties' rights and obligations

The final and binding determination of parties' rights and obligations is the criterion of the jurisdictional mission of the arbitrator.¹⁶⁹ Bucher, for example, emphasises the power of arbitrators to render an award which becomes *res judicata* in the same way as a judgment.¹⁷⁰ The *procedures* that have to be followed in order to arrive at a binding decision by way of arbitration may be described as judicial.¹⁷¹ An arbitral tribunal is bound to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent".¹⁷² While the quotation is from the English Arbitration Act 1996,¹⁷³ the obligation is one of general application.¹⁷⁴

In a modern conception arbitration is not limited to resolving disputes in a traditional way, but it may equally do so by filling gaps in contracts, revising and adapting them—particularly where the law applicable to the main contract authorises the judge to do so or when the parties have vested the arbitrators with such powers.¹⁷⁵ However, the *final and binding determination of parties' rights and obligations* distinguishes arbitration from other forms of alternative dispute resolution.¹⁷⁶

Moreover, a number of legal systems make a distinction between contractual and judicial arbitration.¹⁷⁷ The test for distinguishing between the two different institutions is the binding nature of the decision that results from the process: contract-like or

¹⁶⁷ This is particularly the case in investment arbitration, but as well in sport arbitration.

¹⁶⁸ This is particularly the case in sport arbitration with the CAS.

¹⁶⁹ Jarrosson, *Frontières*, p. 21.

¹⁷⁰ Bucher A., *Arbitrage*, p. 22 para. 24.

¹⁷¹ Redfern/Hunter/Blackaby/Partasides, para. 1-17.

¹⁷² *Ibid.* Emphasis in the original text.

¹⁷³ English Arbitration Act 1996, section 33(1)(a).

¹⁷⁴ See, e.g. UNCITRAL Model Law Article 18. Redfern/Hunter/Blackaby/Partasides, para. 1-17.

¹⁷⁵ Lalive/Poudret/Reymond, p. 292. Because of the fact that arbitrators like judges are not always required to decide a dispute and sometimes only have to supplement or complete the agreement between the parties, Oppetit casts doubt on the jurisdictional character of arbitration (Oppetit, *Arbitrage*).

¹⁷⁶ On these other alternative dispute resolution mechanisms, see, e.g. Lew/Mistelis/Kröll, paras 1-32 *et seq.*

¹⁷⁷ See, e.g. Germany, Italy, the Netherlands (Kaufmann-Kohler/Peter, p. 185).

judgment-like.¹⁷⁸ It is only if the parties intend a decision to be binding like a judgment that it constitutes an award and the process an arbitration.¹⁷⁹

1.5. Comments

The difficulty of each characterisation is defining the borders of what has still to be considered part of a particular notion. This is no less true for the notion of arbitration. It has been observed that the approach followed in the United States in this respect is more pragmatic than the one of European, and particularly French, lawyers.¹⁸⁰ A very important role in this context is played by parties' consent. Indeed, as Jarrosson observed, the Anglo-Saxon approach of stressing the will of the parties not only reduces the jurisdictional power of the arbitrator but the control of qualification through the judge.¹⁸¹

The strong contractualisation of arbitration in the United States permits the parties to adapt this institution to their needs and particular desires. As a contractual dispute resolution method, arbitration has its *raison d'être* in its commercial utility which should only be limited in concrete cases by principles of justice and public order rather than supposed exigencies of definition.¹⁸² While the risk of such an approach is that some scholars would then not denominate a particular dispute resolution mechanism as arbitration, the critique of these scholars mainly originates in the *a priori* idea that a particular dispute resolution mechanism has to fulfil some essential characteristics¹⁸³ from which it is impossible to depart without losing the qualification as arbitration.¹⁸⁴ On the other hand, it has been observed that in the United States a judge may eventually put forward the question of whether an arbitrator was really authorised by the parties to act, but will never ask whether a certain type of arbitration was "real arbitration".¹⁸⁵

It has also been contended that the notion of arbitration should generally be distinct and larger in the field of international arbitration, so as to allow learning from similar

¹⁷⁸ Kaufmann-Kohler/Peter, p. 185.

¹⁷⁹ For Italian law, Bernardini, *Arbitrato*, p. 17; for French law, Jarrosson, *Notion*, p. 162 *et seq.*; for German law, Berger, *Wirtschaftsschiedsgerichtsbarkeit*, pp. 53-54; for Swiss law, Ehrat in *Basler Kommentar*, p. 1415.

¹⁸⁰ Rigozzi, para. 661.

¹⁸¹ Jarrosson, *Frontières*, p. 14.

¹⁸² Rau/Pédamon, p. 483.

¹⁸³ See, e.g. Jarrosson, *Notion*.

¹⁸⁴ Rau/Pédamon, p. 482.

¹⁸⁵ Rau/Pédamon, footnote 54, citing Fouchard/Gaillard/Goldman, pp. 29-30.

foreign institutions or notions which are different from the ones pertaining to a particular country.¹⁸⁶ Similarly, consideration should also be given as to whether a distinct qualification has to be envisaged for types of arbitration which are not commercial arbitration. With regard to sport arbitration it has, in particular, been argued that while the process of qualification has to be done bearing in mind the peculiarities of this type of arbitration, on the other hand these peculiarities do not justify a complete detachment from the traditional concept of arbitration.¹⁸⁷ However, *the expansion of the use of arbitration in fields other than the traditional one of commercial arbitration, i.e. in the fields of investment and sport arbitration, has changed the perception of the consensual nature of arbitration.*

2. THE HISTORICAL EVOLUTION OF THE CONCEPT AND THE CONSENSUAL NATURE OF ARBITRATION

Although arbitration has been considered a relative concept, the exact content of which depends on the applicable law,¹⁸⁸ this part will focus on the relativity and variability of the notion of “arbitration” in a temporal dimension. In fact, as other concepts have, the notion of arbitration has evolved and changed over time.¹⁸⁹ On the other hand, it has to be observed that there are recognisable traits of arbitration which were present in the past and are still present today.

Arbitration is an institution which preceded courts¹⁹⁰ and which must have existed since the dawn of commerce.¹⁹¹ Yet shortly after the appearance of State courts, arbitration assumed the position of the younger (and weaker) brother and it was reduced to an exception, the limits and the functioning of which have been firmly controlled by the courts themselves.¹⁹² However, while not too long ago the domain of *international trade* was still seen as the *only area* where arbitration was the dominant method of settling disputes,¹⁹³ more recently, in particular considering the developments in the

¹⁸⁶ Lalive/Poudret/Reymond, p. 270.

¹⁸⁷ See Rigozzi, para. 671.

¹⁸⁸ Schlosser, *Schiedsgerichtsbarkeit*, p. 1 para. 1. This “geographical” dimension is discussed all through the present thesis by its comparative analysis.

¹⁸⁹ Jarrosson, *Notion*, p. 367.

¹⁹⁰ The thesis was also developed that arbitration stays at the origin of State justice. This view is the one of B. Matthias and then particularly M. Wlassak—and their followers (*e.g.* R. Monier and, more recently, A. Magdelain).

¹⁹¹ See Mustill, *History*, p. 43.

¹⁹² Várady/Barceló/von Mehren, p. 38.

¹⁹³ *Ibid.*

fields of sport and investment arbitrations, it has been observed that *arbitration has developed into the most common method for generally settling international disputes*.¹⁹⁴

During this time not only the areas in which arbitration is applied and its functions have changed, but *the consensual character of arbitration has also undergone a transformation*.

2.1. The traditional concept of arbitration

At the outset any decision to make recourse to arbitration was taken *by the parties after the dispute had broken out (compromis arbitral)*. Arbitration had, therefore, a *pure consensual character* with a *peace restoration function*.¹⁹⁵

Arbitration was already known in Mesopotamia.¹⁹⁶ Several examples of conflicts between States were resolved by mediation or arbitration by a third power.¹⁹⁷ Moreover, not only Assyrian merchants of the 19th and 18th centuries B.C. frequently resorted to arbitration, but arbitral procedure was also used in certain areas of family law, in particular in relation to succession.¹⁹⁸ Pre-Islamic Arabia knew arbitration¹⁹⁹ and the institution was later kept on and developed in the Islamic world.²⁰⁰ From the beginning arbitration has been employed in *different areas and in different cultures* and the *issue of differentiating arbitration from similar institutes*²⁰¹ was not unknown.

Not surprisingly arbitration also made its appearance in ancient Greece, even though it was not always easy to distinguish from similar practices such as “*amiable composition*” and conciliation.²⁰² The concern with *re-establishing peace and security in human relations* on the one hand, and the Greek cities’ hermetic approach to jurisdictional questions, on the other, allowed both private and inter-state arbitration to develop into a particularly appreciated and widespread practice which found its apogee

¹⁹⁴ Kaufmann-Kohler/Peter, p. 186.

¹⁹⁵ See Rigozzi, paras 315-316.

¹⁹⁶ See Lafont, p. 557.

¹⁹⁷ *Ibid.*

¹⁹⁸ Lafont, p. 558.

¹⁹⁹ Clay, pp. 3-4.

²⁰⁰ Jakubowski, p. 176.

²⁰¹ See, *e.g.* also Gaurier, pp. 189-223, on the question whether the private dispute resolution in imperial China was arbitration or mediation.

²⁰² Velissaroupoulos-Karakostas, p. 9.

with the restoration of democracy around 400 B.C. when the Athenians enacted a law²⁰³ on private arbitration.²⁰⁴ In particular, Greek cities gave access to the law to persons and property which were on the margins, or outside the scope of the application of the law and thereby protection from the civil courts.²⁰⁵ Therefore, the tendency to ***extend the scope of application of the law and of protection*** by giving the possibility of ***recourse to a neutral dispute resolution forum*** was already established in the past.

However, arbitration's major development came under the Roman Empire.²⁰⁶ From a technical point of view Roman arbitration²⁰⁷ was founded on two conventions:

- the *receptum arbitri*;
- the *compromissum*.²⁰⁸

The arbitral award was definitive and there was no mean of reformation appeal (*ex sententia arbitri ex compromisso ... appellari non posse*).²⁰⁹ However, the ***nature of arbitration was strictly contractual*** and the respect of the arbitral award could only be assured indirectly by providing the *compromissum* with a penal clause permitting, if necessary, recourse to the *actio ex stipulatu* to the winning party.²¹⁰

While Byzantine arbitration was based on the Roman model for this institution, an important characteristic in Byzantium was the implication of members of the Church acting as arbitrators, and the development of parallel arbitration within Canon law²¹¹—the rules for such arbitration were different from the legislative rules.²¹² This ***tendency towards emancipation*** of arbitration ***from*** a dispute resolution system controlled by the ***State*** was therefore also present in the past.

2.2. The modern concept of arbitration

With the coming of the modern State justice system, arbitration had undergone a transformation.²¹³ While the ***history of arbitration*** is built on the ***position of States and their jurisdictions with regard to the acceptance of this alternative mechanism for***

²⁰³ Preserved by Demosthenes 21.94.

²⁰⁴ Velissaroupoulos-Karakostas, pp. 19 *et seq.*

²⁰⁵ See Velissaroupoulos-Karakostas, pp. 9-10.

²⁰⁶ Clay, pp. 6-7.

²⁰⁷ On Roman arbitration, see, *e.g.* de Loynes de Fumichon/Humbert.

²⁰⁸ See Kaser, p. 214.

²⁰⁹ C. 2,55(56),1 (Caracalla 213).

²¹⁰ Rigozzi, para. 317. See also Kaser, p. 214.

²¹¹ On arbitration in Canon law, see, *e.g.* Lefebvre-Teillard.

²¹² Papadatou, p. 349.

²¹³ Rigozzi, para. 318.

solving disputes,²¹⁴ the exclusive exercise of public power on which State justice is based does *not necessarily enter into conflict with arbitration whose origin is purely consensual*.²¹⁵ Indeed in medieval England, where recourse to arbitration was common, there was a healthy and continuous working relationship between judges and arbitrators, and judges in all the King's courts often acted as arbitrators, both informally and formally.²¹⁶ However the relationship between the courts and the arbitral process was much closer under the English system than was the case in mainland Europe where there was the tendency to favour what, in current jargon, would be called "institutional" arbitration.²¹⁷ *Different legal traditions have, therefore, influenced, and they still influence, different perceptions of arbitration.*

Later, the struggle that many legal orders went through to establish a monopoly of the administration of justice in the central political authority left a residual government antagonism towards—and a related tendency to suspect—private tribunals.²¹⁸ Nevertheless, with time the State has begun to develop a judicial control of the awards and to recognise that decisions taken by individuals may under certain conditions have the same effects as judgments taken by its own tribunals: it is the consecration of the *jurisdictional function of arbitration*.²¹⁹

The aftermath of the First World War then saw the rise of idealistic internationalism which provided fertile soil for the *growth of an international spirit in the field of commercial arbitration*.²²⁰ Two features may be particularly mentioned in this context:

- The inauguration of the *ICC*, with its associated Court of Arbitration.²²¹ Indeed, the rule of law in transborder arbitration has been substantially influenced by private arbitration institutions.²²²
- The emergence over the past decades of a *network of international instruments* pertaining to international commercial arbitration, as a result of which arbitration agreements have become reliable, whereas *arbitration awards have become more efficient (more readily enforceable) than court decisions on the international scene*.²²³

²¹⁴ See Bernardini, *Justice arbitrale*, p. 14.

²¹⁵ Rigozzi, para. 318.

²¹⁶ Roebuck, *Sources*, p. 259.

²¹⁷ See Mustill, *History*, pp. 44 *et seq.*

²¹⁸ Várady/Barceló/von Mehren, p. 51.

²¹⁹ Rigozzi, para. 319.

²²⁰ Mustill, *History*, p. 48.

²²¹ *Ibid.*

²²² Carbonneau, *Arbitration*, p. 27. See also, *e.g.* the LCIA.

²²³ Most importantly, the 1958 New York Convention, the 1961 European Convention on International Commercial Arbitration and the 1965 ICSID Convention (Várady/Barceló/von Mehren, p. 39).

In commercial arbitration today the parties mainly agree to make recourse to arbitration *before the dispute has broken out* (generally by inserting an arbitration clause into the main contract), *reducing* therefore *the pure consensual character of arbitration*.²²⁴ Indeed, the acceptance of and recourse to *arbitration* are *often a necessary pre-condition to entry into the international market-place*.²²⁵

Also the *UNCITRAL Model Law's progressive, modern arbitration regime* has had considerable influence on State arbitration laws both through direct adoption or more indirectly.²²⁶ It has been designed to provide States with a highly advanced statutory framework of arbitration law—in effect to make it possible, especially for developing States, to become instantly *supportive of arbitration* and thereby able to participate in transborder commerce.²²⁷

The *tendency towards acceptance and facilitation of arbitration as an essentially party-designed and controlled dispute resolution mechanism*, in full flood as the 1980s began, has continued unabated.²²⁸ In the described development two doctrines, apparently linked, but in fact almost entirely distinct, have come up:

- the concept of a “transnational” procedural law; and
- the concept of “the new *lex mercatoria*”²²⁹ which is concerned with substantive not procedural law.²³⁰

The *need for emancipation* from the State justice system, *per definitionem* national, has, however, *not only been of extreme importance in the context of international trade*, but even more in the domain of international economic relations with the *involvement of national States themselves* as economic actors, where reasons related to neutrality are essential. Furthermore, considerations related to a *speedy resolution* of the disputes²³¹ and of having the most possible *uniform decisions* are important in the field of sport arbitration. Finally, reasons about *efficiency* have led to the consideration of arbitration as an appropriate means to solve, for instance, consumer disputes.²³²

²²⁴ Rigozzi, para. 319.

²²⁵ See also Carbonneau, *Arbitration*, p. 25.

²²⁶ Várady/Barceló/von Mehren, p. 57.

²²⁷ Carbonneau, *Arbitration*, p. 26.

²²⁸ Várady/Barceló/von Mehren, p. 57.

²²⁹ On *lex mercatoria*, see, e.g. Berger, *Law Merchant*; Carbonneau, *Lex mercatoria*; Cremades/Plehn; Dasser; Goldman, *Applicable law, Frontières, Lex mercatoria, Perspectives*; Kahn, *Lex mercatoria*; Kahn, *Pluralisme*; Lando; Lowenfeld; Mustill, *Lex mercatoria*; Paulsson, *Lex mercatoria*.

²³⁰ Mustill, *History*, pp. 51-52.

²³¹ See for the Olympic Games, Kaufmann-Kohler, *Olympics*.

²³² On arbitration of consumer disputes, see, e.g. Brafford.

2.3. New fields of arbitration

Although it is a commonplace to say that arbitration is consensual,²³³ it has been observed that in the new fields of arbitration *there is to a certain extent a decline in the consensual character of arbitration.*²³⁴ In the meantime, however, there is a *general growing consensus with respect to the choice and use of arbitration* as the most common method for settling international disputes.²³⁵

2.3.1. Arbitration based on international treaties

The resolution of international investment disputes has been seen as “new territory for international arbitration”.²³⁶ Indeed, in the many international treaties, of which the best known are the NAFTA and the ICSID, the preferred dispute resolution mechanism is arbitration, whether institutional arbitration²³⁷ or *ad hoc* arbitration.²³⁸ Investment disputes differ in several respects from ordinary commercial disputes,²³⁹ and it has been observed that with investment arbitration the *circumference of arbitration’s scope of application has been widened to include disputes of a mixed political and commercial character.*²⁴⁰ However, the greatest difference to commercial arbitrations is the source of the tribunal’s power.²⁴¹ While commercial arbitrations require an arbitration agreement between the parties, investment arbitration may be possible without such an arbitration agreement in the ordinary sense.²⁴²

An impressive number of investment laws, bilateral investment treaties (BITs),²⁴³ and multilateral investment treaties or instruments (MITIs)²⁴⁴ implement a process which

²³³ Paulsson, *Privity*, p. 234.

²³⁴ Rigozzi, para. 323.

²³⁵ So, *e.g.* also Kaufmann-Kohler/Peter, p. 186.

²³⁶ See Paulsson, *Privity*, p. 234.

²³⁷ For example, arbitration under the auspices of the ICSID, under the ICC Rules or under the SCC Rules.

²³⁸ For example, arbitration under the UNCITRAL Arbitration Rules. See Lalonde, p. 191.

²³⁹ See, *e.g.* Lew/Mistelis/Kröll, paras 28-8 *et seq.*

²⁴⁰ Carbonneau, *Arbitration*, p. 41.

²⁴¹ Lew/Mistelis/Kröll, para. 28-11.

²⁴² *Ibid.*

²⁴³ BITs have proliferated over the last three decades (Lew/Mistelis/Kröll, para. 5-5). At the end of 2006 there were 2,573 BITs (see UNCTAD, Recent developments in international investment agreements (2006-June 2007), IIA Monitor No. 3 (2007), available under:

<http://www.unctad.org/Templates/Startpage.asp?intItemID=2310> (last accessed 22 July 2008).

²⁴⁴ For examples of MITIs, see, *e.g.* Lalonde, pp. 190-191, and Cremades, pp. 160-161.

allows private complainants direct access to arbitration against a State and public authorities, irrespective of the existence of a contractual agreement to that effect.²⁴⁵ Through this new type of investment conventions we have entered the *era of arbitration without contractual relationship* between the parties to the dispute²⁴⁶—or *arbitration without privity*.²⁴⁷ It is nothing short of a revolution of the (traditional) arbitration theory, which postulates that arbitration is the product of a contract: either an arbitration clause for future disputes or an arbitration agreement for existing disputes.²⁴⁸

In the overwhelming majority of the treaties the provisions set forth the consent of each State to the submission of such disputes to *one or more forms of arbitration* specified in the treaty, and, in the event of a dispute with the State, the investor concerned may resort to the appropriate form of *arbitration on the strength of the State's consent* in the treaty.²⁴⁹ The expression “on the strength of the State's consent” denotes the concept of “*advance consent*”²⁵⁰ contained in thousands of BITs by which States offer their consent to investors to refer future investment disputes to arbitration.²⁵¹

The provisions provided in investment laws or treaties by which a State generally agrees to arbitrate investment disputes constitute a *unilateral standing offer to arbitrate* with any party fulfilling the requirements.²⁵² The State gives its *general-abstract consent* to arbitrate.²⁵³ The offer is accepted by the investor, who therefore consents to arbitrate, when it initiates arbitration proceedings against the State.²⁵⁴ *While there is no arbitration agreement in the traditional sense, the resolution of a dispute by private judges without the parties' consent would not be arbitration.*²⁵⁵ Moreover, in investment arbitration a clear and unavoidable attempt to emancipate arbitration from a State justice system is given.²⁵⁶ It has also been said, about this technique, that *it implies consent more than it requires an express and specific manifestation of it.*²⁵⁷ Furthermore, the vast majority of these international instruments have one common feature: the dispute-settlement provisions require the *consent of the State party, before*

²⁴⁵ Lalonde, pp. 189-190.

²⁴⁶ Werner, *Trade Explosion*, p. 6.

²⁴⁷ Paulsson, *Privity*, p. 234.

²⁴⁸ Werner, *Trade Explosion*, p. 6.

²⁴⁹ Teitelbaum, p. 226.

²⁵⁰ See Dolzer/Stevens, p. 132.

²⁵¹ Teitelbaum, p. 226. See also Parra, *ICSID*.

²⁵² Cremades, pp. 160 *et seq.* and Lew/Mistelis/Kröll, para. 28-12.

²⁵³ See under I.5.

²⁵⁴ *Ibid.*

²⁵⁵ Lew/Mistelis/Kröll, para. 5-21.

²⁵⁶ *Ibid.*

²⁵⁷ Stern, p. 241.

*the investor is able to avail itself of one form of arbitration or the other.*²⁵⁸ It is because of this *asymmetry* between the *consent* of investors and the *advance consent* of host States that investment arbitration has also been described as “arbitration without privity”.²⁵⁹

In *investment arbitration* we do not only assist a phenomenon that I would call the “*verticalisation*” of arbitration, but also the *declining importance of the classic “mirror arbitration” scheme*. Whereas the classic theory (commercial arbitration) postulates the equal situation of both contracting parties, in which each of them can initiate arbitration proceedings and each of them, if a defendant, can counterclaim, under the new generation of investment conventions, it is not so: only the aggrieved investor can bring a claim, and whether the defending State can bring a counterclaim is unclear.²⁶⁰ This new reality, under which our *traditional understanding of arbitration is challenged*, has steadily expanded, and it has been observed that it could result in a parallel and autonomous international arbitration framework giving unprecedented power to individual complainants against States.²⁶¹

While in investment arbitration the issue is primarily that parties’ consent to arbitration is normally not expressed in an arbitration agreement in the classical sense, the situation in what in the thesis is called induced arbitration is rather inverse in the sense that the issue of the substantive validity (consent) of the arbitration agreement arises above all.

2.3.2. *Induced arbitration*²⁶²

2.3.2.1. **General**

The doctrine has often raised the question: is it still considered arbitration when a party has certainly *concluded an arbitration agreement, but did not really have a choice other than to do so?*²⁶³ The issue, which in the commercial domain has been *traditionally raised with regard to the arbitral tribunals of the Chambers of*

²⁵⁸ Kaufmann-Kohler/Stucki, *Foreword*, p. I.

²⁵⁹ Teitelbaum, p. 226.

²⁶⁰ Werner, *Trade Explosion*, p. 6. See under V.11.3.3.

²⁶¹ Lalonde, p. 190.

²⁶² I use the expression “induced arbitration” and not “forced arbitration”, because some French authors employ the French diction “*arbitrages forcés*” rather for “mandatory arbitration” (see, e.g. Jarrosson, *Frontières*, p. 20). On the other hand, Rigozzi utilises the diction “*arbitrage forcé*” for what in this thesis is called “induced arbitration”.

²⁶³ Rigozzi, para. 475.

Commerce of those nations that were part of the former Eastern Bloc²⁶⁴ and is still important today in cases relating to the People's Republic of China,²⁶⁵ is also of relevance in the domain of sport arbitration²⁶⁶ as well as in consumer transactions or working contracts arbitrations. In all these domains a cutback of the consensual nature of arbitration can be perceived.

In relation to *sport arbitration* it has, for instance, been observed that when one examines the circumstances of the *purported consent to arbitration, it often appears to have been entirely fictional*.²⁶⁷ However, it is not only the *consensual basis*²⁶⁸ of arbitration which has been questioned. Indeed, considering that the procedures devised by most sports federations appear to be so connected to the organisation that no outsider has the remotest chance of standing on an equal footing with his adversary—which is of course the federation itself. It has also been argued that to speak of a *consensual process* seems an abuse of language.²⁶⁹

2.3.2.2. Arbitration based on an arbitration agreement contained in articles of association

Arbitration can result from the acceptance of pre-existing articles of association of legal entity or from a set of rules governing joint ownership that contain an agreement to arbitrate.²⁷⁰ Such arbitration should, however, not be confused with decisions taken by the bodies of legal entity, in particular by sports or professional associations.²⁷¹ A *typical example* of arbitration based on an agreement contained in articles of association is *arbitration before the Court of Arbitration for Sport (CAS)*.²⁷² Indeed, the articles of association of the sport federations often provide for appeal to the CAS²⁷³ against their decisions.²⁷⁴

In reality the problem in this context is less the circumstance that arbitration is based on articles of association, but rather the fact that the *athletes* who wish to participate in

²⁶⁴ Goldman, *RCADI*, p. 353.

²⁶⁵ On this issue, see under IV.1.

²⁶⁶ See Rigozzi, para. 475.

²⁶⁷ Paulsson, *Sport disputes*, p. 361.

²⁶⁸ See the expression used by Paulsson, *Sport disputes*, p. 361.

²⁶⁹ Paulsson, *Sport disputes*, p. 361.

²⁷⁰ See also Poudret/Besson, para. 5.

²⁷¹ *Ibid.*

²⁷² See also Rigozzi, para. 473.

²⁷³ On the appeal arbitration procedure before the CAS, see Articles R47 *et seq.* CAS Code.

²⁷⁴ Poudret/Besson, para. 5.

sport competitions, especially at a professional level, *will not have any other choice than to adhere to the articles of association of a particular sport federation.*²⁷⁵ In other words, it is again the problem of what I have called “induced” arbitration.²⁷⁶

2.3.2.3. Comments

The *question* which seems to be of importance here is *whether in the presence of an arbitration agreement it is really necessary to examine the circumstances in order to qualify arbitration as a consensual dispute resolution mechanism.* I do not think so. Indeed, also in commercial arbitration there may be situations in which the examination of the circumstances would lead to the conclusion that consent is fictional. This could, for instance, be the case in a monopolistic market where an enterprise necessarily has to buy goods from a monopolistic supplier, and the two parties have concluded an arbitration agreement “suggested”²⁷⁷ by the monopolist. In such situations consent might have to be considered far more fictional than in circumstances where, for example, a consumer signs an arbitration agreement contained in a contract of adhesion for the buying of goods whose market structure is characterised by the presence of (quasi) pure competition.

In the *United States* the courts consider that the *economic supremacy of one of the parties* should be *considered a quite normal circumstance.*²⁷⁸ Indeed, it has been observed that the dramatic shift in attitude in the US courts towards arbitration and towards the enforceability of contracts to arbitrate makes it almost certain that even adhesive contracts imposed on persons with no realistic alternatives but to sign them will be treated as enforceable agreements to arbitrate, at least in any situation in which the arbitration process meets at least minimal standards of due process.²⁷⁹

The *issue here* is essentially one of the *abuse of a dominant position in a particular market*, or of other behaviours which can be taxed as *anti-competitive practices* leading to such a dominant position, and it should therefore be *considered by competition or antitrust legislations.* In fact, it cannot be that, for instance in cases of consumer arbitration, arbitration as an alternative dispute resolution system has a changeable

²⁷⁵ See also Rigozzi, para. 474.

²⁷⁶ *Ibid.* Rigozzi speaks of “*arbitrage forcé*”.

²⁷⁷ Or induced.

²⁷⁸ Rigozzi, para. 813.

²⁷⁹ Haagen, p. 3.

qualification depending on the market structure of the good or service that a consumer is buying. The *question about qualification should only depend on the existence of* what is considered the cornerstone of arbitration, *i.e.* an *agreement to arbitrate*, from the *functions of which arbitration fulfils* and from the way in which this is done (therefore, the *meeting of minimal standards of due process*).

On the other hand, issues regarding *the validity of arbitration agreements* may arise. Indeed, the importance of the expression “the circumstances of the purported consent” used by Paulsson, when speaking about the fact that consent in sport arbitration is fictional,²⁸⁰ is that it implies that *the focus on consent is shifted from the question about the qualification of arbitration as a consensual dispute resolution mechanism to one of the validity of the arbitration agreement*. With respect to the validity of arbitration agreements, Rigozzi has rightly observed that a tendency can be perceived to minimise the role of consent when looking at the validity of the arbitration agreement and considering the situations in which one party can legitimately force another party to accept arbitration.²⁸¹ This evolution can be seen in Germany where the old section 1025(2) ZPO²⁸² received a much more restrictive interpretation by the courts and was then abolished.²⁸³

2.3.3. Mandatory arbitration

In the domain of mandatory or compulsory arbitration *consent to arbitration becomes completely irrelevant*. In fact, it is the State itself that decides that some disputes have to be compulsorily submitted to arbitration. This type of arbitration is *not based on an arbitration agreement between the parties*, but on a legislative act imposing upon them that the dispute has to be resolved through arbitration.²⁸⁴

While mandatory arbitration was present in the past,²⁸⁵ it has been noticed that there is a growing tendency toward compulsory arbitration forms and also the phenomenon of using the word “arbitration” to label dispute resolution mechanisms which are not based

²⁸⁰ Paulsson, *Sport disputes*, p. 361.

²⁸¹ Rigozzi, para. 813.

²⁸² According to old section 1025(2) ZPO if one party took advantage of his dominant economic or social position to procure the other party's agreement to arbitration or to obtain, with respect to possible proceedings, a superior position (*Übergewicht*), especially in the selection of arbitrators, the agreement was unenforceable (see Várady/ Barceló/von Mehren, p. 54).

²⁸³ Rigozzi, para. 813.

²⁸⁴ See also Rigozzi, para. 326, and Rubino-Sammartano, *Arbitrato interno*, p. 5.

²⁸⁵ Compulsory arbitration was, *e.g.* already very developed during the French Revolution (see Huys/Keutgen, No. 7, pp. 5-6 with references).

on parties' consent.²⁸⁶ A "new field" where this evolution can well be seen is sport arbitration.²⁸⁷ Indeed, the trend of creating arbitration mechanisms through legislative acts for resolving sport disputes seems to generalise. Although here arbitration is not based on parties' consent, there is no doubt that *the jurisdictions of the States, whose law imposes recourse to arbitration in the field of sport, will consider these proceedings as true arbitrations*.²⁸⁸ The most significant area in sport with compulsory arbitration is now the World Anti-Doping Code (WADA-Code)²⁸⁹ which designates the CAS as the exclusive competent instance to hear appeals in cases relating to doping arising from competition in an international event or in cases involving international-level athletes.²⁹⁰ In fact, with the transposition of this provision into different national legislations, arbitration before the CAS is *de facto* compulsorily provided for by the law.²⁹¹

Following the classical characterisation of arbitration as a consensual dispute resolution mechanism, in the legal doctrine it has been considered that arbitration which is compelled by the law is not true arbitration, but rather a type of "*jurisdictions d'exception*" where the power to judge has been delegated by the State and for which the legislator has decided to apply partly or completely the regime of arbitration.²⁹² For Jarrosson the fact that the denomination "arbitration" is used while renouncing the parties' consent to arbitration excludes the qualification of arbitration.²⁹³

On the other hand, scholars have remarked that compulsory arbitration does exist and that, nationally, it is used as a supposedly cheap and informal method of resolving disputes in particular areas.²⁹⁴ In the doctrine the view has been expressed that as far as the law gives freedom to the parties to nominate their arbitrators and decide about the procedure to be applied in the course of the proceeding, compulsory arbitration represents a special type of arbitration.²⁹⁵ In order to back this view, it has also been argued that by rendering compulsory arbitration in a particular domain *the State includes in some way this type of arbitration in the application field of the law of*

²⁸⁶ See Jarrosson, *Frontières*, p. 15.

²⁸⁷ See, e.g. in the United States the *Ted Stevens Olympic and Amateur Sports Act*, in particular its section 220509 of the United States Code.

²⁸⁸ See Rigozzi, para. 470.

²⁸⁹ The World Anti-Doping Code is mandatory for the whole Olympic Movement (see Rule 44 of the Olympic Charter).

²⁹⁰ See Article 13.2.1 WADA-Code.

²⁹¹ Rigozzi, para. 472.

²⁹² Jarrosson, *Frontières*, p. 20.

²⁹³ See Jarrosson, *Frontières*, pp. 20-21.

²⁹⁴ Redfern/Hunter/Blackaby/Partasides, para. 3-01, footnote 3.

²⁹⁵ Rubino-Sammartano, *Arbitration*, pp. 27-28.

*arbitration, so that the question of qualification as arbitration in the sense of this legislation has not got real scope.*²⁹⁶ Furthermore, it has been sustained that in the sport field, while arbitration is imposed by the State, it is not a lesser *private dispute resolution mechanism*. Indeed, the AAA arbitrators which are empowered by the *Ted Stevens Olympic and Amateur Sports Act*²⁹⁷ to decide on the participation on the Olympic Games remain *individuals which are not vested with any prerogative of public power.*²⁹⁸

It appears that the different positions on how mandatory arbitration should be considered also have something to do with the juridical (only juridical?) nature of arbitration.

3. THE JURIDICAL NATURE OF ARBITRATION

Four theories have been suggested with respect to the juridical nature of arbitration: the contractual, the jurisdictional, the mixed or hybrid, and the autonomous theory. These theories aim to show how the international arbitration process, with extensive detachment but with some recognition and support required from the national legal system, can be explained in light of the sovereignty and control of the national legal order, or, in other words, how the legal system relates to the arbitration mechanism.²⁹⁹

No one viewpoint has received universal support in theory or practice, and even at a regional level States treat the juridical nature of arbitration in a different manner.³⁰⁰

Nevertheless, it has been observed that:

*“La principale différence entre le modèle américain et le modèle européen de l'arbitrage tient cependant à ce qu'aux Etats-Unis, l'aspect conventionnel est de loin prédominant”.*³⁰¹

These theories ignore, or at least do not fully correspond with, what happens in the real world of international commercial arbitration. However, one needs to consider these theories and their effect on contemporary international arbitration practice, because

²⁹⁶ Rigozzi, para. 471.

²⁹⁷ See sections 220501 *et seq.* of the United States Code.

²⁹⁸ Rigozzi, para. 480.

²⁹⁹ Lew/Mistelis/Kröll, paras 5-4 *et seq.*

³⁰⁰ *Ibid.*

³⁰¹ Rau/Pédamon, p. 452.

there may be practical consequences in following one rather than another.³⁰² Nevertheless, as it is not fully settled whether arbitration is of a contractual, jurisdictional or mixed nature, one should not unduly favour the contractual over the jurisdictional element.³⁰³

3.1. The jurisdictional theory

The jurisdictional theory is based on the quasi-judicial role of the arbitrator, as an alternative to the local judge and with the acceptance of the local law, and relies on State power to control and regulate arbitrations which take place within its jurisdiction.³⁰⁴

In the first half of the 20th century Lainé and other French authors were particularly concerned with discerning whether an arbitral award rendered abroad had to be enforced in accordance with the procedure applicable to foreign judgments or that used for contracts.³⁰⁵ While Lainé accepted that the source of the arbitrator's authority was the parties' agreement, he sustained that the activity performed by the arbitrators was that of judging and that, consequently, the arbitral award was not a contract but rather a judgment.³⁰⁶

In *Del Drago*³⁰⁷ it was then pointed out that an arbitral award (like a judgment) is not self-executing: if not voluntarily given effect by the parties it will have to be enforced by the courts.³⁰⁸ So at least at the stage of enforcement it is evident that the jurisdictional theory stands only with the support of the latter.³⁰⁹

Later, Pillet suggested that once the arbitrators had been appointed, as long as they did not decide an issue they had not been asked to, the arbitration agreement was completely irrelevant.³¹⁰ The latter's sole function was to put the arbitration in motion,

³⁰² See also Lew/Mistelis/Kröll, paras 5-6 and 5-7.

³⁰³ Mistelis, *Lex arbitri*, p. 159.

³⁰⁴ Lew/Mistelis/Kröll, paras 5-9 and 5-11.

³⁰⁵ Samuel, *Jurisdictional Problems*, p. 51.

³⁰⁶ Lainé, pp. 650-653. See also Samuel, *Jurisdictional Problems*, p. 53.

³⁰⁷ CA Paris, 10 December 1901, *Clunet* 314 (1902). See also the discussion in Rubellin-Devichi, para. 10-11; Schlosser, *Schiedsgerichtsbarkeit*, para. 41.

³⁰⁸ Lew/Mistelis/Kröll, para. 5-12.

³⁰⁹ *Ibid.*

³¹⁰ Pillet, p. 537.

after which the proceedings developed a life of their own.³¹¹ However, Pillet's strict separation of the agreement to arbitrate and the award was criticised, because it reflects neither arbitral practice nor arbitration laws.³¹²

Today, Article V(1)(d) NYC illustrates clearly the *importance of the parties' agreement with respect to the arbitral procedure*.³¹³ Therefore, it has been underlined that right up until the delivery of the final award, the arbitration agreement exerts a powerful influence on the proceedings.³¹⁴

A second line of thought, of the followers of the jurisdictional theory, stressed the source of the arbitrator's powers as being the State rather than the parties' arbitration agreement.³¹⁵ This position is well illustrated by Motulsky:

*“Les arbitres sont des particuliers, auxquels l'ordre juridique permet d'exercer une fonction qui est en principe réservée à l'Etat”.*³¹⁶

This leads to Mann's famous formula, “*lex facit arbitrum*”.³¹⁷ At the heart of Mann's view is the premise that³¹⁸ every sovereign State is entitled to prohibit or permit the carrying-on of any activity within its territory, and that, therefore, each arbitral proceeding is subject to the law where it takes place.³¹⁹ ***One implication of Mann's argument is that although the arbitrator is usually required to obey the will of the parties***, as expressed in their arbitration agreement, this is *due solely to* the fact that *the lex loci arbitri*³²⁰ stipulates, in the particular case, that he should do so.³²¹ Following Mann's view, arbitration detached from all municipal laws is a myth, or at least only exists by virtue of permission granted by the *lex loci arbitri*.³²² On the other hand, it has been observed that Mann gives insufficient consideration to the role of the parties' arbitration agreement.³²³

³¹¹ Pillet/Niboyet, p. 724.

³¹² See Rubelin-Devicchi, p. 17.

³¹³ Samuel, *Jurisdictional Problems*, p. 54.

³¹⁴ *Ibid.*

³¹⁵ See also Samuel, *Jurisdictional Problems*, p. 55.

³¹⁶ Motulsky, p. 14. See also Samuel, *Jurisdictional Problems*, p. 55.

³¹⁷ Mann, p. 159.

³¹⁸ Possibly, subject to the rules of public international law.

³¹⁹ Samuel, *Jurisdictional Problems*, pp. 56-58.

³²⁰ On the role of the *lex loci arbitri* in international commercial arbitration, see also Goode; Mistelis, *Lex arbitri*.

³²¹ See Mann, pp. 160 *et seq.*

³²² *Ibid.*

³²³ See Samuel, *Jurisdictional Problems*, pp. 59-60.

In practice the jurisdictional theory can most clearly be seen in countries where arbitration institutions were/are attached to the national Chambers of Commerce and, thus, retain a close connection with the State, as was/is the case in several former socialist countries and some others considered to be emerging markets.³²⁴ Moreover the theory finds expression in a number of legal issues relating to the arbitration process, such as the immunity of arbitrators, or in the provisions about the independence, impartiality and neutrality of arbitrators.³²⁵

3.2. The contractual theory

The contractual theory emphasises that arbitration has a contractual character: it has its origins in and depends, for its existence and continuity, on the parties' agreement.³²⁶ The exponents of this view *deny the primacy or control of the State in arbitration* and argue that the very essence of arbitration is that it is *“created by the will and consent of the parties”*.³²⁷

Originally, the supporters of the contractual theory considered that an award was a contract made or completed by the arbitrators as agents (or *“mandataires”*) of the parties.³²⁸ However, in his opinion for the court in the *Del Drago* case,³²⁹ Lainé showed the weaknesses in the classical version of the contractual theory.³³⁰

The French *Cour de cassation* in *Roses*³³¹ later formulated the *ratio* of the contractual theory in the following way: “Arbitral awards which rely on an arbitration agreement constitute a unit with it and share with it its contractual character”.³³² Therefore, without subscribing to the idea that the arbitration award is a contract made by the arbitrators who act as agents of the parties, the *Cour de cassation* stated emphatically that arbitration has a contractual starting point and that the award is, in principle, of a contractual nature too.³³³

³²⁴ See Lew/Mistelis/Kröll, para. 5-15.

³²⁵ *Ibid.*

³²⁶ Lew/Mistelis/Kröll, para. 5-16.

³²⁷ See US judgment, *Reily v. Russel*, 34 Mo 524 (1864) 528 (*ibid.*).

³²⁸ See, e.g. Merlin, pp. 139-150.

³²⁹ CA Paris, 10 December 1901, Clunet 314 (1902).

³³⁰ See in particular Lainé, pp. 650 *et seq.*

³³¹ Cas., 27 July 1937, *Roses v. Moller et Cie*, I Dalloz 25 (1938). See also discussion in Klein, 47 Rev. crit. dip. 255 (1958) 255-256; Rubellin-Devichi, paras 12-13, 36; Schlosser, *Schiedsgerichtsbarkeit*, para. 41.

³³² Samuel, *Jurisdictional Problems*, p. 36.

³³³ Lew/Mistelis/Kröll, para. 5-17.

Taking into account Lainés' critique, a number of 20th century scholars³³⁴ have, nevertheless, argued that arbitration is still essentially private and/or contractual in nature, belonging to the law of obligations rather than that of procedure.³³⁵ In particular for Klein, arbitration consists of a number of contractual acts, tightly linked to each other.³³⁶ But also in more recent times the contractual nature of arbitration has been stressed:

“In drafting the award the arbitral tribunal needs to have in mind the people who are to read it. The parties come first. The award is intended for them. They contracted for arbitration. The award is the result of that contract or the relationship or circumstances that led to the arbitration”.³³⁷

However, while this last passage shows the importance of the parties and of the contract to arbitrate, the words “or the relationship or circumstances that led to the arbitration” brings the awareness of the *declining importance of the contract intended in the classical sense* to light. Yet, the declining importance of the contract to arbitrate intended in the traditional sense goes hand in hand with the *increasing significance of the question on consent to arbitration*—this is independently from the fact of whether the consent is expressed in a classical arbitration agreement or not.

In the past Merlin³³⁸ and Foelix,³³⁹ when considering the arbitral award as a contract, regarded compulsory arbitration as outside their definition.³⁴⁰ Also, more recently, it has been reaffirmed that the resolution of a dispute by private judges without the parties' consent is not arbitration.³⁴¹ Or, with the words of Jarrosson:

“Quant à l'origine volontaire de la mission de l'arbitre, elle est, elle aussi, essentielle. Les arbitrages forcés ne sont donc pas de véritables arbitrages, mais une variété de juridictions d'exception, En bref, s'affranchir de la volonté des parties pour le recours à l'arbitrage exclut la qualification d'arbitrage”.³⁴²

Moreover, considering investment arbitration, it has been suggested that we are now in an *era of arbitration without contractual relationship between the parties to the*

³³⁴ See, e.g. Klein, pp. 49 *et seq.* and pp. 186 *et seq.*

³³⁵ Samuel, *Jurisdictional Problems*, pp. 39 *et seq.*

³³⁶ *Ibid.*

³³⁷ Lloyd/Darmon/Ancel/Dervaird/Liebscher/Verbist, p. 27.

³³⁸ Merlin, p. 139.

³³⁹ Foelix, pp. 463 *et seq.*

³⁴⁰ Samuel, *Jurisdictional Problems*, p. 35.

³⁴¹ See Lew/Mistelis/Kröll, para. 5-21.

³⁴² Jarrosson, *Frontières*, pp. 20 *et seq.*

*dispute*³⁴³—or *arbitration without privity*.³⁴⁴ This tendency is well illustrated in the “unilateral commencement of proceedings” provided for in the ICSID Convention, as well as in certain bilateral treaties and national investment laws, the NAFTA and the Energy Charter Treaty.³⁴⁵ However, it was rightly observed that *although there is no arbitration agreement in the traditional sense, the resolution of a dispute by private judges without the parties’ consent is not arbitration*.³⁴⁶

On the other hand, in some jurisdictions, particularly in the United States and France, the contractual component in commercial arbitration is still very important. Indeed, in the United States while the double nature—contractual and jurisdictional—of arbitration is perfectly admitted, it has been observed that the main difference between the American approach and the European one is that in the United States the contractual aspect is by far predominant.³⁴⁷

3.3. The mixed/hybrid theory

Elements of both the jurisdictional and the contractual theory are to be found in modern law and practice of international commercial arbitration. The basic idea of the mixed/hybrid theory developed by Sauser-Hall is well illustrated by this passage:

“Bien que puissant son efficacité dans l’accord des parties qui se manifeste par le contrat d’arbitrage, il [l’arbitrage] a un caractère juridictionnel impliquant l’application de règles de procédure”.³⁴⁸

Sauser-Hall treated the arbitration agreement as similar to an exclusive jurisdiction clause, in that the decision-making powers of the municipal courts were substituted for those of the arbitrators.³⁴⁹ As a result, the conditions for the validity of the arbitration agreement depended essentially on private law, but procedural law applied to the removal of national court jurisdiction and the judging of the dispute involved in the arbitral process.³⁵⁰ According to the mixed theory we have, therefore, a private justice system created by contract.³⁵¹ Or, as Motulsky put it:

³⁴³ Werner, *Trade Explosion*, p. 6.

³⁴⁴ Paulsson, *Privity*, p. 234.

³⁴⁵ Lew/Mistelis/Kröll, para. 5-21.

³⁴⁶ *Ibid.*

³⁴⁷ Rau/Pédamon, p. 452.

³⁴⁸ Sauser-Hall, p. 471.

³⁴⁹ See Sauser-Hall, p. 531.

³⁵⁰ Sauser-Hall, p. 552.

³⁵¹ Lew/Mistelis/Kröll, para. 5-26.

“*L'arbitre est un juge privé*”.³⁵²

Klein and Rubellin-Devichi rejected the use of the exclusive jurisdiction clause analogy, arguing that the arbitral clause created a private jurisdiction as well as excluding that of the municipal courts.³⁵³ Moreover, Klein and Rubellin-Devichi have also criticised Sauser-Hall for separating the contractual and procedural elements of arbitration.³⁵⁴ On a purely practical level, the disadvantage of this separation of the arbitration agreement from the procedure is, as Mustill (then) J. pointed out, “that this piles up the proper laws absurdly high”, capable of producing four different legal systems which have to be considered.³⁵⁵

Subsequent followers of the mixed theory, such as Motulsky,³⁵⁶ have toned down Sauser-Hall’s distinction of the contractual and procedural aspects of arbitration, contenting themselves with indicating the predominance of the contractual features at the beginning of the arbitral process, and the procedural matters once the arbitration proceeding has begun.³⁵⁷

An effect of the hybrid or mixed theory is to acknowledge the strong, though not overwhelming, connection between arbitration and the place where the tribunal has its seat.³⁵⁸ While he has also been criticised for doing so, Sauser-Hall believed in submitting arbitration to the laws of its seat.³⁵⁹ The main reasons which have been individuated for giving the *lex loci arbitri* such prominence are: that the arbitrator’s right to make binding adjudications derives from a delegation by the State of its exclusive powers in this field, that every act is subject to the law in force where it occurs, and that, in the vast majority of cases, the application of the law of the seat and the use of its courts works more efficiently and justly than any other system.³⁶⁰

It has been argued that while the *consensual nature of arbitration is instrumental in initiating arbitration proceedings*, after proceedings have commenced, the parties have

³⁵² Motulsky, p. 46.

³⁵³ Klein, p. 267; Rubellin-Devicchi, p. 95.

³⁵⁴ See Klein, pp. 200-201; Rubellin-Devicchi, pp. 17-18, 29, 88-89.

³⁵⁵ *Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1981] 2 Lloyd's Rep. 446 at p. 455. As Samuel, *Jurisdictional Problems*, footnote 200 at p. 62, pointed out, this case shows how under Sauser-Hall’s scheme, which is essentially that adopted in England, four different laws may be applicable, namely the *lex fori*, the proper law of the main contract, the proper law of the arbitration agreement and the procedural law of the arbitration. See also Rubellin-Devicchi, p. 111, for a similar view.

³⁵⁶ See in particular Motulsky, p. 31.

³⁵⁷ Samuel, *Jurisdictional Problems*, p. 62.

³⁵⁸ Lew/Mistelis/Kröll, para. 5-26.

³⁵⁹ Samuel, *Jurisdictional Problems*, p. 63.

³⁶⁰ Sauser-Hall, pp. 531 *et seq.*

only limited autonomy and the arbitral tribunal is empowered to make important decisions.³⁶¹ On the other hand, it was also rightly observed that the *parties' contract operates right up to the time the award is enforced*.³⁶² Thus, *both the contractual origin and the jurisdictional function have an important influence on arbitration*. Nowadays, the mixed theory still influences the way of describing the chronological course of the international commercial arbitration process:

“International commercial arbitration is a *hybrid*. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award that has binding legal force and effect and which, on appropriate conditions, the courts of most countries of the world will recognise and enforce. The private process has a public effect, implemented with the support of the public authorities of each state and expressed through its national law”.³⁶³

In conclusion, it can be observed that such hybrid situations *de facto* exist, as can be seen in the cohabitation of the jurisdictional approach of the New York Convention with the contractual approach followed by French law³⁶⁴ or in the United States.³⁶⁵

3.4. The autonomous theory

From the 1960s a growing disenchantment with the traditional way of analysing arbitration in terms of contract and jurisdiction has led some jurists to look beyond the structure of the arbitration to its social and economic context.³⁶⁶ The autonomous theory considers that arbitration evolves in an emancipated regime and, thus, has an autonomous character.³⁶⁷ Racine considers that autonomy is present at each stage of the arbitral process with the autonomy of the arbitration clause, the autonomy of the applicable law and the autonomy of the arbitral award.³⁶⁸

The theory was originally developed by Rubellin-Devichi who rejected the mixed theory on the basis that the concepts of contract and jurisdiction are “*antinomiques*” and observed that:

³⁶¹ Lew/Mistelis/Kröll, para. 5-22.

³⁶² Samuel, *Jurisdictional Problems*, p. 62.

³⁶³ Redfern/Hunter/Blackaby/Partasides, para. 1-19.

³⁶⁴ Lew/Mistelis/Kröll, para. 5-26.

³⁶⁵ See Rau/Pédamon.

³⁶⁶ Samuel, *Jurisdictional Problems*, p. 67.

³⁶⁷ Lew/Mistelis/Kröll, para. 5-27.

³⁶⁸ Racine, p. 311.

“Or l'arbitrage assume une fonction propre, en droit interne comme en droit international. ... Ce rôle particulier fait de l'arbitrage une institution autonome étrangère au contrat comme à la juridiction. ..., il faut admettre, croyons-nous, que sa nature n'est ni contractuelle, ni hybride, mais autonome”.³⁶⁹

She argued that the *jurisdictional and contractual features of arbitration are so interconnected that it is impossible and undesirable to try to separate the procedural and contractual parts of it*; moreover, since no distinct segment of the arbitral process is strictly one or the other, it would distort the nature and hinder the development of arbitration to apply the rules relating to either procedure or contract to any part of the arbitral process.³⁷⁰ Even the award, the jurisdictional element of arbitration par excellence, betrays its contractual origins when, as is often the case, the giving of reasons is dependent on the agreement of the parties.³⁷¹ Therefore, Rubellin-Devichi remarked:

“Il est hors de question d'appliquer au compromis le régime des contrats et à la sentence celui des jugements. La sentence n'est pas un jugement, le compromis n'est pas un contrat comme les autres”.³⁷²

According to Rubellin-Devichi *arbitration has to be seen as a whole rather than in terms of its jurisdictional or contractual parts*. In so doing the *emphasis should be less on the structure of the institution than on its use and purposes, and arbitral law has to fulfil users' expectations*.³⁷³ To Rubellin-Devichi, all that the mixed theory³⁷⁴ achieved was to make arbitration and its rules “proteiforme” or infinitely variable.³⁷⁵ It has also been rightly observed that autonomy does not mean independence, and that it is impossible to conceive autonomy as full. Consequently, autonomy is a question of degree and it would be wrong to think that arbitration is or is not autonomous.³⁷⁶ Indeed, Racine expressed the view that *arbitration can be more or less autonomous*.³⁷⁷

Rubellin-Devichi sees arbitration as one of the many instruments of the international legal order, one of whose functions is to develop the *lex mercatoria*.³⁷⁸ While Samuel remarked that the continuing popularity of clearly localised arbitration organisations

³⁶⁹ Rubellin-Devichi, pp. 363 *et seq.*

³⁷⁰ *Ibid.*, and p. 17.

³⁷¹ Samuel, *Jurisdictional Problems*, p. 68.

³⁷² Rubellin-Devichi, p. 17.

³⁷³ See Rubellin-Devichi, p. 18.

³⁷⁴ On the mixed/hybrid theory, see before under II.3.3.

³⁷⁵ Rubellin-Devichi, p. 364.

³⁷⁶ Racine, p. 308.

³⁷⁷ See Racine, p. 308.

³⁷⁸ Rubellin-Devichi, pp. 123-128.

tends to refute Rubellin-Devichi's view,³⁷⁹ on the other hand, it has been rightly observed that the autonomous theory has the advantage that it is compatible with the modern forms of non-national, transnational and delocalised arbitration, as it does not attach too much value to the seat of arbitration and its law.³⁸⁰ In particular, Goldman argued that:

*“toute recherché d'un système de rattachement correspondant à la nature de l'arbitrage débouche sur l'inéluctable nécessité d'un système autonome, et non national”.*³⁸¹

Rubellin-Devichi also believes that ***complete autonomy of the will is necessary for the full development of arbitration.***³⁸² By giving the parties the maximum freedom of choice, user expectations will be satisfied and arbitration will prosper as an institution.³⁸³

Other scholars³⁸⁴ have also followed a ***more functional approach*** in explaining the nature of arbitration. However, it has been observed that the major problem here is that empirical data which would cast some light on the functions of arbitration is limited and often quite unrepresentative of the arbitral industry as a whole.³⁸⁵ Recently, however, efforts have been made to have more representative surveys.³⁸⁶ Nonetheless, as has been pointed out, it is also necessary to know what arbitration is from a structural angle before one can design rules to fulfil its needs.³⁸⁷ The ***functional view leads to focus arbitration more on the users (“to reflect the market place”³⁸⁸) and on the purposes.*** This is well reflected in the following passage:

“International arbitration has developed because ***parties*** sought a flexible, non-national system for the regulation of their commercial disputes. ***They*** wanted their agreement to arbitrate to be respected and enforced; ***they*** envisaged fair procedures, fashioned according to the characteristics of the particular case but not copying any national procedural system; ***they*** expected the arbitrators would be impartial and fair; ***they*** believed the ultimate award would be final and binding, and ***they*** presumed that it would be easily enforceable. Arbitration, organised the way ***they*** considered it appropriate, is how the ***parties*** have decided to determine disputes between them”.³⁸⁹

³⁷⁹ Samuel, *Jurisdictional Problems*, p. 72.

³⁸⁰ Lew/Mistelis/Kröll, para. 5-29.

³⁸¹ Goldman, *RCADI*, p. 350.

³⁸² See Rubellin-Devichi, pp. 118-119.

³⁸³ Rubellin-Devichi, pp. 364-365.

³⁸⁴ See, e.g. David, *Arbitration*, p. 82; Stone, pp. 162-163.

³⁸⁵ Samuel, *Jurisdictional Problems*, p. 71.

³⁸⁶ See the *PWC/Queen Mary survey 2006*. On the results of the 2006 survey, see Mistelis, *Research Report*. A second survey has then been concluded in 2008 (see *PWC/Queen Mary survey 2008*).

³⁸⁷ Samuel, *Jurisdictional Problems*, p. 70.

³⁸⁸ Expression used by Lew/Mistelis/Kröll, para. 5-33.

³⁸⁹ Lew/Mistelis/Kröll, para. 5-30.

Luhmann observed, when speaking about legal systems, that people who do not work in the system appear as “clients”—thus the main question becomes how the system serves its client.³⁹⁰ Arbitration has a distinctive element: *the users-oriented perspective is supported by the arbitration’s fundamental principle of party autonomy*. On the other hand, it has to be questioned how far-reaching party autonomy is in types of arbitration which are not commercial. Have investors, in the case of investment arbitration, athletes, in the case of sport arbitration, or consumers, in the case of consumer arbitration, really the same extent of party autonomy?

3.5. Comments

Observing that the traditional theories attempting to explain the juridical nature of arbitration have been developed focusing on (international) commercial arbitration, it may be asked whether with the *increasing use and importance of arbitration in other fields* (in particular investment arbitration and sport arbitration) *other approaches to describe the phenomenon “arbitration” may be useful*. For *traditional theories* it can be said that the *relationship between State and arbitration* is of central importance, in these *further possible approaches* the fact that *arbitration can be used in different fields* is of major significance. The *scope for our purpose is*, however, primarily *to show the importance of different possible approaches for explaining the relationship between consent and forms of arbitration* which are not commercial and based on a classical arbitration agreement.

3.5.1. Legal pluralism

It has been argued that the best—and perhaps only—manner to justify in theory an “own and autonomous legitimacy” of international commercial arbitration is legal pluralism.³⁹¹ Following legal pluralism all social bodies may be the source of a legal order and not only the State.³⁹² Moreover, in a pluralist approach the recognition of such orders by the State is not a condition of their existence.³⁹³ This presupposes a re-thinking of the traditional State-centric paradigm of law making and a shift towards a

³⁹⁰ Luhmann, p. 227.

³⁹¹ Rigozzi, para. 342.

³⁹² See Francescakis, Preface; Kahn, *Pluralisme*, p. 99.

³⁹³ Teubner, *Legal Pluralism*, pp. 278 *et seq.*

paradigm of spontaneous creation of law by the international business community.³⁹⁴ The mercantile order is created, elaborated by the enterprises which control international exchanges, by those that belong to the industrial sector and control the production unities, by the banks which conduct the monetary and financial flows.³⁹⁵

Rigozzi suggested that there is a *distinct legal order for each type of arbitration*.³⁹⁶ The notion of arbitral legal order would then cover an ensemble of juridical principles which are necessary and sufficient for the existence of arbitration.³⁹⁷ The *arbitral legal order would have its source in the will of the parties*, and this independently from all national reference.³⁹⁸ Rigozzi tries with the concept of arbitral legal order, which is autonomous from the national legal orders, to reconcile the contractual origin of arbitration, its jurisdictional function and its autonomous character with respect to the State legal order.³⁹⁹

It has also been observed that the development in recent years of the system of arbitration has been of particular efficacy as an instrument to bypass the State and interstate juridical orders, thereby possibly breaking the institutional obstacle—which could have been represented by the State or the international tribunals competent in the domain of the international economic relations pursuit by private persons—towards the idea of the existence of a *lex mercatoria*.⁴⁰⁰

In the field of sport it is understandable that sport organisations are seduced by the idea of making recourse to arbitration for guaranteeing in a certain way the tightness of the juridical order of sport.⁴⁰¹ Indeed, while the field of (international) sport arbitration is different from arbitration of international commercial disputes—because of the object of the dispute—on the other hand it is similar because of the *inherent transnationality*.⁴⁰²

In investment arbitration *the system of arbitration has even been developed by the States themselves* with the conclusion of BITs and MITs. Thus, the States created a system of dispute resolution which is alternative to the State courts. The investor “of the other State” may then accept this other alternative dispute resolution system or not. Sometimes, the investor has even to choose a method of dispute resolution *ab initio*,

³⁹⁴ Lynch, p. 28, footnote 136.

³⁹⁵ Kahn, *Pluralisme*, p. 100.

³⁹⁶ Rigozzi, para. 344.

³⁹⁷ Coipel-Cordonnier, p. 16.

³⁹⁸ Clay, pp. 215 and 218.

³⁹⁹ Rigozzi, para. 345.

⁴⁰⁰ See Kahn, *Pluralisme*, p. 103.

⁴⁰¹ Rigozzi, para. 343.

⁴⁰² See also Rigozzi, para. 343.

which precludes him from subsequently re-litigating the dispute in other *fora* (so-called “fork in the road” provisions); at other times he must waive his rights to pursue any other form of dispute resolution, once he has elected to pursue investment arbitration.⁴⁰³ As already observed: “*jurisdiction in international law depends solely upon consent*”.⁴⁰⁴

Rigozzi also argued that the arbitral legal order is not excluded from entering into contact with the national legal order.⁴⁰⁵ Nevertheless, in these situations of conflict the State legal order does not necessarily prevail over the arbitral legal order.⁴⁰⁶ Indeed, in his view, arbitration deploys its effects in its own legal order, and it is ultimately *a hazard or an accident which submits to State courts a dispute which the will of the parties wanted to have excluded from them*.⁴⁰⁷

3.5.2. Systems theory

Systems theory views systems as open to the environment and adaptive. By ceasing to regard systems as closed, it is possible to focus on the way they interact with their respective environments, and in particular how they are dependent upon them. It is the environment which determines the operating conditions of systems, and systems have to adapt to survive.⁴⁰⁸

Given that systems are seen as being *both open to the environment and adaptive*, it seems clear that they can be *directly influenced, regulated, and even determined, by their environment*. Their very flexibility and adaptability depends upon their being able to respond to changes in the environment, either by making internal modifications, or by altering their mode of operation.⁴⁰⁹

The distinction between system and environment is a key feature of the open system, as it focuses attention on concepts like the relationship between input and output, the ability of a system to adapt to its environment, the re-establishment of equilibrium

⁴⁰³ McLachlan/Shore/Weiniger, para. 4.52.

⁴⁰⁴ See McLachlan/Shore/Weiniger, para. 7.168.

⁴⁰⁵ See Rigozzi, para. 346.

⁴⁰⁶ See, e.g. Cas. 23.3.1994 *Hilmarton v. OTV*, Clunet 1994, p. 701 *et seq.*, in which the French *Cour de cassation* has justified the recognition and execution (in France) of an arbitral award in spite of the fact that it had been annulled by the State's Courts of Switzerland where the arbitral tribunal had its seat (*ibid.*).

⁴⁰⁷ Rigozzi, para. 346, citing Rigaux.

⁴⁰⁸ See Teubner, *System*, p. 13.

⁴⁰⁹ *Ibid.*

through control and regulation, or the “rational” *organisation of a system towards a particular end*.⁴¹⁰

The *goal of arbitration* functions is to provide a *neutral forum to resolve disputes* capable of delivering final and binding awards which are based on a fair trial. In doing this *arbitration has great capacity to adapt*.⁴¹¹ both historically and especially in relation to the external context within which it has to operate. Arbitration, because of party autonomy and its consensual nature, is also more “informal” than national justice systems. This also leads to a bigger capacity for adaptation and confers upon arbitration an advantage when compared to national courts.

The adaptive feature is one of the most distinctive characteristics of arbitration.⁴¹² In all the *adaptation processes’ parties’ consent seems to play a fundamental, albeit*—in the various fields where arbitration is used (commercial arbitration, investment arbitration, sport arbitration)—*different role*. Indeed, the *consensual nature of arbitration may be more* (in commercial arbitration) *or less* (for instance, in sport arbitration) *present*. This could be regarded as a sort of “*relativity of consent*”. In the extreme case of adaptation, *i.e.* mandatory arbitration, the consensual characteristic of arbitration is even abandoned.

However, while the systems theory may be useful in explaining the cause of the differences existing in the various types of arbitration as an adaptation process, one may question *whether it is really a process of adaptation or rather a process of self-referentiality*.

3.5.3. *Self-referentiality and autopoiesis*

The idea of self-reference and *autopoiesis*⁴¹³ presupposes that systems *seek the fixed points of their mode of operation in themselves* and not in the environmental

⁴¹⁰ See Teubner, *System*, p. 14.

⁴¹¹ It has been rightly observed that arbitration owes its justification to its *adaptability* (see Várady/Barceló/von Mehren, p. 39).

⁴¹² See, for instance, in the field of sport arbitration the observation of Briner, *Thoughts*, p. 257: “The particular challenge posed to the CAS system is *to adapt* traditional arbitration to the specific environment of international sports”.

⁴¹³ On *autopoiesis*, see Maturana/Varela. The term *Autopoiesis* literally means “auto (self)-creation” (from the Greek: *auto*—*αυτό* for self- and *poiesis*—*ποίησις* for creation or production) and expresses a fundamental dialect between structure and function. It has been coined as a definition of life by the Chilean scientists Maturana and Varela. The origin of the term is clearly biological. However, its usefulness has also been considered for the understanding of social systems (see Beer and Luhmann).

conditions to which they adapt themselves as best they can,⁴¹⁴ or, to put it more precisely, they look for those points in a self-description which function as a programme of internal regulation, organising the system in such a way that it corresponds to this self-description.⁴¹⁵ It has been observed that the notions of *self-observation and self-description are crucial* to the understanding of self-referential systems.⁴¹⁶ Again, the passage of Lew/Mistelis/Kröll cited under II.3.4.⁴¹⁷ is indicative in this respect.

Self-organisation refers to the ability of a system to spontaneously *produce an autonomous order*; *order* is not imposed from the outside, but is *produced internally* through the interplay of the components of the system.⁴¹⁸ The concept of self-production is particularly difficult to understand. Indeed self-production appears to contradict the obvious fact that much of what occurs within a system is brought about by the external factors.⁴¹⁹ What is *different*, however, is *the way* in which the environment influences self-producing law⁴²⁰ and also, possibly, self-producing arbitral legal orders.⁴²¹

Self-regulation is the dynamic variant of self-organisation. A system can be described as self-regulating if it is able to not only build up and stabilise its own structures, but to alter them according to its *own criteria*.⁴²² *Autopoiesis*⁴²³ is a particular combination of various mechanisms of self-reference, where the self-production of elements can be regarded as only a minimum condition for *autopoiesis*.⁴²⁴ In the case of self-referentiality *parties' consent may be seen as the foundation stone on which the ability of the arbitral system to produce an autonomous order rests*. However, *the degree of the consensual character for different types of arbitration may vary*: sometimes the contractual characteristics may appear to prevail, at other times the jurisdictional ones.⁴²⁵

⁴¹⁴ As it is assumed in open systems.

⁴¹⁵ Teubner, *System*, p. 15.

⁴¹⁶ See Teubner, *System*, p. 19.

⁴¹⁷ See Lew/Mistelis/Kröll, para. 5-30.

⁴¹⁸ See Teubner, *System*, pp. 19 *et seq.*

⁴¹⁹ *Ibid.*

⁴²⁰ Teubner, *System*, p. 21.

⁴²¹ On arbitral legal orders, see Rigozzi, para. 344, with citations.

⁴²² Teubner, *System*, p. 20.

⁴²³ On the discussion as to whether *autopoiesis* can be applied to social systems and law, see, *e.g.* Beer; Luhmann, pp. 1 *et seq.*; Teubner, *System*, pp. 25 *et seq.*

⁴²⁴ Teubner, *System*, p. 22.

⁴²⁵ On the fact that one should not unduly favor the contractual over the jurisdictional element, see Mistelis, *Lex arbitri*, p. 159.

III. THE ARBITRATION AGREEMENT

The arbitration agreement is the cornerstone of the arbitration process,⁴²⁶ as there can be no arbitration between parties that have not consented to arbitrate their disputes.⁴²⁷ On the other hand, the arbitration agreement also establishes an obligation for the parties to arbitrate.⁴²⁸ Arbitration agreements have both a contractual⁴²⁹ and a jurisdictional⁴³⁰ character⁴³¹ and fulfil a number of different functions:

1. they evidence the consent of the parties to submit their disputes to arbitration;
2. they establish the jurisdiction and authority of the arbitral tribunal over that of the courts;
3. they are the basic source of the power of the arbitrators.⁴³²

While a widely established requirement is that there be a written agreement in writing, during the last decades the accepted notion of what constitutes a written agreement has become more and more flexible.⁴³³

1. DEFINITION

The majority of statutes and international conventions provide for a definition of the arbitration agreement,⁴³⁴ although they do not define arbitration as such.⁴³⁵ One of the most comprehensive provisions is Article 7(1) UNCITRAL Model Law, its definition covers two types of arbitration agreement: one that submits already existing disputes to arbitration (*compromis*—submission agreement) and one that covers disputes that may arise in the future (*clause compromissoire*—arbitration clause).⁴³⁶ The term “arbitration agreement” is used to refer to either or both of these forms.⁴³⁷ The *clause*

⁴²⁶ Várady/Barceló/von Mehren, p. 85.

⁴²⁷ See also Lew/Mistelis/Kröll, para. 6-1.

⁴²⁸ Lew/Mistelis/Kröll, para. 6-1.

⁴²⁹ By virtue of the required agreement of the parties.

⁴³⁰ By virtue of conferring jurisdiction upon the arbitration tribunal.

⁴³¹ Lew, *Arbitration Clause*, pp. 114 *et seq.*

⁴³² Lew/Mistelis/Kröll, para. 6-2.

⁴³³ Várady/Barceló/von Mehren, p. 92.

⁴³⁴ The Swiss PIL is one of the exceptions, as it does not provide for a definition of the arbitration agreement (see also *BSK-IPRG-Wenger*, para. 3 *ad* Article 178 Swiss PIL).

⁴³⁵ Poudret/Besson, para. 149.

⁴³⁶ See, *e.g.* Redfern/Hunter/Blackaby/Partasides, para. 3-02; Várady/Barceló/von Mehren, p. 85.

⁴³⁷ Várady/Barceló/von Mehren, p. 85.

compromissoire is much more frequent in practice, as an agreement to arbitrate is easier to reach when lawsuits are a not-too-likely theoretical possibility.⁴³⁸

The distinction between arbitration clauses and submission agreements was of paramount importance when submission agreements alone were valid and enforceable, and arbitration clauses were only enforceable if followed by a submission agreement. The requirement that consent to arbitration be renewed after the emergence of the dispute has been repealed in most other jurisdictions.⁴³⁹ Nowadays, the distinction between arbitration clauses and submission agreements has lost most of its significance.⁴⁴⁰ This evolution means, on the one hand, ***more acceptance of arbitration as a dispute resolution method and a strengthening of its jurisdictional nature***, and, on the other hand, ***a decrease in its consensual character***: consent to arbitration is an ***“anticipated consent”*** about the mode of resolution of a dispute which may—hypothetically—arise in the future, but which is not yet real.

2. THE EFFECTS OF THE ARBITRATION AGREEMENT

The effects of the arbitration agreement can be sub-divided into a positive effect and a negative effect.

2.1. Positive (direct) effect

The positive or direct effect of a valid arbitration agreement is to establish a special forum—the arbitration forum—for disputes between the parties. This alternative jurisdiction will have the ***authority to resolve those disputes or types of dispute which the parties have consented to refer to it.***⁴⁴¹ Conversely, it is a contractual obligation of the parties to have their disputes submitted to arbitration.⁴⁴² Indeed, bringing

⁴³⁸ Várady/Barceló/von Mehren, p. 85.

⁴³⁹ Fouchard/Gaillard/Goldman, para. 386. See, for example, Article 2 of the Colombian Decree No. 2279 of 7 October 1989, as amended by Law No. 23 of 21 March 1991, which states that both arbitration clauses and submission agreements are valid; Article 1416 of the Mexican Code of Commerce, as amended on 22 July 1993. On this issue, see Grigera Naón, *Latin America*; Hoagland; Zivy; Treviño. The Brazilian arbitration statute dated 23 September 1996 maintained a clear distinction between arbitration clauses and submission agreements, not allowing the implementation of the arbitration clause to be at the discretion of the defendant. See Articles 3 *et seq.* and the commentary Bosco Lee.

⁴⁴⁰ Fouchard/Gaillard/Goldman, para. 386.

⁴⁴¹ Lew, *Arbitration Clause*, p. 125.

⁴⁴² Lew/Mistelis/Kröll, para. 7-81.

proceedings in a national court would be a breach of the arbitration clause.⁴⁴³ The arbitration agreement vests the arbitrators, either expressly or through the rules chosen or the law which governs the arbitration, with all powers necessary to fulfil their mission.⁴⁴⁴

2.2. Negative (indirect) effects

The negative or indirect effect of an arbitration agreement is to exclude the dispute from the jurisdiction of national courts; indeed the arbitration agreement removes the national courts' normal authority to consider and resolve disputes between the parties.⁴⁴⁵

The existence of a valid arbitration agreement prevents courts from entertaining jurisdiction when faced with an action on the merits.⁴⁴⁶ It is for this reason that the issue of *the validity of the arbitration agreement is crucial*: it is the condition for the valid transfer of jurisdiction from national courts to arbitration tribunals and the enforcement of the final award.⁴⁴⁷ To decide on the validity of the arbitration agreement it is, however, *necessary to determine the law which should govern it and according to which its validity should be decided*.⁴⁴⁸ Under some laws⁴⁴⁹ the courts do not even have jurisdiction to decide on the validity of the arbitration agreement before the arbitrators have ruled on the issue. It is this indirect effect of the arbitration agreement which also plays a fundamental role in its enforcement.⁴⁵⁰

2.3. Investment arbitration

The direct and indirect effects of arbitration agreements, as discussed above, are also clearly reflected in Article 26 ICSID Convention.⁴⁵¹

⁴⁴³ See, e.g. Lew, *Arbitration Clause*, p. 125.

⁴⁴⁴ Lew/Mistelis/Kröll, para. 7-81.

⁴⁴⁵ Lew, *Arbitration Clause*, p. 127.

⁴⁴⁶ Lew/Mistelis/Kröll, para. 7-82. See, e.g. UNCITRAL Model Law Article 8; England, Arbitration Act section 9; Switzerland, PIL Article 7; France, NCPC Article 1458; Germany, ZPO section 1032.

⁴⁴⁷ Lew, *Arbitration Clause*, p. 128.

⁴⁴⁸ *Ibid.* On the law governing the arbitration agreement, see under III.3.

⁴⁴⁹ See, e.g. France, NCPC Article 1458.

⁴⁵⁰ On this aspect, see in particular Lew/Mistelis/Kröll, paras 7-82 *et seq.*

⁴⁵¹ See also Lew, *Arbitration Clause*, p. 128.

3. THE LAW GOVERNING THE ARBITRATION AGREEMENT

As a matter of fact, it is the law applicable to the arbitration agreement which determines jurisdiction, existence and extent of the arbitrator's jurisdiction, by governing:

- the *validity of the clause*, including the arbitrability of future disputes; and
- its *scope of application*, from both a subjective and an objective viewpoint.⁴⁵²

The *law governing the arbitration agreement is determined by the law governing arbitration itself*.⁴⁵³ Indeed the latter will decide if and to what extent the parties should be free to submit their arbitration agreement to the law of their choice.⁴⁵⁴ However, while national courts normally refer to the conflict-of-law rules of the *lex fori* to determine the *lex arbitri*, it is more difficult to establish this law when arbitral tribunals are involved.⁴⁵⁵ After briefly discussing the law governing arbitration in the next section (3.1.), the laws governing the formal validity (section 3.2.)—respectively the substantive validity (section 3.3.)—of the arbitration agreement will be considered.

3.1. The law governing arbitration

De Ly summarised⁴⁵⁶ the four different theories of connecting factors for the determination of the *lex arbitri*:

- the *lex arbitri* should be connected with the place of arbitration;
- party autonomy, *i.e.* choice of arbitral procedural law (with the relevant mandatory law limitations);
- delocalised arbitration (without reference to any national legal system);
- unilateral conflicts (effectively substantive rules) which provide for arbitral proceedings deregulated from the procedural law of the seat of arbitration.⁴⁵⁷

⁴⁵² Bernardini, *Law applicable*, p. 198.

⁴⁵³ Poudret, *Droit applicable*, p. 23.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ See also Ahrens, p. 21.

⁴⁵⁶ See De Ly, pp. 22-23.

⁴⁵⁷ Mistelis, *Lex arbitri*, pp. 167 *et seq.*

3.1.1. *Application of national arbitration laws vs. delocalisation*

The question as to whether international arbitration should be attached to a particular national legal system or not has been long debated. While France, since the 1960s, has shown a trend towards detachment of arbitration from any national law system⁴⁵⁸ (legal delocalisation⁴⁵⁹), others have affirmed the necessity of the strict attachment of arbitration to the law of the seat of arbitration.⁴⁶⁰ The absence of localisation will also be accentuated with the growth of electronic arbitration.⁴⁶¹ Another form of delocalisation is geographical delocalisation⁴⁶² which implies submitting an arbitration to a *lex arbitri* other than that of the seat.⁴⁶³

3.1.2. *National arbitration laws: seat of arbitration vs. party autonomy*

How should arbitration be connected to the legal system? Two broad tendencies can be distinguished:

1. using the *seat* as the connecting factor between an arbitration and a legal system:⁴⁶⁴ this does not only mean, however, that all the conditions of validity are regulated by the law of the seat directly (*substantive rules*), but also that this law may determine which laws are applicable for determining these conditions when the law of the seat does not itself decide the issue by substantive rules (*conflict-of-law rules*);
2. *party autonomy*: the parties can submit arbitration, and therefore the formal and the substantive validity of their arbitration agreement, to the law of their choice.⁴⁶⁵

While the first factor emphasises the procedural nature of arbitration (like a court, the arbitration has its closest connection to the State of its location),⁴⁶⁶ ***the second reflects the consensual or contractual character of arbitration (like a contract, the arbitration***

⁴⁵⁸ Ahrens, p. 21 with citations.

⁴⁵⁹ See also Park, *Judicial Controls*, p. 243.

⁴⁶⁰ See, e.g. in particular Mann, pp. 157 *et seq.*

⁴⁶¹ Fouchard/Gaillard/Goldman, para. 93. See also Kaufmann-Kohler, *Place of Arbitration*, pp. 350 *et seq.*

⁴⁶² The distinction between “geographical” delocalisation and “legal” delocalisation was made by Mayer, *Delocalisation*, p. 44.

⁴⁶³ Poudret/Besson, para. 121.

⁴⁶⁴ Modern arbitration law and practice have accepted the *prima facie* test in favour of the seat as determinative of the *lex arbitri* albeit with occasional qualifications (Mistelis, *Lex arbitri*, p. 161).

⁴⁶⁵ See Poudret, *Droit applicable*, pp. 23-24.

⁴⁶⁶ The importance of the seat of arbitration stems from the theory of the jurisdictional nature of arbitration (Mistelis, *Lex arbitri*, p. 172). On the jurisdictional nature of arbitration, see under II.3.1.

is governed by the law chosen by the parties).⁴⁶⁷ Geographical delocalisation, connecting the arbitration to the law chosen by the parties, has been referred to as the “autonomistic” approach as opposed to the “territorial” approach based on the seat of the arbitration.⁴⁶⁸ However, it has been observed that the approach of geographical delocalisation is a marginal phenomenon which is tending to disappear.⁴⁶⁹ Therefore, one should not unduly favour the contractual over the jurisdictional element.⁴⁷⁰

On the other hand, it should always be remembered, and it is widely recognised by modern arbitration statutes and rules,⁴⁷¹ that decisions about arbitration and applicable law are normally made to, as closely as possible, carry out the intentions of the parties.⁴⁷² Consequently, to reach a decision as to the jurisdiction whose *lex arbitri* will apply, arbitral tribunals shall look *first* at the arbitration agreement and *second*, at the institutional rules chosen by the parties, because the *lex arbitri* has two components:

- the *internal lex arbitri* which regulates the arbitration procedure before and within the arbitral tribunal;
- the *external lex arbitri* which provides the regulatory framework for arbitration proceedings in relation to courts which may perform a supervisory function or may have to assist the arbitral proceedings.⁴⁷³

3.2. The law governing the formal validity of the arbitration agreement

The formal validity of the arbitration agreement is generally directly regulated in most international conventions and national arbitration laws by a substantive rule of private international law.⁴⁷⁴ Such a substantive rule facilitates the determination of the law applicable to formal validity, but by no means solves all problems.⁴⁷⁵ Indeed, as has been observed, the coexistence of a uniform law and national laws poses the highly controversial question of their respective fields of application.⁴⁷⁶

⁴⁶⁷ See Kaufmann-Kohler, *Place of Arbitration*, p. 337.

⁴⁶⁸ Goode, pp. 24-28.

⁴⁶⁹ See Poudret/Besson, para. 121.

⁴⁷⁰ See also Mistelis, *Lex arbitri*, p. 159.

⁴⁷¹ See, e.g. Article 15(1) ICC Rules; Article 14(1) LCIA Rules.

⁴⁷² Mistelis, *Lex arbitri*, p. 158.

⁴⁷³ *Ibid.* and also p. 163.

⁴⁷⁴ See NYC Article II; European Convention 1961 Article I(2)(a); UNCITRAL Model Law Article 7; Germany, ZPO section 1031; England, Arbitration Act 1996 section 5; Netherlands, CCP Article 1021; Switzerland, PIL Article 178.

⁴⁷⁵ Lew/Mistelis/Kröll, para. 6-37.

⁴⁷⁶ Berger, *Arbitration*, pp. 133-134.

While it is now generally accepted that the New York Convention sets a maximum standard and, therefore, arbitration clauses cannot be submitted to stricter requirements under national law, national arbitration laws often adopt a more permissive definition of “writing” than the New York Convention.⁴⁷⁷ When an arbitration agreement, which does not meet the form requirement of Article II NYC, satisfies the more lenient form requirements of the applicable national law, the question as to the relationship of the different form requirements arises.⁴⁷⁸ On the other hand, the question of whether Article VII NYC, which reserves the application of the most favourable law or treaty, can be invoked in all cases is disputed.⁴⁷⁹

Although the provisions of the New York Convention are only directly binding on courts in the Member States and not arbitration tribunals,⁴⁸⁰ there are good reasons why an arbitration tribunal should base its decision, when the issue of formal validity arises in proceedings before it, on the New York Convention.⁴⁸¹ The widespread applicability of the New York Convention and the fact that enforcement under the Convention⁴⁸² is only possible if the form requirement is met, are strong arguments in favour of the application of Article II NYC; on the other hand, if the arbitration agreement does not meet the form requirements of Article II NYC but does satisfy the more lenient requirements of the law at the seat of arbitration, the tribunal should nevertheless assume jurisdiction to give effect to the parties’ agreement.⁴⁸³

3.3. The law governing the substantive validity of the arbitration agreement

There are different approaches to determining the law applicable to all other issues of the agreement in the various legal instruments and international practice:

- some laws take a traditional conflict of laws approach;
- others contain specific substantive conflict rules;

⁴⁷⁷ Lew/Mistelis/Kröll, paras 6-39 and 6-41.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ See Poudret/Besson, para. 187. Van den Berg, *NYC*, pp. 178-179.

⁴⁸⁰ ICC Case No. 5730 of 1988, 117 *Clunet* 1029 (1990) 1033; see also the critical comment by Loquin, 114 *Clunet* 934 (1987) to the *Bonmar* decision of the Paris Court of Appeal (CA Paris, 20 January 1987, *Bonmar Oil NV v. Entreprise Tunisienne d'Activités*, XIII YBCA 466 (1988) 469).

⁴⁸¹ Lew/Mistelis/Kröll, para. 6-48.

⁴⁸² Indeed, the arbitrators should render an enforceable award (see van den Berg, *NYC*, p. 189 *et seq.* with further references); the obligation to render an enforceable award is expressly mentioned in some arbitration rules such as the ICC Rules Article 35.

⁴⁸³ Lew/Mistelis/Kröll, paras 6-48 *et seq.*

- French arbitration law determines the validity of the arbitration agreement on the basis of the parties' intent, without any reference to a national law.⁴⁸⁴

3.3.1. *Traditional conflict of laws approaches*

While the New York Convention and most national arbitration laws do not provide for special provisions dealing with the law applicable to the substantive validity of the arbitration agreement, they do, however, deal with the issue in the annulment and enforcement stadium where the lack of a valid arbitration agreement in general constitutes a defence against an application to set aside or enforce an award.⁴⁸⁵ It has been observed that although these provisions address the issue only from the perspective of the annulment or enforcement judge, there is a strong argument in favour of applying the same criteria at the pre-award stage.⁴⁸⁶ Indeed, the application of different criteria at the pre-award stage could create the danger of divergent decisions.⁴⁸⁷ This is the reason why in various countries⁴⁸⁸ the courts determine the law applicable to the arbitration agreement in accordance to the principle laid down in Article V(1)(a) NYC.⁴⁸⁹ However, uncertainties can only be avoided when the national arbitration law itself directly contains a provision determining the law applicable to the arbitration agreement. Section 48 of the Swedish Arbitration Act, with a rule similar to Article V(1)(a) NYC, is a rare example of such a provision.⁴⁹⁰

In conclusion, it can be observed that in general the law applicable to the arbitration agreement, whether it deals with the issue of the applicable law directly or simply from the perspective of the annulment or enforcement court, is submitted to the same two criteria: the law chosen by the parties and in the absence of such a choice the law of the place of arbitration.⁴⁹¹ However, as in practice it is rare that the parties expressly choose the law applicable to the arbitration agreement⁴⁹² and most arbitration rules are silent⁴⁹³

⁴⁸⁴ Lew/Mistelis/Kröll, paras 6-48 *et seq.*

⁴⁸⁵ See Article V(1)(a) NYC; comparable provisions can be found in most national arbitration laws, including Article 36(1)(a)(i) UNCITRAL Model Law (Lew/Mistelis/Kröll, paras 6-53 *et seq.*).

⁴⁸⁶ In favour of such an approach, see, *e.g.* Corte d'Appello Genoa, 3 February 1990, *Delia Sanara Kustvaart - Bevrachting & Overslagbedrijf BV v. Fallimento Cap Giovanni Coppola srl*, XVII YBCA 542 (1992) 543 (Lew/Mistelis/Kröll, para. 6-55).

⁴⁸⁷ *Ibid.*

⁴⁸⁸ For an overview of some countries, see Poudret/Besson, para. 300.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ For a more detailed analysis of the provision, see Hobér, *Sweden*, p. 355; see also Article 7 Mercosur.

⁴⁹¹ Lew/Mistelis/Kröll, para. 6-58.

⁴⁹² See van den Berg, *NYC*, pp. 291-292.

⁴⁹³ An exception is Article 59(c) WIPO Rules. However, this article is subject to further interpretation (see Lew/Mistelis/Kröll, para. 6-60).

regarding the issue of the law governing the arbitration clause,⁴⁹⁴ the national courts have considered that a choice of law in the main agreement generally extends to the arbitration agreement.⁴⁹⁵ On the other hand, commentators are divided⁴⁹⁶ on this delicate and important question.⁴⁹⁷

3.3.2. *Other approaches*

3.3.2.1. **Switzerland: conflict of laws rule *in favorem validitatis***⁴⁹⁸

Article 178(2) Swiss PIL provides for a rare example⁴⁹⁹ of a substantive rule on the validity of an arbitration agreement.⁵⁰⁰ While, generally, an agreement which does not fulfil the requirements of the law chosen by the parties is invalid, Article 178(2) Swiss PIL also permits the enforcement of an agreement considered to be valid under the law governing the merits of the dispute, and notably the law applicable to the main agreement, or under Swiss law. The purpose of this provision is to avoid, insofar as possible, any disagreement as to the validity of the arbitration agreement.⁵⁰¹ Therefore, in upholding the validity (*in favorem validitatis*) of an arbitration agreement, this provision goes further than any of the traditional conflict of laws approaches.⁵⁰²

3.3.2.2. **France: material rule of Private International Law**

The path chosen by French law, first developed in *Dalico*⁵⁰³ and later followed in other French court decisions,⁵⁰⁴ is particular, because it rejects the conflict of laws approach

⁴⁹⁴ Blessing, *Law Applicable*, p. 170.

⁴⁹⁵ See Poudret/Besson, paras 297 and 300.

⁴⁹⁶ In favour or considering that there is a strong presumption: Collins, p. 127; Lew, *Arbitration clause*, para. 136; Mustill/Boyd, *Arbitration*, p. 63; Redfern/Hunter/Blackaby/Partasides, paras 2-86. Against: van den Berg, *NYC*, p. 293; Schlosser, para. 254, who, however, recognises the application of the chosen law to the arbitration agreement where the seat of the arbitration was not yet determined at the time of the choice of law.

⁴⁹⁷ Poudret/Besson, para. 297.

⁴⁹⁸ See also Abdulla, p. 18.

⁴⁹⁹ An approach *in favorem validitatis* is also to be found in Article 9(6) Spanish Arbitration Act (see also Mantilla-Serrano).

⁵⁰⁰ See Lew/Mistelis/Kröll, para. 6-63.

⁵⁰¹ Abdulla, p. 18, footnote 12. See also DFT 119 II 380, 384.

⁵⁰² Lew/Mistelis/Kröll, para. 6-64.

⁵⁰³ French Cas., 20 December 1993, *Comité populaire de la municipalité de Khoms El Mergheb v. Dalico Contractors*, 121 *Clunet* 432 (1994).

⁵⁰⁴ See, e.g. Cas., 21 May 1997, *Renault v. V 2000 (formerly Jaguar France)*, *Rev. arb.* 537 (1997), with note Gaillard; CA Paris, 25 November 1999, *SA Burkinabe des ciments et matériaux v. société des ciments d'Abidjan*, *Rev. arb.* 165 (2001) 168 in relation to the rules governing the assignment of the arbitration clause; Cas., 5 January 1999, *Banque Worms v. Bellot*, *Rev. arb.* 85 (2000) 86.

in favour of a substantive rule of international arbitration law which directly determines the prerequisites of the validity of an arbitration agreement.⁵⁰⁵ According to this approach the existence and validity of an arbitration clause depends, provided that no mandatory provision of French law or international *ordre public* is affected, only on the common intention of the parties, without it being necessary to make reference to a national law.⁵⁰⁶ From the French perspective this approach is considered more favourable and thus prevails over the New York Convention by virtue of its Article VII.⁵⁰⁷

3.3.3. *International arbitration practice*

The arbitration practice is even less homogenous. Indeed, the proceeding before the arbitrator is peculiar: on the one hand, not being an organ of a particular State, he does not have a *lex fori* compelling him to apply the rules of conflict of such law, and, on the other hand, he is not bound, in particular, to respect the provisions of the New York Convention, which are addressed to courts.⁵⁰⁸

While in many cases a traditional conflict of laws approach is adopted and there is wide consent that the primary factor in determining the applicable law is party autonomy, the differences relate mainly to the relevant connecting factors where the parties have not chosen the law applicable to the arbitration agreement.⁵⁰⁹ Arbitration practice shows that the international arbitrator may take at least three different approaches in these cases⁵¹⁰ in order to determine the substantive law of the arbitration clause: the law of the seat, the law governing the main contract, and the general principles of law and trade usages.⁵¹¹ Nevertheless, there seems to be a tendency in privileging the application of the provisions of the place of arbitration.⁵¹² However in arbitration practice there is also a trend to detach the question of the existence of a valid arbitration agreement from any national law and to determine it by reference to the parties' intent and general principles applicable to international arbitration, taking particular account of the

⁵⁰⁵ Fouchard/Gaillard/Goldman, paras 436-437.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ See Fouchard/Gaillard/Goldman, para. 449.

⁵⁰⁸ Bernardini, *Law applicable*, p. 200.

⁵⁰⁹ Lew/Mistelis/Kröll, para. 6-68.

⁵¹⁰ Blessing, *Law Applicable*, pp. 171 *et seq.*, has identified not less than nine different approaches used in international arbitration practice to determine the law applicable to the arbitration agreement. These solutions have also been advocated with regard to arbitrability (Blessing, *Arbitrability*, p. 192).

⁵¹¹ Bernardini, *Law applicable*, pp. 200-201.

⁵¹² *Ibid.*

limitations imposed by public policy.⁵¹³ A well known example of this approach is the preliminary award in *Dow Chemical v. Isover Saint Gobain*.⁵¹⁴

4. DETERMINATION OF JURISDICTION, WITH PARTICULAR REGARD TO ISSUES CONCERNING PARTIES' CONSENT

4.1. General

Before an arbitration tribunal can decide on the substantive issue in dispute it must determine that it has jurisdiction. Due to the hybrid character of arbitration the jurisdiction of an arbitration tribunal is based on a *complex mixture of contractual and jurisdictional elements*, i.e. the will of the parties as expressed in the arbitration agreement, and the different laws applicable to the various aspects of the arbitration agreement; the consequence of this complexity is that the question of the tribunal's jurisdiction is frequently a matter of dispute.⁵¹⁵ To strengthen the jurisdiction of the arbitration tribunal and to minimise challenges being used to delay or derail arbitration proceedings most modern arbitration laws employ different techniques:

- the so called "competence-competence" principle; and
- the principle of separability.

While under the autonomy/separability principle, arbitrators have jurisdiction to rule on any dispute over the existence or validity of the main contract, under the competence-competence principle they have the power to rule on any question relating to their jurisdiction or, in other words, to the effectiveness of the arbitration agreement as such.⁵¹⁶ Another technique in support of the jurisdiction of the arbitration tribunal found in national laws⁵¹⁷ is to permit the tribunal to start or continue arbitration proceedings even though the jurisdiction of the tribunal is being challenged in the courts.⁵¹⁸

⁵¹³ Lew/Mistelis/Kröll, paras 6-73 and 6-74.

⁵¹⁴ Interim Award in ICC Case No. 4131 of 1982, *Dow Chemical France et al v. Isover Saint Gobain*, IX YBCA 131 (1984).

⁵¹⁵ See Lew/Mistelis/Kröll, para. 14-10. Approximately one third of ICC awards involve a jurisdictional challenge to the tribunal.

⁵¹⁶ Dimolitsa, p. 228.

⁵¹⁷ See Article 8(2) UNCITRAL Model Law; Sweden, Arbitration Act section 2; Germany, ZPO section 1032(3).

⁵¹⁸ Lew/Mistelis/Kröll, para. 14-20.

4.2. Competence-competence

The competence-competence rule has a dual function. Like the arbitration agreement it has, or may have, both positive and negative effects, even if the latter have not yet been fully accepted in a number of jurisdictions.⁵¹⁹

The *positive effect* of the principle of competence-competence means that the arbitral tribunal has the power to rule on its own jurisdiction.⁵²⁰ This principle is the transposition, in a qualified way, to arbitration of the general procedural principle that any court is entitled to decide on its own jurisdiction.⁵²¹ In doing so, *the question as to whether the parties consented to the arbitration agreement has to be determined separately from whether they agreed on the main contract.*⁵²² The competence-competence principle also allows arbitrators to determine that an arbitration agreement is invalid and to make an award declaring that they lack jurisdiction without contradicting themselves.⁵²³ The principle has found recognition in most modern arbitration laws⁵²⁴ as well as international Conventions.⁵²⁵ And, even if such provisions did not exist, arbitration tribunals have traditionally assumed a right to rule on their own jurisdiction, as was the case in *TOPCO v. Libya*,⁵²⁶ where the arbitrator relied on a customary rule.⁵²⁷ De Boissésou considers that the principle derives from one of validity of the arbitration clause, itself a “customary international rule”.⁵²⁸ Moreover, it has also been observed that the most solid justification for the principle lies in the *presumed will of the parties to confer on the arbitrators all aspects of their disputes*, including

⁵¹⁹ Fouchard/Gaillard/Goldman, para. 660.

⁵²⁰ In addition, the so called “positive competence-competence” doctrine, if understood broadly, also has a bearing on whether courts can decide on the arbitrator’s jurisdiction before the tribunal has itself dealt with the issue; for the different understandings of the doctrine of competence-competence, see Park, *Allocation*, pp. 25 *et seq.* (see also Lew/Mistelis/Kröll, para. 14-13, footnote 6).

⁵²¹ Dimolitsa, p. 228.

⁵²² Lew/Mistelis/Kröll, para. 6-15.

⁵²³ Fouchard/Gaillard/Goldman, para. 658.

⁵²⁴ See Article 16(1) UNCITRAL Model Law, and in non Model Law countries, *e.g.* Switzerland, PIL Article 186; England, Arbitration Act section 30. An exception is the Chinese Law where the tribunal has no competence-competence but the decision on jurisdiction is either taken by the arbitration institution under the rules of which the arbitration takes place or by the courts.

⁵²⁵ See, *e.g.* Article 41(1) ICSID Convention.

⁵²⁶ *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, preliminary award on jurisdiction, 27 November 1975, French original in 104 *Clunet* 350 (1977), with introduction by Lalive, “*Un grand arbitrage pétrolier entre un Gouvernement et deux sociétés privées étrangères*”, 104 *Clunet* 320 (1977). For excerpts in English, see IV YBCA 176 (1979).

⁵²⁷ Lew/Mistelis/Kröll, para. 14-18.

⁵²⁸ De Boissésou, para. 732.

jurisdiction, while the courts retain the power to control their decision but not to take their place.⁵²⁹

However, it has been submitted that competence-competence can only be completely efficient where the *arbitral tribunal has real priority over the courts*.⁵³⁰ It is therefore important that the latter refrain from ruling not only on the merits of the disputes but also on the conflict of jurisdiction until the arbitral tribunal has rendered a decision.⁵³¹ This is the so-called *negative effect* of competence-competence, which has been emphasised by French scholars⁵³² and is anchored in Article 1458 NCPC.⁵³³ The basic dilemma is the following:

- on the one hand, *if the legitimacy of arbitration is based on consent, how can a court refer a party to arbitration*—especially concerning the method of dispute settlement—unless it first determines for itself that the party has entered a valid arbitration agreement? and
- on the other hand, if every existence, validity, or scope question is retained for full court scrutiny, opportunities for obstructing the arbitration process will abound, as a party bent on delay or obstruction will raise issue after issue for court determination.⁵³⁴

4.3. The principle of separability

The doctrine of separability recognises the arbitration clause in a main contract as a separate agreement, independent and distinct from the main contract.⁵³⁵ However, it has been observed that the separability (*autonomie*)⁵³⁶ of the arbitration clause is an ambiguous expression.⁵³⁷ Indeed, the French case law led French authors to distinguish between material separability (*autonomie matérielle*), *i.e.* from the main contract, and

⁵²⁹ See Poudret/Besson, para. 457.

⁵³⁰ Poudret/Besson, para. 458.

⁵³¹ *Ibid.*

⁵³² Namely, Fouchard and Gaillard. See, *e.g.* Fouchard/Gaillard/Goldman, paras 660 and 671-682.

⁵³³ Poudret/Besson, para. 458.

⁵³⁴ Várady/Barceló/von Mehren, p. 89.

⁵³⁵ Lew/Mistelis/Kröll, para. 6-9. For the development of the doctrine, see Samuel, “Separability of arbitration clauses – some awkward questions about the law on contracts, conflict of laws and the administration of justice”, 9 ADRLJ 36 (2000).

⁵³⁶ About the different terminologies used to refer to “separability”, see Fouchard/Gaillard/Goldman, para. 389.

⁵³⁷ Poudret/Besson, para. 162.

legal separability (*autonomie juridique ou de rattachement*), i.e. from the law of the main contract or even from all legal systems.⁵³⁸

4.3.1. *Material separability*

4.3.1.1. General

Schwebel observed that when the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement.⁵³⁹ The essence of the doctrine lies in that the *validity of an arbitration clause is not bound to that of the main contract and vice versa*.⁵⁴⁰

The doctrine of separability is now recognised in most modern arbitration laws⁵⁴¹ and arbitration rules,⁵⁴² as well as in the decisions of arbitral tribunals⁵⁴³ and State courts.⁵⁴⁴ It is also mentioned in the European Convention.⁵⁴⁵ However, full acceptance of the doctrine is still outstanding, for instance, in certain Arab countries.⁵⁴⁶ Nevertheless, the doctrine has been characterised as a general principle of international arbitration,⁵⁴⁷ and French authors⁵⁴⁸ particularly do not hesitate to speak of a true transnational rule of international commercial arbitration.⁵⁴⁹ Many arbitral awards have recognised the separability of the arbitration agreement as a general principle of international

⁵³⁸ Poudret/Besson, para. 162, with reference, in particular, to Ancel, pp. 81-83; Blanchin, pp. 13-15; and Fouchard/Gaillard/Goldman, para 388.

⁵³⁹ Schwebel, pp. 1-60, especially at p. 5.

⁵⁴⁰ Lew/Mistelis/Kröll, para. 6-9.

⁵⁴¹ See, e.g. Article 16(1) UNCITRAL Model Law; Switzerland, PIL Article 178(3); Netherlands, CCP Article 1053; Sweden, Arbitration Act section 3; China, Arbitration Law section 19(1). For further references, see Sanders, *Quo Vadis*, pp. 172 *et seq.*

⁵⁴² Article 6(4) ICC Rules; LCIA Article 23; AAA ICDR Article 15; Article 21(2) UNCITRAL Arbitration Rules.

⁵⁴³ See, e.g. *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic*; see summary of the preliminary award contained in IV YBCA 177, 179 (1980) *Libyan American Oil Co. (LIAMCO) v. Government of the Libyan Arab Republic*, 20 ILM 1 (1981); VI YBCA 89, 96 (1981).

⁵⁴⁴ E.g. in France: Cas., 7 May 1963, *Ets Raymond Gosset v. Carapelli*, 91 Clunet 82 (1964); CA Paris, 7 December 1994, *Société V 2000 v. Société Project XJ 220 ITD et autre*, Rev. arb. 245 (1996); for further references, see Fouchard Gaillard Goldman, para. 391.

⁵⁴⁵ See Article V(3) European Convention.

⁵⁴⁶ Lew/Mistelis/Kröll, para. 6-21. See, e.g. Turck, "Saudi Arabia", ICCA Handbook, 4; El Ahdab, p. 610.

⁵⁴⁷ See Dimolitsa, p. 221.

⁵⁴⁸ Fouchard/Gaillard/Goldman, para. 398

⁵⁴⁹ Poudret/Besson, para. 167. See also Berger, *Arbitration*, 121; Lew/Mistelis/ Kröll, para. 6-22.

commercial arbitration, without considering it necessary to justify such recognition with reference to a particular national law.⁵⁵⁰

4.3.1.2. Separability as a mean to strengthen and protect the jurisdiction of arbitrators

The doctrine of separability is another technique which strengthens and protects the jurisdiction of arbitrators.⁵⁵¹ However, while competence-competence empowers the arbitration tribunal to decide on its own jurisdiction, separability ensures that it can decide on the merits, as any challenge to the main agreement does not affect the arbitration agreement.⁵⁵² Therefore, even though these two principles are separate and each has its own scope, there is a logical connection between them.⁵⁵³ Indeed, they are both *based on the presumed will of the parties to submit all disputes to the arbitrator*.⁵⁵⁴ As observed by Sanders, this presumption is strengthened by the clause, common in international arbitration, referring to all disputes “in relation to” the contract, including those concerning the existence and validity.⁵⁵⁵

4.3.1.3. The effect of separability

The arbitration clause may survive the nullity, termination, repudiation or novation of the main contract, although two reservations should be made:

- The arbitration clause is part of a main contract and even has an accessory nature. Nevertheless, this does not exclude the fact that the arbitration clause remains valid, like a jurisdiction agreement, if the contract is null or void or has been terminated. This *depends naturally on the will of the parties, but it can be presumed* that this is what they intended.⁵⁵⁶
- There might exist a defect common to the contract and to the arbitration clause which renders them both null and void.⁵⁵⁷

Thus, while the effect of separability is limited, thereby preventing the fate of the main contract *automatically* affecting the arbitration agreement, the agreement may still,

⁵⁵⁰ Fouchard/Gaillard/Goldman, para. 406. On this issue, see Yves Derains, *Les tendances de la jurisprudence arbitrale internationale*, 120 *Clunet* 829 (1993), especially at 832 *et seq.*

⁵⁵¹ Lew/Mistelis/Kröll, paras 6-10 and 14-19.

⁵⁵² *Ibid.*

⁵⁵³ Fouchard/Gaillard/Goldman, para. 416.

⁵⁵⁴ Poudret/Besson, para. 167, with references.

⁵⁵⁵ Sanders, *Autonomie*, p. 33.

⁵⁵⁶ See Mayer, *Séparabilité*, pp. 261-265.

⁵⁵⁷ *Ibid.*

however, be tainted by the same defects.⁵⁵⁸ Nevertheless, even in those cases the doctrine of separability requires that the question as to *whether the parties consented to the arbitration agreement has to be determined separately from whether they agreed on the main contract*.⁵⁵⁹

On the question about whether the principle of separability should be extended where the very existence of the main contract is in dispute, there are different views.⁵⁶⁰ In France in the *Ducler* case⁵⁶¹ the Paris Court of Appeal held that the inexistence or nullity of the main agreement does not affect the arbitration clause which is completely separable from it.⁵⁶² And more recently in *Omenex*⁵⁶³ the *Cour de cassation* also held that the validity of the arbitration agreement is not affected by the nullity or inexistence of the main contract.⁵⁶⁴ Poudret/Besson observed that the French case law is based on the “principle of validity” and separability of the arbitration agreement.⁵⁶⁵

In England, section 7 of the Arbitration Act 1996 provides that an arbitration agreement contained in another agreement “shall not be regarded as invalid, non-existent or ineffective because that other agreement ... *did not come into existence*”.⁵⁶⁶ It has been rightly observed that the text of the new law no longer makes a distinction between various grounds of invalidity of the main contract.⁵⁶⁷ There might be cases where although the main contract never came into existence the parties agreed on arbitration so that all disputes arising out of work done under the non-existing main contract have to go to arbitration.⁵⁶⁸ Merkin emphasised that section 7 of the Arbitration Act 1996 is not a mandatory provision, because *it is based on the presumed intent of the parties*, and, therefore, *it will only apply in its full scope if the arbitration clause is sufficiently wide*, for instance if it covers all disputes “in connection with” the main contract, as is usually the case.⁵⁶⁹

⁵⁵⁸ Lew/Mistelis/Kröll, paras 6-14 *et seq.*

⁵⁵⁹ *Ibid.*

⁵⁶⁰ See Poudret/Besson, para. 167. Sanders, *Autonomie*, p. 33. Broches, *UNCITRAL*, paras 15-16. Goldman in Cas., Rev. arb. 1989, p. 641 *et seq.* The opinion of Goldman is not only shared by several other authors but has also been followed by the French courts since the *Navimpex* judgment.

⁵⁶¹ Rev. arb. 1990, p. 675, with a note by Mayer; Rev. arb. 2002, p. 792, with a note by Mayer.

⁵⁶² See Poudret/Besson, para. 167.

⁵⁶³ Cas., *Omenex v. Hugon*, Rev. arb. 2006, p. 103, with a note by Racine.

⁵⁶⁴ Poudret/Besson, para. 167.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ Emphasis added.

⁵⁶⁷ Poudret/Besson, para. 176.

⁵⁶⁸ Lew/Mistelis/Kröll, para. 6-15. See also Shackleton.

⁵⁶⁹ Merkin, p. 35 *ad* Section 7.

4.3.2. *Legal separability*

Another consequence of separability is that the arbitration agreement may be governed by a different law from that of the main contract or even independently from all legal systems.⁵⁷⁰ This aspect has played an important role, especially with regard to French case law.

4.3.2.1. **Submission of the main contract and of the arbitration agreement to different laws**

The principle of separability not only means that the validity of the main contract and of the arbitration agreement must be determined separately, but also that they can be—and often are—*governed by different laws*.⁵⁷¹ In France this second aspect of separability was underlined by the judgments in 1970 and 1972 respectively in the *Hecht* case.⁵⁷²

4.3.2.2. **Validity of the arbitration agreement independently of any national law**

In 1975 the Paris Court of Appeal, in its *Menicucci* judgment, had the opportunity to clarify the significance of the *Hecht* judgment. Recalling that an arbitration clause inserted into an international contract is completely autonomous, the court held that, given its separability, such an arbitration clause is valid independently of reference to any national law.⁵⁷³

It has been observed that in the *Menicucci* judgment the principle pursuant to which the validity of an arbitration clause in international contracts *resulted solely from the will of the parties*, independently of any reference to the law of the main contract and to any national law, was thus confirmed.⁵⁷⁴ This has been seen as the pinnacle of autonomy.⁵⁷⁵ The case law initiated by the *Menicucci* judgment was followed not only by the Paris Court of Appeal but also by other courts until being confirmed and clarified by the *Cour*

⁵⁷⁰ On the law governing the arbitration agreement, see under III.3.

⁵⁷¹ Poudret/Besson, para. 178.

⁵⁷² Rev. arb. 1972, p. 67, with a note by Fouchard = Clunet 1971, p. 833, with a note by Oppetit (Court of Appeal of Paris); Rev. arb. 1972, p. 89, with an article by Francescakis, pp. 67-87 = Clunet 1972, p. 843, with a note by Oppetit (*Cour de cassation*). See also Poudret/Besson, para. 179.

⁵⁷³ Poudret/Besson, para. 180.

⁵⁷⁴ Ancel, p. 77.

⁵⁷⁵ *Ibid.*

de cassation in the *Dalico*⁵⁷⁶ judgment. Indeed, this last judgment contains an important clarification, namely that ***the common intention of the parties is subject to mandatory rules of French law and international public policy, these being the only limits to consensualism*** where the matter is referred to a French court.⁵⁷⁷

It has been observed that French case law has ***often ensured the validity and effectiveness of arbitration agreements*** which would have been held invalid if applying a conflict of law approach, and that it has allowed the ***triumph of consensualism***, tempered by material rules of which the content is difficult to determine in advance because they result from international public policy, which is in itself an uncertain concept.⁵⁷⁸ On the other hand, it has been argued that the ***exclusion of all national laws*** should logically ***lead to an exclusion of that chosen by the parties***, which is ***difficult to reconcile with the consensualism*** that this case law claims to uphold.⁵⁷⁹

4.3.3. Comments

The French conception of separability has remained isolated,⁵⁸⁰ and it has been argued that it is hardly in a position to ensure the uniform regulation of international arbitration to which it aspires.⁵⁸¹ Yet in other fields where arbitration is used today and where, on the one hand, there is not necessarily a main contract between the parties and, on the other hand, the structure of the relationships between them is different, the following has been observed:

- with regard to investment arbitration—“jurisdiction in international law depends solely upon consent”,⁵⁸²
- with regard to sport arbitration—there is at least a presumption in favour of arbitration.⁵⁸³

In view of the distinction made by French case law between material and legal separability, it could also be asked whether there might be yet another form of

⁵⁷⁶ French Cas., 20 December 1993, *Comité populaire de la municipalité de Khoms El Mergheb v. Dalico Contractors*, 121 Clunet 432 (1994).

⁵⁷⁷ Poudret/Besson, para. 180. More recently in the *Uni-Kod* case (Cas., *Uni-Kod v. Ouralkali*, Rev. arb. 2005, p. 959, with a note by Seraglini) the *Cour de cassation* reaffirmed the rule of *Dalico*.

⁵⁷⁸ See Poudret/Besson, para. 182.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ See, however, a Luxembourg award which applied this French case law (ICC Award No. 8938 = YBCA 1999, p. 174).

⁵⁸¹ Poudret/Besson, para. 182.

⁵⁸² See McLachlan/Shore/Weiniger, para. 7.168.

⁵⁸³ See Netzle, p. 47; Rigozzi, para. 833. On this aspect, see under VI.3.3.3.

separability: a sort of personal separability. In this type of separability the parties who have consented to arbitrate may be different not only from the parties of the main contract, but also from the initial parties of the formally valid arbitration agreement. Such a type of separability could perhaps be useful to explain the extension of the arbitration agreement to non-signatories, provided that the latter and the original parties have all consented to arbitration. Moreover, it might also be an argument to overcome the difficulties of the requirement for arbitration agreements to be “in writing”, because it could be argued, as has been done by the Swiss Federal Tribunal,⁵⁸⁴ that this condition has only to be fulfilled by the initial parties to the arbitration agreement. Furthermore, such separability may possibly also be useful in investment arbitration where the host State gives, on the one hand, its general and abstract consent to arbitrate through a treaty with another State (the investor’s State), and, on the other hand, a consent to the investor of its counterpart/s (the other State in the case of BITs or the others States in the case of a multilateral treaty) to resolve an individual and concrete investment dispute through arbitration. Indeed the position of the investor which could be seen to be in the “sphere of influence” of the investor’s State and the position of the non-signatory which could be seen to be in the “sphere of influence” of the signatory party is comparable in two aspects:

- the requirement “in writing”, as between who claims against a non-signatory and the non-signatory there is no single written document containing the consent of both parties like there is no single written document containing the consent of both parties between the host State and the investor;⁵⁸⁵ and
- the requirement of consent, as both the non-signatory like the investor must, nevertheless, have consented to arbitration.

5. REQUIREMENTS FOR THE VALIDITY OF THE ARBITRATION AGREEMENT

Whether a dispute should be resolved by arbitrators (instead of courts) depends on the existence, validity, and scope of an arbitration agreement (whether such an agreement has come into existence, whether it is valid, and whether the dispute falls within its

⁵⁸⁴ DFT 129 III 727, consid. 5.3.1., p. 735. See also under III.5.3.4.3.

⁵⁸⁵ See under V.5.

scope).⁵⁸⁶ Limitations on the possibility to refer the resolution of disputes to arbitration are given by their arbitrability.

5.1. Formal validity

It is essential that the formal aspects of the arbitration agreement be addressed, basically because it is also on formal grounds that the enforcement of any award is upheld or dismissed and that arbitral tribunals are deemed to enjoy or to lack competence.⁵⁸⁷ Indeed, international conventions and treaties as well as most bodies of national statute law stipulate the need for arbitration clauses to be recorded in writing.⁵⁸⁸ While the non-essential clauses, such as those concerning procedure, are normally not subject to the formal requirements of the arbitration agreement,⁵⁸⁹ the *essentialia negotii* have to fulfil them.

5.1.1. *The justification for a written form requirement*

In the literature the various justifications for a written form have been grouped into two key categories, as follows:

5.1.1.1. Proving initial consent

While the right of access to a court is generally considered a fundamental right of every citizen in a civilised State and as such is embodied in most if not all human rights conventions,⁵⁹⁰ it is not an absolute right, since, within defined limits, parties are generally free to contract for arbitration and thereby exclude themselves from a court.⁵⁹¹ With the exclusion of a court considered to be a significant decision States have an interest, as part of the public administration of justice, to ensure that any such *agreement reflects a genuine consent*; one way of policing the exclusion of access to a court is to insist that the arbitration agreement be in writing—this is the most commonly cited justification for the form requirement.⁵⁹²

⁵⁸⁶ Várady/Barceló/von Mehren, pp. 86-87.

⁵⁸⁷ Cremades, p. 150.

⁵⁸⁸ See also Cremades, p. 151.

⁵⁸⁹ An exception is English law with section 5(1) of the Arbitration Act 1996 (Poudret/Besson, para. 153).

⁵⁹⁰ *E.g.* Article 6 ECHR.

⁵⁹¹ Landau, *Written Form*, pp. 21 *et seq.*

⁵⁹² *Ibid.*

5.1.1.2. Proving the terms of the agreement

Aside from considerations concerning initial consent, the written form requirement has also been justified on the basis that, *once parties have consented to arbitration, there is an interest in ensuring that the type of arbitration, and the terms of the process, are clear and capable of proof.*⁵⁹³

5.1.2. Differences in the requirement

Most international conventions and national arbitration laws contain substantive conflict of laws provisions with regard to form requirements.⁵⁹⁴ However, in spite of significant harmonisation, partly due to the different times at which the various rules were drafted, national laws differ considerably as to what satisfies the requirement of a written agreement.⁵⁹⁵ Moreover, while some laws require writing only for evidentiary purposes (*ad probationem*),⁵⁹⁶ others make it a condition of validity (*ad validitatem*).⁵⁹⁷ The difference has essentially to be seen in the fact that, if writing is only an evidentiary requirement, the arbitration agreement can also be established by tacit acceptance.⁵⁹⁸ On the other hand France—for international arbitrations—and Sweden do not have requirements of form, and thus oral agreements are sufficient.⁵⁹⁹

5.2. Substantive validity

5.2.1. Consent

5.2.1.1. Existence

Consent to arbitration may be relatively easy to establish if the arbitration clause is contained in a contract negotiated between and signed by the parties.⁶⁰⁰ In order to

⁵⁹³ Landau, *Written Form*, pp. 21 *et seq.*

⁵⁹⁴ See Lew/Mistelis/Kröll, para. 7-6.

⁵⁹⁵ Lew/Mistelis/Kröll, para. 7-11. The New York Convention, for example, adopted in 1958, contains a very narrow definition of “writing”.

⁵⁹⁶ See, *e.g.* Article 1021 Netherlands CCP, Article 9 Spanish Arbitration Act.

⁵⁹⁷ See, *e.g.* Article II NYC, Article 25 ICSID Convention, Article 178 Swiss PIL (Poudret/Besson, para. 183).

⁵⁹⁸ Poudret/Besson, para. 183.

⁵⁹⁹ See Heumann, pp. 32-33, for Sweden.

⁶⁰⁰ Lew/Mistelis/Kröll, para. 7-35.

determine the existence of the parties' consent, arbitrators will make recourse to the general principles of contractual interpretation⁶⁰¹ (e.g. the principle of interpretation in good faith, the principle of effective interpretation, the principle *contra proferentem*).⁶⁰² In practice these principles of interpretation prove most valuable with respect to pathological clauses, *i.e.* incomplete, defective or contradictory clauses.⁶⁰³ Nevertheless, when entering into an arbitration agreement, the parties should strive to express their consent in an unequivocal manner with regard to the essential elements of such agreement, so as to restrict any room for interpretation and ensure the validity of the arbitration agreement.⁶⁰⁴

On the other hand, when contracts are concluded by reference to general conditions, the arbitration clause may not have been the object of specific attention by the parties, since the general conditions or any other document containing the arbitration clause may not be attached to the contract itself.⁶⁰⁵ Furthermore, the parties may also conclude a contract without reference to an arbitration clause but in the context of a series of contracts which include an arbitration agreement.⁶⁰⁶

5.2.1.2. Scope

Insofar as the existence of the parties' consent has been determined, the arbitration agreement is deemed to cover all disputes between the parties, provided that they are arbitrable and arise out of the relationship to which the arbitration agreement refers.⁶⁰⁷

5.2.1.2.1. Whom it binds

As a **general rule** the arbitration clause ***binds only the parties that have originally agreed to it.***⁶⁰⁸ However, questions as to consent to arbitration may arise if claims are brought by or against parties who are not expressed to be a party to the contract containing the arbitration agreement.⁶⁰⁹ The arbitration agreement must, like any contract, be concluded between two or more parties who are determined or

⁶⁰¹ Abdulla, p. 18.

⁶⁰² See Fouchard/Gaillard/Goldman, paras 473 *et seq.*

⁶⁰³ Abdulla, p. 19.

⁶⁰⁴ *Ibid.*

⁶⁰⁵ Lew/Mistelis/Kröll, para. 7-35.

⁶⁰⁶ *Ibid.*

⁶⁰⁷ Abdulla, p. 19.

⁶⁰⁸ See, e.g. Abdulla, p. 20.

⁶⁰⁹ Lew/Mistelis/Kröll, para. 7-36.

determinable.⁶¹⁰ This requirement causes problems where there are more than two parties (multi-party arbitration) or where the arbitration agreement is held to include persons or companies who have not signed it (extension).⁶¹¹ In these latter cases the central issue is whether the arbitration agreement can be extended to a non-signatory.

5.2.1.2.2. What it encompasses

a. *Disputes covered by the arbitration agreement*

It is important to ensure that the wording adopted in an arbitration agreement is adequate to fulfil the intentions of the parties.⁶¹² **Most arbitration agreements are broadly worded**, and, usually, when parties agree to resolve any disputes between them by arbitration, they **intend to resolve all disputes** between them by this method (unless a specific exception is made).⁶¹³ This is, in particular, also the case when the model clauses of arbitration institutions are adopted by the parties.⁶¹⁴ From the case law it has generally emerged that there are three categories of claim that are potentially within the scope of an arbitration agreement:

- contractual claims (including claims incidental to the contract, such as *quantum meruit*);
- claims in tort; and
- statutory claims, *i.e.* claims that arise out of legislation which might bind the parties, such as securities and antitrust legislation.⁶¹⁵

In all three categories of claim it is essential that a determination is made as to whether a particular claim or defence has sufficient connection with the contract to be covered by the arbitration agreement.⁶¹⁶

b. *Set-off and counterclaims*

There are cases in which a respondent party will seek to introduce a counterclaim or raise a set-off against the claim. In general, this is possible provided the counterclaim or

⁶¹⁰ Poudret/Besson, para. 154.

⁶¹¹ *Ibid.*

⁶¹² Redfern/Hunter/Blackaby/Partasides, para. 3-38.

⁶¹³ See Lew/Mistelis/Kröll, para. 7-63; see also Redfern/Hunter/Blackaby/Partasides, paras 3-38 *et seq.*

⁶¹⁴ See, *e.g.* the ICC Model clause which covers “All disputes arising out or in connection with the present contract”.

⁶¹⁵ Redfern/Hunter/Blackaby/Partasides, para. 3-40.

⁶¹⁶ *Ibid.*

set-off relates to the same contract as the main claim.⁶¹⁷ On the other hand, the difficult problem is where a respondent wishes to counterclaim or raise a set-off arising under a different contract between the same parties, because in this situation the counterclaim or set-off is not covered by the arbitration agreement, and, as a consequence, the arbitration tribunal does not have jurisdiction to deal with the counterclaims and set-off claims.⁶¹⁸

Although the situation may be different if the contracts underlying the main claims and on which the counterclaims and set-off are based are closely related and form part of the same economic venture,⁶¹⁹ the existence of a separate arbitration or choice of forum clause is, generally, considered to exclude the possibility of a set-off.⁶²⁰

A set-off of a claim from a different contract is also possible if the chosen arbitration rules allow a set-off to be raised.⁶²¹ However, while most arbitration rules contain provisions on counterclaims, only some of them deal with set-off⁶²² even though both institutions have a striking resemblance.⁶²³

5.2.2. Arbitrability

5.2.2.1. In general

Arbitrability, sometimes also referred to as “objective arbitrability”, relates to whether or not the subject matter of the dispute may be validly submitted to arbitration.⁶²⁴ Or, in other words, it involves determining *which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts*.⁶²⁵ The concept should be distinguished from the one of “subjective arbitrability” which encompasses capacity and broadly refers to whether or not a specific entity or person may be party to an arbitration.⁶²⁶

⁶¹⁷ Berger, *Set-Off*, pp. 64-65. See, e.g. UNCITRAL Arbitration Rules Article 19(3).

⁶¹⁸ Lew/Mistelis/Kröll, para. 7-68.

⁶¹⁹ See Lew/Mistelis/Kröll, para. 7-69.

⁶²⁰ Berger, *Set-Off*, pp. 74-79.

⁶²¹ Lew/Mistelis/Kröll, para. 7-70.

⁶²² See Article 19(3) UNCITRAL Arbitration Rules; Article 30(5) ICC Rules; Article 42(c) WIPO Arbitration Rules; Article 21(5) Swiss Rules.

⁶²³ Berger, *Set-Off*, pp. 53 *et seq.*, stating the reasons for such reluctance.

⁶²⁴ Abdulla, p. 21.

⁶²⁵ Redfern/Hunter/Blackaby/Partasides, para. 3-12.

⁶²⁶ Abdulla, p. 21.

While, in principle, any dispute should be just as capable of being resolved by a private arbitral tribunal as by the judge of a national court, it is, however, precisely because arbitration is a private proceeding with public consequences that some types of dispute are reserved for national courts, whose proceedings are generally in the public domain.⁶²⁷ Whether or not a particular type of dispute is “arbitrable” under a given law is *in essence a matter of public policy*⁶²⁸ for that law to determine.⁶²⁹ The decision as to which types of disputes are the exclusive domain of national courts, and which can be referred to arbitration differs from State to State reflecting the political, social and economic prerogatives of the State, as well as its general attitude towards arbitration.⁶³⁰

5.2.2.2. With regard to consent’s issues

It has been observed that the issue of arbitrability is one of the most important threshold questions in the arbitration process.⁶³¹ In fact, *party autonomy is impotent before this barrier which constitutes a clear limitation of parties’ consent to arbitrate.*

Nevertheless, especially for international cases,⁶³² when a court is trying to decide whether to enforce an arbitration agreement, the *tendency is to break down the barriers prohibiting arbitration.*⁶³³ Moreover, the *trend* in most legal systems *is toward expanding the boundaries of arbitrability*, at least with respect to international arbitration and disputes over enforcement of the arbitration agreement.⁶³⁴ Therefore, *the ambit where parties can consent also expand.*

5.2.3. Capacity

The concept of capacity is twofold. On one hand, it relates to the capacity of a person or entity to enter into an arbitration agreement on its own behalf and act as a party to

⁶²⁷ Redfern/Hunter/Blackaby/Partasides, para. 3-12.

⁶²⁸ Although in general limits on arbitrability of disputes arise from public policy only few laws make express reference to the notion of “public policy”, as, e.g. the French NCPC Article 2060.

⁶²⁹ Redfern/Hunter/Blackaby/Partasides, para. 3-13.

⁶³⁰ Lew/Mistelis/Kröll, para. 9-35. See also Mustill/Boyd, *Arbitration*, p. 71.

⁶³¹ Várady/Barceló/von Mehren, p. 217.

⁶³² On the differentiation between national/international context, see, e.g. *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346, 3355 *et seq* (1985) where the US Supreme Court held that in an international context the ambit of arbitration may be wider than in a national context and declared antitrust disputes to be arbitrable which in *American Safety Equipment Corp v. JP Maguire & Co*, 391 F 2d 821, 826 *et seq.* (2d Cir. 1968) were still held not to be arbitrable in a domestic context (see Lew/Mistelis/Kröll, para. 9-36).

⁶³³ See Várady/Barceló/von Mehren, pp. 218-219.

⁶³⁴ *Ibid.*

arbitral proceedings; on the other hand, it deals with the capacity of a party to enter into an arbitration agreement in the name and on behalf of another person or entity (agency).⁶³⁵

The majority of arbitration laws are silent on the *capacity to arbitrate*, which is *usually on the same footing as the capacity to contract in general*.⁶³⁶ The general rule is that any natural or legal person who has the capacity to conclude a valid contract has the capacity to enter into an arbitration agreement.⁶³⁷ Except for restrictions aimed at protecting consumers, national laws rarely impose restrictions on the capacity to conclude arbitration agreements.⁶³⁸ However, with regard to the *authority necessary to agree to arbitration on behalf of another person*, there is *great diversity* among national laws.⁶³⁹

5.3. Relationship between formal requirements and consent

5.3.1. *The functions of the formal requirements in respect with consent*

In the literature the justification for a written form requirement for “proving initial consent”⁶⁴⁰ has been subdivided in several different, but related aspects:

5.3.1.1. “Cautionary” function

The requirement of writing has a “cautionary” function, in that it distinguishes the conclusion of an arbitration agreement from other types of transaction, thereby alerting the parties to the special significance of the agreement.⁶⁴¹ In turn this should provoke proper consideration before initial consent to the agreement is given.⁶⁴²

On the other hand, considering the fact that parties usually insert a short model clause, recommended by an arbitration institution, as a formality and that the arbitration clause

⁶³⁵ Abdulla, p. 24. On agency, see under IV.4.

⁶³⁶ Poudret/Besson, para. 270.

⁶³⁷ Redfern/Hunter/Blackaby/Partasides, para. 3-25.

⁶³⁸ Lew/Mistelis/Kröll, para. 7-33.

⁶³⁹ Poudret/Besson, para. 274.

⁶⁴⁰ See under III.5.1.1.1.

⁶⁴¹ Landau, *Written Form*, p. 22.

⁶⁴² *Ibid.*

in a commercial contract is often a “midnight clause”,⁶⁴³ one may ask how relevant the “cautionary” function really is. In any case, with respect to the “cautionary” function, regard should be given to whether the arbitration agreement was entered into by seasoned businessmen, or by people with little experience.⁶⁴⁴

5.3.1.2. “Evidential” function

Writing has an obvious “evidential” function as it facilitates the resolution of a dispute as to whether or not an arbitration agreement was actually consented to and concluded.⁶⁴⁵ Given the importance of the rights that are thereby excluded,⁶⁴⁶ there has been a perceived need to be able to prove a party’s consent to arbitration with particular certainty.⁶⁴⁷

5.3.1.3. “Channeling” function

The imposition of a writing requirement has a “channeling” function, allowing for certain types of agreement to be singled out as special legal mechanisms with particular attributes, and, requiring that particular transactions take a prescribed form in order to attract specific legal consequences or characteristics.⁶⁴⁸ In this way parties have to take a conscious decision to invoke the particular legal device, while knowing the consequences of such a choice.⁶⁴⁹

⁶⁴³ See Redfern/Hunter/Blackaby/Partasides, para. 3-02.

⁶⁴⁴ See Swiss Federal Tribunal, 7 February 1984, *Tradax Export SA (Panama) v. Amoco Iran Oil Company (US)*, XI YBCA 532 (1986), para. 10. See also *Obergericht Basel*, 5 July 1994, XXI YBCA 685 (1996).

⁶⁴⁵ Landau, *Written Form*, p. 23.

⁶⁴⁶ The right of access to court which is generally considered a fundamental right of every citizen in a civilised State. See, e.g. in particular Article 6 ECHR which, however, is not considered to be an absolute right. On human rights and arbitration, see, e.g. Besson, *Human Rights*; Jarrosson, *Convention*; Landrove, *European Convention*, Samuel, *ECHR*; Wedam-Lukic.

⁶⁴⁷ Landau, *Written Form*, p. 23.

⁶⁴⁸ In England, the requirement of writing in section 5 of the Arbitration Act 1996 constitutes, partly, a “scope” provision; if an agreement is in writing, the 1996 Act will apply, with all its legal consequences; if an agreement is not in writing, it will still have some limited existence in English law, but outside of the regime of the 1996 Act.

⁶⁴⁹ Landau, *Written Form*, p. 23.

5.3.2. *Conformity with Article II(2) NYC as presumption of “meeting of the minds”?*

Although, in principle, the form of the arbitration agreement does not concern questions regarding its formation, as these questions have to be judged under the applicable law, it has nevertheless been pointed out that if an arbitration agreement conforms to the requirement of Article II(2) NYC, there exists a *strong presumption that there is a “meeting of the minds”* between the parties since the requirements of Article II(2) NYC are fairly strict.⁶⁵⁰ Indeed, it may even be argued that, as far as the arbitration agreement is concerned, *if Article II(2) NYC is complied with, the parties can be deemed to have consented to arbitration*, except where lack of consent can be proven.⁶⁵¹

5.3.3. *Towards a triumph of substance over form*

While in the New York Convention the emphasis is on a *signed* agreement, in the modern laws of arbitration this requirement has largely disappeared.⁶⁵² In most of them all that is required is some *written* evidence of an agreement to arbitrate.⁶⁵³ In some systems of law an oral agreement to arbitrate will be regarded as being “in writing” if it is made “by reference to terms which are in writing”;⁶⁵⁴ or if an oral agreement “is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement”.⁶⁵⁵

It has been observed that in these modern arbitration laws there has in effect been *a triumph of substance over form*, because as long as there is some written evidence of an agreement to arbitrate, the form in which that agreement is recorded is immaterial.⁶⁵⁶ Moreover, some laws require writing only for evidentiary purposes (*ad probationem*)⁶⁵⁷ and others contain no form requirements.⁶⁵⁸ It has also been pointed out that there is no justification to submit arbitration agreements to stricter form requirements than other

⁶⁵⁰ Van den Berg, *NYC*, p. 177.

⁶⁵¹ *Ibid.*

⁶⁵² Redfern/Hunter/Blackaby/Partasides, para. 3-09.

⁶⁵³ *Ibid.*

⁶⁵⁴ See, e.g. the English Arbitration Act 1996, section 5(3).

⁶⁵⁵ See, e.g. the English Arbitration Act 1996, section 5(4). The “implied consent” provisions of the Model Law are also to be found in English Arbitration Act 1996, section 5(5). See Redfern/Hunter/Blackaby/Partasides, para. 3-09, and also Landau, *Written Form*, pp. 52-55.

⁶⁵⁶ Redfern/Hunter/Blackaby/Partasides, para. 3-09.

⁶⁵⁷ See, e.g. the Dutch law.

⁶⁵⁸ See, e.g. the French law (for international arbitration) and the Swedish law. See for an overview Poudret/Besson, paras 183 *et seq.*

contractual provisions,⁶⁵⁹ since arbitration is no longer considered a dangerous waiver of substantial rights.⁶⁶⁰ Indeed, on the one hand, the selection of arbitration is not an exclusion of the national forum but rather the natural forum for international disputes⁶⁶¹ and, on the other hand, form requirements do not necessarily promote legal certainty, but they are often the source of additional disputes.⁶⁶²

This all supports the complete abolition of the “in-writing” requirement,⁶⁶³ or at least the submission of the issue of formal validity to a substantive rule of international arbitration.⁶⁶⁴ In any case the writing requirement should be interpreted dynamically in light of modern means of communication⁶⁶⁵ and of the growing complexity of modern economic transactions. A degree of caution on the question on the “in-writing” requirement is, however, necessary, as:

1. even courts in jurisdictions familiar with international arbitration still sometimes refuse to enforce arbitration agreements that are not in a written document signed by the parties or otherwise contained in an exchange of letters or telegrams;⁶⁶⁶
2. an arbitration agreement that is regarded as valid by an arbitral tribunal or court in one country may not be so regarded by the courts of the country where the award falls to be enforced.⁶⁶⁷

Although courts have decided that a general reference⁶⁶⁸ to a separate document containing an arbitration clause was sufficient to constitute an “arbitral clause in a contract signed by both parties” in the sense of Article II(2) NYC⁶⁶⁹ and that no specific reference⁶⁷⁰ to the arbitration clause is required,⁶⁷¹ the main differences relate to the

⁶⁵⁹ See, e.g. the critic of Kaplan, pp. 30 *et seq.*

⁶⁶⁰ Lew/Mistelis/Kröll, para. 7-9.

⁶⁶¹ See Lionnet, p. 606.

⁶⁶² Lew/Mistelis/Kröll, para. 7-9.

⁶⁶³ See, e.g. Herrmann, *Freshfields Lecture*, p. 216; Herrmann, *Arbitration Agreement*, pp. 45 *et seq.*; Sanders, *Quo vadis*, pp. 157 *et seq.*

⁶⁶⁴ See, e.g. Blessing, *Law Applicable*, pp. 169 and 172.

⁶⁶⁵ On the functional equivalence of the written form in arbitration agreements in online business to business transactions, see Kaufmann-Kohler, *Online B2B*, pp. 358 *et seq.* Also the UNCITRAL Working Group on Arbitration in its 32nd session of March 2000 agreed that Article II(2) NYC should be interpreted to cover the use of electronic means of communication and that it required no amendment for this purpose (Report, A/CN.9/468 of 10 April 2000, No. 101).

⁶⁶⁶ See, e.g. the decision of the Second Circuit Court of Appeals in *Kahn Lucas Lancaster Inc v. Lark International Ltd* 186 F 3d 210 (1999). The Second Circuit’s decision in *Kahn Lucas* has been applied by a number of other US courts, who have arrived at varying interpretations (some liberal; some less so) of an “exchange of letters and telegrams”.

⁶⁶⁷ Redfern/Hunter/Blackaby/Partasides, para. 3-09.

⁶⁶⁸ On general reference or global reference, see under IV.3.2.3.3.

⁶⁶⁹ See for the same ruling in relation to the second alternative, the exchange of documents, Switzerland, Swiss Federal Tribunal, 12 January 1989, XV YBCA 509 (1990).

⁶⁷⁰ On specific reference or explicit reference, see under IV.3.2.3.2.

⁶⁷¹ France, Cas., 9 November 1993, *Bomar Oil NV v. ETAP - l'Entreprise Tunisienne d'Activités Pétrolières*, XX YBCA 660 (1995); Spain, Tribunal Supremo, 30 January 1986, *X v. Y*, XIII YBCA 512

interpretation of the second alternative form requirement, *i.e.* the exchange of documents.⁶⁷² Problems do in particular arise where only one party has clearly consented in writing to arbitration, as is typically the case with purchase orders or letters of confirmation containing an arbitration clause upon which the other party acts without sending a written reply.⁶⁷³ Some courts have followed in those cases a restrictive interpretation approach,⁶⁷⁴ others have adopted a wider one. A wide interpretation approach was followed in *Sphere Drake Insurance v. Marine Towing*⁶⁷⁵ where the US Courts did not follow the legislative history or a strict textual interpretation of Article II(2) NYC,⁶⁷⁶ but applied *intent over form*.⁶⁷⁷ Issues can also arise when a third party signs a document or engages in written communications, as in such cases it may be possible to attribute those written communications to the party which has not expressly consented to arbitration in writing.⁶⁷⁸

5.3.4. *The decreasing importance of the formal requirements shown using the example of Swiss case-law with regard to non-signatories*

5.3.4.1. General

Contrarily to French law, in the case of international arbitration, Swiss law requires a written arbitration agreement for validity.⁶⁷⁹ Therefore, in the case of an extension to third non-signatory parties the issue of the significance of the formal requirement of having a written arbitration agreement arises.

5.3.4.2. Different scholarly views

Poudret/Besson are of the opinion that, as Article 178(1) Swiss PIL subjects the validity of the arbitration agreement to requirements of form, the intention of the parties must be

(1988). Specific reference was required in *Tryff Hansa v. Equitas* [1998] 2 Lloyd's Rep. 439 and in another case cited by Merkin, *Arbitration Act*, 30.

⁶⁷² Lew/Mistelis/Kröll, paras 7-21 and 7-22.

⁶⁷³ *Ibid.*

⁶⁷⁴ See, *e.g.* Corte di cassazione, 28 October 1993, no 10704/93, *Robobar Ltd v. Finncold sas*, XX YBCA 739 (1995). See also: Corte di cassazione, 18 September 1978, No. 4167, *Gaetano Butera v. Pietro e Romano Pagnan*, IV YBCA 296 (1979) 299 *et seq.*; see also the German decision by the Landgericht München, 20 June 1978, V YBCA 260 (1980) 261; and the Hong Kong case *Small v. Goldroyce* [1994] 2 HKC 526.

⁶⁷⁵ *Sphere Drake Insurance Plc v. Marine Towing, Inc*, 16 F 3d 666, 669 (5th Cir. 1994).

⁶⁷⁶ Which requires signature or exchange of documents for arbitration agreements and clauses.

⁶⁷⁷ Lew/Mistelis/Kröll, para. 7-24 *et seq.*

⁶⁷⁸ *Ibid.* See under III.5.4.2.

⁶⁷⁹ See Article 178(1) Swiss PIL.

manifested by one or more texts and therefore *tacit acceptance based on non-written acts is insufficient*.⁶⁸⁰

Blessing, on the other hand, has always maintained that the issue of the extension of the arbitration clause to non-signatories is not an issue under sub-paragraph 1, but rather under sub-paragraph 2 of Article 178 Swiss PIL. Indeed, according to him, it is a problem as to the *scope of an existing* (validly signed or even exchanged *arbitration agreement*) *ratione personae*: once an arbitration clause exists its scope and reach have to be determined according to Article 178(2) Swiss PIL.⁶⁸¹ Therefore, *the issue will be one of consensus* and interpretation as to whether the contract (containing an arbitration clause) was meant to also include a non-signatory party.⁶⁸²

5.3.4.3. The position of the Swiss Federal Tribunal in the decision 129 III 727 (of 16 October 2003)

The Swiss Federal Tribunal, with regard to the relation between sub-paragraphs 1 and 2 of Article 178 Swiss PIL—while recognising the necessity of the form requirements for arbitration clauses—has, however, in 2003 held that:

*“Toutefois, cette exigence de forme ne s'applique qu'à la convention d'arbitrage elle-même, c'est-à-dire à l'accord (clause compromissoire ou compromis) par lequel les parties initiales ont manifesté réciproquement leur volonté concordante de compromettre. Quant à la question de la portée subjective d'une convention d'arbitrage formellement valable au regard de l'art. 178 al. 1 LDIP—il s'agit de déterminer quelles sont les parties liées par la convention et de rechercher, le cas échéant, si un ou des tiers qui n'y sont pas désignés entrent néanmoins dans son champ d'application ratione personae -, elle relève du fond et doit, en conséquence, être résolue à la lumière de l'art. 178 al. 2 LDIP (dans ce sens, cf., parmi d'autres, BLESSING, ibid.)”.*⁶⁸³

The Swiss Federal Tribunal, in upholding the majority decision of the arbitral tribunal,⁶⁸⁴ has made a *distinction between the validity of the arbitration agreement between the initial parties and the validity of its extension to third non-signatory*

⁶⁸⁰ Poudret/Besson, para. 258. See also Poudret, *Note*, p. 392.

⁶⁸¹ Blessing, *Introduction*, para. 504.

⁶⁸² *Ibid.*

⁶⁸³ DFT 129 III 727, consid. 5.3.1., p. 736.

⁶⁸⁴ See also Poudret, *Note*, pp. 393 *et seq.* It has been observed that the arguments which have been retained by the arbitral tribunal in order to admit the extension of the arbitration agreement and which have been reported at the consid. 5.1.1. of DFT 129 III 727 show the influence of the French case law (see Poudret, *Note*, pp. 393 *et seq.*).

parties.⁶⁸⁵ While the former is subject to the formal requirements provided for in Article 178(1) Swiss PIL, which exclude an oral agreement, *the extension would not have to comply with these formal requirements*. According to the Swiss Federal Tribunal the determination of the scope *ratione personae* of the arbitration agreement merely raises the question of interpretation, *i.e.* of substance, which must be resolved according to one of the three national laws referred to in Article 178(2) Swiss PIL.⁶⁸⁶

The Swiss Federal Tribunal has motivated this jurisprudence with the liberal approach that the Court had already followed in the past.⁶⁸⁷ Indeed an arbitration clause has been seen by the Swiss Supreme Court as binding for persons who have not signed it in many other cases: assignment, assumption of debt, in the case of procedural behaviour, or when it is required by the principle of good faith.⁶⁸⁸

It is exactly the distinction made by the Swiss Federal Tribunal that led to my earlier observation as to whether, following French case law, there might even be another form of separability: a sort of personal separability.⁶⁸⁹

5.3.4.4. Critics of the Swiss Federal Tribunal's decision

Contrarily to the Swiss Federal Tribunal Poudret/Besson maintain that the submission of the third non-signatory party to the arbitration between the initial parties should, in order to comply with the formal (already simplified) requirements of Article 178(1) Swiss PIL, derive from *documents manifesting the intent of such a third party to arbitrate*, and, indeed, until the aforementioned new case law, the Swiss Federal Tribunal always based the extension of the arbitration agreement on documents manifesting the intent of the third party.⁶⁹⁰ Poudret/Besson are of the opinion that the extension of the arbitration clause implies that the third party is also bound by a valid arbitration agreement, and not only that a valid arbitration agreement exists between the initial parties. Thus, the submission to arbitration in Switzerland is only valid if it complies with the conditions of form and substance provided for in Article 178 Swiss PIL.⁶⁹¹

⁶⁸⁵ See also Poudret/Besson, para. 258.

⁶⁸⁶ *Ibid.*

⁶⁸⁷ Huber, p. 39. See also Poudret, *Note*, pp. 394 *et seq.*

⁶⁸⁸ DFT 129 III 727, consid. 5.3.1., p. 735.

⁶⁸⁹ See under III.4.3.3.

⁶⁹⁰ See Poudret/Besson, para. 258.

⁶⁹¹ *Ibid.*

In between the positions of Blessing and Poudret/Besson, a third way has been suggested by Habegger. He supports the finding that *no overly strict requirements should apply to the formal validity of an extension of the arbitration clause to a third party*. Therefore, he argued that for showing compliance with Article 178(1) Swiss PIL an “*exchange of text*” *between an initial party and the party to which the arbitration clause is to be extended is not required*.⁶⁹²

5.4. Upholding the arbitration agreement in spite of its signature by only one of the parties or the non-fulfilment of formal requirements

5.4.1. Expression of consent in more documents

When a contract containing the arbitration clause is signed by only one party it is widely accepted that the written consent of the other party contained in a different document does not have to be signed.⁶⁹³ Indeed, the signature requirement merely applies to the first alternative of Article II(2) NYC but not to the second—the exchange of documents.⁶⁹⁴

5.4.2. Three party situations

In bills of lading and other three party situations, in which it frequently transpires that the third party signs a document or engages in written communications, it may be possible to attribute those written communications to the party which has not expressly consented to arbitration in writing.⁶⁹⁵ The third party may be considered to have acted as an agent or a broker when consenting in writing.⁶⁹⁶

⁶⁹² Habegger, p. 410.

⁶⁹³ Lew/Mistelis/Kröll, para. 7-28.

⁶⁹⁴ Switzerland, Federal Tribunal, 5 November 1985, *Tracomina CA v. Sudan Oil Seeds Co Ltd*, XII YBCA 511 (1987); *Obergericht Basel*, 5 July 1994, *DIETF Ltd v. RF AG*, XXI YBCA 685 (1996). On the *Tracomina case*, see in particular also Samuel, *Arbitration clauses*, pp. 508 *et seq.*

⁶⁹⁵ Lew/Mistelis/Kröll, para. 7-29.

⁶⁹⁶ See, *e.g.* Swiss Federal Tribunal, 7 February 1984, *Tradax Export SA (Panama) v. Amoco Iran Oil Company (US)*, XI YBCA 532 (1986). On the *Tradax case*, see in particular also Samuel, *Arbitration clauses*, pp. 509 *et seq.*

⁶⁹⁶ Lew/Mistelis/Kröll, para. 7-30.

5.4.3. *Good faith and estoppel considerations*

Where the consent of both parties to the arbitration clause was clear, in spite of the non-fulfilment of formal requirements, courts have also resorted to considerations of good faith and estoppel to uphold the arbitration agreement.⁶⁹⁷ The Swiss Federal Tribunal in *Compagnie de Navigation et Transport v. MSC* held:⁶⁹⁸

“in particular situations, a certain behaviour can replace compliance with a formal requirement according to the rules of good faith”.

However, there are also decisions where for reasons of legal certainty it has been impossible to overcome the lack of form in the arbitration agreements.⁶⁹⁹

⁶⁹⁷ Lew/Mistelis/Kröll, para. 7-30.

⁶⁹⁸ Swiss Federal Tribunal, 16 January 1995, *Compagnie de Navigation et Transport SA v. MSC (Mediterranean Shipping Company)*, XXI YBCA 690 (1996) 698 para. 13. On the *Compagnie de Navigation* case, see in particular also Samuel, *Arbitration clauses*, pp. 511 *et seq.*

⁶⁹⁹ Lew/Mistelis/Kröll, para. 7-30, footnote 35. See, *e.g.* ICC Case No. 5832, 115 *Clunet* 1198 (1988) 1202; *Aughton Ltd v. MF Kent Services Ltd*, (1991) 31 *Con LR* 60 (CA).

SECOND PART

The Second Part of this study will compare—by analysing them separately—three different areas in which arbitration today plays a significant role in an international context: commercial arbitration (Chapter IV.), investment arbitration (Chapter V.) and sport arbitration (Chapter VI.).

IV. COMMERCIAL ARBITRATION

The starting point of the comparison will be the classical field of commercial arbitration. In international commercial arbitration it is of paramount importance to characterise the nature of the underlying transaction and determine whether or not the relevant dispute is commercial. On the other hand, the involvement of commercial persons may be of relevance, but should not be the guiding principle.⁷⁰⁰ Indeed, States and their ministries and agencies may be involved in a commercial activity, although they do not qualify, strictly speaking, as a commercial person.⁷⁰¹ In commercial arbitration the relationship between the parties is horizontal and consent is expressed in an arbitration agreement which can take the form of a submission agreement or an arbitration clause.⁷⁰²

The concept of “commercial” that underlies this thesis is the one followed by the Model Law—it describes “commercial” in a footnote to Article 1(1) in a comprehensive and open-ended way.⁷⁰³ The definition includes disputes with State parties and does not distinguish between civil and commercial arbitration as some national legal systems do.⁷⁰⁴

Chapter IV. begins by making some general remarks on the consensual character of commercial arbitration and looking at the possible exception of arbitration with the

⁷⁰⁰ Lew/Mistelis/Kröll, para. 4-5.

⁷⁰¹ *Ibid.*

⁷⁰² See under III.1.

⁷⁰³ Some countries which adopted the Model Law incorporated the text of the footnote into a section of the law; other jurisdictions simply reproduced the text in a schedule (see Lew/Mistelis/Kröll, p. 53, footnotes 15 and 16). For the wording of this footnote in the Model Law, see under the annex containing the wording of the provisions cited in the main body of the thesis.

⁷⁰⁴ See, e.g. French domestic arbitration law (Fouchard/Gaillard/Goldman, para 64).

Chambers of Commerce of (former) communist countries (section 1.). Then it turns to discuss the content of the arbitration agreement (section 2.). After that the determination of the existence of parties' consent and its scope is analysed (section 3.). Agency and consent (section 4.) and the transfer of the arbitration agreement and consent (section 5.) are considered. A longer section is then devoted to parties' consent with regard to the extension of arbitration agreements, in particular within groups of companies (section 6.). And, finally, the relevance of parties' consent with regard to procedural mechanisms is examined (section 7.).

1. GENERAL REMARKS

1.1. The consensual character of commercial arbitration

The agreement to arbitrate is the foundation stone of international commercial arbitration, as it records the consent of the parties to submit to arbitration—a consent which is indispensable to any process of dispute resolution outside national courts.⁷⁰⁵ Indeed, the consent of the parties is the essential basis of a voluntary system of international commercial arbitration.⁷⁰⁶ Nevertheless, it has been observed that compulsory arbitration does exist and that internationally, the most striking example of compulsory arbitration occurred in the socialist countries of Central and Eastern Europe, where it was employed as the method of settling disputes under the provisions of the Moscow Convention of 1972.⁷⁰⁷

1.2. Arbitration with communist countries as an exception?

1.2.1. Former socialist countries of Central and Eastern Europe

1.2.1.1. Overview

The Moscow Convention of 26 May 1972 provided for a referral to arbitration for all disputes which arose between economic organisations of the former CMEA countries.

⁷⁰⁵ See, e.g. Born, p. 1.

⁷⁰⁶ See, e.g. Redfern/Hunter/Blackaby/Partasides, para. 3-01.

⁷⁰⁷ Redfern/Hunter/Blackaby/Partasides, para. 3-01, footnote 3. Similarly also Rigozzi, para. 475.

Arbitration was thus the compulsory dispute resolution mechanism within the COMECON, and the system became widely harmonised throughout the Member States. Awards were final and binding and enforceable in the same manner as court judgments; grounds for refusal of enforcement were strictly limited.⁷⁰⁸

In the past, foreign trade organisations of the Soviet Union and other East European countries, in negotiating contracts with Western corporations, have proposed, and occasionally insisted on, arbitration under the rules of the foreign trade arbitration institution established at the Chamber of Commerce of the East European country in question.⁷⁰⁹ While most CMEA countries only had one arbitration court, the former Soviet Union had the FTAC and the MAC.⁷¹⁰ The FTAC and MAC, both attached to the USSR Chamber of Commerce and Industry in Moscow, have generally been seen as representative of such institutions.⁷¹¹

1.2.1.2. With particular regard to consent and the proceeding

It has been observed that both FTAC and MAC displayed features, on a theoretical level, which made them resemble national courts rather than arbitral tribunals. The most important aspect of arbitration, namely the *voluntary submission to arbitration*, was, however, a condition precedent for FTAC and MAC to try disputes.⁷¹² Moreover, parties engaged in East–West trade had a *fairly broad spectrum of choices among various available arbitration mechanisms*,⁷¹³ and, yet even though there might have been a sort of pressure to resort to arbitration before the foreign trade arbitration commissions of Eastern Europe, it has been observed that with the exception of the award in the Soviet–Israeli Oil Arbitration,⁷¹⁴ FTAC and MAC had an unblemished *reputation for fairness*,⁷¹⁵ and this in spite of the fact that they were attached to the Chamber of Commerce.

⁷⁰⁸ Blessing, *Introduction*, para. 267.

⁷⁰⁹ Hobér, *Moscow*, p. 121.

⁷¹⁰ Blessing, *Introduction*, para. 268.

⁷¹¹ Hobér, *Moscow*, p. 121.

⁷¹² See Hobér, *Moscow*, p. 158.

⁷¹³ *E.g.* arbitration in a third country under the rules of the ICC or arbitration in Stockholm under the auspices of the Arbitration Institute of the SCC (Hobér, *Moscow*, p. 120).

⁷¹⁴ The case is the infamous Soviet-Israeli Oil Arbitration. The award is translated and reproduced in 53 *Am. J. Int'l. L.* 800 (1959). For comments on the award, see, *e.g.* Berman; Domke; Metzger.

⁷¹⁵ See Hobér, *Moscow*, p. 163.

1.2.2. *People's Republic of China (PRC)*

1.2.2.1. Overview

In the PRC, prior to the enactment of the 1994 Arbitration Law, CIETAC and CMAC had exclusive jurisdiction over foreign-related disputes.⁷¹⁶ While this “monopoly” was challenged when the 1994 Law introduced a rather ambiguous provision stating that “foreign-related arbitration commissions may be established by the China International Chamber of Commerce”,⁷¹⁷ CIETAC remains the largest arbitration institution of the country.⁷¹⁸ CIETAC, which is regularly insisted upon by Chinese contracting parties, is organised under the auspices of the China Council for the Promotion of International Trade (CCPIT)—a powerful force for trade with China—and to this extent it is controlled and influenced by the Chinese Government.⁷¹⁹

1.2.2.2. CAA requirements: more than only consent to arbitration?

In reading Articles 16 and 18 CAA together, one may find that the *designation of an arbitration institution* (the substitute wording for “arbitration institution” in the CAA is “arbitration commission”) actually *constitutes a compulsory requirement* for a valid arbitration agreement under the CAA.⁷²⁰ It has been argued that, due to the fact that arbitration is contractual in nature, an arbitration agreement should only be invalid if according to the interpretation of the arbitration agreement and all relevant circumstances no common consent to arbitrate can be ascertained.⁷²¹ The CAA provisions, however, require much *more than the parties' consent to arbitrate*, which could make arbitration agreements very vulnerable to the easy invalidation by courts.⁷²² Indeed, this requirement could disqualify foreign arbitration institutions at the outset from handling arbitrations in China, when their model arbitration clauses do not mention the arbitration institution itself⁷²³ and therefore do not meet the requirements of Article 16 CAA.⁷²⁴

⁷¹⁶ Zhou, p. 149.

⁷¹⁷ *Ibid.*

⁷¹⁸ In recent years, nearly 1,000 cases have been filed with the CIETAC annually on average (see http://www.cietac.org.cn/english/introduction/intro_1.htm).

⁷¹⁹ Lew/Mistelis/Kröll, para. 3-30.

⁷²⁰ Manjiao, p. 111.

⁷²¹ Tao/von Wunschheim, p. 316.

⁷²² See Manjiao, p. 111.

⁷²³ For this reason the ICC has a Model arbitration clause for Mainland China which mentions the arbitration institution. For the wording of the clause, see under the annex containing the wording of the provisions cited in the main body of the thesis.

⁷²⁴ See Tao/von Wunschheim, p. 324.

1.2.3. *Comments*

Arbitration with parties of (former) communist countries is, in my opinion, ***not really an exception from the consensual character*** of commercial arbitration. Indeed, the parties still had, and respectively still have, a possibility of choice, although perhaps a more limited one. For instance, in China *ad hoc* arbitrations are not permitted,⁷²⁵ and therefore it is not possible to consent to arbitration with own rules. However, parties still have the ***possibility to choose***, even though only among institutional arbitrations. The fact that the parties' choice is restricted to institutional rules is, however, in my view, ***primarily an issue about how far reaching party autonomy is, and less one about the consensual character of arbitration.***

What is surely a more difficult aspect to cope with is the one about ***unequal bargaining powers*** between the parties who decide to consent to arbitration. This aspect concerns, however, more the question of whether the arbitration agreement, as it has been concluded, is valid or not (***validity of the arbitration agreement***). On the other hand, this issue is ***mitigated*** when the parties have the possibility of choice among various available arbitration mechanisms, and, above all, when the arbitration ***proceedings*** before a determinate arbitration institution are ***conducted in a fair way***. The issue with the requirements of the CAA also shows the importance of the content of the arbitration agreement.

2. THE CONTENT OF THE ARBITRATION AGREEMENT

2.1. The essential elements for which consent is required

When entering into an arbitration agreement, the parties should strive to express their consent in an unequivocal manner with regard to the essential elements of such an agreement, so as to restrict any room for interpretation and ensure the validity of the arbitration agreement.⁷²⁶ The validity supposes that the essential elements are defined without ambiguity or contradiction, as otherwise, the clause is defective and might prove invalid or ineffective.⁷²⁷

⁷²⁵ The Chinese arbitration system has a tradition of prohibiting *ad hoc* arbitration (see Manjiao, p. 115).

⁷²⁶ Abdulla, p. 19.

⁷²⁷ Poudret/Besson, para. 158.

2.1.1. *The agreement to arbitrate: any dispute between the parties will be resolved by arbitration*

The arbitration agreement must clearly express the parties' intention to submit their dispute to arbitration, instead of going to a national court. The ***agreement should make clear that arbitration is the exclusive forum*** in which disputes between the parties are to be resolved.⁷²⁸ In particular all ambiguity between arbitration in the strict sense, mediation, expert determination, and other modes of dispute resolution must be avoided.⁷²⁹ Should the parties intend to subordinate their arbitration to prior conciliation proceedings, they should mention it in their arbitration agreement since this is a requirement of their submission to arbitration.⁷³⁰ Indeed, the fulfilment of this requirement is a prerequisite to be met before consent to arbitration can become effective.

Although the ambiguity of including an ***additional choice of forum clause*** should also be avoided, occasionally an arbitration agreement may allow one or both parties the choice as to whether to go to arbitration or have the dispute decided by State courts.⁷³¹ The possibility of choice ***increases the consensual character of arbitration, when this mode of dispute resolution is preferred***, because the choice is made once the dispute has broken out.⁷³² On the other hand, when the ***route of State courts is preferred, the consent to arbitration of both parties has vanished***. This seems especially unfair in the case of unilateral arbitration clauses. Indeed, the resulting lack of equality between the parties raises the issue of the validity of such an arrangement.⁷³³ Therefore, where only one party, in general the one with the greater bargaining power, has the right to choose between arbitration and litigation, there might be problems with the enforceability of the arbitration agreement in some systems.⁷³⁴ While in the US this matter is not settled—although in commercial contracts there seems to be a trend in favour of their validity⁷³⁵—French law has held such agreements to be valid.⁷³⁶ Moreover, for instance

⁷²⁸ Lew/Mistelis/Kröll, para. 8-10.

⁷²⁹ Poudret/Besson, para. 155.

⁷³⁰ *Ibid.*

⁷³¹ Lew/Mistelis/Kröll, paras 8-10 *et seq.*

⁷³² This is at least so from the optic of the party choosing the forum.

⁷³³ Fouchard/Gaillard/Goldman, para. 488.

⁷³⁴ In Mexico, for instance, such arbitration clauses are not considered to be valid: see Article 567 Código Federal de Procedimientos Civiles.

⁷³⁵ *Doctor's Assoc v. Distajo*, 66 F 3d 438, 451 (2d Cir. 1995). For further references, see Kröll, *Finanzgeschäften*, pp. 367 and 378; Niddam, pp. 159 *et seq.*; Drahozal.

⁷³⁶ Fouchard/Gaillard/Goldman, para. 488.

in Germany, the Federal Supreme Court has considered this type of clause to be valid even when contained in standard terms of business.⁷³⁷

2.1.2. Indication of the dispute or legal relationship which will be the subject matter of arbitration

The agreement must *identify what disputes should be referred to arbitration*: is it all or only specific disputes arising out of the specific contractual relationship between the parties?⁷³⁸ In doing this it is important to ensure that the wording adopted in an arbitration agreement is adequate to fulfil the intentions of the parties.⁷³⁹ It should also be made clear that the disputes are in respect of a particular contract or contracts, as an agreement to submit future disputes between the parties to arbitration without reference to any contractual relationship between the parties may be void for reasons of uncertainty.⁷⁴⁰

The various arbitration institutions recommend *model clauses with broad wording* by referring to “all”⁷⁴¹ or “any dispute”,⁷⁴² “all disputes, controversies and differences”,⁷⁴³ or just generally “disputes, controversies or claims”.⁷⁴⁴ Indeed, the reference to “each dispute” or “a dispute” could be interpreted to mean that each dispute should be the subject of a separate arbitration.⁷⁴⁵ Moreover, in identifying the *link between the dispute and the contract* clauses are used such as “arising from/arising out of or in connection with”⁷⁴⁶ or “arising out of or relating to or in connection with”.⁷⁴⁷ Clearly the terms “relating to” and “in connection with” are wider than “arising out of” a particular contract and this wider language may allow a tribunal to deal with a peripheral agreement which relates to, but is separate from, the main agreement in

⁷³⁷ BGH, 24 September 1998 ZIP 1998, 2065 with note Kröll, WuB VII A § 1025 1-99. For the same position under English law, see *Pittalis v. Sherefettin* [1986] QB 868; Russell on arbitration, para. 2-045. (Lew/Mistelis/Kröll, para. 8-12).

⁷³⁸ Lew/Mistelis/Kröll, para. 8-13.

⁷³⁹ Redfern/Hunter/Blackaby/Partasides, para. 3-38.

⁷⁴⁰ This was not the case in *Navigazione Alta Italia SpA v. Concordia Maritime Chartering AB (The “Stena Pacifica”)* [1990] 2 Lloyd’s Rep. 234 (Lew/Mistelis/Kröll, para. 8-16).

⁷⁴¹ See ICC recommended arbitration clause.

⁷⁴² Found in the LCIA, ICSID, SIAC and HKIAC recommended clauses.

⁷⁴³ See, e.g. standard clause of the Japanese Commercial Arbitration Association.

⁷⁴⁴ See similarly “dispute, controversy or claim” in AAA, ICDR, HKIAC, WIPO, SCC Clauses.

⁷⁴⁵ Lew/Mistelis/Kröll, para. 8-13.

⁷⁴⁶ See, e.g. standard clause of LCIA, SIAC, HKIAC.

⁷⁴⁷ See, e.g. standard clause of ICC.

which the arbitration agreement is contained—even though it is not expressly or directly covered in that main agreement.⁷⁴⁸

Language should be used which identifies the generic issues between the parties, *e.g.* “disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination”⁷⁴⁹—this may facilitate set-off and counterclaims being addressed in the same arbitration.⁷⁵⁰

The *model clauses* recommended by the various institutions have an *expansive effect on parties’ consent to arbitration*. Indeed, with the broad wording parties agree that a bigger number of disputes fall within the scope of the arbitration agreement. However, as *consent is given before disputes break out*, there is at the same time a *reduction of the pure consensual character of arbitration*. This leads to a phenomenon which I would call the “*paradox of consent*”: the expansion of parties’ consent to arbitration causes a reduction of the pure consensual character of arbitration itself.

On the other hand narrower language will result in certain disputes falling outside the scope of the arbitration clause, and, accordingly, claims in tort or other non-contractual claims have been held not to arise under “an agreement” and are not covered by an arbitration clause.⁷⁵¹ In a context where the selection of *arbitration* is no longer seen as the exclusion of a national forum, but rather the *natural forum for international disputes*,⁷⁵² this should be avoided, as before the dispute breaks out the parties might have consented to submit future disputes to arbitration. Indeed, it can also be observed that the *reduction of the pure consensual character of arbitration goes hand in hand with the growing acceptance of arbitration as a mechanism to solve international disputes*.

Doubt has also been cast on whether arbitration (like court proceedings) needs to be contentious by pointing out that neither arbitrators nor courts are necessarily called upon to decide disputes in the strict sense, but to regulate relationships between parties, notably by adapting a contract or filling gaps therein.⁷⁵³ However, clear and express

⁷⁴⁸ Lew/Mistelis/Kröll, para. 8-14.

⁷⁴⁹ LCIA standard clause.

⁷⁵⁰ Lew/Mistelis/Kröll, para. 8-15.

⁷⁵¹ See Working Group on the ICC Standard Arbitration Clause, Final Report of 3 March 1992, Doc. N1111o 420/318. See also *Fillite (Runcorn) Ltd v. Aqua-Lift (a firm)* [1989] 45 BLR 27; *Empresa Exportadora de Azucar v. Industria Azucaera Nacional SA (The Playa Larga)* [1983] 2 Lloyd’s Rep. 171.

⁷⁵² Lionnet, p. 606. See also Lew/Mistelis/Kröll, para. 7-9.

⁷⁵³ Oppetit, *Arbitrage*, pp. 315-326.

wording should be used if parties want to entrust the arbitration tribunal with the task of gap filling and adaptation of the contract—particularly given the creative, as opposed to judicial, nature of this task.⁷⁵⁴

2.1.3. *Finality of awards*

One stop dispute resolution is an advantage of arbitration, as most national laws allow *no or limited rights of appeal against an award*.⁷⁵⁵ Parties do not wish to be tied up in the national courts on appeal to challenge the arbitrators' conclusions or to delay the effect of the tribunal's decision indefinitely where one party wishes to avoid the determination of the tribunal.⁷⁵⁶ For this reason, while it should be self evident and implied in the arbitration agreement, arbitration clauses often contain the words “finally settled”⁷⁵⁷ or “resolved”⁷⁵⁸ by arbitration.⁷⁵⁹ Where under the law of the place of arbitration there is an appeal mechanism against the decision of the arbitration tribunal,⁷⁶⁰ the parties may wish to exclude this right of appeal.⁷⁶¹ The English Court of Appeal has held that the wording of the standard ICC clause was enough to manifest the parties' intention to exclude the right of appeal against the award under section 3(1) of the English Arbitration Act 1979.⁷⁶²

2.2. Other relevant considerations

2.2.1. *In General*

Lawyers frequently consider and seek to cover many other relevant issues in the arbitration agreement. These include: for institutional arbitration, which institution; the place of arbitration; the number of arbitrators; the method of appointment and qualification of the arbitrators; the language of the arbitration; the procedure to be followed; the applicable rules to determine the issues in dispute; timetable for the

⁷⁵⁴ That applies irrespective of the fact that under some laws standard arbitration agreements may also empower the courts to fill gaps and adapt contracts; see Kröll, *Ergänzung*, pp. 104 *et seq.* and 165 *et seq.*

⁷⁵⁵ Lew/Mistelis/Kröll, para. 8-18.

⁷⁵⁶ *Ibid.*

⁷⁵⁷ See, *e.g.* recommended arbitration clauses of ICC and Japan Commercial Arbitration Association.

⁷⁵⁸ See, *e.g.* recommended arbitration clauses of LCIA and SIAC.

⁷⁵⁹ Lew/Mistelis/Kröll, para. 8-18.

⁷⁶⁰ See, *e.g.* section 69 English Arbitration Act 1996.

⁷⁶¹ Lew/Mistelis/Kröll, para. 8-19.

⁷⁶² *Marine Contractors Inc v. Shell Petroleum Company of Nigeria* [1984] 2 Lloyd's Rep. 77.

award; and several other less common issues, such as costs of arbitration or confidentiality.⁷⁶³ While these various points can sometimes usefully be dealt with in the arbitration agreement, they are not crucial to its validity.⁷⁶⁴

2.2.2. *The seat of arbitration*

Although some authors ignore or consider the seat of arbitration of secondary importance, for others⁷⁶⁵ the arbitration agreement must directly or indirectly connect the arbitration to a legal system which will ensure its effectiveness in the absence of any contractual mechanism to this effect. There are different forms of connection:

- the direct connection with the designation of a seat;
- the submission to the arbitration rules of an arbitration institution;⁷⁶⁶ and, finally,
- an indirect connection with the submission to arbitration rules containing a procedure for appointing arbitrators who can then determine the seat in the absence of an agreement of the parties.⁷⁶⁷

A number of national laws⁷⁶⁸ provide for a subsidiary connecting factor based on the domicile of one of the parties where no seat has been fixed.⁷⁶⁹ However, in order to ensure the effectiveness of the arbitration the conditions of such a subsidiary connection have to be met. On the other hand the Swiss PIL and the UNCITRAL Model Law contain no subsidiary connecting factors. Therefore, it has been sustained that, despite all these precautions the determination of the seat by the parties can be an essential element of the arbitration agreement, and not merely an important or useful one, as many authors⁷⁷⁰ submit.⁷⁷¹ Nevertheless, the importance of the seat of arbitration has also been challenged on several grounds:

- the choice of seat is often a matter of convenience;

⁷⁶³ Lew/Mistelis/Kröll, paras 8-20 *et seq.* For an overview of these elements, see Lew/Mistelis/Kröll, paras 8-21 *et seq.* or Redfern/Hunter/Blackaby/Partasides, paras 3-42 *et seq.*

⁷⁶⁴ Poudret/Besson, para. 158.

⁷⁶⁵ See, *e.g.* Poudret/Besson, para. 157.

⁷⁶⁶ Such an institution is generally competent to appoint the arbitrator or arbitrators in the absence of an agreement between the parties or in case of obstruction by one of them, and even to determine the seat of the arbitration. Failing such a determination, the seat can be fixed by the appointed arbitrators. To take the example of the ICC arbitration, these powers of the ICC Court of Arbitration result from Articles 8(3), 8(4) and 14(1) of the ICC Rules.

⁷⁶⁷ Article 7(2) UNCITRAL Arbitration Rules is an example.

⁷⁶⁸ Namely those of Germany, the Netherlands and Sweden. Italian and English law also contain subsidiary connecting factors designed to avoid the invalidity of the arbitration agreement when the seat has not been indicated.

⁷⁶⁹ Poudret/Besson, para. 157.

⁷⁷⁰ See, *e.g.* Bernardini, *Arbitration Clause*, p. 51; Craig/Park/Paulsson, p. 93.

⁷⁷¹ Poudret/Besson, para. 157.

- the choice of seat is often determined not by the parties but by the arbitration institution they have selected;
- the choice of seat is often governed by the desire for neutrality;
- the role of the arbitration tribunal is transitory and the seat has no necessary connection with the dispute.⁷⁷²

In particular, in light of the emancipation of arbitration from national laws and the above arguments, there is a school of thought that international arbitration can be delocalised.⁷⁷³

2.2.3. *Ad hoc arbitrations*

As there are no clear rules applicable, in the case of *ad hoc* arbitrations the agreement should provide for the ***appointment of the arbitrators and the procedures*** to follow. If the arbitration agreement is silent then the rules of the applicable law, which will invariably be the law of the place of arbitration if one has been agreed, will be applied to these issues.⁷⁷⁴

2.2.4. *Multiparty arbitrations*

Where there are more than two parties to a contract the arbitration agreement should anticipate a dispute involving more than two parties, as these situations can give rise to additional complications, especially with respect to the appointment of arbitrators.⁷⁷⁵

2.3. **Implied terms**

By consenting to arbitration the parties also consent to the implied terms⁷⁷⁶ which arise from an agreement to arbitrate. The issue with implied terms is how far the parties are conscious of and consent to such terms. A good example of this problem is the treatment of confidentiality in England.⁷⁷⁷ However, in 2008 the English Court of

⁷⁷² See the comprehensive summary in Goode, pp. 32 *et seq.*

⁷⁷³ Lew/Mistelis/Kröll, para. 4-49. On delocalised arbitration, see, *e.g.* the discussion in Nakamura and Rubins, *Arbitral Seat*. An example of delocalised arbitration is sport arbitration, in particular in the context of Olympic Games (see Kaufmann-Kohler, *Olympics*, pp. 3, 22 and 80).

⁷⁷⁴ Lew/Mistelis/Kröll, para. 8-47.

⁷⁷⁵ See Lew/Mistelis/Kröll, para. 8-55.

⁷⁷⁶ “*Dispositives Recht*” in Germany, “*lois supplétives*” in France (see also Zweigert/Kötz, p. 327).

⁷⁷⁷ See in particular the cases *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha* (The “Eastern Saga”) [1984] 2 Lloyd’s Rep. 373 *et seq.*, and [1984] 3 All ER 835 *et seq.*; *Dolling-Baker v. Merrett and others*, [1991] 2 All ER 890 *et seq.*; [1990] 1 WLR 1205 *et seq.*; *Hassneh Insurance Co. of Israel v. Stuart J.*

Appeal has restated the position that, as a matter of English law,⁷⁷⁸ an implied duty of confidentiality exists in every arbitration agreement.⁷⁷⁹ Indeed, there are a number of exceptions to this general rule, albeit that the full extent of these exceptions has yet to be finally determined.⁷⁸⁰

It has been observed that such far reaching implied obligations are in most cases not in the parties' interest and that many parties are even not aware of their existence and scope when they conclude the arbitration agreement.⁷⁸¹ Generally speaking, the *issue* with implied terms is *on what parties' consent to* or, in other words, it is about *the content of the arbitration agreement*. Recently, it has thus been argued that the parties' expectations to international commercial arbitration would be better served by enforcing only express, rather than implied, obligations of confidentiality.⁷⁸²

The approach of the English courts to "confidentiality" has met with little sympathy elsewhere.⁷⁸³ Nevertheless, also the High Court of Singapore and the Supreme Court of Bermuda have, in the years 2003 and 2006, followed the English case law.⁷⁸⁴

2.4. The problem of awareness of national provisions shown by using the example of the Dutch consolidation provision

With the conclusion of the arbitration agreement the national law provisions of the seat of arbitration become applicable. Some provisions may be problematic with regard to the consensual nature of arbitration. The law of the Netherlands provides, for instance, for the possibility to have a court-ordered consolidation.⁷⁸⁵ Therefore, the issue arises as to whether the parties to the arbitration agreement are aware of this provision and the possibility that a third party may eventually join the proceedings.

Mew [1993] 2 Lloyd's Rep. 243 *et seq.*; *Ali Shipping Corp. v. Shipyard Trogir* [1998] 1 Lloyd's Rep. 643 *et seq.*; [1998] 2 All ER 136 *et seq.*; [1997] EWCA Civ 3054.

⁷⁷⁸ On the differentiation between terms implied in law and terms implied in fact, see Lord Denning M.R. in *Shell v. Lostock Garages* [1977] 1 All E.R. 481, 487 *et seq.* (CA.); Gatehouse J., in *Ashmore v. Corporation of Lloyd's* (No. 2), [1992] 2 Lloyd's Rep. 620, 626 *et seq.* (Q.B.). See also Hadzimanovic.

⁷⁷⁹ *Emmot v. Michael Wilson & Partners* [2008] EWCA Civ 184.

⁷⁸⁰ Young/Chapman, p. 45.

⁷⁸¹ See Ritz, p. 17.

⁷⁸² Young/Chapman, p. 45.

⁷⁸³ *Ibid.*

⁷⁸⁴ Singapore: decision of 6 June 2003 in the case *Myanmar Yaung Chi Oo Co. Ltd. v. Win Win Nu and another*, [2003] 2 SLR 547 *et seq.*, 552 para. 17. Bermuda: decision of 2 February 2006, see under: <http://www.legalweek.com/articles/128033/offshore+a+question+of+confidence.html> (last accessed in April 2009).

⁷⁸⁵ See Article 1046 Netherlands CCP. On this provision, see under IV.7.2.2.2.2.b.

3. DETERMINATION OF THE EXISTENCE OF PARTIES' CONSENT AND ITS SCOPE

3.1. Interpreting parties' consent

3.1.1. *In general: applicability of the general principles of contractual interpretation*

Arbitration agreements are, in general, subject to the same type of rules of interpretation as all other contracts, and all relevant circumstances have to be taken into account.⁷⁸⁶ Several principles of interpretation might be applied for interpreting parties' consent.

3.1.1.1. Interpretation in good faith

The first and most widely accepted principle of interpretation applied to arbitration agreements is the principle of interpretation in good faith; this rule of interpretation means that a *party's true intention* should always prevail over its declared intention—where the two are not the same.⁷⁸⁷ Thus, declarations should be interpreted in good faith and the parties' conduct, both at the time of contracting and subsequently, considered.⁷⁸⁸

From this broad rule—that contracts must be interpreted in good faith—more specific rules of interpretation can be derived, all of which stem from the need to establish the actual intention of the parties:

- first, the *intention of the parties must be examined in context*, that is to say, by taking into account the consequences which the parties reasonably and legitimately envisaged;
 - second, the *attitude of the parties after the signature of the contract* and up until the time when the dispute arose should be taken into account, as that attitude will indicate how the parties themselves actually perceived the agreements in dispute.⁷⁸⁹
- This rule is sometimes referred to as “practical and quasi-authentic interpretation” or “contemporary practical interpretation” and is usually applied in arbitral case law.⁷⁹⁰

⁷⁸⁶ Lew/Mistelis/Kröll, para. 7-60.

⁷⁸⁷ Fouchard/Gaillard/Goldman, para. 477.

⁷⁸⁸ See, e.g. Lew/Mistelis/Kröll, para. 7-60.

⁷⁸⁹ Fouchard/Gaillard/Goldman, para. 477.

⁷⁹⁰ See, e.g. the 23 August 1958 *ad hoc* award by Messrs. Sauser-Hall, referee, Hassan and Habachy, arbitrators, in *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*, 27 ILR 117, 198 (1963).

In particular, recognition of the existence of an arbitration agreement will frequently result from a party initially relying on the existence of that agreement to avoid the jurisdiction of the courts, but subsequently denying its existence or validity before an arbitral tribunal;⁷⁹¹

- third and finally, the *agreement must be interpreted as a whole*.⁷⁹² This need for an interpretation of the agreement or of its various constituent parts as a whole, bound together by the true intention of the parties, is one of the factors to be taken into account in disputes involving the construction of arbitration agreements contained in related contracts.⁷⁹³

3.1.1.2. Effective interpretation

A second principle of interpretation of arbitration agreements is the principle of effective interpretation. This common-sense rule whereby, if in doubt, one should “*prefer the interpretation which gives meaning to the words*, rather than that which renders them useless or nonsensical”,⁷⁹⁴ is widely accepted not only by the courts but by arbitrators who readily acknowledge it to be a “universally recognised rule of interpretation”.⁷⁹⁵

The principle of effective interpretation has, for instance, been applied by the Swiss Federal Tribunal in decision 130 III 66 where it held that, when it is clear that the parties wanted to oust State’s courts in favour of arbitration, the arbitration agreement should be interpreted in accordance to the principle of effective interpretation so as to uphold the arbitration agreement.⁷⁹⁶

Another example of the application of this principle can be seen in the following passage where an arbitral tribunal interpreting a pathological clause held that:

⁷⁹¹ For an example of the censure of such conduct (which was held to constitute the recognition of the arbitration agreement), see, in the United States, *In re Petition of Transrol Navegacao S.A. v. Redirekommanditselskaber Merc Scandia XXIX*, 782 F Supp 848 (SDNY 1991); XVIII YBCA 499 (1993). See also the 1995 award on jurisdiction in ICC Cases No. 7604 and 7610, *Moroccan company v. Algerian company*, 125 Clunet 1027 (1998), and observations by D. Hascher and 125 Clunet 1053 (1998), and observations by J.-J. Arnaldez.

⁷⁹² ICC Award No. 8694 (1996), *American company v. Belgian company*, 124 Clunet 1056 (1997), and observations by Y. Derains.

⁷⁹³ Fouchard/Gaillard/Goldman, para. 477.

⁷⁹⁴ See ICC Award No. 1434 (1975), at 982.

⁷⁹⁵ See, e.g. ICC Award No. 1434 (1975); ICC Award No. 3380 (1980), *Italian enterprise v. Syrian enterprise*, 108 Clunet 927 (1981), and observations by Y. Derains (Fouchard/Gaillard/Goldman, para. 478).

⁷⁹⁶ See 130 III 72. See also 4P.226/2004, consid. 4.2.

“when inserting an arbitration clause in their contract the intention of the parties must be presumed to have been willing to establish an effective machinery for the settlement of disputes covered by the arbitration clause”.⁷⁹⁷

3.1.1.3. Interpretation *contra proferentem*

The third major principle of interpretation, less frequently encountered in arbitral case law but widely recognised in comparative law, is the principle that the agreement should be interpreted *contra proferentem*, or against the party that drafted the clause in dispute.⁷⁹⁸ Indeed, it is not unusual to find that one party has simply signed contractual documents drafted by the other party,⁷⁹⁹ and that a question has subsequently arisen as to whether various provisions of that contract constitute an arbitration agreement or, more commonly, as to the scope of that arbitration agreement.⁸⁰⁰

If the arbitration agreement is based on the standard conditions of one party the other party can rely on existing uncertainties as to the scope of the arbitration agreement to resist applications for referral to arbitration or to resist court proceedings.⁸⁰¹ On the other hand, in such cases, it is perfectly reasonable that the party responsible for drafting the ambiguous or obscure text should not be entitled to rely on that ambiguity or obscurity (in claiming, for example, that a particular disputed matter is not covered) and that, consequently, the agreement should be interpreted *contra proferentem*.⁸⁰²

3.1.2. Inclinations in interpreting?

3.1.2.1. Restrictive interpretation

In older awards the jurisdictional effect of arbitration agreements sometimes led to a restrictive interpretation, as they were seen as a renunciation of the constitutional right

⁷⁹⁷ Preliminary award in ICC Case No. 2321 (1974), *Two Israeli companies v. Government of an African State*, I YBCA 133 (1976); for a French translation, see 102 Clunet 938 (1975), and observations by Y. Derains.

⁷⁹⁸ See also UNIDROIT Principle 4.6.

⁷⁹⁹ This is quite often the normal case, as we will see later (under VI.), for arbitration agreements in the field of sport.

⁸⁰⁰ Fouchard/Gaillard/Goldman, para. 479.

⁸⁰¹ Lew/Mistelis/Kröll, para. 7-60.

⁸⁰² For a case where this principle was implicitly applied, see the 3 April 1987 award in ICC Case No. 4727, *Swiss Oil v. Petrogab*, enforced by CA Paris, 16 June 1988, 1989 Rev. arb. 325. See also TGI Paris, 1 February 1979, *Techniques de l'Ingénieur v. Sofel*, 1980 Rev. arb. 97 (Fouchard/Gaillard/Goldman, para. 479).

to have a dispute decided by the courts.⁸⁰³ The same position has also been adopted in courts' judgments.⁸⁰⁴ A restrictive interpretation is, however, *not justified in international arbitration*, given that this mode of dispute resolution in many cases offers the parties better guarantees of neutrality and efficiency than proceedings before national courts.⁸⁰⁵

It has been observed that interpretation must, in any event, not be restrictive where it is not the valid conclusion, but the subject matter and ambit of arbitration agreement which is at issue.⁸⁰⁶ In the *Sonatrach* case⁸⁰⁷ the Swiss Federal Tribunal held that while the existence of an arbitration agreement should not be assumed too lightly, *once it has been established that an arbitration agreement has been concluded, there is no reason to interpret it restrictively*. On the contrary, the court should assume that in deciding to arbitrate, the parties intended to confer wide powers upon the arbitral tribunal.⁸⁰⁸

3.1.2.2. Extensive interpretation

In today's arbitration-friendly climate the opposite view prevails. While, in particular, the US courts have consistently held that arbitration agreements must be interpreted in favour of arbitration,⁸⁰⁹ comparable views can be found in most countries which have adopted a pro-arbitration policy.⁸¹⁰

It has been observed that this rule can *apply only once it has been ascertained that the parties actually agreed on arbitration*, whilst, on the other hand, in cases where the main issue is whether the parties agreed to arbitration at all there is no justification for such an interpretive rule in favour of arbitration.⁸¹¹ Indeed, although it is the primary mode of dispute settlement in international business, every party has a legitimate and constitutional right to choose to have its rights determined by the courts.⁸¹²

⁸⁰³ See, e.g. ICC Case No. 4392, 110 *Clunet* 907 (1983) 908 (Lew/Mistelis/Kröll, para. 7-61).

⁸⁰⁴ See, e.g. Paris CA, 11 March 1986, *Gaz. Pal.* 1986, I, p. 298; or decision of the Italian *Corte di cassazione*, 10 March 2000, *Krauss Maffei Verfahrenstechnik GmbH et al v. Bristol Myers Squibb*, XXVI YBCA 816 (2001) 821 para. 11.

⁸⁰⁵ See, e.g. Poudret/Besson, para. 304; and Fouchard/Gaillard/Goldman, para. 480.

⁸⁰⁶ Poudret/Besson, para. 304.

⁸⁰⁷ DFT 116 Ia 56.

⁸⁰⁸ See also Poudret/Besson, para. 304.

⁸⁰⁹ See, e.g. *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346, 3355 *et seq.* (1985); see also *Remy Amerique, Inc v. Touzet Distribution, SARL*, XIX YBCA 820 (1994) 823 (SDNY, 16 March 1993) or *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 US 1, 24-25 (1983).

⁸¹⁰ See Karrer/Kälin-Nauer, p. 31; Raeschke-Kessler/Berger, paras 282 *et seq.*

⁸¹¹ Lew/Mistelis/Kröll, para. 7-62.

⁸¹² Generally critical to an in interpretation in favour of arbitration Fouchard/Gaillard/Goldman, para. 481; Schlosser, 320 (Lew/Mistelis/Kröll, para. 7-62).

3.1.2.3. Comments

In my opinion *arbitration agreements should be interpreted in a neutral way*, therefore neither restrictively nor extensively, not only with regard to their validity, but also with respect to their scope. Indeed, with regard to consent to arbitration, not only the question of whether the parties prefer arbitration over State courts as a dispute resolution mechanism is important, but also the extent of what is covered by the parties' consent to arbitration. Both these aspects are equally important when considering the rather jurisdictional side of an arbitration agreement. Furthermore, it can also be observed that a neutral manner of interpretation is even more appropriate with the gradually diminishing importance of the formal requirements of arbitration agreements. Nevertheless, national laws may clearly provide for *in favorem validitatis* provisions to, whenever possible, uphold the validity of the arbitration agreement.⁸¹³

On the other hand, when considering the rather contractual side of an arbitration agreement, the *principles of interpretation used for other types of contracts should find application, including the one of effective interpretation*. The principle of effective interpretation should therefore possibly be distinguished from an extensive way of interpreting arbitration agreements. Finally, *a rule of "in favour of arbitration"* should only be applied when the goal is *to eliminate barriers against parties' consent to arbitration, i.e.* limitations on the subject matter at issue (objective arbitrability).

3.2. The degree of certainty required on the parties' consent

3.2.1. Pathological clauses

The expression "pathological clause"⁸¹⁴ denotes arbitration agreements, and particularly arbitration clauses, which contain a defect or defects liable to disrupt the smooth progress of the arbitration.⁸¹⁵ Arbitration agreements can be pathological for a variety of reasons. Here it will be focused on those with a connection to consent to arbitration.

⁸¹³ See, e.g. Article 178(2) Swiss PIL or Article 9(6) Spanish Arbitration Act.

⁸¹⁴ The expression was first used by Eisenmann in 1974.

⁸¹⁵ Fouchard/Gaillard/Goldman, para 484.

Some arbitration clauses use permissive language, for instance only providing the parties with an option to choose arbitration.⁸¹⁶ Moreover, although it is not necessary that the clause uses the term arbitration or expressly states that the decision rendered should be final and binding,⁸¹⁷ ambiguity can also arise where it is not conclusive from the arbitration clause whether the parties actually agreed on arbitration or some other form of dispute resolution, such as expert determination.⁸¹⁸

Pathological clauses *will need to be interpreted by the arbitrators*,⁸¹⁹ and by the courts reviewing the existence of an arbitration agreement and ensuring that the arbitrators remained within the bounds of their jurisdiction.⁸²⁰ As a general rule courts and tribunals seek to interpret arbitration clauses positively.⁸²¹ Indeed, in most cases, the arbitrators or the courts—relying on the principle of effective interpretation more than on any rule *in favorem validitatis*⁸²²—will salvage the arbitration clause by *restoring the true intention of the parties*.⁸²³

3.2.2. Combined clauses

In some cases, parties combine in a single clause the submission of their disputes to arbitration and the designation of a State court. While, at first glance, this combination may appear to be contradictory, with the inevitable outcome that the whole agreement will be held invalid, the courts have not systematically adopted such an approach, and, generally, distinguish among three situations:

- that where one or more of the parties is granted an option to choose between arbitration and the courts;⁸²⁴
- that where the parties specify that the courts are to serve as an appeal jurisdiction; and

⁸¹⁶ See, e.g. *Canadian National Railway Co v. Lovat Tunnel Equipment Inc*, 3 Int. ALR N-5 (2000), 174 DLR (4th) 385 (Ontario Court of Appeal, 8 July 1999); for further examples, see Craig/Park/Paulsson, para. 9-02 (see also Lew/Mistelis/Kröll, para. 7-72).

⁸¹⁷ See, e.g. partial award in ICC Case No. 9759 reported by Grigera Naón, “Choice of Law Problems in International Arbitration”, 289 RCADI 88 (2001).

⁸¹⁸ Lew/Mistelis/Kröll, para. 7-73. See for an English case *David Wilson Homes Ltd v. Survey Services Ltd and Others* [2001] 1 All ER 449.

⁸¹⁹ On interpreting parties’ consent, see under I.4.2.

⁸²⁰ Fouchard/Gaillard/Goldman, para 484.

⁸²¹ Lew/Mistelis/Kröll, para. 7-71.

⁸²² This rule should rather be one of the provisions contained in the national laws, see, e.g. Article 178(2) Swiss PIL or Article 9(6) Spanish Arbitration Act.

⁸²³ Fouchard/Gaillard/Goldman, para 484.

⁸²⁴ This clause is not uncommon, for instance, in banking contracts.

- that where the contradiction appears more evident, in which the arbitral tribunal, to assess whether or not there is such a contradiction and subject of course to review by the courts, must establish the parties' true intention.⁸²⁵

3.2.3. *Incorporation by reference*⁸²⁶

3.2.3.1. **In general**

An arbitration agreement by reference means that the arbitration clause is contained in a separate and pre-existing document (such as general business conditions, standard form contracts, regulations, sales conditions of a supplier etc.) to which the parties' contract refers; such agreements are very common in the practice of international commerce because it simplifies and accelerates transactions.⁸²⁷ An example is where the provisions of a subcontract incorporate by reference the "general conditions" of the prime contract or where, in a bill of lading, reference is made to the terms contained in the charterparty.⁸²⁸

It has been observed that it is *important to separate two issues: formal validity and consent*.⁸²⁹ While authors and courts were initially very wary about the validity of arbitration agreements by reference under Article II(2) NYC,⁸³⁰ in time even the validity of a general reference under Article II NYC has been confirmed in a number of decisions.⁸³¹ Also, national arbitration laws have expressly addressed the question.⁸³² The fate of an arbitration agreement by reference depends, however, not only on formal questions, but also on *questions of substance*. Indeed, the question as to whether the addressee of an offer, referring to a document containing an arbitration clause, *effectively consented* to such a clause is a *matter of interpretation of that party's intent* and of how the agreement was formed.⁸³³

⁸²⁵ Fouchard/Gaillard/Goldman, paras 487 and 490.

⁸²⁶ Arbitration clauses by reference are also important in sport arbitration, see under VI.5.1.

⁸²⁷ Poudret/Besson, para. 213.

⁸²⁸ Di Pietro, p. 439.

⁸²⁹ Samuel, *Arbitration clauses*, p. 506.

⁸³⁰ See Poudret/Besson, paras 215 *et seq.* See also Di Pietro, pp. 440 *et seq.*

⁸³¹ See, *e.g.* the Swiss cases *Tradax Export SA v. Amoco Iran Oil Company*, 7 February 1984, 11 YBCA 532 (1986); *Compagnie de Navigation et Transports SA v. Mediterranean Shipping Company*, 16 January 1995, 21 YBCA 690 (1996). On these cases, see in particular Samuel, *Arbitration clauses*, and Di Pietro.

⁸³² See, *e.g.* Article 7(2) UNCITRAL Model Law, section 6(2) English Arbitration Act 1996, German ZPO section 1031.

⁸³³ Poudret/Besson, para. 213.

In order to establish whether a party has consented to arbitration in full awareness, a distinction should be made between explicit and global references.

3.2.3.2. Explicit reference

Where the parties have *explicitly referred in their agreement to an external arbitration clause*,⁸³⁴ for example by providing for “arbitration” according to standard form FOSFA, or according to the general conditions of one of the parties, the arbitration agreement by reference does not raise any specific problems. In such cases *the contract explicitly manifests the will of the parties to submit to arbitration, and the fact that the details are contained in a separate document is not decisive*. Indeed, the arbitration agreement itself can be the object of a separate document.⁸³⁵ Difficulties may however arise when an external arbitration clause is subsequently changed in a substantial way; in such a case the parties need to agree to the changes.⁸³⁶

3.2.3.3. Global reference

The situation is more delicate where the reference is implicit or global, *i.e.* merely mentions the document referred to and not the arbitration clause contained therein.⁸³⁷

In this case, *the validity of the arbitration clause will mainly depend on the circumstances, particularly on the knowledge which the parties had or should have had of the contents of the document referred to and, in consequence, of the arbitration clause*.⁸³⁸ Their personal qualifications, their ongoing business relationship, and the relevant trade usages can play an important role in this respect.⁸³⁹ In particular, according to some case law, general reference may suffice if it is established that the parties are experienced traders used to entering into contracts governed by certain trade rules and were aware, in the particular case, of the effect triggered by the incorporation.⁸⁴⁰

⁸³⁴ See Huber, p. 80.

⁸³⁵ Poudret/Besson, para. 214.

⁸³⁶ Huber, p. 81.

⁸³⁷ Poudret/Besson, para. 214.

⁸³⁸ *Ibid.*

⁸³⁹ See also Huber, p. 84.

⁸⁴⁰ Di Pietro, p. 446.

The validity of an arbitration agreement by reference should therefore not be determined *in abstracto*, but by taking the particular circumstances of the case into account.⁸⁴¹ This is fundamentally *a question of general contract law*, *i.e.* the question of the conclusion of the contract⁸⁴² (arbitration agreement).

3.2.3.4. The relation between form and consent, in particular tacit acceptance, with regard to arbitration clauses by reference

In national laws, which require a written form or proof in writing, acceptance will result from a document and cannot be tacit. However, German law makes an exception: while requiring the written form, it recognises tacit acceptance of an arbitration clause by reference in two cases.⁸⁴³ Dutch law recognises the tacit acceptance in all cases.⁸⁴⁴ Finally, tacit acceptance is admissible where no requirements of form exist whatsoever, as is the case under French law, pursuant to which proof of the addressee's knowledge of the clause even constitutes a presumption of acceptance, or under Swedish law.⁸⁴⁵

Whilst different views have been expressed,⁸⁴⁶ it has been observed that French case law is more liberal than Swiss case law because, in the absence of any requirement of form, it can content itself with a tacit acceptance which does not result from any document.⁸⁴⁷ By contrast, in the absence of any reference to general business conditions containing an arbitration clause, the mere knowledge of that clause based on an ongoing business relationship will not be sufficient to constitute acceptance or to make the clause applicable to a new transaction where no reference to these conditions is made.⁸⁴⁸

⁸⁴¹ Poudret/Besson, para. 214.

⁸⁴² Reymond, p. 88.

⁸⁴³ See German ZPO section 1031(2), which considers sufficient the transmission of a document emanating from one of the parties or from a third party, provided there is no objection from the addressee, and provided that this is in conformity with recognised commercial usage, and section 1031(4) for charterparty cases.

⁸⁴⁴ Poudret/Besson, para. 226. Indeed, Dutch law requires writing only for evidentiary purposes (*ad probationem*).

⁸⁴⁵ *Ibid.*

⁸⁴⁶ See, *e.g.* Alvarez G.A., p. 78.

⁸⁴⁷ Poudret/Besson, para. 219.

⁸⁴⁸ Cas. Verdol, Dalloz 1992, IR, p. 208; see CA The Hague, YBCA 1985, p. 485, NL 9: the GATFA clause contained in 25 previous contracts was not applicable to the contract which did not refer thereto; ICC Award No. 7154, Clunet 1994, p. 1059 = Collection m. pp. 555, 559.

3.3. Set-off and counterclaims⁸⁴⁹

Set-off is a complex institution giving rise to several questions of jurisdiction and applicable law in international relations.⁸⁵⁰ It has been shown that one of the difficulties of set-off in private international law is the result of the lack of uniformity of the national laws governing it, which concerns not only the manner in how it is regulated, but also its very nature.⁸⁵¹ It has also been observed that when claims of money are at stake, which is usually the case in international economic arbitration, set-off and counterclaim are “only a hair’s-breadth away”,⁸⁵² from each other.⁸⁵³ Set-off in international economic arbitration is therefore sometimes regarded as a “counterclaim in disguise”;⁸⁵⁴ the reason for this similarity is that both set-off and counterclaim are meant to avoid circuity of action.⁸⁵⁵ Moreover, in some jurisdictions, counterclaim and set-off are closely intertwined.⁸⁵⁶

However, in spite of these similarities and the diversity of national laws, set-off and counterclaim have to be distinguished sharply from each other, as a number of general characteristics differentiate set-off from counterclaim.⁸⁵⁷ Set-off can be used merely “as a shield, not as a sword”.⁸⁵⁸ Conversely a counterclaim is an independent claim raised by the defending party in judicial proceedings.⁸⁵⁹

3.3.1. *Set-off*

The problem of jurisdiction over set-off can arise both before an arbitral tribunal, where the set-off claim is not covered by the arbitration agreement, and, conversely, before a national court, where such a claim is validly submitted to arbitration.⁸⁶⁰ Both cases concern the *scope of the arbitration agreement*.⁸⁶¹ In determining the procedural

⁸⁴⁹ On set-off and counterclaims, see also under III.5.2.1.2.2.b.

⁸⁵⁰ Poudret/Besson, para. 317.

⁸⁵¹ For an overview, see Poudret/Besson, para. 317.

⁸⁵² Wood, para. 1-37 *in fine*.

⁸⁵³ Berger, *Set-Off*, p. 58.

⁸⁵⁴ See, e.g. Habscheid, pp. 70 and 80.

⁸⁵⁵ Berger, *Set-Off*, p. 58.

⁸⁵⁶ This applies, e.g. to the “*compensation judiciaire*” of French law. This institution is a procedural means provided for in Article 70 of the French NCPC (Berger, *Set-Off*, p. 59).

⁸⁵⁷ See Berger, *Set-Off*, p. 59 and Poudret/Besson, para. 318.

⁸⁵⁸ *Stooke v. Taylor* [1880] 5 QB 569 at 575.

⁸⁵⁹ See Poudret/Besson, para. 318.

⁸⁶⁰ Poudret/Besson, para. 319.

⁸⁶¹ Poudret, *Compensation*, p. 379.

admissibility of a set-off defence international arbitrators may be confronted with two different situations.⁸⁶²

3.3.1.1. Cross-claim not subject to a jurisdiction or different arbitration clause

3.3.1.1.1. The principle

The *basic procedural prerequisite*⁸⁶³ of set-off in this scenario—the most commonly encountered form of set-off in practice⁸⁶⁴—*is derived from the consensual character of arbitration: the cross-claim has to be within the scope of the arbitration agreement.*⁸⁶⁵

This basic rule prevents the respondent from enlarging the arbitrators' jurisdiction unilaterally by simply raising the defence of set-off.⁸⁶⁶ On the other hand, if the arbitration agreement does not cover the cross-claim, the parties may agree to extend the scope of the arbitration agreement.⁸⁶⁷ Such an agreement may also be effected impliedly if the claimant does not object to the setting off of a cross-claim that lies outside the scope of the arbitration agreement.⁸⁶⁸

3.3.1.1.2. Cross-claims arising out of closely related contracts

There are precedents in international case law where the respondent has based his set-off defence on a cross-claim that arose out of a contract closely linked to the one in dispute.⁸⁶⁹ Although the extremely close connection between the contracts may make it easy for the tribunal to confirm the admissibility of the set-off, nevertheless, not infrequently, the question arises in arbitral practice as to whether an arbitration

⁸⁶² See Berger, *Set-Off*, p. 64.

⁸⁶³ The question of the procedural admissibility of the set-off is independent of its characterisation as an institute of procedural (as in Anglo-American law) or substantive law (as in Continental Europe), see Bucher E., *Verrechnung*, p. 710.

⁸⁶⁴ See Mustill/Boyd, *Arbitration*, p. 131.

⁸⁶⁵ See Lebedev, pp. 41 and 44; Rüede/Hadenfeldt, p. 251; Mustill/Boyd, p. 131; UN Doc. A/CN.9/264, Article 23, para. 8 *in fine*. It is for this reason that Article 19(3) UNCITRAL Arbitration Rules provides that the respondent may rely on “a claim arising out of the same contract for the purpose of a set-off” (see Berger, *Set-Off*, p. 64).

⁸⁶⁶ See Berger, *Set-Off*, pp. 64 *et seq.*

⁸⁶⁷ This procedure was suggested by the arbitral tribunal but not followed by the parties in a partial award relating to the famous *Sofidif* case.

⁸⁶⁸ Aden, p. 86; see also van Houtte H., pp. 113 and 121.

⁸⁶⁹ See, *e.g.* an award rendered under the auspices of the Court of Arbitration at the Chamber of Commerce and Industry in Sofia in 1980 (Award of 1 October 1980 in (1987) YBCA at p. 84) - (Berger, *Set-Off*, p. 66).

agreement contained in one contract extends to related contracts.⁸⁷⁰ ***No general solution can be given for these cases*** and the answer always depends on the circumstances of the case, and particularly on the wording of the arbitration agreement in the main contract and on the attitude of the applicable law towards the ***interpretation of arbitration agreements***.⁸⁷¹

3.3.1.2. Cross-claim subject to a jurisdiction or different arbitration clause

Although there is a growing tendency to assume that, as a rule, an international arbitral tribunal has jurisdiction to hear a set-off defence based on a cross-claim that is subject to a different arbitration agreement or jurisdiction clause, this view applies only to those set-offs that have a substantive nature.⁸⁷² Indeed, being a substantive defence which denies the existence of the claim, the set-off has the same quality as any other substantive defence.⁸⁷³ The tribunal should therefore be authorised to decide on *all* defences which are raised against the claim (“*le juge de l’action est le juge de l’exception*”⁸⁷⁴), and consequently also on the merits of the set-off.⁸⁷⁵ Referring the cross-claim to adjudication before the domestic court is regarded as “depriving the set-off of its efficiency, especially when regarded as an essentially dilatory means”.⁸⁷⁶ Therefore, ***conflicting arbitral or forum selection clauses relating to the cross-claim are not per se a bar to set-off***.⁸⁷⁷

However, while the simultaneous adjudication of claim and cross-claim via the set-off defence is alleged to be in the presumed interest of the parties to the arbitration,⁸⁷⁸ ***taking a purely pragmatic approach to this problem neglects the will of the parties*** as expressed in the arbitration or other forum selection clause covering the cross-claim.⁸⁷⁹

⁸⁷⁰ See, e.g. the ICSID case *SOABI v. La République du Sénégal* in (1991) *ICSID Review*, pp. 124, 144; *Nova (Jersey) Knit Ltd v. Kammgam Spinnerei GmbH* [1977] 1 Lloyd’s Rep. 163; Craig/Park/Paulsson, pp. 100 *et seq.*; Berger, *Arbitration*, p. 123.

⁸⁷¹ Berger, *Set-Off*, p. 66.

⁸⁷² E.g. the “*Aufrechnung*” or “*Verrechnung*” under German or Swiss law, the “*compensation légale*” under French law and the equitable or “transaction” set-off under English law.

⁸⁷³ Berger, *Set-Off*, p. 72.

⁸⁷⁴ This formula is used by the Swiss Federal Tribunal and the prevailing doctrine in Switzerland, see DFT 85 II 103; Poudret, *Compensation*, p. 364.

⁸⁷⁵ See, e.g. Reiner, *Aufrechnung*, p. 119; Poudret, *Compensation*, p. 378; Lalive/Poudret/Reymond, No. 8 *ad* Article 186 Swiss PIL; Schwab/Walter, pp. 22 *et seq.*; Rüede/Hadenfeldt, p. 253.

⁸⁷⁶ Poudret, *Compensation*, p. 372. This solution is also advocated for equitable or “transaction” set-off raised in arbitrations having their seat in England (Mustill/Boyd, *Arbitration*, p. 131).

⁸⁷⁷ Schöll, p. 131.

⁸⁷⁸ Berger, *Set-Off*, p. 73.

⁸⁷⁹ See ICC Award No. 5971 in (1995) 13 ASA Bulletin at pp. 728, 738, stating that refusing to admit the set-off “would deny justice to the Parties (in particular, here, to Defendants)”.

Indeed, the arbitrators have to *determine the will of the parties* at the moment of conclusion of the arbitration agreement, covering the main claim on the one hand and the different forum clause covering the cross-claim on the other.⁸⁸⁰ From this *ex ante* perspective *both the consensual nature of arbitration and the function and nature of forum selection clauses* put into question the admissibility of set-off in international arbitrations.⁸⁸¹

When concluding the arbitration clause on which the arbitral proceedings are based, the parties intended to have those and *only those claims* decided by the arbitral tribunal *which fall under the scope of the arbitration agreement*.⁸⁸² To extend the proceedings beyond the arbitration agreement without any indication as to the corresponding will of the parties would be against the parties' original intentions.⁸⁸³

Moreover, when the cross-claim is not subject to another arbitration agreement but to a jurisdiction clause and the claimant opposes the tribunal's competence to hear the set-off, one has to *take account* not only of the parties' intentions that underlie the arbitration agreement but *also* of their *will as expressed in the other forum selection clause*.⁸⁸⁴

3.3.1.3. Comments

It has been observed that an easy way to solve that problem is certainly to *expand the parties' consent* to allow the arbitrators to deal with any counterclaim for the purposes of a set-off.⁸⁸⁵ That is the option taken by *Article 21(5) Swiss Rules*. However, as noted by Schöll, this provision does not mean that a set-off defence should be allowed regardless of the law applicable to it, but it has to be understood in the sense that, if the substantive law requirements for set-off are met, the arbitral tribunal can entertain the defence even if it would normally have no jurisdiction on the defendant's claim, and even if the parties agreed, in respect to that claim, on another dispute settlement mechanism.⁸⁸⁶

⁸⁸⁰ See *Basler Kommentar-Wenger*, Article 186, No. 28; Reiner, *Aufrechnung*, p. 121 with reference to Berger, *Wirtschaftsschiedsgerichtsbarkeit*, pp. 325 *et seq.*

⁸⁸¹ See Schlosser, No. 399; Wenger, "Die internationale Schiedsgerichtsbarkeit" in (1989) *BJM*, pp. 337, 351; Bucher A., *Die neue internationale Schiedsgerichtsbarkeit in der Schweiz* (1989) No. 192; Bucher E., in *Die internationale Schiedsgerichtsbarkeit in der Schweiz (II)* (ed. Böckstiegel), pp. 138 *et seq.*

⁸⁸² See Schlosser, No. 399.

⁸⁸³ *ZK-IPRG-Vischer*, Article 182, No. 13.

⁸⁸⁴ Berger, *Set-Off*, pp. 76 *et seq.*

⁸⁸⁵ Mourre, *Set-Off*, p. 393.

⁸⁸⁶ Schöll, p. 108.

*Some scholars*⁸⁸⁷ *also establish a presumption* according to which, by entering into an arbitration agreement, the claimant accepts that the arbitrators' jurisdiction will be extended to any claim used by the defendant as a basis for a set-off defence.⁸⁸⁸ Poudret submits that the claimant should be considered as having *implicitly accepted* such an extension of the arbitral tribunal's jurisdiction,⁸⁸⁹ Schöll posits that such a presumption should be based on an analysis of the contractual situation in the particular case, rather than on the general assumption that, by entering into arbitration, a party accepts that the tribunal will deal with any set-off defence that might come onto the table.⁸⁹⁰

3.3.2. Counterclaims

Despite its practical importance, the question of the admissibility of counterclaims before an arbitral tribunal is not mentioned in many laws.⁸⁹¹ The arbitration rules do not usually contain restrictions on the admissibility of counterclaims raised in the statement of defence.⁸⁹² Nevertheless, in the absence of a particular rule in the *lex arbitri*, the arbitration rules or the chosen procedural rules, the arbitral tribunal may freely determine the admissibility of counterclaims by virtue of its power to determine the arbitral proceedings.⁸⁹³ *The counterclaims must fall under an arbitration agreement between the parties*,⁸⁹⁴ although not necessarily that upon which the jurisdiction of the arbitral tribunal over the principal claims is based.⁸⁹⁵ In the latter case, however, the admissibility of the counterclaim presupposes that the modalities of arbitration pursuant to both agreements are compatible.⁸⁹⁶

3.4. Consent to arbitration because of related agreements

Consent to arbitration may also exist if a contract does not contain an arbitration clause but forms part of a contractual network which includes an arbitration agreement, as is

⁸⁸⁷ See, e.g. Poudret or Schöll.

⁸⁸⁸ Mourre, *Set-Off*, p. 396.

⁸⁸⁹ Poudret, *Compensation*, p. 380.

⁸⁹⁰ Schöll, pp. 132 *et seq.*

⁸⁹¹ See also Poudret/Besson, para. 574. See, however, section 1046(3) German ZPO, section 23(2) Swedish Arbitration Act, Article 23(1) UNCITRAL Model Law.

⁸⁹² See ICC Rules, Article 5(5); LCIA Rules, Article 2(1)(b); UNCITRAL Arbitration Rules, Article 19(3); Swiss Rules, Article 3(9); WIPO Rules, Article 11.

⁸⁹³ Fouchard/Gaillard/Goldman, para. 1222; Lalive/Poudret/Reymond, No. 7 *ad* Article 186 Swiss PIL.

⁸⁹⁴ Raeschke-Kessler/Berger, para. 699.

⁸⁹⁵ Lalive/Poudret/Reymond, No. 7 *ad* Article 186 Swiss PIL.

⁸⁹⁶ See also Poudret/Besson, para. 574.

the case where parties enter into a *framework agreement*, containing an arbitration clause, governing their future relationship within which they conclude a number of separate contracts.⁸⁹⁷ Moreover, depending on the facts of the case, an arbitration agreement may also exist if the contract is part of a *series of contracts* between the same parties—the majority of which consistently contain arbitration clauses.⁸⁹⁸

Whether the arbitration clause in the main contract may also *extend to follow up or repeat contracts concluded in close connection and in support of a main contract* is usually a question of *interpretation*; this may be the case if the subsequent agreements amend or complete the main contract⁸⁹⁹ but not where the additional contracts go beyond the implementation of the main contract.⁹⁰⁰ The model arbitration clause of the NAI referring to arbitration “all disputes arising in connection with the present contract, or further contracts resulting therefrom” provides a perfect example for an extension of the arbitration agreement to related contracts even though the question remains when a contract “results” from the main contract.⁹⁰¹ The parties submitting their disputes to the *NAI Rules* therefore *consent to such extension*. On the other hand, as *in general no consent to arbitration can be assumed if third parties are involved*, the arbitration clause contained in a construction contract with the general contractor does not usually cover the general contractor's contract with the subcontractor.⁹⁰²

3.5. Indirect consent to arbitration by virtue of trade usages

An arbitration agreement may exceptionally exist by virtue of trade usages in a certain industry; in light of the writing requirement such an option is primarily limited to countries which do not require any strict form for arbitration agreements.⁹⁰³ In such cases *the parties consent indirectly to arbitration by belonging to a certain industry*.

⁸⁹⁷ Lew/Mistelis/Kröll, para. 7-44.

⁸⁹⁸ See David, *Arbitration*, para. 227; Raeschke-Kessler/Berger, para. 277; CA Paris, 25 March 1983, *Société Sorvia v. Weinstein International Disc Corp*, Rev. arb. 363 (1984) 365; see also *A & B v. C & D* [1982] Lloyd's Rep. 166. For the opposite case where the lack of an arbitration agreement in one contract led to an interpretation of a connected contract which struck out an arbitration agreement, see *MH Alshaya Company WLL v. RETEK Information Systems* (2000) WL 33116470 (Lew/Mistelis/Kröll, para. 7-45) or the ICC Case No. 7154, 121 Clunet 1059 (1994).

⁸⁹⁹ *Maxum Foundation, Inc v. Salus Corp*, 779 F 2d 974, 978 (4th Cir. 1985); *Hart Enterprises Int, Inc v. Anhui Provincial Import & Export Corp*, 888 F Supp 587-591, XXI YBCA 767 (1996) (SDNY 1995).

⁹⁰⁰ See ICC Case No. 8420, XXV YBCA 328 (2000) 338-340 (Lew/Mistelis/Kröll, para. 7-46).

⁹⁰¹ Berger, *Set-Off*, p. 66.

⁹⁰² Lew/Mistelis/Kröll, para. 7-47. See under US law the decision in *Intertec Contracting A/S et al v. Turner Steiner International SA*, XXVI YBCA 949 (2001) 955, para. 15-21, 34 (SDNY 2000, 2d Cir. 2001).

⁹⁰³ See, e.g. BGH, 3 December 1992, XX YBCA 666 (1995) 668 para 5, with note Berger, DZWIR 466 (1993); see also *Chelsea Square Textiles Inc et al v. Bombay Dyeing and Manufacturing Company Ltd*,

4. AGENCY AND CONSENT

4.1. In general

There is *great diversity regarding the authority and form requirements* necessary to agree to arbitration on behalf of another person.⁹⁰⁴ On the other hand, it is generally agreed that the New York Convention does not pose any requirement of form on this subject.⁹⁰⁵

It has been observed that the *relaxation of the protective element in the form requirements* brings good reasons to allow oral conferrals of power on an agent, especially where the agent is authorised to enter into the contract on behalf of the principal.⁹⁰⁶ However, this brings with it on the one hand more incertitude and, on the other hand, a *greater importance of the issue of consent to arbitration* by the non-signatory. Indeed, where an agreement containing an arbitration clause has been entered into by a person who expressly or impliedly did so as a representative of a principal, that non-signatory principal may be bound to the arbitration agreement.⁹⁰⁷ While in agency's cases, where there is a formal representation or a subsequent ratification by the principal, the principal normally will have consented to arbitration, *issues with non-signatories arise—in particular in the case of apparent agents*.

4.2. Apparent agents

With regard to Swiss cases, it has been observed that because agency relationships in non-signatory situations are often not explicit, the courts and tribunals are regularly dealing with undisclosed or apparent agents, *i.e.* situations where a principal is not willing to be represented or not aware of a representative, but a third party's legitimate

189 F.3d 289, XXV YBCA 1035 (2000) (2d Cir. 1999): illegible arbitration clause becomes part of contract as trade usage; David, *Arbitration*, para. 226 (Lew/Mistelis/Kröll, para. 7-49).

⁹⁰⁴ See Poudret/Besson, para. 274.

⁹⁰⁵ See Alvarez G.A., p. 79 No. 3, and Reiner, *Agent's Power*, p. 82.

⁹⁰⁶ See ICC Case No. 5730 of 1988, 117 *Clunet* 1029 (1990) 1036; Reiner, *Agent's Power*, pp. 88 *et seq.* See also Lew/Mistelis/Kröll, para. 7-31.

⁹⁰⁷ Hosking, p. 293. See, *e.g.* *Interbras Cayman Co. v. Orient Victory Shipping Co., SA*, 663 F.2d 1, 6-7 (2d Cir. 1981).

reliance in such representation is protected.⁹⁰⁸ In these cases there is *no consent of the principals to arbitration*. Therefore, *to warrant an extension of the arbitration clause, the “appearance” upon which the counterparty relies must reach a certain threshold.*⁹⁰⁹

4.3. The position of the agent in the case of arbitration on the side of the principal

An agent that executes a contract on behalf of a disclosed principal normally will not be compelled to arbitrate against its wishes;⁹¹⁰ however, in some US circuits,⁹¹¹ a non-signatory agent may be permitted to compel arbitration based on an arbitration agreement contained in the contract the agent signed in his capacity as a corporate director, officer or employee where he would otherwise be required to defend the claim in court.⁹¹² It has been remarked that this highly pragmatic approach to agency theory sometimes also becomes expressed in terms of other theories, *e.g.* that the signatory is estopped from denying that the arbitration provision applies to the non-signatory agent⁹¹³ or that the agent has by his behaviour assumed the duty to arbitrate.⁹¹⁴

5. TRANSFER OF THE ARBITRATION AGREEMENT AND CONSENT

5.1. Assignment⁹¹⁵

Also at the heart of the problems which can arise in cases of assignments is that arbitration is a consensual process.⁹¹⁶ Moreover, issues come up because of the “in

⁹⁰⁸ Zuberbühler, p. 20.

⁹⁰⁹ See Zuberbühler, p. 21, footnote 12. See, *e.g.* *G S.p.A. v. Mr. Z*, unpublished interim award of 4 August 1994, confirmed by DFT of 16 May 1995, ASA Bulletin 4/1996, 667; Habegger, *Groups of Companies*, No. 50.

⁹¹⁰ *Lerner v. Amalgamated Clothing & Textile Workers Union*, 938 F.2d 2, 5 (2d Cir. 1991).

⁹¹¹ See, *e.g.* *Pritzker v. Merrill Lynch, Pierce, Fenner and Smith*, 7 F.3d 1110 (3d Cir. 1993); *Roby v. Corporation of Llyoyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993). However, this general proposition has been rejected in other circuits. See, *e.g.* *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002); *McCarthy v. Azure*, 22 F.3d 351, 357–61 (1st Cir. 1994).

⁹¹² Hosking, p. 293.

⁹¹³ See, *e.g.* *Usina Costa Pinto SA Azucar e Alcool v. Louis Dreyfus Sugar Co., Inc.*, 933 F Supp 1170, 1179 (SDNY 1996).

⁹¹⁴ See, *e.g.* *AHTNA Gov't Servs Corp. v. 52 Rausch, LLC*, No. C 03-00130 SI, 2003 US Dist. LEXIS 2460, at *11 (N.D. Cal. Feb. 19, 2003). See Hosking, p. 293.

⁹¹⁵ On Assignment and Arbitration, see in particular Landrove, *Assignment*.

⁹¹⁶ See also Jagusch/Sinclair, para. 15-4.

writing” requirement requested by the New York Convention and most national arbitration laws.

5.1.1. In general: practice in different countries

Parties are in general free to assign their contractual rights to a third party. Where those rights are covered by an arbitration agreement the prevailing view in international arbitration is that the assignee automatically becomes a party to the arbitration agreement; indeed courts *in various countries*,⁹¹⁷ such as France, England, Sweden, Switzerland and Germany, have consistently held that the *assignee can sue and be sued under the arbitration agreement*.⁹¹⁸ The *Cour d’appel* of Paris went as far as considering it a general principle of arbitration law.⁹¹⁹ On the other hand, there have been cases where tribunals and courts have rejected the idea of an automatic transfer of the arbitration agreement,⁹²⁰ and required an express approval by the assignee or the original debtor as a precondition for the transfer of the right to arbitrate.⁹²¹ In particular, Italy is an exception to the general consensus favouring transfer in the event of the assignments of rights.⁹²²

5.1.2. With regard to the necessity to comply with the written form requirement

The New York Convention requires an arbitration agreement to be “in writing” and “signed” by the parties or contained in an exchange of letters or telegrams”, but it does not explicitly answer the question of whether an assignment of an agreement

⁹¹⁷ For an overview of the situation in different countries, see also Girsberger/Hausmaninger.

⁹¹⁸ Lew/Mistelis/Kröll, para. 7-52, with references to cases in the footnotes. For further cases, see also Girsberger/Hausmaninger, pp. 123-136.

⁹¹⁹ CA Paris, 25 November 1999, *SA Burkinabe des ciments et matériaux v. société des ciments d’Abidjan*, Rev. arb. 165 (2001) 168; see also *Banque de Paris et des Pays-Bas v. Amoco Oil Company*, 573 F Supp 1464 (SDNY 1983) 1469 which considered it to be a basic principle of case law.

⁹²⁰ The Foreign Trade Arbitration Commission at the USSR Chamber of Commerce and Industry, award in Case No. 109/1980, 9 July 1984, *All-Union Foreign Trade Association “Sojuznefteexport” (USSR) v. JOC Oil Ltd (Bermuda)*, XVIII YBCA 92 (1993) para 17. For further US cases, see Girsberger/Hausmaninger referring to *Kaufman v. William Iselin & Co, Inc* 143 NE 780 and *Lachmar v. Trunkline LNG Co*, 753 F 2d 8 (CA 2d Cir., 1985).

⁹²¹ Lew/Mistelis/Kröll, para. 7-54.

⁹²² See the leading case decided in 1998 by the Italian Corte di Cassazione (N. 12616, Foro italiano 1999, I/2, p. 2979, c. 4). However, the Italian arbitral practice recognises that a transfer of the contract, and not just that of a claim resulting from it, entails the transfer of the arbitration clause (Riv. dell’arb. 2000, pp. 167-168).

automatically includes assignment of the arbitration clause.⁹²³ While most national arbitration laws also require that the arbitration agreement be in writing,⁹²⁴ courts have generally held that an *automatic transfer* of the arbitration clause does not violate the in writing requirement by arguing that the requirement addresses merely the initial conclusion of the arbitration agreement, but not subsequent transfers.⁹²⁵ Such an approach, which has also been criticised,⁹²⁶ would have the *advantage* in that there is *no possibility of conflict in this respect with the substantive validity of the arbitration agreement (consent)*. On the other hand, with regard to consent other issues arise.

5.1.3. *With regard to consent, considering in particular the situation in France*

The transfer of the arbitration agreement in the event of assignment of rights raises, in particular, two questions with regard to consent:

5.1.3.1. **First, is the agreement fully binding on the assignee, even without the latter's consent?**

Although one might object to such automatic transfer by invoking the principle of autonomy, according to which the fate of the main contract and of the arbitration clause are not bound,⁹²⁷ it has been observed that autonomy, which concerns the respective validity of the two agreements, is not an obstacle to the second contract being a functional accessory to the first, and that this fact justifies its transfer.⁹²⁸ French courts have long since held that in the absence of an agreement to the contrary, the transfer of rights and duties resulting from a contract *includes the transfer of the arbitration clause*, which is a part of the terms and conditions of such contract, so that the assignee is bound by the arbitration clause.⁹²⁹ They justify this solution either by the *accessory*

⁹²³ Jagusch/Sinclair, para. 15-4.

⁹²⁴ See in particular under III.5.1.2.

⁹²⁵ Girsberger/Hausmaninger, pp. 142 *et seq.*

⁹²⁶ See, *e.g.* Girsberger/Hausmaninger, p. 144.

⁹²⁷ Poudret/Besson, para. 284.

⁹²⁸ Mayer, Note *ad* Rev. arb. 1990, pp. 675, 686,

⁹²⁹ Notably Paris, Rev. arb. 1966, p. 100; Rev. arb. 1988, p. 565 (transfer of the contract) and 570 (assignment of a claim); Rev. arb. 1993, p. 624 (*idem*)/Lyon, Rev. arb. 1997, p. 402 (assignment of an undertaking to sell shares); Cas., Rev. arb. 2000, p. 85, with a note by Cohen = Clunet 1999, p. 787, with a note by Poillot Peruzzetto (assignment of Claims), and Rev. arb. 2000, p. 280, with a note by Gautier: application to a substituted agent; Paris, Rev. arb. 2001, p. 165, with a note by Cohen: assignment of a

character of the arbitration clause, or by the *presumed will of the parties* to the assignment, or again by *interpretation of such will*.⁹³⁰

Conversely, it has also been argued that the presence in arbitration agreements not only of rights but of duties (e.g. to refrain from instituting ordinary court proceedings) precludes any valid transfer of an arbitration clause to the assignee unless the latter expressly agrees to be bound by those duties.⁹³¹

5.1.3.2. Secondly, is such transfer binding on the obligor, even without his consent?

The obligor had agreed to arbitrate with the assignor, but not with the unknown assignee. While in practice it is not possible to force a party to the arbitration clause to arbitrate with a third party, French authors and courts have overcome this difficulty by either a *presumption of consent* or considering that the *arbitration clause is firmly bound to the contract* and thus should follow it.⁹³²

On the other hand, *no automatic transfer* takes place when the *parties have excluded an assignment of the arbitration agreement*,⁹³³ or if it results from the circumstances that the *clause was concluded intuitu personae*.⁹³⁴ Moreover, non-assignment clauses in relation to the substantive right are often considered to exclude any assignment of the arbitration agreement.⁹³⁵ While these cases are obstacles to the transfer of the arbitration agreement, this will, however, be the case only exceptionally in international trade where arbitration is viewed favourably, and constitutes a common mode of dispute resolution.⁹³⁶ Nevertheless, the assignment should not lead to a deterioration of the original debtor's position.⁹³⁷

claim. On the distinction between the assignment of a claim and the transfer of a contract, see ICC Award No. 7154, Collection III, p. 555, with a note by Derains, No. IV.

⁹³⁰ Poudret/Besson, para. 284.

⁹³¹ Girsberger/Hausmaninger, p. 141, referring to *Lachmar v. Trunkline LNG Co*, 753 F 2d 8 (CA 2d Cir., 1985).

⁹³² See notably Paris, Rev. arb. 1988, p. 565; de Boissésou, *Arbitrage*, p. 546 para. 624; Fouchard/Gaillard/Goldman, paras 716-718; Li, pp. 48-52 paras 64-69.

⁹³³ See Jagusch/Sinclair, para. 15-14; Lew/Mistelis/Kröll, para. 7-55.

⁹³⁴ Clunet 2002, p. 1084 (ICC award 7983), with a note by S. Jarvin: the contract containing a clause of confidentiality would be deemed concluded *intuitu personae* and so not transferable without the consent of the parties.

⁹³⁵ Lew/Mistelis/Kröll, para. 7-55.

⁹³⁶ Paris, Rev. arb. 2001, p. 165, with a note by Cohen.

⁹³⁷ See Lew/Mistelis/Kröll, para. 7-55.

5.1.4. *Personal vs. non-personal nature of the right to arbitrate*

The reason for the automatic assignment is that *arbitration agreements are not personal covenants*⁹³⁸ but form part of the economic value of the assigned substantive right.⁹³⁹ Indeed, the prevailing view today is that they are entered into because of non-personal reasons, such as expediency, cost-efficiency and other perceived advantages of the arbitration process.⁹⁴⁰ Moreover, as the Court of Appeal of New York stated in *Hosiery Mfg Corp v. Goldston*, arbitration contracts would be of no value if either party could escape by assigning a claim subject to arbitration between the original parties to a third party.⁹⁴¹ Otherwise, it would be possible for a party to circumvent the arbitration agreement by assigning the main claim.⁹⁴² An exclusion of the possibility of assignment may, however, exist where the agreement to arbitrate is entered into on the basis of a *special personal relationship*.⁹⁴³ Indeed, in such a case there should be a *presumption that there is no consent to arbitrate with a third party* on the part of the obligor. Moreover, an award rendered in application of Swiss law⁹⁴⁴ also considered that an arbitration agreement *combined with a confidentiality clause* was concluded *intuitu personae* and, therefore, could not be assigned without the agreement of the other contractual party.⁹⁴⁵

5.2. Subrogation by operation of law, third party beneficiaries and universal succession

5.2.1. Overview

5.2.1.1. Subrogation by operation of law

Subrogation by operation of law apparently does not lead to the same difficulties as contractual assignment. It has been generally recognised, particularly in France,⁹⁴⁶ that

⁹³⁸ *Shayler v. Woolf* [1946] Ch 320, 324; Swedish Supreme Court, 15 October 1997, *MS Emja Braack Schiffahrts KG v. Wärtsila Diesel Aktiebolag*, XXIV YBCA 317 (1999). For a different view, see, however, the early English decision *Cottage Club Estates v. Woodside Estates Co.* (1928) 2 KB 463, 466; 97 LJKB 72, 74.

⁹³⁹ See, e.g. France, CA Paris, 28 January 1998, *CCC v. Filmkunst*, Rev. arb. 567 (1988); Germany, BGH, 2 March 1978, NJW 1585 (1978) 1586.

⁹⁴⁰ Girsberger/Hausmaninger, p. 141.

⁹⁴¹ (1924) 143 NE 779, 780; 238 NY 2d 22.

⁹⁴² Lew/Mistelis/Kröll, para. 7-53.

⁹⁴³ See Jagusch/Sinclair, para. 15-14; Lew/Mistelis/Kröll, para. 7-55.

⁹⁴⁴ Clunet 2002, p. 1084 (partial award, ICC No. 7983), with a note of Jarvin.

⁹⁴⁵ Poudret/Besson, para. 285.

⁹⁴⁶ ICC Award No. 1704 = Collection I, p. 312. On the French conflict of law rules applicable to statutory transfers, see de Boissesson, para. 625 and Fouchard/Gaillard/Goldman, paras 701-703.

it *extends to the arbitration agreement* so that the subrogated party is subject to it and benefits from it.⁹⁴⁷ The same is also true according, for instance, to the practice of the Swiss⁹⁴⁸ and English⁹⁴⁹ courts.⁹⁵⁰

5.2.1.2. Universal succession

It is commonly recognised that the *universal successor is bound by the arbitration clause* concluded by the person whom he succeeds, under the reservation of an agreement to the contrary, in particular where such a clause had a strictly personal character.⁹⁵¹ Other cases of universal succession such as takeovers, merger of companies, or the acquisition of the assets and liabilities of a company cause the transfer of the arbitration agreement to the new owner or the new combined company in the case of a merger.⁹⁵²

5.2.1.3. Third party beneficiaries

Furthermore, the third party beneficiary doctrine has to be considered. Broadly speaking, the third party beneficiary doctrine provides that in certain circumstances a non-signatory who has received benefits under the main contract is entitled to request performance of those benefits.⁹⁵³ It has been observed⁹⁵⁴ that while the US case law on “third party beneficiary” is surprisingly inconsistent, in general “the mere status of the third party beneficiary imposes no duty to arbitrate ... [however] doing so is a condition to the third party beneficiary’s enforcing its rights” under that contract,⁹⁵⁵ *i.e.* the *third party beneficiary is only bound to arbitrate where it is the claimant in a claim relying*

⁹⁴⁷ Poudret/Besson, para. 289.

⁹⁴⁸ See, *e.g.* CJ GE, SJ 1987, p. 650 = ASA Bulletin 1987, p. 269, consid. 5.

⁹⁴⁹ See, *e.g.* QB and CA, *Schiffahrtsgesellschaft Detlev von Appen v. Voest Alpine Intertrading and Others* [1997] 1 Lloyd's Rep. 179 and 2 Lloyd's Rep. 279: the subrogated insurer is subject to the arbitration clause, and restrained by an *anti-suit injunction*; Mustill/Boyd, p. 137, speak of “novation”, but as Goutal observes (Rev. arb. 1988, p. 447), novation gives rise to a new right so that no transfer takes place.

⁹⁵⁰ See Poudret/Besson, para. 289.

⁹⁵¹ Poudret/Besson, para. 290.

⁹⁵² Swiss Federal Tribunal, ASA Bulletin 1998, p. 653 = RSDIE 1999, p. 593, with an approving note by Knoepfler; for Sweden, see SAR 2004/1, p. 98, with notes by Zikin and Landrov, and Hobér, *Party substitution*, p. 46, Collection III, p. 543: ICC Award No. 3281 applying this case law (Poudret/Besson, para. 290).

⁹⁵³ Hosking, p. 292.

⁹⁵⁴ *Ibid.*

⁹⁵⁵ Macneil/Speidel/Stipanowich, § 18.7.214.

on the main agreement.⁹⁵⁶ In keeping with the general US contract approach, the *third party must be an intended beneficiary*, although evidence of this may be drawn from the writing itself and the surrounding circumstances.⁹⁵⁷

In England, section 8 of the Contracts (Rights of Third Parties) Act 1999 *extended the arbitration clause contained in the contract to the third party beneficiary* of a substantive term of that contract, so that the third party can enforce the term against the promisor through arbitration.⁹⁵⁸ The latter can reciprocally invoke the agreement to obtain a stay of proceedings brought against him before the courts.⁹⁵⁹ Interestingly, the drafters moved from an initial position of considering it inappropriate for the statute to apply to arbitration provisions as this would impose “duties and burdens”⁹⁶⁰ on a third party, to instead viewing the arbitration agreement as a “condition” to enforcing the “benefit” conferred by the doctrine.⁹⁶¹

By contrast, the French *Cour de cassation denied the transfer of the arbitration agreement in favour of a third party beneficiary* for the reason that such a clause can merely create rights and not duties.⁹⁶² Without contesting this result, Goutal infers that the beneficiary could opt for arbitration without being thereby bound.⁹⁶³

5.2.2. Comments

These situations may at first look seem quite similar for the third party to mandatory arbitration, as the *third party is subject to and benefits from the arbitration agreement because of an operation of law and not because of its direct consent*. Therefore, the discussion on whether the arbitration clause has to be seen as a burden or not is understandable. However, I share the view of Jarrosson who observed that an arbitration clause is not strictly speaking a burden, but rather a part of the rights stipulated in

⁹⁵⁶ See also *Collins v. Int'l Dairy Queen Inc. and American Dairy Queen Corp.*, 2 F. Supp. 2d 1465 (M.D. Ga. 1998).

⁹⁵⁷ In fact this requirement has been very loosely applied. See, e.g. *Spear Leeds & Kellogg v. Central Life Assurance Co.*, 85 F.3d 21 (2d Cir. 1996).

⁹⁵⁸ In November 2003, the Commercial Court issued a judgment addressing, apparently for the first time, this provision and the impact of The Contracts (Rights of Third Parties) Act 1999 on arbitration clauses, *Nisshin Shipping Co. Ltd v Cleaves & Co.* [2003] EWHC 2602 (Comm), summarised by S. Nappert and J. Pires Ferreira, [2004] Int. ALR, para.17.

⁹⁵⁹ *Halisbury's Statutes*, 4th ed. 2000, 11, p. 318, and Mustill/Boyd, p. 147 (Poudret/Besson, para. 289).

⁹⁶⁰ *Hansard*, House of Lords, col. 1059 (27 May 1999) (per Lord Wilberforce).

⁹⁶¹ UK Contracts (Rights of Third Parties) Act 1999, Explanatory Note, § 34 (Hosking, p. 292).

⁹⁶² *Cas.*, Bisutti, *Rev. arb.* 1987, p. 139, with a note by Goutal, and 1988, p. 559; de Boissésou, p. 109 para. 132 *et seq.*, does not exclude it; Li, p. 61 para. 81, is rightly critical.

⁹⁶³ *Rev. arb.* 1987, pp. 145-146.

favour of the beneficiary and binding on the latter once he has accepted them.⁹⁶⁴ Therefore, in this *indirect way the third party gives its consent to arbitration*. On the other hand, while the *other party has consented to arbitration as a dispute resolution mechanism*, its consent was to arbitrate with the original party and not with the third party. Nevertheless, when concluding the arbitration agreement the other party should have been *aware of the possibility* that the arbitration agreement could pass to a successor because of an *operation of law*.

6. PARTIES' CONSENT WITH REGARD TO THE EXTENSION OF ARBITRATION AGREEMENTS

6.1. In general

6.1.1. *The problem of "extension"*

The widely used concept of "extension" of the arbitration clause to non-signatories is a misleading concept, since in most cases, courts and arbitral tribunals still base their determination of the issue on the *existence of a common intent of the parties and, therefore, on consent*.⁹⁶⁵ Indeed, in the *majority of cases*, the status as party of a non-signatory *does not result from the text of the agreement* containing the arbitration clause, *but from tacit acceptance*, as is particularly the case for the extension to companies belonging to the same group.⁹⁶⁶ However, while this approach does not encounter any major difficulties under French law, which has no formal requirements, this is not the case under other laws which do not content themselves with either tacit acceptance or acceptance by conduct, but require that the will to submit to arbitration result from written documents.⁹⁶⁷

6.1.2. *Different inclination in presuming parties' intention to the extension*

Whilst most authors have recognised that such an extension *should not take place unless it corresponds to the mutual intention of the parties*, they are *more or less*

⁹⁶⁴ See Jarrosson, *Agreement*, pp. 222-223.

⁹⁶⁵ Hanotiau, *Groups of companies*, para. 14-5.

⁹⁶⁶ Poudret/Besson, paras 251 *et seq.*

⁹⁶⁷ *Ibid.*

inclined to presume such intention; they will accept “extension” to a greater or lesser extent depending on:

- whether they attach more or less weight to economic criteria and the efficiency of arbitration;
- whether they consider arbitration the usual mode of dispute resolution in international commerce;
- whether they give weight to the respect of contractual texts or on the principle of good faith in business matters; and, finally,
- whether or not they permit international commercial usage to prevail over national laws.⁹⁶⁸

6.2. The “group of companies” doctrine

6.2.1. Issues

In international arbitration groups of companies raise a number of different issues; some of them concern mainly the substance of the dispute, others seem to be of a more procedural nature.⁹⁶⁹ It has been observed that the *existence of a group of companies gives a special dimension to* the issue of conduct or *consent*.⁹⁷⁰ Whether an arbitration agreement signed by a company member of a group of companies is also binding upon and entitles other members of that group non-signatories of the agreement remains an open question in State court’s case law and in international arbitration practice.⁹⁷¹ In the doctrine, the answer to this issue is as controversial as in the *dicta* of arbitral tribunals and State courts.⁹⁷²

6.2.2. A brief characterisation of the doctrine

The theory of “group of companies”, more an economic concept than a legal one,⁹⁷³ has prospered in arbitration case law and, under the influence of the latter, before the French courts.⁹⁷⁴ The considerations of the arbitral tribunal in *Dow Chemical v. Isover*⁹⁷⁵ are

⁹⁶⁸ Poudret/Besson, para. 253.

⁹⁶⁹ Hanotiau, *Groups of companies*, para. 14-1.

⁹⁷⁰ See Hanotiau, *Groups of companies*, para. 14-6.

⁹⁷¹ Sandrock, *Groups of companies*, pp. 625 *et seq.*

⁹⁷² *Ibid.*

⁹⁷³ On the definition of this notion, see Berger, pp. 161-162; Derains/Schaf, p. 234; Fadlallah, p. 106 para. 6; Jarrosson., *Agreement*, p. 210.

⁹⁷⁴ Poudret/Besson, para. 265.

generally viewed as forming its cornerstone, although this award was not the first of this sort.⁹⁷⁶ While it is often said that the “group of companies” doctrine has particularly prospered in ICC arbitrations, it was not as widely followed by arbitration case law as its notoriety might lead to believe.⁹⁷⁷

Under the doctrine, a group of companies constitutes one and the same economic reality—despite the legal independence of the individual entities from one another—where the circumstances of the contract’s conclusion, its performance, its (possible) subsequent termination, and the degree of control executed among the group companies warrants such an inference.⁹⁷⁸ On the other hand, in all “group of companies” decisions, *the finding of an (implied) consensus of the parties often remains key* in binding non-signatories to an arbitration clause.⁹⁷⁹ The theory of “group of companies” is distinct from agency⁹⁸⁰ because its aim is binding other members of the group to the arbitration agreement, and not replacing some members with others.⁹⁸¹

6.2.3. Countries’ different approaches

6.2.3.1. France

In France, it was the ICC award No. 4131, *Dow Chemical v. Isover*⁹⁸² which began the case law based on the “group of companies” doctrine. Two of the four claimants were not mentioned as parties in the disputed contracts, but had participated in the negotiations and the performance of the contracts; they therefore claimed to benefit from the arbitration clauses contained therein. The arbitrators, by invoking Articles 8(3) and 8(4) ICC Rules then in force, first confirmed the autonomy of the arbitration agreement with regard to all national laws,⁹⁸³ which is in accordance with the French conception of the separability of the arbitration agreement. The arbitrators inferred therefrom that they should decide “*based on the mutual will of the parties*” and “usage

⁹⁷⁵ *Dow Chemical v. Isover Saint Gobain*, ICC Case No. 4131 (1982), ICC Awards 1974-1985, 146-153 and 464-473 with observations by Yves Derains.

⁹⁷⁶ See notably ICC Award No. 1434, Collection I, p. 262; ICC Award No. 2138, Clunet 1975, p. 934; ICC Award No. 2375, Clunet 1976, p. 973 = Collection I, p. 257.

⁹⁷⁷ See Poudret/Besson, para. 254, who observe that among some 30 published awards concerning this question, only a quarter recognised the extension of the clause to companies.

⁹⁷⁸ Zuberbühler, p. 25.

⁹⁷⁹ *Ibid.*

⁹⁸⁰ On agency, see under IV.4.

⁹⁸¹ Poudret/Besson, para. 265.

⁹⁸² ICC Award No. 4131 (*Dow Chemical*), Clunet 1983, p. 899 = Rev. arb. 1984, p. 137.

⁹⁸³ See also under III.3.3.3.

conforming to the needs of international commerce, notably where a group of companies is concerned”. They concluded that “the arbitration agreement expressly accepted by certain companies of the group must bind the other companies which, by virtue of the role they played in the conclusion, the performance of the termination of the contracts containing such clauses, appear, *according to the mutual intention of all the parties involved in the proceedings*, to have been true parties to these contracts, or to have been primarily affected by these and by the disputes arising therefrom”.⁹⁸⁴

Later, a series of judgments of the Paris Court of Appeal, beginning with those rendered in the cases *Korsnas Marina v. Durand Auzias* and *Ofer Brothers v. Tokyo Marine*, justified extension on the basis of an even more general and audacious formula pursuant to which “an arbitration clause contained in an international contract has its own validity and effectiveness which require its extension to *all parties directly involved in the performance of the contract* and in the disputes which may arise therefrom, once it has been established that their situation and their activities enable to *presume that they were aware of the existence and the scope of the arbitration clause*, even if they were not signatories of the contract containing it”.⁹⁸⁵ This formula is *based on two presumptions*: the presumption of awareness of the clause, which is allegedly sufficient to presume acceptance thereof.⁹⁸⁶

The final step was taken in a third judgment where the court considered the carrier *Cotunav* bound by the arbitration clause contained in an agreement made between two public agencies, in which *Cotunav* had no part, *for the sole reason that “by accepting to intervene in the performance of the contract as carrier appointed by one of the parties in the framework of the contract, Cotunav necessarily assumed the obligations defined by the contract with regard to the carrier and accepted its modalities, including the arbitration agreement”*.⁹⁸⁷ It has been observed that participation in the performance of the agreement, bereft of any other link with the parties, led to an *apparently irrefutable presumption*⁹⁸⁸ of acceptance of the arbitration clause. Thus, this is an enlargement of its previous case law, since it recognised such tacit acceptance outside of a group of companies; *tacit acceptance results solely from the performance of a*

⁹⁸⁴ Poudret/Besson, para. 255.

⁹⁸⁵ Rev. arb. 1989, p. 691, criticised by Tschanz p. 707, by Fouchard/Gaillard/Goldman, paras 440 and 505, and Poudret, *Extension*, pp. 900-901; Jarrosson, *Agreement*, pp. 216-217, contents himself with recalling the criticism levelled against the judgment.

⁹⁸⁶ Poudret/Besson, para. 256.

⁹⁸⁷ Rev. arb. 1990, p. 675 (1 case), with a critical note by Mayer.

⁹⁸⁸ The judgment speaks of “necessarily”.

contract concluded by other parties.⁹⁸⁹ Indeed, a subjective criterion, *i.e.* membership of a group, has thus been abandoned in favour of an *objective criterion*, *i.e.* a connection with the object of the contract, of which arbitration is merely a “component of its performance”.⁹⁹⁰

The prediction “to take the formula too literally ... could lead to an *extension of the effects of the arbitration agreement to persons who have not even consented to it implicitly*”⁹⁹¹ was therefore confirmed. However, as the Paris Court of Appeal then repeated its formula in a number of subsequent judgments,⁹⁹² it has been observed that the presumption of awareness and, by virtue thereof, of *acceptance resulting from the performance of the contract*, can now be considered a material rule applicable before French courts to international arbitration agreements.⁹⁹³

6.2.3.2. Switzerland

Switzerland has produced comparably few arbitral awards and court decisions explicitly dealing with the “group of companies” doctrine. The Swiss Federal Tribunal discussed, in particular, the “group of companies” doctrine *in dicta* in *Butec*.⁹⁹⁴ It cautioned that one should only reluctantly bind non-signatory respondents to an arbitration clause on the basis of the “group of companies” doctrine. Applying the principle of *Konzernvertrauenshaftung* to the facts in *Butec*, the Swiss Supreme Court *denied an extension of the arbitration agreement*, since the claimants had been aware of their exclusive contractual relationship with the subcontracting signatory, and *the non-signatory had simply intervened into the performance of the contract* to the extent required by its role as the main contractor.⁹⁹⁵ This judgment *strongly illustrates the gap which exists between Swiss and French case law*.⁹⁹⁶

Under these conditions it is understandable that arbitrators sitting in Switzerland have mostly refused to extend arbitration agreements, not just for formal reasons, but by considering that the notion of “group of companies” and the piercing of the corporate

⁹⁸⁹ Poudret/Besson, para. 256.

⁹⁹⁰ *Ibid.*

⁹⁹¹ Tschanz, in Rev. arb. 1989, p. 707.

⁹⁹² Notably *Orri*, Rev. arb. 1992, p. 95, and *V2000*, Rev. arb. 1996, p. 245.

⁹⁹³ Poudret/Besson, para. 256.

⁹⁹⁴ *Saudi Butec Ltd et Al Fouzan Trading v. Saudi Arabian Saipem Ltd*, unpublished ICC interim awards of 25 October 1994, confirmed by DFT of 29 January 1996, ASA Bulletin 3/1996, 496-507.

⁹⁹⁵ Zuberbühler, p. 26.

⁹⁹⁶ See also Poudret/Besson, para. 258.

veil are instruments which should only be used with extreme reluctance.⁹⁹⁷ In summary, the present state of Swiss law is that the extension of an arbitration agreement to a party which does not appear therein can be seriously envisaged only if it can be established (by any means) that such a party was validly represented by one of the other parties—which does not result solely from membership in a group of companies—or if there was subsequent ratification or, finally, if the attempt to evade arbitration constitutes an abuse of rights allowing a piercing of the corporate veil (*Durchgriff*).⁹⁹⁸

6.2.3.3. England

English *courts strongly respect the contractual nature of arbitration*. Indeed, the doctrine of “group of companies” is said to be inconsistent with the principle of privity of contract, the principle of the corporate veil and the treatment of derivative actions.⁹⁹⁹ In *Peterson Farms*, the Commercial Court held that “the [group of companies] doctrine ... forms no part of English law”.¹⁰⁰⁰ Therefore, the High Court confirmed the restrictive approach of English case law¹⁰⁰¹ with regard to a presumption of the extension of an arbitration agreement to the other members of the group.¹⁰⁰² It has been argued that *Peterson Farms*¹⁰⁰³ represents a set-back to the efforts of incorporating the “group of companies” doctrine into transnational law or the *lex mercatoria*.¹⁰⁰⁴ On the other hand, it has also been observed that the decision of the Commercial Court does not inevitably command the conclusion of the end of any possibility of extension of the arbitration clause to a non-signatory company when the underlying contract is governed by English law.¹⁰⁰⁵ Indeed, while the *existence of a group of companies is not the ground* on which courts and arbitral tribunals usually *extend arbitral clauses to non-signatories*, they *generally base their decision on consent or on conduct as an expression of implied consent or as a substitute for consent*.¹⁰⁰⁶ Extension may therefore be achieved by recourse to such theories as agency, trust or piercing the corporate veil.

⁹⁹⁷ See in particular the awards ICC Nos. 4402, 4504, 5281, 5721 and ASA Bulletin 1990, p. 270.

⁹⁹⁸ Poudret/Besson, para. 260.

⁹⁹⁹ Hanotiau, *Groups of companies*, para. 14-16.

¹⁰⁰⁰ *Peterson Farms Inc. v. C&M Farming Limited*, [2004] EWHC 121 (Comm), 62. For a discussion of the case, see, e.g. Gaffney.

¹⁰⁰¹ *Adams v. Cape Industries* [1991] 1 All ER 929, CA.

¹⁰⁰² Poudret/Besson, para. 262.

¹⁰⁰³ *Peterson Farms Inc. v. C&M Farming* [2004] 1 Lloyd's Rep. 603, QB = SAR 2004/1, p. 282.

¹⁰⁰⁴ Leadley/Williams, pp. 112-113.

¹⁰⁰⁵ See, e.g. Woolhouse, p. 443; Hanotiau, *Groups of companies*, para. 14-31.

¹⁰⁰⁶ Hanotiau, *Groups of companies*, para. 14-31.

6.2.3.4. United States

The same theories are also applied in the United States. However, it appears that in relation to the issue of extension of the clause to non-signatories, American law is much more liberal¹⁰⁰⁷ than any in Europe. At least in some Circuits, the paramount concern of the courts is the “federal policy favouring arbitration”.¹⁰⁰⁸ On the other hand, the *Sarhank* case,¹⁰⁰⁹ where the Second Court of Appeals declined to enforce an arbitral award against a corporate parent where there was no “clear and unmistakable intent by [it]. .. to arbitrate”, *may indicate a shift* from a rather liberal view, as expressed, for example, in the *J.J. Ryan* case,¹⁰¹⁰ *back to a greater emphasis on the parties’ intent to arbitrate*.¹⁰¹¹

6.2.4. The theoretical foundation of the doctrine and its rejection

Some authors suggest that the principles on which the “group of companies” doctrine is founded are based on the *lex mercatoria* or on usages of international trade; others, on the other hand, submit that the law governing the arbitration agreement should be applied.¹⁰¹² While the advocates of the “group of companies” doctrine purport that the exceptions to the notion of the separate entity of each juristic person and the privity of contract can be derived from the so-called *lex mercatoria*, the opponents of the “group of companies” doctrine also recognise the existence of exceptions, but they do not derive these exceptions from the *lex mercatoria*, but from the respective rules of the *national proper laws of contract*.¹⁰¹³

Not surprisingly the majority of the authors who favour “extension” are French,¹⁰¹⁴ as they do not have to take any formal or substantive conditions into account, with the exception of such substantive rules that might result from international public policy.¹⁰¹⁵ On the other hand, German and English authors are rather critical towards the “group of

¹⁰⁰⁷ See, e.g. *Thompson CSF v. American Arbitration Association*, 64 F.3d 773, 776 (2nd Cir. 1995); *Bel-Ray Co. v. Cbemrite (PTY) Ltd.*, 181 F.3d 435 (3rd Cir.1999).

¹⁰⁰⁸ Hanotiau, *Groups of companies*, para. 14-25.

¹⁰⁰⁹ *Sarhank Group v. Oracle Corporation*, 404 F.3d 657 (2nd Cir. 2005). For case notes, see Wilske/Shore and Salomon/Sterken.

¹⁰¹⁰ *JJ. Ryan & Sons v. Rhone Poulenc Textile SA*, 863 F.2d 315 (4th Cir. 1988); see Hosking, pp. 294-295, citing further decisions of the 4th Circuit Court of Appeals.

¹⁰¹¹ Zuberbühler, p. 27.

¹⁰¹² Poudret/Besson, para. 264.

¹⁰¹³ See Sandroock, *Extending*, pp. 167 *et seq.*

¹⁰¹⁴ See, e.g. de Boissésou, p. 522 para. 603 No. 1.; Derains, p. 242; Derains/Schaf., in particular p. 233, recognising a “presumed tacit acceptance”; and Jarrosson, *Agreement*.

¹⁰¹⁵ Poudret/Besson, para. 253.

companies” doctrine and reject it only admitting very restrictively a piercing of the corporate veil (*Durchgriff*).¹⁰¹⁶

6.3. Comments on extension on grounds linked to consent

In the majority of cases, the status as party of a non-signatory does *not result from the text of the agreement containing the arbitration clause, but from tacit acceptance*.¹⁰¹⁷ This is particularly so for the “group of companies” doctrine which *is based on tacit or even presumed acceptance of the arbitration clause*.¹⁰¹⁸ Such acceptance would result either from *conduct at the time of the conclusion of the agreement*, in particular participation in its negotiation but without the intention of signing it,¹⁰¹⁹ *or from subsequent acts*, particularly supervision of the operations or an active role in their performance, from which tacit acceptance may be inferred.¹⁰²⁰ However, while *originally* participation in the negotiation or performance of the contract was *only an indication* of such acceptance, a *presumption* has since been established, by virtue of an alleged usage of international commerce, that *knowledge of the clause constitutes acceptance* thereof.¹⁰²¹

Some cases even suggest that a *party’s conduct* should *not necessarily* be regarded as an expression of a *party’s implied consent*, but rather the party’s substantial involvement in the negotiation and performance of the contract and the knowledge of the existence of the arbitration clause have a standing of their own, as a *substitute for consent*, just as reliance is substitute for consideration.¹⁰²² In any case, it has been observed that, whatever the factual scheme, *the issue of extension of the arbitration clause to the other companies of the group should be analysed in terms of consent*, rather than by determining whether the so called “group of companies” doctrine is known or unknown in the relevant legal system.¹⁰²³

¹⁰¹⁶ See, e.g. Sandrock, *Extending*, pp. 627-630 and 646-647, and *Group of companies*, pp. 166-168; Schlosser, pp. 322-325; Mustill/Boyd, *Arbitration*, pp. 148 *et seq.*; Samuel, pp. 104 *et seq.*

¹⁰¹⁷ Poudret/Besson, para. 251.

¹⁰¹⁸ Derains/Schaf, p. 233.

¹⁰¹⁹ Derains, *Extension*, p. 242.

¹⁰²⁰ Blessing, *Introduction*, para. 498. See also de Boissésou, pp. 522 *et seq.*; Derains, *Extension*, p. 242.

¹⁰²¹ Poudret/Besson, para. 256.

¹⁰²² Hanotiau, *Groups of companies*, para. 14-6.

¹⁰²³ *Ibid.*

6.4. Estoppel

The doctrine of equitable estoppel in its traditional sense reflects the general legal principle of *non venire contra factum proprium*, found in Roman law and also known in many contemporary civil law jurisdictions.¹⁰²⁴ In arbitration the doctrine has developed a specific meaning applicable to non-signatories in the context of jurisdictionally fragmented multiparty situations.¹⁰²⁵

6.4.1. *The doctrine with respect to arbitration agreements*

In general, this doctrine applies where a party by its own conduct is prevented from denying that the other party in question is entitled to rely on an arbitration agreement.¹⁰²⁶ Or, in other words, estoppel denies a party who has accepted the benefits of a contract containing an arbitration clause the defence that such an arbitration clause is not applicable to that party.¹⁰²⁷ While in the majority of cases the doctrine has been employed by the US courts to estop the signatory party “from avoiding arbitration with a non-signatory”, on various occasions the doctrine has equally been applied to estop the non-signatory party from avoiding arbitration with the signatory party.¹⁰²⁸ US courts have recognised at least two different versions of it:¹⁰²⁹

1. First, courts have compelled a non-signatory to arbitrate where the non-signatory knowingly exploits or directly receives a “benefit” from the agreement containing the arbitration clause.¹⁰³⁰ In such instances, courts have allowed estoppel to be used as a proverbial “sword” rather than “shield”, *i.e.*, empowering the signatory to request arbitration of a claim.¹⁰³¹

¹⁰²⁴ Gaillard, *Contredire*, p. 241.

¹⁰²⁵ See Brekoulakis, *Third Parties*, p. 68.

¹⁰²⁶ Hosking, p. 293.

¹⁰²⁷ See, *e.g.* *Intergen N. V. v. Grina*, 344 F.3d 134, 145 (1st Cir. 2003). See also, *e.g.* Sentner, 58-66 (with an overview of US case law); Hosking, pp. 293-294. Certain estoppel applications have been the subject of intense academic debate. See, *e.g.* Uloth/Rial, *Equitable Estoppel*, pp. 604-624 (tracing the development of what is referred to as “intertwined claims estoppel”).

¹⁰²⁸ Brekoulakis, *Third Parties*, p. 69.

¹⁰²⁹ Apart from these two variants of estoppel, courts have also applied a similar analysis to require a non-signatory to arbitrate based on so-called “assumption” of the obligation. See, *e.g.* *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991).

¹⁰³⁰ See, *e.g.* *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber and Resin Intermediates, SAS*, 269 F.3d 187, 200 (3d Cir. 2001).

¹⁰³¹ See, *e.g.* *American Bureau of Shipping v. Tencara Shipyard, SPA*, 170 F.3d 349 (2d Cir. 1999); *Int'l Paper Co. v. Schwabedissen Maschinen and Anlagen GmbH*, 206 F.3d 411 (4th Cir. 2000).

2. Second, courts have compelled arbitration based on an analysis of:¹⁰³²
 - a. the relationship between the claim and the contract containing the arbitration clause; and
 - b. the existence of a “nexus between the parties”.¹⁰³³

6.4.2. *Issues with consent*

Although the broad language of the second version has been fertile ground for arguments that in effect use only the close relationship of the signatory and the non-signatory as the basis for implied consent to arbitration,¹⁰³⁴ the concern with these variations of the estoppel doctrine is that they frequently result in highly fact-specific decisions and sometimes appear to be used as an “easy option” rather than applying a more rigorous legal analysis using traditional principles of contract and agency law.¹⁰³⁵ This has been the case in *Choctaw Generation v. American Home Assurance*.¹⁰³⁶ Indeed, whereas in relation to bank guarantees¹⁰³⁷ or letters of credit issued on the basis of a contract containing an arbitration clause it cannot be assumed that the bank has consented to arbitration on the basis of the underlying contract if the guarantee or the letter of credit does not provide for arbitration,¹⁰³⁸ in *Choctaw* the US Court of Appeal for the Second Circuit held that a signatory to an arbitration clause may be bound under the doctrine of estoppel to arbitrate claims against the bank, where the issues “the non-signatory is seeking to resolve in arbitration are intertwined with the agreement the estopped party has signed”.¹⁰³⁹

The differentiation seems, however, in my view less to have its reason in the existence of a “nexus between the parties”. Indeed, the “nexus between the parties” is the same under both circumstances. However, while in the case of bank guarantees or letters of credit issued on the basis of a contract containing an arbitration clause the bank (in the

¹⁰³² See, e.g. *Sunkist Softdrinks, Inc. and Del Monte Corp. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993).

¹⁰³³ Hosking, p. 294.

¹⁰³⁴ See, e.g. *Sam Reisfeld & Son Imp. Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); *McBro Planning and Development Co. v. Triangle Electronic Construction Co., Inc.*, 741 F.2d 342 (11th Cir. 1984).

¹⁰³⁵ Hosking, p. 294.

¹⁰³⁶ *Choctaw Generation Ltd Partnership v. American Home Assurance Company*, 17(1) Mealey’s IAR C-1 (2002) C-2 (2d Cir. 2001); see also *JA Jones, Inc et al v. The Bank of Tokyo-Mitsubishi Ltd et al*, XXV YBCA 902 (2000) 904 (EDNC 1999); for the application of the doctrine of equitable estoppel in other cases, see *International Paper Company v. Schwabedissen Maschinen & Anlagen GmbH*, XXV YBCA 1146 (2000) 1149-1150.

¹⁰³⁷ On the issue of consent in relation to bank guarantees, see also Hanotiau, *Bank Guarantees*.

¹⁰³⁸ *Grundstatt v. Ritt*, 106 F 3d 201 (7th Cir. 1997).

¹⁰³⁹ Lew/Mistelis/Kröll, para. 7-48.

position of a respondent) gives no consent to arbitrate, in the *Choctaw* case the bank (in the position of a claimant) gave its consent to arbitrate by beginning the arbitration (claiming). On the other hand, it must also be observed that in the *Choctaw* case the respondent had only consented to the use of arbitration as a dispute resolution mechanism with the other signatory party to the arbitration agreement, but not to arbitrate with the bank. Therefore, the differentiation made in treating the two situations can only be justified when in the *Choctaw* case one enlarges the consent of the respondent from a *consent to arbitration with a determined party* to a *consent to arbitration without having regard with whom the arbitration shall take place* (as far as there is a relationship between the claim and the contract containing the arbitration clause).

6.5. Extension on grounds unrelated to consent

6.5.1. Extension by piercing the corporate veil

The principle of “piercing the corporate veil” is applicable in a whole series of different factual situations which have one characteristic feature in common: that a company is used by another company, by a natural person or by a State as a trustee for certain purposes.¹⁰⁴⁰ If either the trustor or the trustee have then signed an arbitration agreement, the effects of this agreement may be extended to the respective partner in the trust relationship.¹⁰⁴¹

It has been observed that given the very extensive case law in connection with groups of companies, and the assumption of tacit or even presumed acceptance, the French courts have rarely had to rely on the notion of fraud in order to pierce the corporate veil.¹⁰⁴² The situation is, however, different in other countries—for instance Switzerland.¹⁰⁴³

¹⁰⁴⁰ Sandrock, *Extending*, p. 172. See the description of three different kinds of cases at pp. 174 *et seq.*

¹⁰⁴¹ See Sandrock, *Extending*, pp. 172 *et seq.*

¹⁰⁴² Poudret/Besson, para. 257.

¹⁰⁴³ See, e.g. *Saudi Butec Ltd et Al Fouzan Trading v. Saudi Arabian Saipem Ltd*. The unpublished ICC interim awards of 25 October 1994, confirmed by DFT of 29 January 1996, ASA Bulletin 3/1996, 496-507; Habegger, *Groups of Companies*, No. 51; Hanotiau, *Complex Arbitrations*, No. 121. On the *Saudi Butec* case, see also earlier under IV.6.2.3.2. See also Zuberbühler, pp. 28 *et seq.*

6.5.2. *Extension without consent*

6.5.2.1. Extension based on the economic unity of the group

Case law does not offer any significant examples of the extension of an arbitration agreement on the *sole basis of the economic unity of a group*. Indeed, the fact that a company belongs to a group that constitutes an economic unity would seem to be a sign or factor conducive to extending the arbitration agreement, but is *not sufficient in itself*.¹⁰⁴⁴

6.5.2.2. Extension in the interest of the administration of justice

It has been observed that, although this ground may sound somewhat vague, it is fully justified in view of the *jurisdictional nature of arbitration* and the legitimate expectations of the parties.¹⁰⁴⁵ An example is the reference to the indivisibility of the dispute in the decision of a US court,¹⁰⁴⁶ which held that when the *claims made against a parent company and its subsidiary are based on the same facts and are fundamentally indivisible*, a tribunal may decide that the claims made against the parent company should be decided by arbitration even though that company was not formally a party to the arbitration clause.¹⁰⁴⁷ Moreover, there is also insistence in some cases on the need for the arbitrators to be presented with *all the legal and economic aspects* of the dispute.¹⁰⁴⁸ Considerations about the *effect of arbitral awards on third parties* might also be important.¹⁰⁴⁹

7. RELEVANCE OF PARTIES' CONSENT WITH REGARD TO PROCEDURAL MECHANISMS

In this section the needs which may arise during arbitral proceedings will be detailed showing how they can potentially conflict with the consensual nature of commercial arbitration. Different institutional arbitration rules and laws will be compared. This

¹⁰⁴⁴ Vidal, p. 73. See, e.g. Court of Appeals, 5th Circuit, 9 September 2003, *Bridas SAPIC v. Government of Turkmenistan*, [2004] Int. ALR 55; (2004) 19:10 Mealey's IAR 6 at 8.

¹⁰⁴⁵ See Vidal, p. 73.

¹⁰⁴⁶ Court of Appeals, 4th Circuit, 863 F.2d 315, 1988, *Ryan*.

¹⁰⁴⁷ Vidal, p. 73.

¹⁰⁴⁸ Paris, 7 December 1994, *Jaguar*, Rev. arb. 1996.245 (Annot. Ch. Jarrosson), upheld by Cass. Civ. Ire, 21 May 1997, Rev. arb. 1997.537 (Annot. E. Gaillard).

¹⁰⁴⁹ See Brekoulakis, *Third Parties*, pp. 215 *et seq.*

comparative scrutiny also has a temporal dimension, in particular because the arbitration rules of the different Swiss Chambers of Commerce (two of which—Geneva and Zurich—will be discussed) were substituted in 2004, in respect of *international* arbitration, by the Swiss Rules.¹⁰⁵⁰ Bearing in mind that the goal of arbitration is to have an enforceable award, some considerations about enforceability will be made. However, the main objective of section 7. is to suggest which questions should be considered and which solutions appear to be the most respectful of parties' consent in situations of joinder and intervention of third parties in arbitral proceedings, or in the case of consolidation of parallel proceedings.

7.1. Joinder and intervention of third parties in arbitral proceedings

7.1.1. In general

Joinder of third parties or their intervention in the proceedings is well known in State courts. In State courts for reasons of efficient administration of justice procedural laws contain provisions allowing the joinder or intervention of third parties, irrespective of whether all parties concerned agree.¹⁰⁵¹ The same needs may arise in arbitral proceedings. However, joinder or intervention in arbitrations is generally only possible if all parties involved (including, therefore, the joining third party) and the arbitral tribunal consent.¹⁰⁵² The consent of all parties is necessary, because of the contractual nature of arbitration and its confidentiality.¹⁰⁵³

7.1.2. Institutional arbitration

7.1.2.1. ICC Rules

7.1.2.1.1. General

The ICC Rules do not address many of the issues that may arise in a multiparty context,

¹⁰⁵⁰ The Swiss Rules of International Arbitration (“Swiss Rules”), which came into force on 1 January 2004, govern *international* arbitrations. For *domestic* cases, the arbitration rules of the different Swiss Chambers of Commerce and Industry continue to be relevant (see also Kellerhals/Berger, *Swiss Rules*, p. 1). On the Swiss Rules, see also Meyer-Hauser and *The Swiss Rules of International Arbitration*, (May 2004), ASA Special Series No. 22.

¹⁰⁵¹ See Lew/Mistelis/Kröll, para. 16-39.

¹⁰⁵² See Berger, *Arbitration*, pp. 311-312.

¹⁰⁵³ See Hanotiau, *Multicontract*, p. 384.

such as, for example, the joinder of parties not named in the request for arbitration.¹⁰⁵⁴ Indeed, by referring only to “claimants” and “respondents”, the new rules, like the old ones, are based on the assumption of a bipolar conception of the process (even though there may be a number of parties on each side).¹⁰⁵⁵ It has been observed that one of the most controversial topics concerning multiparty scenarios in ICC arbitration is the possibility for a respondent to request successfully from the ICC Court that a new party join the arbitral proceedings.¹⁰⁵⁶

7.1.2.1.2. Traditional view

The ICC Court has generally considered that *only the claimant* is entitled to identify the parties to the arbitration.¹⁰⁵⁷ This was also the position of the arbitral tribunal in case 5625¹⁰⁵⁸ where it was decided that only those who name themselves as such in the request for arbitration, or are identified as defendants in the claimants’ request for arbitration, can become parties in an ICC arbitration.¹⁰⁵⁹ Although the award was rendered under the 1975 ICC Rules, it could have been made under the present version *mutatis mutandis*, if literally applied.¹⁰⁶⁰

However, a claimant wishing to amend a request for arbitration in order to introduce a new party may have no alternative but to begin a new arbitration if the original arbitration is already so advanced as to preclude the joinder of an additional party without the consent of the others.¹⁰⁶¹

7.1.2.1.3. Moderation of the traditional view

The traditional view of the ICC Court, which is consistent with Article 4(3)(a), has been moderated. It would appear that the ICC Court may now allow a new party to be joined in the arbitration at the *respondent’s request* if, and only if, two *sine qua non* conditions are met:

¹⁰⁵⁴ Derains/Schwartz, p. 36.

¹⁰⁵⁵ See Derains, *Limits*, p. 31, and Derains/Schwartz, pp. 36 and 73.

¹⁰⁵⁶ See Whitesell/Silva-Romero, p. 10.

¹⁰⁵⁷ *Ibid.*

¹⁰⁵⁸ For the procedural situation in the ICC Case No. 5625, see Jarvin, *Comment*, p. 484.

¹⁰⁵⁹ *Ibid.*

¹⁰⁶⁰ Derains, *Limits*, p. 29.

¹⁰⁶¹ Derains/Schwartz, p. 58, who, however, also observed that there is nothing in the Rules that mandates such a strict position.

1. the ***third party must have signed the arbitration agreement*** on the basis of which the request for arbitration has been filed. Hence, by deciding to join the new party, the ICC Court is simply following the parties' intention and will, as expressed in their arbitration agreement;
2. the ***respondent must have introduced claims against the new party***.¹⁰⁶²

Nevertheless, to ensure that all parties have an equal opportunity to participate in the constitution of the arbitral tribunal, the ***request for the joinder of a new party must be made before the arbitrators have been appointed or confirmed***, unless all parties agree to such joinder.¹⁰⁶³

7.1.2.1.4. Criticism and proposal of Derains

Failing any special agreement by the parties, be it in the arbitration clause or later on, neither addition of parties¹⁰⁶⁴ nor consolidation of proceedings is possible under the ICC Rules.¹⁰⁶⁵ Derains expressed the opinion that this ***traditional approach of the ICC Court***, which requires ***parties to the same arbitration agreement*** to participate in separate arbitration proceedings dealing with closely interrelated matters, is ***too strict***.¹⁰⁶⁶ Indeed, with the adoption of the 1998 Rules and, in particular, its Articles 10(2) and 19, the situation has changed. Nowadays, the terms of reference no longer constitute an impassable hurdle. In his proposal Derains differentiates between whether the arbitral tribunal has been constituted or not, and whether the terms of reference have already been signed.¹⁰⁶⁷

7.1.2.2. **Geneva Rules**¹⁰⁶⁸

Article 18 ***only*** allowed for a joinder of a third party ***on the request of the respondent***. The *ratio* of this provision was that the claimant initiated the proceedings and could have named any party he wanted as respondent from the beginning.¹⁰⁶⁹ The defendant had to give notice of its wish to call a third party upon being served with the request of

¹⁰⁶² Whitesell/Silva-Romero, pp. 10 *et seq.*

¹⁰⁶³ *Ibid.*

¹⁰⁶⁴ Whether voluntary or under compulsion.

¹⁰⁶⁵ Derains, *Limits*, p. 30.

¹⁰⁶⁶ See Derains, *Limits*, pp. 30 *et seq.*

¹⁰⁶⁷ *Ibid.*

¹⁰⁶⁸ With the coming into force on 1 January 2004 of the Swiss Rules, the relevance of the Geneva Chamber of Commerce and Industry Arbitration Rules is now limited to *domestic* arbitration.

¹⁰⁶⁹ See Lew/Mistelis/Kröll, para. 16-46.

arbitration, but only up to the time when he filed the answer to the request of arbitration.¹⁰⁷⁰ It was the *institution*¹⁰⁷¹ **which first had to rule on the joinder**, taking into account the *prima facie* existence of an arbitration agreement as well as the practical and legal advisability of conducting joint proceedings.¹⁰⁷² If the institution accepted the joinder, the third *party was involved in setting up the tribunal* in the same manner as in a multiparty arbitration.¹⁰⁷³ However, it was the *tribunal which had the final say on a joinder or intervention*.¹⁰⁷⁴ If the arbitrators decided against a joinder, the arbitrations proceeded without the third party but with the same tribunal.¹⁰⁷⁵

7.1.2.3. LCIA Rules

Article 22(1)(h) expressly requires the *consent of the third person* to be joined *as well as of the party*¹⁰⁷⁶ **applying for a joinder**.¹⁰⁷⁷ The decision of whether to permit a joinder is taken by the arbitral tribunal which has *discretion* in this respect.¹⁰⁷⁸ The effect of this provision is that the *second party to the arbitration agreement does not have to consent expressly* to the joinder, as it has *done so by agreeing to the LCIA Rules*.¹⁰⁷⁹ The LCIA solution can be problematic with regard to confidentiality as an unwished third person might be joined. Therefore, even though the arbitral tribunal's decision acts as a "barrier",¹⁰⁸⁰ a party which does not want to have third persons in the proceeding, should insist on the exclusion of the applicability of Article 22(1)(h) in writing.¹⁰⁸¹

7.1.2.4. NAI Rules

Article 41.4 provides that the arbitral tribunal may allow the joinder or intervention of a third party, after having heard it and the other parties, if the third party accedes in writing to the initial arbitration agreement. Therefore, the *consent of all parties is necessary*.

¹⁰⁷⁰ Imhoos, p. 132.

¹⁰⁷¹ The CCIG.

¹⁰⁷² See Kaufmann, p. 75.

¹⁰⁷³ In accordance with Article 17 Geneva Rules (see Article 18.3 Geneva Rules).

¹⁰⁷⁴ See also Lew/Mistelis/Kröll, para. 16-46.

¹⁰⁷⁵ See Article 18.4 Geneva Rules. See also Kaufmann, p. 75.

¹⁰⁷⁶ Claimant or respondent.

¹⁰⁷⁷ This does not, however, cover the possibility of joining a third party in relation to a counterclaim (see Lew/Mistelis/ Kröll, p. 390 at footnote 33).

¹⁰⁷⁸ Lew/Mistelis/Kröll, para. 16-44.

¹⁰⁷⁹ *Ibid.* See also Melnyk, p. 63, and Redfern/Hunter/Blackaby/Partasides, para. 3-85.

¹⁰⁸⁰ And this provision has been used very sparingly and very rarely granted (Bamforth/Maidment, p. 12).

¹⁰⁸¹ The beginning of Article 22(1) LCIA Rules states: "Unless the parties at any time agree otherwise in writing".

7.1.2.5. Swiss Rules

Article 4(2) Swiss Rules first allows for *a third party to intervene* in pending arbitral proceedings. Parties electing the Swiss Rules are therefore considered to have given their *consent for the intervention of third parties*.¹⁰⁸² As a consequence, none of the parties can object if a third party is willing to join the proceedings. It has been observed that a third party requesting to participate in a pending arbitration is thereby deemed to have fulfilled the formal and substantive conditions to become a party to the arbitration.¹⁰⁸³ However, this of course does not mean that any third party wishing to intervene in pending arbitration proceedings under the Swiss Rules shall *eo ipso* become a party, as the only effect of this assumption is that the *initial parties* to the arbitration agreement *do not have to consent expressly to the joinder*, and it remains at the *discretion of the arbitral tribunal* to allow the intervention.¹⁰⁸⁴

Moreover, Article 4(2) Swiss Rules also *authorises the arbitral tribunal to cause a third party to participate* in the arbitration *upon a request made by a party* to pending arbitral proceedings. It has been observed that this solution, which has its basis in Article 18 CCIG, is however less limiting, as either the claimant or the respondent can request the joinder of a third party.¹⁰⁸⁵ The field of application of the Swiss Rules is also broader than the one of Article 22(1)(h) LCIA Rules which only provides for the second type of joinder.¹⁰⁸⁶

While in the *first situation* the *consent of the third party to the joinder can be implied* by his request to join in the proceedings, in the *second situation* the *consent of the third party is necessary*. This, in my opinion, even applies when the third party is party to the same arbitration agreement as the initial parties to the proceeding, for the case that the third party has not expressly waived in the common arbitration agreement his right to designate an arbitrator (which is quite unlikely). In fact, the Swiss Rules themselves do *not provide*, in case of third parties' participation, for a *provision regarding waiver of the right to designate an arbitrator on the part of the joining third party* (a waiver of the right to designate an arbitrator is only foreseen in the case of the consolidation of

¹⁰⁸² See also Lew/Mistelis/Kröll, para. 16.42.

¹⁰⁸³ See Gilliéron/Pittet in Zuberbühler/Müller/Habegger (eds.), para. 12 to Article 4 Swiss Rules.

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ Gilliéron/Pittet in Zuberbühler/Müller/Habegger (eds.), para. 13 to Article 4 Swiss Rules.

¹⁰⁸⁶ Blessing, *Comparison*, p. 31.

proceedings).¹⁰⁸⁷ On the other hand, the consent of the initial parties to the proceedings is given by the fact that they have submitted their dispute under the Swiss Rules. Therefore, afterwards their agreement to a specific joinder is no longer necessary.

Nevertheless, the provision of conferring some “*discretionary power*” to the arbitral tribunal *increases its jurisdictional power*.

7.1.3. *Ad hoc arbitration*

As a general rule, it has been observed that bringing into the proceedings a *party to the arbitration agreement* which was not initially named as a party to the arbitral proceedings raises more difficulties where the arbitration is institutional rather than *ad hoc*.¹⁰⁸⁸ On the other hand, an entity which is *not party to the arbitration agreement* should only be joined with the consent of all parties and the arbitral tribunal.¹⁰⁸⁹

7.1.4. *Lex arbitri*

Because of the inherent conflict between the consensual nature of arbitration and a statutory joinder not based on consent, the different arbitration laws in general do not contain provisions dealing with the joinder of third parties or their intervention.¹⁰⁹⁰ Nevertheless, Article 1696bis Belgian Judicial Code and Article 1045 Netherlands CCP confirm the possibility for third parties to intervene or be joined as parties in arbitral proceedings. However, the participation of a third party remains *subject to an agreement with the parties in dispute and to the consent of the arbitral tribunal*.¹⁰⁹¹

7.1.5. *Comments*

In order to decide whether the participation of a new party is possible or not, the consent of all parties involved is important. Therefore, it is useful to distinguish, in a first step, if

¹⁰⁸⁷ See Article 4(1) Swiss Rules

¹⁰⁸⁸ Hanotiau, *Problems*, p. 336. Different seems, however, to be the view of Derains, *Limits*, p. 33. For an *ad hoc* case, see *Marine Drive Complex v. Ghana*, Awards of 27 October 1989 and 30 June 1990, XIX YBCA (1994), pp. 11 *et seq.* where the joinder was accepted by making reference to Article 20 UNCITRAL Arbitration Rules.

¹⁰⁸⁹ See Article 20 UNCITRAL Arbitration Rules: “...However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement”. See also Berger, *Arbitration*, pp. 311-312.

¹⁰⁹⁰ Lew/Mistelis/Kröll, para. 16-47.

¹⁰⁹¹ The two mentioned law articles are therefore not comparable to the provisions allowing for a joinder in State courts (see Lew/Mistelis/Kröll, para. 16-49, for Article 1045 Netherlands CCP).

the new party to the arbitral proceeding is also a party to the arbitration agreement or not.

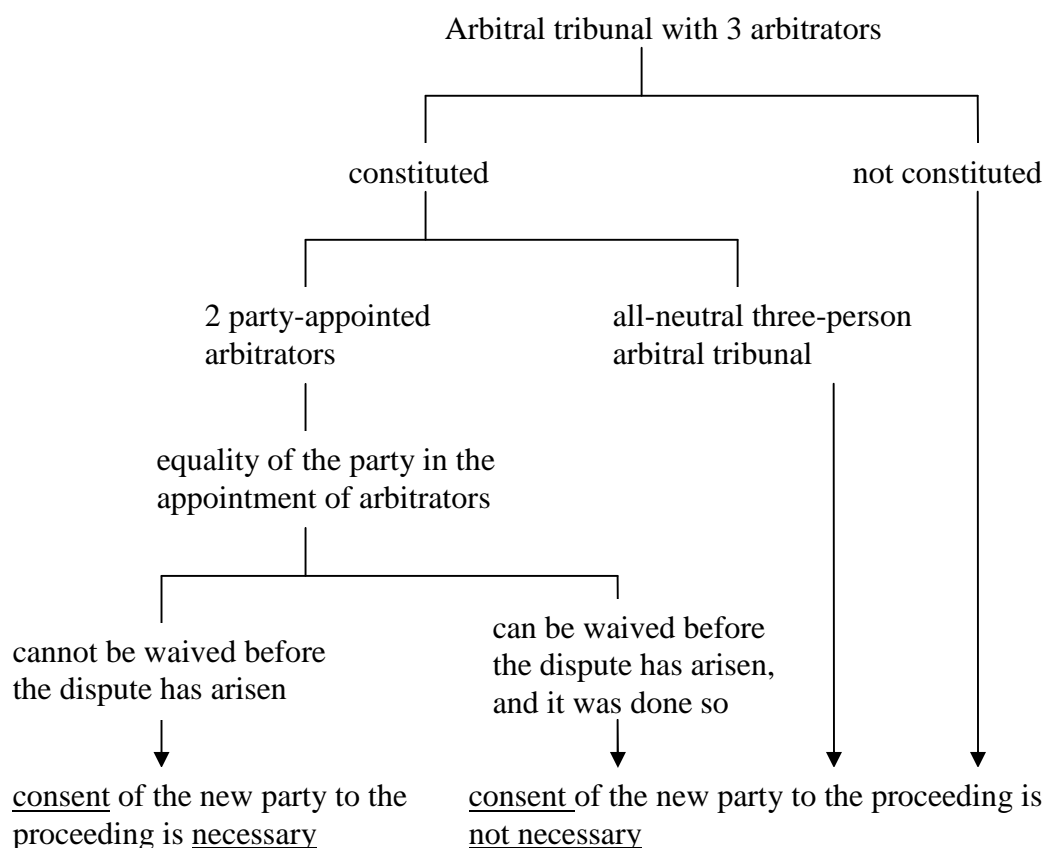
7.1.5.1. New party to the arbitral proceeding is also a party to the arbitration agreement

In this case the *consent of the parties*, that are *already involved in the arbitral proceeding*, to a new party participating in the proceeding, is *included in their common arbitration agreement*. The traditional view of the ICC is too strict, but the moderate view is still not sufficiently liberal. The criticism of Derains is justified.

The *consent of the new party to the proceeding is necessary* where a three-person *arbitral tribunal* (with two-party appointed arbitrators) is *already constituted*. However, strictly this consent does not concern the “joining” of the arbitral proceeding itself, because such consent is already existent on the ground of the arbitration agreement, but rather the acceptance of the arbitral tribunal (consent to the arbitral proceeding with the existing composition of the arbitral tribunal). Therefore, this *consent is not necessary* where the institutional rules provide that an *all-neutral three-person arbitral tribunal* has to be constituted in multiparty arbitrations, as was the case in international arbitrations under the Zurich Rules (an all-neutral tribunal is also possible in ICC arbitrations when the initial parties to the proceedings number more than two and each member of the arbitral tribunal was appointed by the ICC Court in accordance to Article 10(2) ICC Rules). The *consent of the new party to the proceeding* is also *not necessary* in countries where the *principle of the equality of the parties in the appointment of arbitrators can be waived before the dispute has arisen*, and the new party to the proceeding has *done so*. This possibility is not given when the seat of arbitration is in France. Indeed, in the *Dutco* case the French *Cour de cassation* reversed a judgement of the Paris *Cour d'appel* and found that “the principle of the equality of the parties in the appointment of arbitrators is a matter of public policy (*ordre public*) which can be waived only after a dispute has arisen”.¹⁰⁹² Therefore it was considered to be irrelevant whether the parties when entering into the arbitration agreement could anticipate such an appointment procedure or even agreed to it.¹⁰⁹³

¹⁰⁹² See *Cour de cassation*, 7 January 1992, *Siemens AG/BKMI Industrieanlagen GmbH v. Dutco Construction Company*, XVIII YBCA 140 (1993). For a discussion of the *Dutco* case, see, e.g. Bellet; Delvolvé, *Dutco*.

¹⁰⁹³ Lew/Mistelis/Kröll, para. 16-15.



It should also be noted that important issues may arise in determining *who* is party to the arbitration agreement,¹⁰⁹⁴ and whether the request of joinder has been made on time (not only with regard to the constitution of the arbitral tribunal but in general).¹⁰⁹⁵

7.1.5.2. New party to the arbitral proceeding is not a party to the arbitration agreement

Whether or not a new party, which is not a party to the arbitration agreement, can participate in the arbitral proceeding depends on the *consent of all parties*, if the initial parties have not chosen arbitration rules which facilitate joinder.¹⁰⁹⁶ That the consent of

¹⁰⁹⁴ In particular, see the problematic concerning the extension of the scope of arbitration agreements to “non-signatories”. On this issue, see, e.g. *The Arbitration Agreement—Its Multifold Critical Aspects* (December 1994), ASA Special Series No. 8.

¹⁰⁹⁵ See, e.g. Article 20 UNCITRAL Arbitration Rules “unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances”.

¹⁰⁹⁶ See, e.g. the LCIA Rules or the Swiss Rules. Here the consent of the initial parties is given, because they submitted their dispute under the said arbitration rules. Thus, afterwards only the consent of the new joining third party is necessary. See also Melnyk, p. 63. On this aspect, see, e.g. the decision by the Privy Council in *The Bay Hotel and Resort Ltd v. Cavalier Construction Co Ltd*, [2001] UKPC 34, 17(1) Mealey’s IAR B-1 (2002), B-7 *et seq.*

all parties is necessary can also be inferred from the arbitration acts of Belgium and the Netherlands. The only impact of these laws is therefore that they underline this necessity.

7.2. Consolidation of different arbitrations

7.2.1. *In general*

Consolidation denotes the act or process of uniting several arbitrations which are pending or initiated into a single set of proceedings before the same arbitral tribunal.¹⁰⁹⁷ The need for consolidation is often said to be most acute in maritime and construction arbitration.¹⁰⁹⁸ Nevertheless, while consolidation has several advantages,¹⁰⁹⁹ like prevention of inconsistent awards,¹¹⁰⁰ procedural efficiency as well as saving of time and money,¹¹⁰¹ it also presents disadvantages,¹¹⁰² such as the constitution of the arbitral tribunal,¹¹⁰³ the distribution of costs¹¹⁰⁴ and issues of confidentiality.¹¹⁰⁵

However, probably the *strongest criticism* is that *compelling consolidation without the consent of the parties involved directly undermines the freedom of contract that forms the basis of an arbitration agreement.*¹¹⁰⁶ This aspect is, along with confidentiality, the main reason most countries have not adopted provisions on the consolidation of related arbitral proceedings. In fact, it is believed that this constitutes an infringement of the rights of the parties to have their disputes settled in private according to their will.¹¹⁰⁷ For the same reason, arbitration institutions are rather reluctant to consolidate proceedings.¹¹⁰⁸

¹⁰⁹⁷ See Platte, p. 68; Lew/Mistelis/Kröll, para. 16-38.

¹⁰⁹⁸ See, e.g. Van Haersolte-van Hof, p. 427.

¹⁰⁹⁹ For a detailed analysis of the advantages of consolidation generally, see Chiu.

¹¹⁰⁰ See, e.g. Gaillard, *Consolidation*, p. 36; see also Chiu, pp. 55-56, or Leboulanger, *Multi-Contract*, pp. 62-64.

¹¹⁰¹ *Ibid.*

¹¹⁰² For a detailed analysis of the disadvantages of consolidation generally, see Chiu.

¹¹⁰³ See, e.g. Chiu, p. 58.

¹¹⁰⁴ See, e.g. Gaillard, *Consolidation*, p. 37. See also Chiu, p. 61.

¹¹⁰⁵ See, e.g. Lew/Mistelis/Kröll, 16-75. See also Diamond and in particular Collins discussing the case *Oxford Shipping Company Limited v. Nippon Yusen Kaisha* ("The Eastern Saga") [1984] 2 Lloyd's Rep. 373 (QB).

¹¹⁰⁶ Chiu, p. 57.

¹¹⁰⁷ See Leboulanger, *Multi-Contract*, p. 64.

¹¹⁰⁸ *Ibid.*

7.2.2. Consolidation of different arbitrations between different parties

Basically, consolidation is possible in two ways:

1. with the parties' consent in the arbitration agreement: the parties may have expressly agreed to consolidation by inserting a relevant provision in their agreement, implicitly, or by reference to arbitration rules;
2. without the parties' consent in the arbitration agreement: the *lex arbitri*¹¹⁰⁹ might allow ordered consolidation.¹¹¹⁰

7.2.2.1. With the parties' consent in the arbitration agreement

7.2.2.1.1. In general

While the simplest way to facilitate consolidation is an agreement by the parties or a special provision in the arbitration clause, such agreements are rare in practice.¹¹¹¹ Drafting multiparty arbitration clauses is not easy. It requires a close understanding of the nature of the relationship between the different parties, and of the type of disputes that could arise in the future.¹¹¹² Therefore, it is not surprising that none of the leading arbitration institutions has officially recommended a multiparty arbitration clause which provides for consolidation.¹¹¹³

The clauses discussed are usually based on broad notions such as “related disputes” which are complicated in practice, because they lead to the question of *what constitutes the necessary connection*.¹¹¹⁴ Moreover, the clauses of *all contracts involved must allow for a consolidation*, as only then can the consent of all parties be considered as given.¹¹¹⁵ The question of whether consolidation is possible depends ultimately on an *interpretation of the various arbitration agreements* and it is therefore up to the arbitral

¹¹⁰⁹ State legislation or case law.

¹¹¹⁰ See Platte, p. 69.

¹¹¹¹ Lew/Mistelis/Kröll, para. 16-51. One example where the parties agreed on consolidation after the dispute has arisen is ICC Case No. 6719 (on ICC Case No. 6719, see Arnaldez/Derains/Harscher, *Collection of ICC Arbitral Awards 1991-1995*, pp. 567 *et seq.*).

¹¹¹² Redfern/Hunter/Blackaby/Partasides, para. 3-84.

¹¹¹³ Lew/Mistelis/Kröll, para. 16-51. In fact, most recommended institutional arbitration clauses are based upon the traditional two-party model. Attempts to propose multiparty arbitration clauses were, however, undertaken by scholars. See, *e.g.* Bartels; Wetter, *Multi-party*.

¹¹¹⁴ Has the connection to be a legal or economic one, direct or indirect, strong or weak? (see Lew/Mistelis/Kröll, para. 16-52).

¹¹¹⁵ *Ibid.*

tribunal to decide whether or not to consolidate—this issue falls within the competence-competence of the arbitral tribunal.¹¹¹⁶

7.2.2.1.2. Express agreement

An example of the problems encountered in drafting arbitration clauses which allow separate arbitration proceedings between different parties to be consolidated is given in the House of Lords' decision in *Lafarge Redland v. Shepard Hill*, where a contractor engaged a subcontractor under a subcontract incorporating, with amendments, the FCEC Standard Form of Subcontract.¹¹¹⁷ Few standard forms contain agreements to consolidate arbitration proceedings with proceedings arising under other contracts: the FCEC Standard Form of Subcontract for use with the ICE Conditions with its clause 18(2) is an exception.¹¹¹⁸

7.2.2.1.3. Implied agreement

As express contractual provisions for multiparty arbitration are relatively rare, the question arises as to in which situations an arbitration clause can be interpreted as encompassing an agreement to multiparty arbitration, *i.e.* in which cases can an implied agreement be said to exist?¹¹¹⁹ It may be ***possible to interpret less explicit arbitration clauses as permissive of consolidation of proceedings:***

- if all contracts concluded in connection with a single economic venture between the different parties involved contain identically worded arbitrations clauses; or
- if the heads of agreement of a specific project contains an arbitration clause to which the different contracts concluded in the execution of this heads of agreement refer.¹¹²⁰

Both situations may be an indication of consent for consolidation. However, the mere fact of identical wording is not itself conclusive for permission for consolidation.¹¹²¹

The question of multiparty arbitration on the basis of different arbitration clauses arose in the *Andersen* arbitration where, in spite of different versions of arbitration

¹¹¹⁶ Lew/Mistelis/Kröll, paras 16-52 and 16-61.

¹¹¹⁷ *Lafarge Redland Aggregates Ltd v. Shepard Hill Civil Engineering Ltd*, [2000] 1 WLR 1621 (see Lew/Mistelis/ Kröll, para. 16-53.).

¹¹¹⁸ Mimms, p. 2.

¹¹¹⁹ Nicklisch, p. 59.

¹¹²⁰ Lew/Mistelis/Kröll, para. 16-56.

¹¹²¹ *Ibid*; see also Mimms, p. 1.

agreements, the arbitral tribunal affirmed its jurisdiction in an interim award¹¹²² by ruling that all the parties were bound by the most recent arbitration clause.¹¹²³ This conclusion was upheld by the Swiss Federal Tribunal on an application to set the award aside.¹¹²⁴ However, the *Andersen* case was peculiar insofar as the arbitration clauses were different because many of the parties had not updated their contracts so as to include the most recently approved arbitration clause.¹¹²⁵

Generally, ***differences in such substantial matters as the chosen seat or the applicable law should exclude consolidation.***¹¹²⁶ Even where all contracts involved are concluded within the framework of the same venture between the various parties involved, the arbitral tribunal cannot assume a global jurisdiction for all contracts concluded for that venture, but has to verify its jurisdiction in relation to each party and to each issue.¹¹²⁷ This was clearly held by the French *Cour d'Appel de Versailles* in the *Sofidif* case.¹¹²⁸

7.2.2.1.4. Reference to arbitration rules

a. General

Recourse to administered arbitration appears to be the most suitable means to reach a dual goal:

1. consolidation, whenever opportune and/or necessary, of separate proceedings;
2. harmonisation of the said proceedings, when consolidation is to be discouraged.¹¹²⁹

By inserting careful provisions into the respective rules, the arbitration institutions can put into operation a true “contractual system of consolidation and/or harmonisation”, therefore filling the gap created by the contractual foundation of arbitration, as opposed to the coercive measures available at the level of procedural law.¹¹³⁰ ***Consolidation in***

¹¹²² Rendered on 29 April 1999.

¹¹²³ See Final award in Case No. 9797 of 28 July 2000, ASA Bulletin, Vol. 18 – No. 3 (2000), pp. 514-540, Summary of the proceedings. As a consequence, also the appointing authorities were not the same.

¹¹²⁴ Decision of the Swiss Supreme Court of 8 December 1999, ASA Bulletin, Vol. 18 – No. 3 (2000), pp. 546-557.

¹¹²⁵ See Lew/Mistelis/Kröll, para. 16-57.

¹¹²⁶ Lew/Mistelis/Kröll, para. 16-59.

¹¹²⁷ *Ibid.*

¹¹²⁸ On the *Sofidif* case, see CA de Versailles (*Chambres réunies*) 7 mars 1990 – *OIAETI et Sofidif v. COGEMA, SERU, Eurodif, CEA*, Note E. Loquin, Rev. arb., 1991 No. 2, pp. 326-344).

¹¹²⁹ Bernini, p. 299.

¹¹³⁰ *Ibid.*

institutional arbitration presupposes that the different proceedings are administered by the same institution, and it is possible in two ways:

1. the parties may agree to the joinder of proceedings;
2. consolidation may be ordered, in certain cases, by the arbitration institution to whose rules the parties have adhered in their arbitration agreement or by the arbitral tribunal appointed in accordance with those rules.¹¹³¹

b. ICC Rules / LCIA Rules

The ICC and LCIA Rules make no reference to the possibility of consolidation of arbitration between different parties.¹¹³²

c. CEPANI Rules

According to Article 12 *consolidation can be ordered by the institution*. The request of consolidation can come from the arbitral tribunal, from the parties or the most diligent party, or CEPANI itself. Within the framework of the CEPANI rules, consolidation is possible, even though the parties to the different disputes are not the same in whole or in part.¹¹³³ CEPANI's approach requires only some link of connection or indivisibility of the disputes.¹¹³⁴

d. Zurich Rules¹¹³⁵

Under the Zurich Rules *consolidation was possible* in multiparty situations, where an identical three-men arbitral tribunal was appointed,¹¹³⁶ and in cases of further arbitrations between parties which already had an arbitration pending under these rules.¹¹³⁷ The *decision* as to whether to conduct the arbitrations separately, or to consolidate them, partly or altogether, *was taken by the arbitral tribunal*.

¹¹³¹ See Hanotiau, *Problems*, p. 330.

¹¹³² See also Mimms, p. 4; and Derains, *Limits*, p. 30, with regard to the ICC Rules.

¹¹³³ Hanotiau, *Problems*, pp. 332-333.

¹¹³⁴ *Ibid.*

¹¹³⁵ With the coming into force on 1 January 2004 of the Swiss Rules, the relevance of the Zurich Chamber of Commerce Arbitration Rules is now limited to *domestic* arbitration.

¹¹³⁶ See Article 13 Zurich Rules (Multi-Party Arbitration).

¹¹³⁷ See Article 14 Zurich Rules (Assignment of further Arbitrations). In cases of further arbitrations between parties which already had an arbitration pending under the Zurich Rules, it was the *institution* which could assign a new dispute to the existing arbitral tribunal. The *arbitral tribunal* decided afterwards whether both arbitrations were to be conducted separately, or consolidated them, partly or altogether.

e. *Swiss Rules*

Article 4(1) Swiss Rules provides that the Chambers *may decide* that a new case shall be referred to the arbitral tribunal already constituted for the existing proceedings. By choosing the Swiss Rules and, in particular, Article 4(1), the *parties are deemed to have given their consent to consolidation in advance*.¹¹³⁸ It is not a condition for the consolidation of *different proceedings* under the Swiss Rules that the proceedings to be consolidated are between the *same parties*,¹¹³⁹ as the consolidation can also be ordered when the new case involves *different parties* than those in the existing arbitral proceedings.¹¹⁴⁰ Therefore, there is an expansion of the scope of arbitration *ratione personae*, as the initial parties give their *consent* in advance to arbitration as the mechanism used *to solve disputes in general*, and *not only* for solving those *with regard to a particular party*.¹¹⁴¹

It has been observed that consolidation can be ordered despite the objection of one party.¹¹⁴² Thus, with this provision some “*discretionary power*” is *conferred* upon the institution and a *strengthening of the jurisdictional side* of arbitration.

f. *CIMAR*

The CIMAR reflect the terms of the English Arbitration Act 1996. They require in rule 3.9 the express consent of all the parties.¹¹⁴³ Moreover, consolidation can only take place when the same arbitrator is already appointed in two or more arbitral proceedings which involve some common issues.¹¹⁴⁴

7.2.2.2. *Lex arbitri*

If no agreement exists between the parties, consolidation can be based on the law governing the arbitration.¹¹⁴⁵ Statutory regulation of consolidation started to be adopted

¹¹³⁸ See also Gilliéron/Pittet in Zuberbühler/Müller/Habegger (eds.), para. 4 to Article 4 Swiss Rules.

¹¹³⁹ Gilliéron/Pittet in Zuberbühler/Müller/Habegger (eds.), para. 5 to Article 4 Swiss Rules.

¹¹⁴⁰ Peter W., p. 5.

¹¹⁴¹ Provided that the joining parties have also agreed on the Swiss Rules.

¹¹⁴² Blessing, *Comparison*, p. 31.

¹¹⁴³ Mimms, p. 4.

¹¹⁴⁴ *Ibid.*

¹¹⁴⁵ Lew/Mistelis/Kröll, para. 16-66.

after the appearance of the Model Law,¹¹⁴⁶ before this, consolidation was only really known in the US.¹¹⁴⁷ The solutions in the few countries which have enacted legislative provisions can basically be divided into two categories: the “false” and the “real” legislative solutions.¹¹⁴⁸

7.2.2.2.1. “False” legislative solutions

a. *In general*

The “false” legislative solutions are *closer to consensual rather than to legislative consolidation*, because they require as a condition for consolidation the consent of all the parties.¹¹⁴⁹ An example of such a solution is section 35 English Arbitration Act 1996.

b. *Section 35 English Arbitration Act 1996*

Section 35 states the position at common law: *consolidation is only possible with the consent of all the parties involved, but not otherwise*. This section only recognises that arbitration is a voluntary process and the parties may agree that the proceedings can be “consolidated” or be the subject of concurrent hearings.¹¹⁵⁰ However, in the absence of an agreement, the arbitral tribunal has no power to order consolidation against the will of a party, and the Act contains no power for the court to order consolidation.¹¹⁵¹

Despite a strong body of opinion that some form of consolidation should be permitted, even without the consent of all concerned,¹¹⁵² the DAC concluded that such a provision should not be included in the Act, because it was felt that neither consolidation nor concurrent hearings could be reconciled with party autonomy and the right of any party to have its dispute resolved by the tribunal of its choice.¹¹⁵³ Furthermore, compulsory

¹¹⁴⁶ In 1985.

¹¹⁴⁷ Sanders, *Quo vadis*, p. 213. The Model Law itself does not contain provisions on consolidation (see Binder, para. 9-017).

¹¹⁴⁸ Leboulanger, *Multi-Contract*, p. 58, citing Gaillard.

¹¹⁴⁹ *Ibid.*

¹¹⁵⁰ Mustill/Boyd, *Companion Volume*, p. 43.

¹¹⁵¹ See also Mustill/Boyd, *Companion Volume*, p. 309.

¹¹⁵² The DAC received many submissions—the majority of them coming from the construction industry—which called for a provision that would empower either a tribunal and/or the court to order consolidation or concurrent hearings.

¹¹⁵³ Landau, *English Arbitration Act*, p. 117; DAC Report of February 1996, para. 180.

consolidation would involve an infringement of the principle of confidentiality inherent in a choice of arbitration.¹¹⁵⁴

7.2.2.2.2. “Real” legislative solutions

a. *In general*

The “real” legislative solutions *allow the courts to compel consolidation* as they are based on the intervention of the lawmaker and not only the will of the parties.¹¹⁵⁵ Examples of “real” legislative solutions are Article 1046 Netherlands CCP and section 6B Hong Kong Arbitration Ordinance.

b. *Article 1046 Netherlands CCP*

Article 1046 provides that any party of two or more connected arbitral proceedings which are pending before *different arbitral tribunals*¹¹⁵⁶ *in the Netherlands*¹¹⁵⁷ may request a court-ordered consolidation of the proceedings, *unless the parties have agreed otherwise*. In the Dutch provision the *consent of the parties is therefore presumed*, but they have the *possibility to opt-out*.¹¹⁵⁸ According to Sanders, this has been criticised, and indeed, an opt-in solution would have been more in line with the requirement of consent of the parties.¹¹⁵⁹ However, it is *enough that one of the arbitration agreements excludes consolidation to prevent consolidation*.¹¹⁶⁰ Must such a clause necessarily be explicit, or can it be implicit, for instance in that the rules of the concerned arbitration institutions do not provide for consolidation? In the case of the Netherlands it *seems that implied terms are not enough to justify an exclusion of consolidation*.¹¹⁶¹ In fact, the standard arbitration clause of the NAI Arbitration Rules, which do not contain provisions with regard to consolidation, provide for an optional

¹¹⁵⁴ Mustill/Boyd, *Companion Volume*, p. 309; see also DAC Report of February 1996, para. 180.

¹¹⁵⁵ Leboulanger, *Multi-Contract*, p. 58.

¹¹⁵⁶ The provision does not regulate consolidation of connected arbitral proceedings before the same arbitral tribunal (Sanders, *Quo vadis*, p. 219).

¹¹⁵⁷ As consolidation under Article 1046 Netherlands CCP is only possible between arbitral proceedings taking place in the Netherlands, it will be rare that international arbitrations will be subject to consolidation under this provision. (*Introduction to NAI Arbitration Rules*, 5 Additional clauses).

¹¹⁵⁸ Sanders, *Quo vadis*, p. 219. See also Miller, p. 90; and Sanders, *The New Dutch Arbitration Act*, p. 201, who indicated that the parties may in practice opt-out of the possibility of consolidation by reference to the rules of an arbitration institute.

¹¹⁵⁹ Sanders, *Quo vadis*, p. 219.

¹¹⁶⁰ See Schultsz, p. 214.

¹¹⁶¹ *Ibid.*

clause to exclude consolidation. The President of the District Court of Amsterdam¹¹⁶² has discretionary power, and he may order full¹¹⁶³ or partial¹¹⁶⁴ consolidation.

c. *Section 6B Hong Kong Arbitration Ordinance*

Section 6B gives the High Court *wide powers to order related arbitration proceedings to be consolidated, albeit only in relation to domestic arbitrations*.¹¹⁶⁵ Therefore, consolidation by the court is not available where one contract provides for domestic arbitration while a related contract provides for international arbitration conducted under the Model Law.¹¹⁶⁶ However, although there is a different system for international cases, the *Ordinance permits the parties to an international arbitration to opt-into the domestic regime in writing*.¹¹⁶⁷ While the court has considered the provisions of section 6B in a number of cases, section 6B is relatively infrequently used,¹¹⁶⁸ and in many cases where this power is applied, a formal order to consolidate is not made, but both arbitrations are ordered to be heard at the same time.¹¹⁶⁹ Cases in which section 6B was applied were, *e.g.* the *Shui On* cases,¹¹⁷⁰ and *Hong Kong Institute of Education v. Aoki Corp.*¹¹⁷¹

7.2.2.2.3. Australia/New Zealand

The Australian International Arbitration Act provides in section 24 (an optional provision) in conjunction with section 22 that parties may agree in writing that one of them may apply to an arbitral tribunal for an order to consolidate. In Australia¹¹⁷² we therefore *find, exceptionally, tribunal-ordered instead of court-ordered*

¹¹⁶² Where arbitrations in the building industry take place (Sanders, *Quo vadis*, p. 219; see also Sanders, *The New Dutch Arbitration Act*, p. 201).

¹¹⁶³ See Article 1046(3) Netherlands CCP.

¹¹⁶⁴ See Article 1046(4) Netherlands CCP.

¹¹⁶⁵ See De Speville, p. 110 and Kaplan/Morgan, p. 19.

¹¹⁶⁶ Kaplan/Morgan, p. 20.

¹¹⁶⁷ See Sanders, *Quo vadis*, p. 221 and Redfern/Hunter/Blackaby/Partasides, para. 3-82 at footnote 226.

¹¹⁶⁸ Orders for consolidation or concurrent hearings tend to be prevalently made in relation to construction arbitrations.

¹¹⁶⁹ Kaplan/Morgan, p. 19.

¹¹⁷⁰ On the first *Shui On* case ([1986] HKLR 1177), see Miller and Veeder, *Consolidation*. On the second *Shui On* case ([1987] HKLR 1224), see Veeder, *Consolidation*.

¹¹⁷¹ In the case *Hong Kong Institute of Education v. Aoki Corp* Burrell J endorsed and adopted with minor elaboration a three stage test described by Ma J in the case *Linfield Limited v. Brooke Hillier Parker and others*. In the *Hong Kong Institute of Education* case there was a multitude of factors weighing in favour of consolidation (see *Arbitration Decisions* 2003, pp. 3-4).

¹¹⁷² For Australia, see also Croft.

consolidation.¹¹⁷³ In this kind of consolidation, a distinction is drawn between related proceedings before the same arbitral tribunal and the case where two or more arbitral tribunals are involved.¹¹⁷⁴ Section 24, an *opt-in provision*, regulates both cases¹¹⁷⁵ in detail.¹¹⁷⁶ The difference between an opt-in provision and the regulation of the English Arbitration Act 1996¹¹⁷⁷ is that in the English Arbitration Act the consent of all parties concerned by a specific consolidation is necessary, while in the first type of provision, all parties of a particular arbitration agreement *give their consent in advance by opting-in to the possibility that any consolidation can be ordered when the consolidation requisites are fulfilled*. However, in the Australian solution, consolidation is not possible, where the parties of the related arbitration have not given their consent to consolidation.

The Arbitration Act of New Zealand¹¹⁷⁸ follows the Australian approach, but falls back on *court-ordered consolidation if the same arbitral tribunal refuses or fails to make an order of consolidation, or two or more arbitral tribunals cannot reach an agreement.*¹¹⁷⁹

7.2.2.2.4. United States of America

The *FAA does not contain any provision regarding consolidation.*¹¹⁸⁰ Furthermore, the US Supreme Court has not addressed the question of consolidation,¹¹⁸¹ so the highest Federal Courts that have decided this issue are the US Courts of Appeal.¹¹⁸² However, the *case-law has not been uniform* among the different Circuits.¹¹⁸³

¹¹⁷³ See Sanders, *Quo vadis*, p. 215.

¹¹⁷⁴ *Ibid.*

¹¹⁷⁵ For the case of related proceedings before the same arbitral tribunal, see section 24(4) of the Australian International Arbitration Act. For the case of related proceedings before 2 or more arbitral tribunals, see paragraphs (5)-(7) of section 24 of the Australian International Arbitration Act.

¹¹⁷⁶ Sanders, *Quo vadis*, p. 215.

¹¹⁷⁷ On the English Arbitration Act 1996, see under IV.7.2.2.2.1.b.

¹¹⁷⁸ See section 2 (Second Schedule) of the New Zealand Arbitration Act (Consolidation of arbitral proceedings).

¹¹⁷⁹ See also Sanders, *Quo vadis*, p. 222.

¹¹⁸⁰ See Wallace, pp. 5-6. See also Born, p. 679; Coe, p. 195; Dore, p. 3.

¹¹⁸¹ To the contrary, the US Supreme Court has rejected petitions to do so (see Wallace, p. 6).

¹¹⁸² Wallace, p. 6. The US Courts of Appeal are just one level below the Supreme Court and are divided among geographic areas called Circuits (see Wallace, p. 6).

¹¹⁸³ See, e.g. *Compania Espanola de Petroleos SA v. Nereus Shipping SA*, 527 F.2d 966 (CA 2d Cir., 1975); *Cable Belt Conveyors Inc. v. Alumina Partners of Jamaica*, 669 F. Supp. 577 (SDNY), aff'd, 857 F.2d 1461 (2d Cir.), cert. denied, 484 US 855 (1987)—(the case is described in some detail in Branson/Wallace); *Weyerhaeuser Co. v. Western Seas Shipping Co*, 743 F.2d 635 (9th Cir. 1984); *Government of the United Kingdom of Great Britain v. Boeing Co*, 998 F.2d 68 (2d Cir. 1993).

The uncertainty that exists under the FAA is exacerbated when US State laws are considered.¹¹⁸⁴ In fact, several states¹¹⁸⁵ have enacted statutes that deal expressly with the consolidation of arbitrations, and which allow court-ordered consolidation even without the parties' consent.¹¹⁸⁶ The relationship between such state laws and the FAA is unclear; some courts have held that the FAA pre-empts such laws, while others have reached a contrary result.¹¹⁸⁷

Moreover, the *Revised Uniform Arbitration Act 2000*, which is intended to apply to arbitrations of both international and domestic disputes held in each State that enacts the new law, introduced in its section 10 a *provision concerning court-ordered consolidation*.¹¹⁸⁸ The parties may deprive the courts of this power by agreeing that arbitrations under a particular agreement may not be consolidated with other arbitrations¹¹⁸⁹ (*possibility to opt-out*). Moreover, a further restriction on the possibility of consolidation is given in section 10(a)(4) RUA. ¹¹⁹⁰

7.2.2.3. Comments

Without doubt, the question of parties' consent is essential to the issue of consolidation of arbitral proceedings between different parties. However, often the discussion and the proposed or implemented solutions reflect quite opposite views. In the Netherlands, the consent of the parties to court-ordered consolidation is presumed when they have chosen the seat of arbitration in that country, whereas in England, the Arbitration Act 1996 provides that no consolidation is possible without the express consent of the parties, and this position is, as well reflected in the CIMAR. The contrasting views also emerge from the evolution in the US.

The issue of *consolidation should be solved primarily in institutional arbitration rules*, as it is in the CEPANI and Swiss Rules. Under both sets of rules, the consolidation of related disputes is ordered by the respective institution. In contrast, the Zurich Rules provided that the decision was taken by the arbitral tribunal (this was possible, because

¹¹⁸⁴ Born, p. 679.

¹¹⁸⁵ See, e.g. California, Georgia, Massachusetts (see Born, p. 679 and Comment of section 10 of the *Uniform Arbitration Act*, p. 36).

¹¹⁸⁶ Born, p. 679.

¹¹⁸⁷ *Ibid.*

¹¹⁸⁸ Ball, pp. 56-57.

¹¹⁸⁹ *Ibid.* See also section 10(c) Revised Uniform Arbitration Act 2000.

¹¹⁹⁰ In fact, even in the absence of express prohibitions on consolidation, the legitimate expectations of contracting parties may limit the ability of courts to consolidate arbitration proceedings (Comment on section 10 of the *Uniform Arbitration Act*, p. 38).

in multiparty situations an *identical* arbitral tribunal was appointed for the first and all other arbitrations¹¹⁹¹). The parties' consent to consolidate proceedings is given by submitting the disputes to these arbitration rules. The possibility for the parties to choose *ad hoc* arbitration or another set of rules not providing for consolidation, or to opt-out of the provisions of the chosen arbitration rules which provide for ordered consolidation, is enough to respect the requirements of consent. Ideally, the arbitration institutions whose rules contain consolidation provisions should, however, provide for standard arbitration clauses in which the possibility to opt-out is contained.

Subsidiarily, the lex arbitri should address consolidation. The necessity of provisions in the *lex arbitri* is in particular given in cases where the arbitration agreements refer to different institutional rules providing for consolidation, or where one of the arbitrations is an *ad hoc* arbitration. ***Opt-in provisions are to be preferred to opt-out ones, because they better correspond with the requirement of parties' consent.***¹¹⁹² The requirement of consent is important, because when different proceedings are consolidated by applying a provision contained in a *lex arbitri*, not only the composition of the arbitral tribunal can change, but also the relevant arbitration rules applicable to the proceedings. Opt-in provisions also have the advantage of the parties' consciously selecting the same *lex arbitri* in different related arbitration agreements. Indeed, a provision like Article 1046 Netherlands CCP is not helpful when a consolidation of two arbitrations would be suitable, but one of them has its seat outside the Netherlands.

The ***presumption of consent of the parties for consolidation, as contained in the Dutch arbitration act, goes too far.*** Where the *lex arbitri* contains an opt-out provision, it is suggested that the provision allowing ordered consolidation should at least make the following distinctions:

- where the institutional arbitration rules chosen by the parties do not provide for ordered consolidation,¹¹⁹³ consolidation without the express consent of the parties should not be possible;¹¹⁹⁴

¹¹⁹¹ See Article 13 Zurich Rules.

¹¹⁹² See also the same conclusion of Sanders, *Quo vadis*, p. 219, with regard to Article 1046 Netherlands CCP.

¹¹⁹³ These institutional arbitration rules can be the same for each dispute (*e.g.* for both arbitrations the ICC Rules), or also different sets of rules for each dispute (*e.g.* for the one arbitration the ICC Rules and for the other the LCIA Rules).

¹¹⁹⁴ In contrast, it seems that in the Netherlands the fact that the parties choose arbitration rules which do not provide for consolidation (*e.g.* the NAI Rules) is not enough to exclude consolidation based on Article 1046 Netherlands CCP (see under IV.7.2.2.2.2.b.).

- where the different institutional arbitration rules chosen by the parties all provide for ordered consolidation, consolidation should be possible without further consent requirements;¹¹⁹⁵
- where the different institutional arbitration rules chosen by the parties provide some for ordered consolidation and some not (this would also be the case for *ad hoc* arbitrations), consolidation should only be possible when the parties of the arbitration agreements in which arbitration rules have been chosen that do not provide for ordered consolidation expressly consent to consolidation.¹¹⁹⁶

Court-ordered consolidation, or a solution like the one in New Zealand, should be preferred to tribunal-ordered consolidation. In fact, a mere tribunal-ordered consolidation, as provided for in the Australian legislation risks ineffectiveness if different arbitral tribunals cannot agree on consolidation. Although this could be a possible “barrier” where the *lex arbitri* contains an opt-out legislative provision, such an additional “obstacle” is in my view not necessary in the case of an opt-in provision.

7.2.3. Consolidation of different arbitrations between the same parties

Most of the objections raised against consolidation of arbitrations arising out of separate contracts involving different parties are not relevant to the consolidation of multicontract arbitrations in a two-party context.¹¹⁹⁷ In particular, in bi-party arbitrations no confidentiality issues arise, because no third party is involved.¹¹⁹⁸ Also the problems regarding the appointment of arbitrators are significantly reduced, because the parties do not generally lose their right to appoint a different arbitrator themselves.¹¹⁹⁹ Finally, difficulties concerning unjust apportionment of fees do not occur either.¹²⁰⁰ ***When arbitrations between the same parties are to be consolidated, parties’ consent appears therefore to be less imperative.***

¹¹⁹⁵ Where the arbitrations are submitted to the *same* arbitration rules which provide for consolidation, consolidation occurs in conformity of these rules. The *lex arbitri* is in such a case not necessary to consolidate.

¹¹⁹⁶ If a party, e.g. a main-contractor, is, on the one hand, party to an arbitration agreement referring to arbitration rules ***which provide*** for consolidation, and, on the other hand, party to an arbitration agreement referring to arbitration rules ***which do not provide*** for consolidation, the consent of that party for consolidation should be considered as implicitly given.

¹¹⁹⁷ Lew/Mistelis/Kröll, para 16-87.

¹¹⁹⁸ Leboulanger, *Multi-Contract*, p. 65.

¹¹⁹⁹ See also Lew/Mistelis/Kröll, para 16-87. Both parties are only restricted in so far as they cannot appoint different arbitrators for each arbitration—though there are situations where parties do not wish to appoint the same arbitrator for the two arbitrations.

¹²⁰⁰ See Leboulanger, *Multi-Contract*, p. 67.

Agreeing with Leboulanger, where there are *different arbitrations between the same parties* the *principle of “autonomie de la volonté” should be soothed* by mandatory principles such as the proper administration of justice, the equal treatment of parties, adversarial proceedings and the rights of defence—all of which are part of international public policy as conceived by most national legal systems and by the law of international arbitration.¹²⁰¹ Joinder of parallel proceedings between two parties bound by interrelated agreements should therefore be seriously considered by arbitrations institutions and introduced into their rules so that complex arbitrations dealing with multi-contracts become more efficient and meet the parties’ legitimate expectations.¹²⁰²

Currently, the conditions vary from one arbitration institution to another. The ICC Rules adopt a stricter approach in providing for clear-cut requirements to be applied by the institution.¹²⁰³ While the consent of all of the parties is not required, the ICC Court has generally been reluctant in recent years to order the joinder of two arbitrations against the objection of a party.¹²⁰⁴ The Swiss Rules,¹²⁰⁵ as well as the CEPANI Rules,¹²⁰⁶ have wide latitude in this respect as was the case in the past in the Geneva Rules¹²⁰⁷ for international cases.¹²⁰⁸ On the other hand, the Zurich Rules left wide discretion to the arbitrators.¹²⁰⁹

7.2.4. Consolidation of arbitral proceedings and court proceedings in a single arbitration

7.2.4.1. General

Normally, it is impossible to consolidate *multi-fora disputes* when some of the parties have concluded arbitration clauses and others have not—unless *all the parties agree*.¹²¹⁰

¹²⁰¹ Leboulanger, *Multi-Contract*, p. 97.

¹²⁰² *Ibid.*

¹²⁰³ See Article 4(6) ICC Rules.

¹²⁰⁴ See Derains/Schwartz, pp. 63-64; see also Hanotiau, *Problems*, p. 332, and Whitesell/Silva-Romero, p. 16. However, in most related cases brought before ICC, the parties themselves reach an agreement on consolidation.

¹²⁰⁵ See Article 4(1) Swiss Rules.

¹²⁰⁶ See Article 12 CEPANI Rules.

¹²⁰⁷ See Article 16 Geneva Rules.

¹²⁰⁸ So for the Geneva Rules Imhoos, p. 131.

¹²⁰⁹ See Article 14 Zurich Rules (Assignment of further Arbitrations).

¹²¹⁰ Schneider, p. 110. An interesting solution to this issue was found by an American court in the case *Dale Metals Corp. and Overseas Development Corp. v. KIWA Chemical Industry Co. Ltd. et al.* (IV YBCA (1979), pp. 333 *et seq.*). On this case, see also Schneider.

7.2.4.2. Parties' agreement to arbitrate

In spite of a jurisdiction clause, the parties to court proceedings can agree to resolve their dispute by arbitration, even after the dispute has arisen. This can be done expressly, in the form of a submission agreement, or implicitly.¹²¹¹

7.2.4.3. Parties' consent to consolidate arbitral proceedings

According to Gaillard, in addition to the agreement of the parties to court proceedings that their disputes should be solved through arbitration, all the parties involved must agree to consolidate the related arbitral proceedings in a single arbitration.¹²¹² Such an agreement can be made by the parties expressly or implicitly.¹²¹³

7.2.4.4. Comments

In the consolidation of arbitral proceedings and court proceedings two levels of examination have to be distinguished:

1. the first level regards the decision of the parties to court proceedings about the method by which the dispute has to be solved (before a court, or before an arbitral tribunal);
2. the second level concerns the consolidation of the arbitral proceedings.

In the first level the consent of the parties to court proceedings, and whose method for the resolution of the dispute will change, is indispensable. However, in the second level, one should differentiate between the parties that decide that their dispute is now to be solved through arbitration instead of in court proceedings (group A), and the parties of the related arbitration (group B). While for group B the consent to consolidate the arbitral proceedings is necessary, for group A the answer to the question of consent is less obvious. Indeed, since for consolidation of court proceedings parties' consent is normally not necessary, the fact that group A's parties had initially chosen that State courts should solve their dispute, could at least be seen as an implicit agreement to consolidate the arbitral proceedings. Moreover, consent has also to be seen as given when the parties of group A decide to submit their dispute to arbitration under institutional rules which provide for ordered consolidation, or to arbitration having seat

¹²¹¹ See Gaillard, *Consolidation*, p. 41.

¹²¹² *Ibid.*

¹²¹³ Gaillard, *Consolidation*, p. 42.

in a country whose *lex arbitri* provides for ordered consolidation, instead of the initially chosen court proceeding.

7.2.5. *Practical consolidation*¹²¹⁴

In light of the difficulties raised by consolidation of proceedings, the practice has searched for other solutions to the problems of multiparty arbitration. These solutions seek to synchronise the different arbitrations.¹²¹⁵

- Appointment of the same arbitrators.¹²¹⁶ However, in the first *Shui On* case,¹²¹⁷ Hong Kong's High Court expressed concern about the possibility of inconsistent decisions, even from the same sole arbitrator, if the proceedings are tried separately.¹²¹⁸
- Concurrent hearings. This is, for instance, expressly provided for by section 6B Hong Kong Arbitration Ordinance. Moreover, some arbitration rules provide for concurrent hearings too.¹²¹⁹ The Supreme Court of New South Wales in *Aerospatiale v. Elspan et al.*¹²²⁰ even considered extending concurrent hearings to cases where the arbitration proceedings were parallel to court proceedings.
- Staying one proceeding.¹²²¹
- String arbitration is well known in commodity arbitration¹²²² where all contracts are identical except for the parties and the price, and they all refer to the same set of arbitration rules.¹²²³ A similar approach can also be found in certain maritime arbitrations.¹²²⁴

¹²¹⁴ Or *de facto* consolidation.

¹²¹⁵ See also Lew/Mistelis/Kröll, paras 16-79 and 16-85.

¹²¹⁶ *Abu Dhabi Gas Liquefaction Co Ltd v. Eastern Bechtel Corp* [1982] 2 Lloyd's Rep. 425.

¹²¹⁷ *Shui On Construction Company Limited v. Moon Yik Company Limited, et al.*, and *Schindler Lifts (Hong Kong) Limited v. Shui On Construction Company Limited*, Supreme Court of Hong Kong, High Court, Docket 1985 No. MP2114, judgment dated 12 September 1986 (Rhind, J.); or *Shui On Construction Company Limited v. Moon Yik Company Limited, et al.*, (1989) XIV YBCA 215.

¹²¹⁸ Miller, p. 88.

¹²¹⁹ See, e.g. paragraph 14 LMAA Terms.

¹²²⁰ *Aerospatiale Holdings Australia Pty Ltd et al v. Elspan International Pty Ltd (Hong Kong)*, XIX YBCA 635 (1994), No. 55053/92 (Supreme Court of New South Wales, 14 August 1992).

¹²²¹ Lew/Mistelis/Kröll, para. 16-83. See, e.g. the decision of the US Supreme Court in *Volt Information Sciences, Inc v. Board of Trustees of Leland Stanford Junior University*, 109 S Ct 1248 (1989), in XV YBCA 131 (1990), where, however, the parties had agreed to arbitrate in accordance with Californian law and such a possibility was expressly provided for in the applicable Californian statute (Cal. Civ. Proc. Code Ann. s. 1281.2(c)).

¹²²² See Redfern/Hunter/Blackaby/Partasides, para. 3-80.

¹²²³ Sanders, *Quo vadis*, p. 212.

¹²²⁴ Concerning the charter and the different sub-charters of a vessel which is allegedly not fit for purpose. See Lew/Mistelis/Kröll, para. 16-84.

The advantage of practical consolidation is that it is *more respectful with regard to parties' consent*.

7.3. Problems of enforcing awards in multiparty arbitration

The most obvious basis for a refusal to enforce an award of an arbitration to which a third party was joined or in which two or more disputes were consolidated is *the absence of an appropriate arbitration agreement between the parties*.¹²²⁵ However, the New York Convention also allows a court to refuse enforcement of an award if a party was unable to present its case,¹²²⁶ or if the composition of the arbitral tribunal or the procedures were not in accordance with the agreement of the parties.¹²²⁷

Normally, if all parties have agreed on joinder or consolidation, the award should be enforceable.¹²²⁸ In particular consent is, in my view, given when the parties submit their disputes to institutional rules which allow for consolidation and/or for joinder. Nevertheless, in the case of joinder the third party clearly has to agree to be joined in the arbitral proceeding, if he is not already a party to the arbitration agreement.

While in my opinion ordered consolidation based on opt-in legislative provisions should not pose problems in respect of the awards' enforcement, the legal standing in the case of ordered consolidation based on opt-out legislative provisions is less clear.¹²²⁹ Indeed, a provision like Article 1046 Netherlands CCP is more difficult to reconcile with the New York Convention than an opt-in statutory provision in the *lex arbitri*. Therefore, as in the case of an opt-out provision like the Dutch one the situation regarding the enforceability under the New York Convention is not clear, the parties should be encouraged whenever possible to record their agreement to consolidation or joinder.¹²³⁰

¹²²⁵ See Article V(1)(a) NYC.

¹²²⁶ See Article V(1)(b) NYC.

¹²²⁷ See Article V(1)(d) NYC. See Lew/Mistelis/Kröll, paras 16-97 and 16-98, and also Chiu, pp. 61-62.

¹²²⁸ Lew/Mistelis/Kröll, para. 16-96.

¹²²⁹ See the discussion between Van den Berg, *Consolidated and Replique*, and Jarvin, *Critique*.

¹²³⁰ See also Lew/Mistelis/Kröll, para. 16-98.

V. INVESTMENT ARBITRATION

Developed countries have long sought to protect their nationals' investments in other countries, in particular in developing countries.¹²³¹ However, while there have been cases since the early 1990s, it is only in the last few years that there has been a dramatic rise in a new type of international arbitration: international investment arbitration.¹²³² The main purpose of investor-to-State arbitration is to avoid resorting to the local courts; indeed, as stated in the third preamble of the ICSID Convention, the Contracting States have solemnly "recognised" that:¹²³³

"while such [investment] disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases".

Although investment disputes differ in several respects from ordinary commercial disputes,¹²³⁴ one of the key differences between investment arbitration and commercial arbitration is the source of the tribunal's power.¹²³⁵ While commercial arbitrations require an arbitration agreement between the parties, investment arbitration is possible without such an arbitration agreement in the ordinary sense.¹²³⁶ Indeed, national legislation or treaties (bilateral or multilateral) may give investors the right to initiate arbitration proceedings against the host State.¹²³⁷ There may even be no contractual relationship between the parties (investor and host State) at all which has led authors to speak about "arbitration without contractual relationship",¹²³⁸ "arbitration without privity"¹²³⁹ or to the observation that "*jurisdiction in international law depends solely upon consent*".¹²⁴⁰

Chapter V. will begin with a brief overview of the different legal instruments employed for the encouragement of investments (sections 1. to 4.) and then the requirement of consenting "in writing" will be discussed (section 5.). Afterwards, an important part of Chapter V. will be dedicated to the number of ways of expressing consent to investment arbitrations (section 6.). The latter are often based on provisions in national investment

¹²³¹ Kinnaer/Bjorklund/Hannaford, p. 24.

¹²³² Blackaby, *Tale*, para. 11-1.

¹²³³ Crivellaro, p. 119.

¹²³⁴ See for an overview of differences Lew/Mistelis/Kröll, para. 28-8.

¹²³⁵ See Blackaby, *Tale*, paras 11-7 *et seq.* For further differences, see Blackaby, *Tale*, paras 11-12 *et seq.*

¹²³⁶ Lew/Mistelis/Kröll, para. 28-11.

¹²³⁷ *Ibid.*

¹²³⁸ See Werner, *Trade Explosion*, p. 6.

¹²³⁹ See Paulsson, *Privity*, p. 234.

¹²⁴⁰ See McLachlan/Shore/Weiniger, para. 7.168.

protection laws or international treaties by which the State generally agrees to arbitrate investment disputes.¹²⁴¹ These provisions constitute a unilateral standing offer to the public to submit to arbitration with any party fulfilling the requirements; the offer is then accepted by the investor when they initiate arbitration proceedings against the State.¹²⁴² Until that time the investor is not bound to arbitrate and the State cannot begin proceedings against the investor.¹²⁴³

After discussing the temporal sequence of consent to arbitration (section 7.) as well as the relevance of the time of consent and the amicable negotiation period as a precondition to be met before consent can be perfected (section 8.), another important part of Chapter V. will be devoted to the interpretation of consent (section 9.). Disputes on jurisdiction in investment arbitrations are often not about interpreting a contract between the parties, but interpreting statutes, treaties and conventions to see whether the dispute falls within the ambit of the State's obligation to arbitrate in these instruments.¹²⁴⁴

A brief overview on the differentiation between treaty and contract claims will be given (section 10.), and the essential criteria for arbitrations under ICSID will be discussed by considering in particular the role of consent to arbitrate and its expansion (section 11.). Indeed, these criteria are of the utmost importance for the definition of ICSID's jurisdiction. Then, after considering the scope of consent and its limitations (section 12.) the question as to irrevocability of consent (section 13.), the expansion of consent due to the most-favoured-nation clauses and the umbrella clauses will be examined (section 14.). And, finally, the relevance of parties' consent with regard to the procedural mechanism of consolidation will be analysed (section 15.).

1. BRIEF HISTORICAL OVERVIEW OF THE EVOLUTION OF THE USE OF ARBITRATION CLAUSES INCLUDED IN STATES' CONTRACTS

The use of arbitration clauses included in States' contracts¹²⁴⁵ has undergone an important evolution in the last years leading to a questioning of the effects which have

¹²⁴¹ Lew/Mistelis/Kröll, para. 28-12.

¹²⁴² See Cremades, pp. 156 *et seq.*

¹²⁴³ See also Lew/Mistelis/Kröll, para. 28-12.

¹²⁴⁴ Lew/Mistelis/Kröll, para. 28-13.

¹²⁴⁵ On investments contracts, see, *e.g.* Dolzer/Schreuer, pp. 72 *et seq.*

traditionally been attributed to these clauses.¹²⁴⁶ Giardina has distinguished three different stages in this evolution:

1. the first stage was the *Pyramid* case¹²⁴⁷ where an ICSID tribunal founded its competence on an Egyptian national law concerning foreign investments and on the consent given by the investor with his demand of arbitration;
2. the second stage consisted of establishing the State's consent to ICSID arbitration on the provisions of BITs stipulated with the investor's State.¹²⁴⁸ The case *Asian Agricultural Products (AAPL) v. Republic of Sri Lanka*¹²⁴⁹ in 1990 was its first application and it was based on Sri Lanka's consent expressed in the treaty Sri Lanka-United Kingdom which was extended to Hong Kong through an exchange of notes;
3. the third stage is represented by reference to ICSID arbitration, or to other forms of arbitration, contained in multilateral treaties, *i.e.* primarily the NAFTA and the Energy Charter.¹²⁵⁰ However, while the ICSID Convention does not offer consent to arbitration, NAFTA¹²⁵¹ and the Energy Charter¹²⁵² do so.¹²⁵³

2. NATIONAL INVESTMENT LAWS

Many countries have adopted investment laws. Developing countries typically have special legislation designed to encourage foreign investment and, at the same time, make sure that such investment fits into the overall economic development objectives of the country.¹²⁵⁴ Investment legislation, as a rule, contains provisions guaranteeing certain minimum protective standards, including most-favoured-nation treatment¹²⁵⁵ or national treatment of foreign investors (non-discrimination), as well as a promise of fair compensation in the case of expropriation.¹²⁵⁶

¹²⁴⁶ See Giardina, p. 661.

¹²⁴⁷ *Pyramides (SPP (Middle East) Ltd v. Arab Rep. of Egypt)* YBCA, 1991.28. *Southern Pacific Properties Ltd. (Middle East) et al. v. Arab Republic of Egypt*, 2 awards on jurisdiction, 27.11.1985 and 14.04.1988, XVI YBCA 16 (1991).

¹²⁴⁸ Giardina, p. 662.

¹²⁴⁹ *Asian Agricultural Products Limited (AAPL) v. Democratic Socialist Republic of Sri Lanka*, Case No. ARB/87/3, Award (27 June 1990), 15 ICSID Review-FILJ 169 (2000) [6 ICSID Review-FILJ 526 (1991)—Salacuse] and 5 ICSID Reports 245 (1990) [4 ICSID Reports 245 (1997)—Lew] and 30 ILM 577 (1991).

¹²⁵⁰ See Giardina, p. 662.

¹²⁵¹ See Article 1122 NAFTA.

¹²⁵² See Article 26(3)(a) ECT.

¹²⁵³ Dolzer/Schreuer, pp. 243 *et seq.*

¹²⁵⁴ Horn, p. 10.

¹²⁵⁵ On the most-favoured-nation treatment, see under V.14.1.

¹²⁵⁶ See Horn, p. 10.

Investment laws frequently provide for arbitration as a means to settle investment disputes.¹²⁵⁷ As national investment protection laws generally extend to all foreign investors irrespective of whether or not they are protected by BITs or multilateral treaties, a foreign investor can initiate arbitration relying on the arbitration provision in the national investment protection law.¹²⁵⁸

3. BILATERAL INVESTMENT TREATIES (BITs)

The modern type of bilateral investment treaty (BIT) between capital exporting and importing countries evolved and partially superseded or amended the traditional treaties on friendship, commerce and navigation.¹²⁵⁹ Although the usual BIT is between a capital-exporting State and a developing country, occasionally two developing countries¹²⁶⁰ or two industrialised countries¹²⁶¹ have concluded them.¹²⁶²

The large number of treaty arbitrations in recent years has been a product of an exponential growth in the number of BITs: after Germany started the post-War BIT program in 1959 by signing a BIT with Pakistan,¹²⁶³ by 1970 there were 72 BITs, by 1980 165, by 1990 385, and then the numbers have grown even faster reaching at the end of 2006, 2,573.¹²⁶⁴ BITs tend to resemble each other in their purpose and content.¹²⁶⁵ This similarity is due to their derivation from a limited number of common sources.¹²⁶⁶ Many Western States have adopted model form BITs¹²⁶⁷ which they use as a starting point in their treaty negotiations.¹²⁶⁸

Normally, BITs provide a wide ambit of protection, including a wide concept of investment, and they typically also contain a broad concept of expropriation.¹²⁶⁹

¹²⁵⁷ See Parra, *Settlement*, p. 314.

¹²⁵⁸ Horn, p. 10. This was for example the case in the *SPP-Egypt* arbitration.

¹²⁵⁹ *Ibid.*

¹²⁶⁰ See, e.g. BITs between Thailand and China of 12 March 1985 and between Egypt and Morocco of 3 June 1976.

¹²⁶¹ See, e.g. the United States-Canada Free Trade Agreement of 2 January 1988.

¹²⁶² Salacuse, p. 57.

¹²⁶³ See, e.g. Kinnaer/Bjorklund/Hannaford, pp. 25 *et seq.*

¹²⁶⁴ See UNCTAD, *Bilateral Investment Treaties 1959-1999* (2000) 1, and UNCTAD, *Recent developments in international investment agreements (2006-June 2007)*, IIA Monitor No. 3 (2007), available under: <http://www.unctad.org/Templates/Startpage.asp?intItemID=2310> (last accessed 22 July 2008).

¹²⁶⁵ On the topics encompassed by a typical BIT, see Salacuse, pp. 61 *et seq.* See also McLachlan/Shore/Weiniger, paras 2.09 *et seq.*

¹²⁶⁶ McLachlan/Shore/Weiniger, para. 2.05.

¹²⁶⁷ See, e.g. France, Germany, the Netherlands, the United Kingdom and the United States.

¹²⁶⁸ McLachlan/Shore/Weiniger, para. 2.06.

¹²⁶⁹ Horn, p. 11.

Moreover, in addition to substantive rules, BITs usually contain dispute resolution provisions for certain defined categories of investments, invariably providing for arbitration; the scope and the content of these clauses differ considerably, depending on the States involved and their respective bargaining power.¹²⁷⁰ By providing investors with direct access to impartial dispute settlement—international arbitration—the BITs have depoliticised investment disputes.¹²⁷¹

4. REFERENCE TO ICSID ARBITRATION OR TO OTHER FORMS OF ARBITRATION CONTAINED IN MULTILATERAL TREATIES

4.1. ICSID

4.1.1. *Brief historical overview and goals of the ICSID*

The International Centre for the Settlement of Investment Disputes (ICSID) was established under the 1965 ICSID Convention, which came into force on October 14, 1966.¹²⁷² The goal of the Convention, prepared under the auspices of the World Bank, was to provide a special forum for the settlement of investment disputes in order to encourage foreign investment and world development.¹²⁷³ In 1978 ICSID then created the “Additional Facility” to cover cases which fall outside the ambit of the ICSID Convention, in particular where one of the parties is not from a Contracting State.¹²⁷⁴

4.1.2. *ICSID arbitration*

The characteristic of ICSID arbitration is the mixed nature of the dispute with its limitation to cases arising between a State and a foreign national.¹²⁷⁵ While legal disputes between individuals or corporations are normally settled before domestic courts and States may settle their legal disputes before the International Court of Justice, in mixed disputes, especially arising from international investment relationships, no

¹²⁷⁰ Lew/Mistelis/Kröll, para. 28-22.

¹²⁷¹ Kinnaer/Bjorklund/Hannaford, p. 26.

¹²⁷² See Reed/Paulsson/Blackaby, p. 1, and Schreuer, *Convention*, p. 318.

¹²⁷³ Lew/Mistelis/Kröll, para. 28-38.

¹²⁷⁴ *Ibid.* See also Cremades, pp. 154 *et seq.*

¹²⁷⁵ Schreuer, *Convention*, para. 4.

appropriate forum was seen to exist.¹²⁷⁶ ICSID arbitration is an example of delocalised arbitration proceedings governed only by international rules and not submitted to the provisions of any one national arbitration law.¹²⁷⁷ In particular, ICSID awards are not submitted to the scrutiny of national courts for annulment or enforcement.¹²⁷⁸

Although during the first 30 years of its existence, ICSID was a somewhat “Sleeping Beauty”, with an average of one or two cases being registered each year, it is with the widespread development of bilateral and multilateral investment treaties that the activities of ICSID have fully awakened.¹²⁷⁹ To date over 130 States have ratified the ICSID Convention and over 100 disputes¹²⁸⁰ have been referred to ICSID arbitration.¹²⁸¹ Not only some thousands of BITs¹²⁸² offer dispute settlement under the ICSID Convention to investors from the respective countries, but also a number of multilateral treaties have been concluded that also offer ICSID settlement to investors.¹²⁸³ In this way a significant number of world-wide private foreign investments are protected through the Convention’s mechanisms.¹²⁸⁴

4.2. The NAFTA

4.2.1. *Brief overview of the NAFTA*

The North American Free Trade Agreement (NAFTA) is a comprehensive multilateral trade agreement which was entered into in 1993 by the United States, Canada and Mexico to provide for a widely liberalised common market between the three countries.¹²⁸⁵ Indeed, encouraging investment is only one goal of NAFTA, as the Agreement covers a diverse range of topics.¹²⁸⁶ With respect to private commercial disputes within the Free Trade Area, in addition to a general encouragement to settle disputes by arbitration or other means of alternative dispute resolution, NAFTA

¹²⁷⁶ Schreuer, *Convention*, para. 4.

¹²⁷⁷ Lew/Mistelis/Kröll, para. 28-40.

¹²⁷⁸ *Ibid.*

¹²⁷⁹ Obadia, *ICSID*, p. 67.

¹²⁸⁰ A list of the cases filed can be found at <http://www.worldbank.org/icsid/cases/cases.htm>.

¹²⁸¹ Lew/Mistelis/Kröll, para. 28-39.

¹²⁸² At the end of 2006 2,573 (see under V.3.).

¹²⁸³ Schreuer, *Convention*, p. 318.

¹²⁸⁴ *Ibid.*

¹²⁸⁵ See Lew/Mistelis/Kröll, para. 28-26.

¹²⁸⁶ See Kinnaer/Bjorklund/Hannaford, p. 23.

contains dispute settlement mechanisms in three different chapters,¹²⁸⁷ the most relevant of which is Chapter 11.¹²⁸⁸

4.2.2. NAFTA Chapter 11

4.2.2.1. In general

NAFTA Chapter 11 is generally concerned with ensuring fair treatment of investors of a Contracting Party by the other Contracting Parties. It does not confer new rights on investors *vis-à-vis* non-governments. Chapter 11 contains three sections:

- section A establishes the substantive obligations of the Contracting Parties with respect to investors and their investments;¹²⁸⁹
- section B contains the dispute resolution mechanisms for disputes arising out of the obligations contained in section A;
- section C provides for important definitions which govern the scope of application of the Chapter.¹²⁹⁰

Yet it is important to place NAFTA Chapter 11 in context: although Chapter 11 is only one of over 2,500 investment treaties that form a complex web of overlapping protections for foreign investors,¹²⁹¹ it is, however, one of the few plurilateral investment instruments,¹²⁹² and one of the few agreements between countries with fully developed economies.¹²⁹³

4.2.2.2. Arbitration under NAFTA Chapter 11

NAFTA Chapter 11 embodies *a pre-commitment to the arbitration of investor-State disputes* and thereby *transfers control* over the incidence and conduct of investment

¹²⁸⁷ Chapters 11, 19 (which contains neither a wholly State-to-State nor a wholly investor-State procedure, but a procedure which might best be described as *sui generis*) and 20 (a State-to-State dispute settlement chapter). Chapter 14, which covers financial services, incorporates by reference the dispute-settlement mechanism of Chapter 11 (Section B). Moreover, the obligations of Chapter 14 are also subject to dispute settlement under Chapter 20 (see Kinnaer/Bjorklund/Hannaford, pp. 36 *et seq.*).

¹²⁸⁸ See also Lew/Mistelis/Kröll, para. 28-26.

¹²⁸⁹ For an overview of the major obligations imposed by Chapter 11 of the NAFTA, see Eklund, pp. 137-140.

¹²⁹⁰ Alvarez H.C., p. 394.

¹²⁹¹ There were 2,573 BITs at the end of 2006. See UNCTAD, Recent developments in international investment agreements (2006-June 2007), IIA Monitor No. 3 (2007), available under <http://www.unctad.org/Templates/Startpage.asp?intItemID=2310> (last accessed 22 July 2008).

¹²⁹² Another multilateral investment instrument with obligations flowing between developed countries is the Energy Charter Treaty, 17 December 1994, 34 ILM 360 (1995).

¹²⁹³ Kinnaer/Bjorklund/Hannaford, p. 23.

disputes *from the State parties to private persons*.¹²⁹⁴ Indeed, one of the great opportunities Chapter 11B offers to investors is the possibility to submit a claim to binding arbitration without the need for an arbitration agreement in the ordinary sense or even a contract with the State or State enterprise involved.¹²⁹⁵

This private right to direct action eliminates recourse to traditional State-to-State negotiations in which a foreign investor asked for his country's intervention (diplomatic protection) against the host State.¹²⁹⁶ It provides for *guaranteed access to international arbitration*, which, despite a number of modifications and exceptions to harmonise procedures and protect certain interests of the State parties, offers many advantages to investors and enhances the security of their investments.¹²⁹⁷ Indeed, the Chapter represents a remarkable step towards managing a series of public international law standards of protection (against expropriation, national treatment, minimum standard of treatment, etc.) with binding arbitral processes invocable at the instance of the private investor.¹²⁹⁸

4.2.3. *Limiting the scope of investment arbitration*

NAFTA's drafters were aware that they were combining a trade agreement with an investment treaty and that arbitration of investment disputes might have a disruptive effect on other NAFTA commitments including trade in goods and procurement.¹²⁹⁹ The compromises made to reconcile NAFTA's competing goals implicated a multiplicity of concerns, which embraced, for instance, that:

- inconsistencies between Chapter 11 and other NAFTA chapters are resolved in favour of the latter; or that
- investment was limited by a definition *numerus clausus*, indicating what "investment means" rather than what "investment includes".¹³⁰⁰

¹²⁹⁴ Eklund, p. 135.

¹²⁹⁵ See also Alvarez H.C., p. 408.

¹²⁹⁶ Park, *NAFTA*, p. 13.

¹²⁹⁷ See Eklund, pp. 393 *et seq.*

¹²⁹⁸ Eklund, p. 135.

¹²⁹⁹ Park, *NAFTA*, p. 35. Furthermore, there was recognition that investment arbitration posed special problems with respect to vital national prerogatives in tax and financial services.

¹³⁰⁰ *Ibid.*

4.3. The Energy Charter Treaty

4.3.1. *Brief historical overview and goals of the Energy Charter*

The Energy Charter Treaty (ECT) is a multilateral investment treaty which was entered into in 1994 by 49 countries from Western, Central and Eastern Europe, Japan and Australia.¹³⁰¹ Its objective is to provide a legal framework for continuing cooperation between the Contracting States in the energy sector, particularly to create a level playing field for investment in the eastern European energy sector.¹³⁰² Indeed, the primary purpose of the ECT is to enhance investment, trade and transit in the energy sector by providing investment security, by facilitating transit and helping to introduce liberalising market-economy features into the post-Soviet economies.¹³⁰³ However, there are also more programmatic sections of the ECT concerning environment and competition law.¹³⁰⁴

Part III of the ECT sets out the provisions for the promotion, protection and treatment of investments in the energy sector which include a non discriminatory and national or most-favoured-nation treatment of investments, the removal of barriers and restrictions such as domestic content requirements, compensation for harm to the investment through State actions and prompt, adequate and effective compensation in the event of expropriation.¹³⁰⁵

4.3.2. *Arbitration*

While the ECT also includes State-to-State methods of dispute settlement governing measures affecting energy sector, transit, trade, tax and inter-State arbitration (Article 27 ECT), the focus here will be on Article 26 ECT, which exclusively concerns investor-State arbitration.¹³⁰⁶ Article 26 ECT (Part V) contains the rather innovative regime for dispute settlement, *creating a direct investor/State obligation of compulsory*

¹³⁰¹ The ECT came into force in April 1998. The Treaty has been signed or acceded to by fifty-one States plus the European Communities; the total number of its Signatories is therefore fifty-two (see www.encharter.org).

¹³⁰² Lew/Mistelis/Kröll, para. 28-34.

¹³⁰³ Wälde/Weiler, p. 169.

¹³⁰⁴ *Ibid.*

¹³⁰⁵ See Paulsson, *Privity*, pp. 251 *et seq.*; Lew/Mistelis/Kröll, para. 28-34.

¹³⁰⁶ Wälde/Weiler, p. 169.

arbitration,¹³⁰⁷ and may be invoked in relation to any alleged breach of Part III of the Treaty.¹³⁰⁸ Investors from one Member State with investments in the territory of another Member State can sue that second State when measures affecting their investment(s) breach one of the key disciplines listed in Article 26 ECT and they suffer a loss as a result.¹³⁰⁹

Under Article 26(3) ECT the States give their *unconditional consent to the submission of a dispute to international arbitration*. Indeed, the investor is *not bound by earlier contractual commitments* when making its choice and it may opt for arbitration even though the contract with the State included a forum selection clause in favour of the host State's court or a different type of arbitration.¹³¹⁰ If the investor opts to submit the dispute to arbitration, the investor then has the further choice between arbitration under the ICSID Rules, the ICSID Additional Facility Rules, the SCC Rules or *ad hoc* under UNCITRAL Arbitration Rules.¹³¹¹ The choice of venue to which an investor chooses to submit the dispute depends on both practical and tactical factors.¹³¹²

5. THE REQUIREMENT OF CONSENTING "IN WRITING" IN INVESTMENT ARBITRATION

The most conspicuous peculiarity in investment arbitration is that consent agreements need not be based on a document that is signed by both parties, but rather the host State may make a general offer, contained in legislation or in a treaty to which the host State is party, to foreign investors or to certain categories of foreign investors to submit to arbitration.¹³¹³

In the first ICSID case where an advance offer of jurisdiction was invoked, *SPP v. Egypt*,¹³¹⁴ the respondent State argued that the "offer" contained in its investment legislation could not amount to consent in writing for the purposes of Article 25 ICSID

¹³⁰⁷ See Lew/Mistelis/Kröll, para. 28-35.

¹³⁰⁸ See Paulsson, *Privity*, p. 251.

¹³⁰⁹ Wälde/Weiler, p. 170.

¹³¹⁰ Lew/Mistelis/Kröll, para. 28-35.

¹³¹¹ See Article 26(4) ECT.

¹³¹² Amkhan, p. 70. For instance, an investor will not be in a position to refer the dispute to ICSID if both the host State and home State are not party to the ICSID Convention; also, it would be futile to submit a claim to ICSID if the respondent Contracting Party to the ECT is the European Communities (Amkhan, p. 70).

¹³¹³ For ICSID arbitration, see *UNCTAD*, p. 1.

¹³¹⁴ *Southern Pacific Properties Ltd. (Middle East) (SPP) et al. v. Arab Republic of Egypt*, Awards on Jurisdiction (27 November 1985 and 14 April 1988), XVI YBCA 16 (1991).

Convention. The tribunal analysed the issue at length before concluding that *the relevant article of the Egyptian Foreign Investment Law constituted an express consent in writing to ICSID's jurisdiction* and that *no further ad hoc expression of consent on the part of the State was required*.¹³¹⁵

Whereas the point remained controversial prior to the birth of BIT arbitration,¹³¹⁶ nowadays it is no longer disputed.¹³¹⁷ In 2000 Stern's conclusion was that we were walking with giant steps towards a general system of compulsory arbitration against States for all matters relating to international investments, at the initiative of the private actors of international economic relations.¹³¹⁸ Indeed, *while, to perfect a consent agreement, the investor has to accept the host State's offer in writing, this acceptance can be quite informal and may even be expressed through the act of instituting proceedings*.¹³¹⁹

Although the fact that the *State's written consent (in the treaty) and the investor's written consent (in the request for arbitration) are not contained in the same document* has not given rise to difficulties either under the requirement of Article 25 ICSID Convention for "consenting in writing" or the requirement in Article II NYC for an "agreement in writing", the 2004 US model BIT,¹³²⁰ for instance, specifically provides that the State's consent and the investor's submission of a claim to arbitration shall satisfy the requirements of the ICSID Convention for written consent and (where the claim is not brought under ICSID) the requirements of the New York Convention for an agreement in writing.¹³²¹

6. WAYS OF EXPRESSING CONSENT TO ARBITRATION

The greatest difference between investment arbitration and commercial arbitration is the *source of the tribunal's power*: while commercial arbitration requires an arbitration agreement between the parties, investment arbitration may also be possible without such

¹³¹⁵ McLachlan/Shore/Weiniger, para. 3.23.

¹³¹⁶ See, however, *American Manufacturing and Trading Inc. v. Republic of Zaire* (Award) 5 ICSID Reports 11 (ICSID, 1997); *Ceskoslovenska Obchodni Banka AS v. Slovak Republic*, Decision on Jurisdiction, 5 ICSID Reports 330, pp. 343-350 (ICSID, 1999).

¹³¹⁷ See McLachlan/Shore/Weiniger, paras 3.24 *et seq.*

¹³¹⁸ See Schreuer, *Convention*, p. xii. See also McLachlan/Shore/Weiniger, para. 3.27.

¹³¹⁹ *UNCTAD*, p. 1.

¹³²⁰ See 2004 US model BIT, Article 25(2).

¹³²¹ McLachlan/Shore/Weiniger, paras 3.28 *et seq.*

an arbitration agreement in the ordinary sense.¹³²² Indeed, *the consent to arbitration can have three origins*: an investor-State contract, an investment code or law and the dispute-settlement clause of a bilateral or multilateral treaty.¹³²³

Although, according to ICSID, until the mid-1980s, jurisdiction in all the cases brought before ICSID was founded upon an agreement entered into by the parties to the dispute, such as the investment contract, the subject matter of more recent ICSID disputes where jurisdiction has been based on a BIT typically concerned claims based on breaches by the State of the investor's rights under international law.¹³²⁴ Investor-State arbitration under BITs, or under plurilateral treaties such as the NAFTA, does not usually involve a specific agreement to arbitrate, but rather, the agreement to arbitrate stems from an offer made by the State in the relevant treaty or in national investment laws, and the acceptance by the investor of that offer.¹³²⁵ The ICSID Convention itself does not contain such an offer to arbitrate;¹³²⁶ the consent of the parties to ICSID Convention arbitration has to be found elsewhere, whether in a specific contract or in an investment treaty.¹³²⁷

The fact that national legislation or bi- or multilateral treaties may give each investor the right to initiate arbitration proceedings against the host State and that there may even be no contractual relationship between the parties at all has led to labelling investment arbitration: "*arbitration without privity*".¹³²⁸ However, the established understanding is that an *offer to arbitrate is contained in a BIT and is accepted by the investor's notice of arbitration or by such other consent as the treaty may require*.¹³²⁹ At that point, and not before, there is thus a *perfected agreement to arbitrate* between a qualified investor and the host State.¹³³⁰ As the English Court of Appeal said in *Republic of Ecuador v. Occidental Exploration and Production Co.*:

"The treaty involves ... a deliberate attempt to ensure for private investors the benefits and protection of *consensual arbitration*; ... the *agreement to arbitrate* which results by following the treaty route is *not itself a treaty*. It is an *agreement between a private investor* on the one side *and the relevant state* on the other".¹³³¹

¹³²² Lew/Mistelis/Kröll, para. 28-11.

¹³²³ Obadia, *ICSID*, p. 69.

¹³²⁴ Gill/Gearing/Birt, pp. 397 *et seq.*

¹³²⁵ Kinnaer/Bjorklund/Hannaford, p. 1122-3.

¹³²⁶ See, e.g. Dolzer/Schreuer, p. 243.

¹³²⁷ Kinnaer/Bjorklund/Hannaford, p. 1122-3.

¹³²⁸ See Paulsson, *Privity*. Lew/Mistelis/Kröll, para. 28-11.

¹³²⁹ Crawford, p. 360.

¹³³⁰ *Ibid.*

¹³³¹ *Republic of Ecuador v. Occidental Exploration and Production Co.* [2005] EWCA Civ. 1116, paras 32–33 (Lord Phillips of Worth Matravers MR, Clarke, Mance LJ).

6.1. Consent through direct agreement between the parties

An agreement between the parties recording consent to arbitration may be reached through a compromissory clause in an investment agreement between the host State and the investor submitting future disputes arising from the investment operation to arbitration.¹³³² This is the classic arbitration clause, included in contracts entered into by a Contracting State or any subdivision or agency thereof and an investor of another Contracting State.¹³³³ On the other hand, it is also possible to submit a dispute that has already arisen between the parties through consent expressed in a *compromis*.¹³³⁴ However, notwithstanding the fact that consent may be given with respect to existing or future disputes, the majority of cases brought to ICSID arbitration are based on agreements between the parties containing a consent clause for future disputes, as obviously consent by both parties is much easier to obtain before the outbreak of a disagreement.¹³³⁵

While an agreement between the parties recorded in a single instrument is the most common form of consent, the agreement on *consent between the parties need not necessarily be recorded in a single instrument*.¹³³⁶ Indeed, in *Amco v. Indonesia* the tribunal held:

“while a consent in writing to ICSID arbitration is indispensable, since it is required by Article 25(1) of the Convention, such consent in writing is not to be expressed in a solemn, ritual and unique formulation”.¹³³⁷

Moreover, an agreement between the parties can record their consent to ICSID jurisdiction *by reference* to another legal instrument,¹³³⁸ as was the case in *CSOB v. Slovakia* where the tribunal concluded that the parties, by referring to the BIT between the Czech and the Slovak Republics, intended to incorporate the ICSID clause in the BIT into their agreement.¹³³⁹

¹³³² Dolzer/Schreuer, p. 239; with reference to ICSID, see also *UNCTAD*, p. 7.

¹³³³ Cremades, p. 157.

¹³³⁴ Schreuer, *Convention*, para. 249.

¹³³⁵ *UNCTAD*, p. 7.

¹³³⁶ Dolzer/Schreuer, p. 239.

¹³³⁷ *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 392.

¹³³⁸ *UNCTAD*, p. 9.

¹³³⁹ *CSOB v. Slovak Republic*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review-FILJ 251, pp. 268-271 (1999).

In *Duke Energy v. Peru*, where the investor had concluded several successive contracts with Peru connected to the same investment and where only one of them contained a clause whereby the parties consented to ICSID arbitration, the tribunal applied the *principle of the “unity of the investment”*.¹³⁴⁰ The tribunal held that: “The reality of the overall investment, which is clear from the record, overcomes Respondent’s objection that it could never have consented to arbitration of a dispute related to the broader investment”.¹³⁴¹

Notwithstanding the fact that the ICSID has published a series of model clauses that envisage different eventualities and can be included in contracts to be concluded between host States and investors,¹³⁴² the ICC standard arbitration clause is the most common dispute settlement mechanism included in international contracts.¹³⁴³

6.2. Consent through host State (national) legislation

6.2.1. In general

The host State may offer consent to arbitration in general terms to foreign investors or to certain categories of foreign investors in its legislation; such an offer, in order to become operative, has to be accepted by the foreign investor.¹³⁴⁴ When ICSID arbitration is foreseen, a connection is formed between the requirement of consent stipulated by the ICSID Convention and the internal legislation of that State.¹³⁴⁵

Unlike bilateral or multilateral treaties, the provisions contained in national investment protection laws *generally extend to all foreign investors*, as they may in effect contain an *open offer to arbitrate* disputes with the foreign investor.¹³⁴⁶ Nonetheless, States have in several cases¹³⁴⁷ challenged the jurisdiction of tribunals in arbitration proceedings initiated on the basis of investment protection laws.¹³⁴⁸

¹³⁴⁰ Dolzer/Schreuer, p. 239.

¹³⁴¹ *Duke Energy v. Peru*, Decision on Jurisdiction, 1 February 2006, paras 119-134, 131.

¹³⁴² An updated list of such clauses may be found at:

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ModelClauses> (last accessed 22 July 2008).

¹³⁴³ Cremades, p. 157.

¹³⁴⁴ UNCTAD, p. 11.

¹³⁴⁵ See Hirsch, p. 51.

¹³⁴⁶ Lew/Mistelis/Kröll, para. 28-15.

¹³⁴⁷ See, e.g. the two awards on jurisdiction, 27 November 1985 and 14 April 1988, *Southern Pacific Properties Ltd (Middle East) et al v. Arab Republic of Egypt*, XVI YBCA 16 (1991). Comparable objections were raised in *Gaith Pharaon v. Republic of Tunisia*; see Paulsson, *Privity*, p. 235. See also

6.2.2. *With particular reference to ICSID arbitration*

6.2.2.1. Offer to consent by the host State

References to dispute settlement by the Centre in national investment legislation show a considerable measure of diversity and not all of them amount to consent to jurisdiction or an offer to the investor to accept ICSID's jurisdiction.¹³⁴⁹ However, when an offer is made by the host State to the foreign investors, this offer is a *standing offer*. The provisions constituting offers of consent in national laws are of different types:

- some national investment laws provide unequivocally and exclusively for dispute settlement by ICSID.¹³⁵⁰ These statutes constitute a unilateral offer, which may acquire force of an agreement once the investor has given its consent;¹³⁵¹
- a more common method to provide for settlement by the Centre is to include a reference to the Convention as one of several possible means of dispute settlement;
- other provisions¹³⁵² are not so clear, but it may still be inferred from them that they express the State's consent to ICSID's jurisdiction.¹³⁵³

6.2.2.2. Investor acceptance

While a host State may express its consent to ICSID's jurisdiction through legislation, the *investor has to perform some reciprocal act to perfect consent*.¹³⁵⁴ Indeed, even where consent is based on the host State's legislation, it can only come into existence through an agreement between the parties, because the provision in the host State's legislation can amount to no more than an offer that may be accepted by the investor.¹³⁵⁵

ICSID, Decision on Jurisdiction, 24 December 1996, *Tradex Hellas SA v. Republic of Albania*, 14 ICSID Review-FILJ 161 (1999) where the main issue was the retroactive application of law.

¹³⁴⁸ Lew/Mistelis/Kröll, para. 28-15.

¹³⁴⁹ Schreuer, *Convention*, para. 259.

¹³⁵⁰ See, e.g. Article 8(2) of the Albanian Law on Foreign Investment of 1993. This was the law applicable in *Tradex Hellas SA v. Republic of Albania*, 14 ICSID Review-FILJ 161 (1999).

¹³⁵¹ Hirsch, p. 52.

¹³⁵² See, e.g. Article 45(1) of the Cameroon Investment Code, 1990, or Article 27(2) of the Kazakhstan Law on Foreign Investments, 1995.

¹³⁵³ UNCTAD, p. 11.

¹³⁵⁴ Schreuer, *Convention*, para. 276.

¹³⁵⁵ UNCTAD, p. 13.

In other words, consent given by the host State must be combined with that given by the investor.¹³⁵⁶

6.2.2.2.1. Acceptance of offer through instituting proceeding

The investor may accept the host State's offer by introducing a request for arbitration to the Centre.¹³⁵⁷ It has been said of this technique—of accepting the offer through instituting proceedings—that it *implies consent more than it requires an express and specific manifestation of it*.¹³⁵⁸

While it is possible to perfect consent through the institution of proceedings, it has been observed that it is questionable whether it is wise for the investor to rely on the host State's offer contained in its legislation without accepting it at an earlier stage.¹³⁵⁹ Indeed, generally the State will be permitted to withdraw its consent if it was given through legislation, as long as the investor has not yet communicated its consent to the Centre's jurisdiction.¹³⁶⁰ The *acceptance of the offer* is therefore of paramount importance, as it *triggers the irrevocability of the reached consent*.¹³⁶¹ Or, in other words, once the investor has accepted consent based on legislation, the agreement on consent will stay in effect even if the legislation is repealed.¹³⁶²

6.2.2.2.2. Acceptance of offer prior to instituting proceedings

The investor may *express its acceptance of the State's offer in a variety of ways other than instituting proceedings*, including:

- an investment agreement with the host State;
- a simple communication to the host State that consent to ICSID's jurisdiction in accordance with the legislation is accepted;¹³⁶³
- a statement contained in an application for an investment licence; or
- a mere application if under the law in question the successful applicant automatically gets specified benefits including access to ICSID.¹³⁶⁴

¹³⁵⁶ Cremades, p. 157.

¹³⁵⁷ UNCTAD, p. 14.

¹³⁵⁸ Stern, *Consentement*, p. 241.

¹³⁵⁹ Schreuer, *Convention*, para. 277.

¹³⁶⁰ Hirsch, p. 53.

¹³⁶¹ UNCTAD, p. 14.

¹³⁶² Schreuer, *Convention*, para. 277.

¹³⁶³ See Cremades, p. 157.

Although the investor's acceptance of consent can be given only to the extent of the offer made in the legislation, it is entirely possible for the investor's acceptance to be narrower than the offer and to extend only to certain matters or only to particular investment operations.¹³⁶⁵

6.3. Consent through treaties

The host State may also give its consent to investment arbitration under international treaties, whether bilateral or multilateral.¹³⁶⁶ In those cases the consent of the host State is granted on the level of public international law.¹³⁶⁷

While some treaties only contain declarations of intent to make such offers in the future, in the majority of cases they constitute a *unilateral offer* by the State involved to all investors from the other State party to settle disputes by arbitration.¹³⁶⁸ However, treaties do not contain an open offer to arbitrate disputes which is extended to all foreign investors irrespective of their nationality, but only a unilateral offer to arbitrate, from a State, in respect to the investors that are nationals of the other Contracting Party (in the case of BITs)—or Contracting Parties (in the case of multilateral treaties)—to the treaty. It is exactly because of the *unilateral character* of the *standing offers* contained in treaties that the *issue of the investors' nationality*¹³⁶⁹ *is of paramount importance* in treaty-based arbitration.

6.3.1. *Bilateral Investments Treaties (BITs)*

Most investment arbitration disputes in recent years have been based on jurisdiction established through BITs.¹³⁷⁰ Owing to the great number of BITs and the reference to ICSID arbitration made in the same,¹³⁷¹ it *may be asserted* with a still greater degree of

¹³⁶⁴ Schreuer, *Convention*, para. 278.

¹³⁶⁵ UNCTAD, p. 14.

¹³⁶⁶ See Cremades, p. 157.

¹³⁶⁷ Hirsch, p. 54.

¹³⁶⁸ See Lew/Mistelis/Kröll, para. 28-22, for BITs.

¹³⁶⁹ See under V.11.1.

¹³⁷⁰ Dolzer/Schreuer, p. 242.

¹³⁷¹ Dolzer/Stevens, p. 129.

certainty *that the ICSID is the natural form for resolution of investor-State disputes*.¹³⁷² This is particularly true thanks to Model BITs.¹³⁷³

6.3.1.1. In general

The vast majority of BITs contain clauses which make reference to investment arbitration.¹³⁷⁴ Numerous dispute settlement clauses in BITs offer several alternative forms of arbitration.¹³⁷⁵ Therefore, only those that contain clear and unequivocal consent by Contracting Parties to ICSID dispute-settlement mechanism will automatically determine the existence of an ICSID arbitration clause and, by the same token, of ICSID jurisdiction, subject always to the proviso that consent in writing be given by the investor of a Contracting State in such a way as to amount to “the act or result of coming into harmony or accord”.¹³⁷⁶

The clauses contained in the BITs—known as *unequivocal consent, automatic consent or advanced consent clauses*—are characterised by containing an offer to arbitrate that is:

- public in nature (*i.e.* contained in an instrument of public international law);
- unilateral in character (*i.e.* in respect of all investors that are national of the other Contracting Party);
- binding on the issuing party (in that the State receiving foreign investment is internationally bound *vis-à-vis* the State of which the investor is a national);
- only revocable by means of an instrument of equal rank; and
- subject to a set term during which it will remain in force.¹³⁷⁷

It has been observed that arbitral jurisdiction is *no longer* premised on the privity of contracts, *i.e.* on *reciprocity of negotiated consent*, as under this new concept reciprocity is renounced and replaced by a sort of compulsory jurisdiction against the host State.¹³⁷⁸ Nevertheless, the separate *agreement to arbitrate an investment claim under a BIT is a contract* and not a treaty.¹³⁷⁹

¹³⁷² Cremades, p. 158.

¹³⁷³ See, *e.g.* the Chinese Model BIT (2003), the German Model BIT (2005), the UK Model BIT (2005) or the US Model BIT (2004).

¹³⁷⁴ See Dolzer/Stevens, pp. 129 *et seq.*

¹³⁷⁵ Dolzer/Schreuer, p. 242.

¹³⁷⁶ Cremades, p. 162.

¹³⁷⁷ *Ibid.*

¹³⁷⁸ Blessing, *Law Applicable*, p. 185.

¹³⁷⁹ Crawford, p. 361.

6.3.1.2. Offer by the host State

6.3.1.2.1. Offers of consent in BITs

Although the majority of ICSID clauses in modern BITs express consent on the part of the two Contracting States to submit to ICSID's jurisdiction, for the benefit of nationals of the other State party to the treaty, some BITs do not specifically mention consent.¹³⁸⁰ On the other hand, formulations to the effect that each Contracting Party "hereby consents", that a dispute "shall be submitted" to the Centre or that the parties have the right to initiate proceedings leave no doubt as to the binding character of these clauses.¹³⁸¹ Since the case of *AAPL v. Republic of Sri Lanka*,¹³⁸² it has been understood that this type of BIT clause may constitute necessary and sufficient consent on the part of the host State for the purposes of Article 25(1) ICSID Convention.¹³⁸³

6.3.1.2.2. ICSID as one of several alternatives

In BITs it is frequent for clauses to be included that provide for several alternative forms of arbitration (multiple clauses).¹³⁸⁴ These most commonly include ICSID, with a reference to the ICSID Additional Facility if one of the State parties to the BIT is not an ICSID signatory, *ad hoc* arbitration, often under the UNCITRAL Arbitration Rules, references to the ICC or the Arbitration Institute of the SCC.¹³⁸⁵ Another alternative considered may include the domestic courts of the host State.¹³⁸⁶

In such a case, the choice of one form of arbitration or another may be mutually agreed by the disputing parties or, alternatively, left for the investor to decide,¹³⁸⁷ with the State in the latter instance thus giving its advanced consent to any of the respective mechanisms of arbitration.¹³⁸⁸

¹³⁸⁰ Schreuer, *Convention*, paras 289 *et seq.*

¹³⁸¹ See Dolzer/Schreuer, p. 242; *UNCTAD*, p. 17.

¹³⁸² *Asian Agricultural Products Limited (AAPL) v. Democratic Socialist Republic of Sri Lanka*, Case No. ARB/87/3, Award (27 June 1990), 15 ICSID Review-FILJ 169 (2000) [6 ICSID Review-FILJ 526 (1991)—Salacuse] and 5 ICSID Reports 245 (1990) [4 ICSID Reports 245 (1997)—Lew] and 30 ILM 577 (1991).

¹³⁸³ See Cremades, p. 158.

¹³⁸⁴ Cremades, p. 159.

¹³⁸⁵ McLachlan/Shore/Weiniger, para. 3.21.

¹³⁸⁶ Schreuer, *Convention*, para. 293.

¹³⁸⁷ See, *e.g.* Switzerland-Paraguay BIT (1993), Article 9; Lithuania-Poland BIT (1992), Article 7.

¹³⁸⁸ See Cremades, p. 159.

6.3.1.2.3. BITs referring to future consent

Not all references to the ICSID Convention in BITs constitute binding offers of consent by the host State:¹³⁸⁹

- some clauses only contain promises of future consent;
- others hold out a general prospect of sympathetic consideration; or
- others simply state that consent may be given by way of agreements with the investor.¹³⁹⁰

a. Promise of future consent

Although provisions of this sort commit the host State to consent to the jurisdiction of the Centre, either in the investment agreement or in another form, they do not constitute actual consent for the purposes of the Centre's jurisdiction.¹³⁹¹ The investor's home State can nevertheless request that the host State give its consent and, if necessary, resort to such procedures as are available between the States parties to the BIT.¹³⁹² Thus, any remedy must, in the first place, lie with the treaty partner to the BIT.¹³⁹³ In such a case, several remedies for breach of treaty on the level of public international law may be available to the investor's home State.¹³⁹⁴

b. General prospect of sympathetic consideration

An even weaker reference to consent is contained in some BITs that provide for the host State's sympathetic consideration to a request for dispute settlement through arbitration.¹³⁹⁵ It is evident that a clause of this kind does not amount to consent by the host State.¹³⁹⁶ Indeed, the most that can be read into it is that consent may not be withheld arbitrarily and that the States parties to the BIT must consider arbitration in good faith.¹³⁹⁷

¹³⁸⁹ See also Dolzer/Schreuer, p. 242.

¹³⁹⁰ UNCTAD, p. 18.

¹³⁹¹ Hirsch, p. 56.

¹³⁹² Broches, *BIT*, p. 63.

¹³⁹³ Schreuer, *Convention*, para. 297.

¹³⁹⁴ See Hirsch, p. 56.

¹³⁹⁵ Dolzer/Schreuer, p. 242; see also UNCTAD, p. 19.

¹³⁹⁶ Schreuer, *Convention*, para. 299.

¹³⁹⁷ See UNCTAD, p. 19, for ICSID.

c. *Consent by way of agreement*

Some BITs only foresee a future agreement between the host State and the investor containing consent to ICSID's jurisdiction.¹³⁹⁸ And, on occasion, host States commit themselves to granting favourable consideration to a request of this nature submitted by the investor.¹³⁹⁹ Such treaty provisions, however, do not bind the host State to give its consent to the Centre's jurisdiction, and they certainly do not constitute consent for the purposes of establishing jurisdiction in accordance with Article 25 ICSID Convention.¹⁴⁰⁰ Nevertheless, some scholars hold that the effect of provisions of this type is that the host State is not permitted to refuse to settle the dispute at the Centre, in the absence of reasonable justification given in good faith.¹⁴⁰¹

6.3.1.3. Acceptance by the investor

A provision on consent to arbitration in a BIT is merely an offer by the respective States that requires acceptance by a national of the other State party to the BIT.¹⁴⁰² The national investors of the other Contracting Party, by taking up the unilateral and binding offer of the host State, give their consent to arbitration, and, in so doing, thereby conclude an arbitration agreement that is valid and binding on both parties.¹⁴⁰³

Once the arbitration agreement is perfected through the acceptance of the offer contained in the treaty, it remains in existence even though the States parties to the BIT agree to amend or terminate the treaty.¹⁴⁰⁴

6.3.1.3.1. Acceptance by instituting proceedings

It is recognised practice that an investor may accept an offer of consent contained in a BIT by instituting ICSID proceedings,¹⁴⁰⁵ when "there is nothing in the BIT to suggest that the investor must communicate its consent in a different form to the State".¹⁴⁰⁶

¹³⁹⁸ See, e.g. Article 6 of the Sweden-Yugoslavia BIT of 1978 (Schreuer, *Convention*, para. 300).

¹³⁹⁹ Delaume, *BIT*, p. 14. Broches, *BIT*, p. 65.

¹⁴⁰⁰ Hirsch, p. 57.

¹⁴⁰¹ Delaume, *BIT*, p. 14.

¹⁴⁰² Dolzer/Schreuer, p. 243.

¹⁴⁰³ See Cremades, p. 158, for ICSID.

¹⁴⁰⁴ Dolzer/Schreuer, p. 243.

6.3.1.3.2. Acceptance of offer prior to instituting proceedings

Withdrawal of an offer of consent before its acceptance would appear to be less of a problem in the case of ICSID clauses provided for in treaties than in the case of national legislation.¹⁴⁰⁷ Indeed, withdrawal of the host State's consent contained in a BIT would be a breach of the treaty and would presumably trigger some adverse reaction on the part of the other party to the treaty.¹⁴⁰⁸ Also, an ICSID clause in a treaty remains valid notwithstanding an attempt to end it, unless there is a basis for termination under the law of treaties.¹⁴⁰⁹ Nevertheless, it has been observed that in order to avoid complications early acceptance is also advisable in the case of offers of consent contained in treaties.¹⁴¹⁰

6.3.1.3.3. Some BITs require early acceptance

The clauses of some BITs¹⁴¹¹ specifically provide for the giving of consent by the investor, and, once the investor has accepted the offer contained in the BIT itself, either party may start proceedings.¹⁴¹² However, consent by the investor must be expressed in some positive way and cannot be substituted by the BIT or simply assumed.¹⁴¹³ There are also ways in which *an investor may be induced to give consent*:

- submission to ICSID or other methods of settlement may be made a condition for admission of investments in the host State and may form part of the licensing process;
- BITs may specifically provide that their benefits will extend only to investors that have consented to ICSID's jurisdiction.¹⁴¹⁴

¹⁴⁰⁵ See, e.g. *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo*, Case No. ARB/93/1, Award (21 February 1997), 36 ILM 1534 (1997) and XXII YBCA 60 (1997). On this award, see Chatterjee. See also Dolzer/Schreuer, p. 243.

¹⁴⁰⁶ See *Generation Ukraine v. Ukraine*, Award, 16 September 2003, 10 ICSID Reports 240, paras 12.2, 12.3.

¹⁴⁰⁷ Schreuer, *Convention*, para. 303.

¹⁴⁰⁸ UNCTAD, p. 20.

¹⁴⁰⁹ Schreuer, *Convention*, para. 303.

¹⁴¹⁰ Broches, *BIT*, p. 63.

¹⁴¹¹ See, e.g. Article 8 (first alternative) of the United Kingdom Model Agreement; or the United States Model Agreement Article VI.

¹⁴¹² UNCTAD, p. 20.

¹⁴¹³ Schreuer, *Convention*, para. 308.

¹⁴¹⁴ UNCTAD, p. 21.

6.3.1.3.4. Some BITs ignore the investor's consent

Some BITs containing binding consent clauses ignore the fact that consent by the investor is a necessary requirement to complete consent.¹⁴¹⁵ It has been observed that a consent clause so formulated is flawed.¹⁴¹⁶ Indeed, while the investor may institute proceedings against the host State on the basis of the BIT, thereby signifying his consent, the host State cannot do so without a prior expression of consent on the part of the investor.¹⁴¹⁷ Some BITs¹⁴¹⁸ recognise this situation by stating that only the investor is entitled to institute proceedings.¹⁴¹⁹

6.3.2. *Consent through multilateral treaties*

Since the early 1990s a number of multilateral treaties that provide for ICSID's jurisdiction have come into existence: the NAFTA, the ECT, MERCOSUR and the Cartagena Free Trade Agreement.¹⁴²⁰ In the following, however, only the NAFTA and the ECT will be discussed. The underlying mechanism is similar to the one in BITs. Multilateral treaties also contain offers by party States to consent to ICSID jurisdiction,¹⁴²¹ and such offers may be taken up by investors of any other party States to the treaty.¹⁴²²

6.3.2.1. **The NAFTA**

The NAFTA on the one hand expressly provides that "each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement" (Article 1122), and, on the other hand, that the investor must also consent to arbitration (Article 1121), thereby emphasising the reciprocal nature of consent to arbitration. Moreover, under the NAFTA, submission of a claim to arbitration is only open to an investor and not to a host State.¹⁴²³

¹⁴¹⁵ See, e.g. France/Nigeria BIT (1990) Article 8 (Dolzer/Stevens, pp. 134 *et seq.*). Schreuer, *Convention*, para. 304.

¹⁴¹⁶ See Schreuer, *Convention*, para. 305.

¹⁴¹⁷ *Ibid.*

¹⁴¹⁸ See, e.g. German Model Agreement Article 11 (Model I).

¹⁴¹⁹ Schreuer, *Convention*, para. 305.

¹⁴²⁰ See *UNCTAD*, pp. 23-24.

¹⁴²¹ The ICSID Convention itself does not offer consent to arbitration (see, e.g. Dolzer/Schreuer, p. 243).

¹⁴²² Cremades, p. 160.

¹⁴²³ Schreuer, *Convention*, para. 312.

6.3.2.1.1. Pre-commitment to arbitration: consent of the State parties (standing offer of the States)

Article 1122 provides that the parties consent to the submission of a claim to arbitration. Indeed, Canada, the United States and Mexico have consented to arbitrate all future claims made under NAFTA Chapter 11 provided such claims are submitted in accordance with the procedures set out in section B of the Chapter.¹⁴²⁴ This *pre-commitment to arbitration* by the parties represents one of the most innovative aspects of NAFTA and shows a strong commitment to the efficient resolution of investor-State disputes.¹⁴²⁵ Article 1122(2) confirms that this consent will satisfy the requirements of the ICSID Convention, the New York Convention and the Inter-American Convention with respect to consent in the case of the former and the requirement for an arbitration agreement in the latter two.¹⁴²⁶

6.3.2.1.2. Limits on State parties' consent

Article 1122(1) places a limit on parties' consent—it extends to the submission of a claim to arbitration “in accordance with the procedures set forth in this agreement”. Because consent is a precondition to the process of arbitration, the parties have argued that the procedural requirements set forth in section B of Chapter 11, in addition to the scope provisions set forth in Article 1101, should be read as limiting the jurisdiction of the tribunals.¹⁴²⁷ It has been observed that tribunals have varied in how strictly they have construed the limitations of Article 1122, but it is fair to say that most have construed the consent required by the provision relatively broadly.¹⁴²⁸

6.3.2.1.3. Who can submit a claim to arbitration (acceptance by the investors)

A private investor who believes that a party, or a State or provincial government thereof, (other than its own) has violated any of the provisions under section A of

¹⁴²⁴ Eklund, p. 140.

¹⁴²⁵ *Ibid.*

¹⁴²⁶ Alvarez H.C., p. 403. See Article 1122 para. 2 NAFTA. See also Kinnaer/Bjorklund/Hannaford, p. 1122-4.

¹⁴²⁷ Kinnaer/Bjorklund/Hannaford, p. 1122-3.

¹⁴²⁸ *Ibid.*

NAFTA Chapter 11,¹⁴²⁹ may resort to binding international arbitration.¹⁴³⁰ More specifically, an investor of a party may submit a claim on its own behalf, or on behalf of an enterprise incorporated in the jurisdiction of a party where the investor owns or controls directly or indirectly that enterprise, where:

- the investor believes that a party has breached an obligation under section A, Article 1503(2),¹⁴³¹ or Article 1502(3)(a)¹⁴³² where the monopoly has acted in a way inconsistent with the party's obligations under section A; and
- the investor or enterprise has incurred loss or damage by reason of, or arising out of, that breach.¹⁴³³

Article 1121 requires that an investor consent to arbitration, and that the consent be accompanied by the appropriate waiver(s).¹⁴³⁴ Indeed, before an investor may submit a claim, it must consent, in writing, to arbitration and waive the right to begin or continue administrative or judicial proceedings under the law of any party, or other dispute settlement procedures, except for applications for interim relief not involving the payment of damages before a tribunal or court under the law of the disputing party.¹⁴³⁵ Therefore, the NAFTA, by requiring as a condition for jurisdiction that the claimant submit a waiver of the right to initiate or continue before domestic judiciaries any proceedings with respect to the measures taken by the respondent that are alleged to be in breach of the NAFTA, contains another approach to the *ne bis in idem* principle in the relationship between international tribunals and domestic courts.¹⁴³⁶

Between them Articles 1121 and 1122 ensure that the disputing parties have consented to arbitration.¹⁴³⁷ The giving of consent by the disputing investor completes the pre-existing consent of each party to arbitration pursuant to Article 1122, and, in this manner, a form of privity or consent to arbitration is created between the disputing investor and the disputing party.¹⁴³⁸

¹⁴²⁹ There are also certain exceptional circumstances in which a Chapter 11 NAFTA claim cannot be brought to arbitration, as for instance, a dispute arising out of a decision by a Party to prohibit or restrict the acquisition of an investment pursuant to Article 2102 NAFTA (National Security), or, similarly, a decision made under the Investment Canada Act.

¹⁴³⁰ Eklund, pp. 140 *et seq.*

¹⁴³¹ State Enterprises.

¹⁴³² Monopolies and State Enterprises.

¹⁴³³ Eklund, pp. 140 *et seq.*

¹⁴³⁴ Kinnaer/Bjorklund/Hannaford, p. 1122-4.

¹⁴³⁵ Alvarez H.C., p. 403.

¹⁴³⁶ Schreuer, *Vivendi*, p. 308.

¹⁴³⁷ Kinnaer/Bjorklund/Hannaford, p. 1122-4.

¹⁴³⁸ Alvarez H.C., p. 403.

6.3.2.1.4. Choice of the ICSID or the UNCITRAL Arbitration Rules by the investor

Provided the preconditions to submission of a claim to arbitration and all preliminary steps have been met, a disputing investor may choose to submit the claim to arbitration pursuant to one of three sets of rules:

- a. the ICSID Convention (and its Rules of Procedure for Arbitration Proceedings), provided that both the disputing party and the party of the investor are parties to the Convention;
- b. the Additional Facility Rules of ICSID, provided that either the disputing party or the party of the investor, but not both, is a party to the ICSID Convention; or
- c. the UNCITRAL Arbitration Rules.

In the event a disputing investor selects arbitration pursuant to the ICSID Convention or the ICSID Additional Facility Rules, a second level of this type of “virtual” consent is created by Article 1125 which provides that the disputing party “agrees” to the appointment of the members of the arbitral tribunal as required by Article 39 of the Convention and Article 7 of Schedule C to the Additional Facility Rules.¹⁴³⁹ However, as long as Canada and Mexico are not parties to the ICSID Convention, the NAFTA will not operate to confer jurisdiction under the Convention. Indeed, while ICSID Additional Facility arbitration is available between United States investors and Canada or Mexico and between Canadian or Mexican investors and the United States, in the disputes between Canadian investors and Mexico or Mexican investors and Canada not even the ICSID Additional Facility may be used.¹⁴⁴⁰ Thus, in the disputes of the latter kind only arbitration under the UNCITRAL Arbitration Rules is available.¹⁴⁴¹

The rules selected by the disputing investor will apply except to the extent they are modified by the provisions of Chapter 11B. The latter occurs in several areas, which include the number of arbitrators and their method of appointment; consolidation,¹⁴⁴² notice to, and participation by, other parties; the law applicable to the merits of the dispute; the role of the Free Trade Commission; available remedies; enforcement of awards; and publication of awards.¹⁴⁴³

¹⁴³⁹ Alvarez H.C., p. 403.

¹⁴⁴⁰ UNCTAD, p. 23.

¹⁴⁴¹ *Ibid.*

¹⁴⁴² See under V.15.

¹⁴⁴³ Alvarez H.C., p. 404. See also Eklund, pp. 141 *et seq.*

6.3.2.2. The Energy Charter Treaty

6.3.2.2.1. Unconditional irrevocable consent (offer by the State)

Article 26(3) ECT explicitly details that each of the ECT Contracting Parties has given its prior unconditional consent to submit to international arbitration or conciliation a dispute which falls within the remits of paragraph (1).¹⁴⁴⁴ This consent, given by signature to the treaty, is considered to satisfy the requirements of four arbitral options,¹⁴⁴⁵ but also of the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards.¹⁴⁴⁶ As the State's consent is contained within the provision and is unconditional and irrevocable, no further arbitration agreement is necessary; the treaty bestows the arbitration right directly upon foreign treaty investors.¹⁴⁴⁷ However, sub-paragraphs (b) and (c) of paragraph (3) list the two permissible exceptions to "unconditional consent":

- The first exception is where the investor has submitted the dispute to domestic courts or administrative tribunals, or previously agreed dispute settlement mechanisms.¹⁴⁴⁸
- The second exception is where a dispute arises regarding an alleged breach of the obligation, as set out in the last sentence of Article 10(1) ECT, which reads as follows: "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party".¹⁴⁴⁹

6.3.2.2.2. Acceptance by the investor

On the other hand, the *investor is not bound by earlier contractual commitments* when making its choice and it *may opt for arbitration even though the contract with the State included a forum selection clause* in favour of the host State's court or a different

¹⁴⁴⁴ Amkhan, p. 69. The reference to the New York Convention and the option to choose a place in a State which is member of the New York Convention (Article 25(5)(b) ECT) are meant to increase the likelihood of recognition and enforcement (Wälde, *ECT*, pp. 450-451).

¹⁴⁴⁵ Arbitration under the ICSID Rules, the ICSID Additional Facility Rules, the SCC Rules or *ad hoc* under UNCITRAL Arbitration Rules.

¹⁴⁴⁶ Wälde, *ECT*, p. 450.

¹⁴⁴⁷ Wälde/Weiler, p. 170.

¹⁴⁴⁸ Amkhan, p. 69. The Contracting Parties that have availed themselves of this exception are listed in ECT Annexe ID and are under obligation to provide the Secretariat with a written statement of their "policies, practices and conditions" concerning this exception (*ibid.*).

¹⁴⁴⁹ *Ibid.* Contracting Parties that have availed themselves of this exception were to be listed in Annexe IA; Hungary is the only Contracting Party that has opted to make use of this exception (*ibid.*).

type of arbitration.¹⁴⁵⁰ Indeed, an investor may, at its choice and following a cooling-off period of 3 months, submit the dispute to resolution:

- a. to the courts or administrative tribunals of the host State party to the dispute;
- b. in accordance with a previously agreed dispute settlement procedure; or
- c. to international arbitration.¹⁴⁵¹

If the investor opts to submit the dispute to arbitration, the investor then has the further choice between arbitration under the ICSID Rules, the ICSID Additional Facility Rules, the SCC Rules or ad hoc under UNCITRAL Arbitration Rules.¹⁴⁵²

6.3.2.2.3. Comments

It has been observed that the unmistakable thrust of Article 26 ECT is to eliminate procedural or jurisdictional wrangling by creating a regime that strongly favours the use of neutral arbitration to sanction violation of the treaty to the detriment of investors, as can be seen in the wide range of options granted to the claimant, where, for instance, reference to a previously agreed forum is only a possibility, but not a requirement.¹⁴⁵³ This also means that a defendant minded to be obstreperous will find no comfort in the fact that a dispute is only partially covered by a contract containing an arbitration clause; a claimant apprehensive of the limited authority of arbitrators operating under such a clause may wipe the slate clean and opt for one of the three types of arbitration defined in Article 26 ECT without regard to what had been agreed before, and any defect in an arbitration clause might thus be cured by relying on Article 26 ECT.¹⁴⁵⁴

6.3.2.3. Non-binding-references to ICSID

Some multilateral instruments¹⁴⁵⁵ also contain reference to ICSID dispute settlement mechanism without offering consent on the part of the participating States.¹⁴⁵⁶

¹⁴⁵⁰ Lew/Mistelis/Kröll, para. 28-35.

¹⁴⁵¹ See Article 26(2) ECT.

¹⁴⁵² See Article 26(4) ECT. On possible criteria in the choice of venue, see in particular Amkhan, p. 70.

¹⁴⁵³ Paulsson, *Privity*, pp. 249 *et seq.*

¹⁴⁵⁴ *Ibid.*

¹⁴⁵⁵ See, *e.g.* Article X of the 1987 ASEAN Agreement for the Promotion and Protection of Investments.

¹⁴⁵⁶ Schreuer, *Convention*, para. 316.

7. TEMPORAL SEQUENCE OF CONSENT TO ARBITRATION

7.1. Formation of consent from a temporal perspective

Consent by both parties must exist at the time of the institution of the proceedings.¹⁴⁵⁷

The possibility that the parties did not act on the same time covers two situations:

1. a single instrument may be signed on different days; or
2. the consent may be expressed in more than one instrument.¹⁴⁵⁸

7.1.1. *Consent through direct agreement between the parties*

In arbitration clauses contained in investment agreements *both* the host State and the investor give their consent to arbitration *before* a dispute has broken out. On the other hand, when the host State and the investor give their consent to arbitration in a *compromis* they express it *after* a dispute has broken out. In both cases, however, there is *symmetry*.

7.1.2. *State's offer in its legislation or in a treaty*

In an investor-to-State dispute based on a State's public offer of consent to ICSID arbitration, the *State is clearly the first party who gives its consent*.¹⁴⁵⁹ *This consent is given* either in a BIT, in a multilateral treaty or in an internal law concerning the protection and promotion of foreign investments *before a dispute has broken out*.¹⁴⁶⁰ On the other hand, *the investor gives his consent only after a dispute has arisen*, when he elects to file a request for arbitration to ICSID.¹⁴⁶¹

The drafters of the ICSID Convention envisaged the possibility of a State giving its consent in advance to ICSID arbitrations, albeit they envisaged this happening through investment legislation rather than BITs: "Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus a host State might in its investment promotion legislation offer to submit disputes arising out of certain

¹⁴⁵⁷ See *UNCTAD*, p. 26.

¹⁴⁵⁸ Schreuer, *Convention*, para. 320.

¹⁴⁵⁹ Crivellaro, p. 87.

¹⁴⁶⁰ See Crivellaro, pp. 87-88.

¹⁴⁶¹ *Ibid.*

classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing”.¹⁴⁶²

Here there is *asymmetry*. This form of “asymmetric” and not reciprocal arbitration distances the treaty’s investment arbitration method very conspicuously from the arbitration clauses usually found in investment agreements.¹⁴⁶³ In treaty’s investment arbitration it is only the investor—motivated by his self-interest and complaint, but also acting as agent of implementation of the treaty—that can raise complaints and litigate against the allegedly non-complying government.¹⁴⁶⁴ This asymmetry between the consent of investors and the advance consent of host States has been described as “arbitration without privity”:

“This new world of arbitration is one where the claimant need not have a contractual relationship with the defendant and where the tables could not be turned: the defendant could not have initiated the arbitration, nor is it certain of being able to bring a counterclaim. ... What is already clear is that this is not a subgenre of an existing discipline. It is dramatically different from anything previously known in the international sphere”.¹⁴⁶⁵

7.2. Time of consent

The time of consent is determined by the date at which both parties have agreed to ICSID’s jurisdiction:

- if the consent clause is contained in an offer by one party (State or investor), its acceptance by the other party will determine the time of consent;
- if the host State makes a general offer to accept ICSID’s jurisdiction in its legislation or in a treaty, the time of consent is determined by the investor’s acceptance of the offer.¹⁴⁶⁶

While the investor is under no time constraints to accept the offer and thus to complete the consent unless the offer, by its own terms, provides for acceptance within a certain period of time, it should be borne in mind that consent, once completed, has a number of legal consequences; consequently, care should be taken to perfect consent at the appropriate time and not to rely on a standing offer without actually taking it up.¹⁴⁶⁷

¹⁴⁶² McLachlan/Shore/Weiniger, para. 3.22.

¹⁴⁶³ See Wälde, *ECT*, p. 452, referring to petroleum, mineral development investment agreements.

¹⁴⁶⁴ Wälde, *ECT*, p. 452.

¹⁴⁶⁵ Paulsson, *Privity*, pp. 234 *et seq.*

¹⁴⁶⁶ *UNCTAD*, p. 25.

¹⁴⁶⁷ *Ibid.*

7.3. From retrospective to prospective consent

7.3.1. *Retrospective consent*

In the past, individuals have been at times authorised to bring international claims against States before tribunals created in the aftermath of war or revolution. States have, therefore, occasionally allowed investor claims under international law prior to the innovation of the general consent in investment treaties.¹⁴⁶⁸ However, these tribunals¹⁴⁶⁹ did not involve *generalised* arbitration, based on comprehensive jurisdiction, because their authority was retrospective. Furthermore, authority was given to them only after the fact, and was limited to disputes arising from a distinct period, series of events, or subject-matter.¹⁴⁷⁰

7.3.2. *Prospective consent*

Bilateral and multilateral treaties provide that in the event of a dispute with the State, the investor concerned may resort to the appropriate form of arbitration *on the strength of the State's consent* in the treaty.¹⁴⁷¹ The phrase “*on the strength of the State's consent*” denotes the concept of “*advance consent*”,¹⁴⁷² or “*prospective consent*”,¹⁴⁷³ contained in the thousands of BITs by which States offer their consent to investors to refer future investment disputes to arbitration. The asymmetry between the consent of investors and the advance consent of host States has been described as “*arbitration without privity*”.¹⁴⁷⁴ While the question of whether this advance consent is inherently unfair is subject to debate, what is clear is that it leaves host States open to having arbitration claims brought by investors with whom they have no contractual relationship.¹⁴⁷⁵ Therefore, authors have also spoken of “*arbitration without contractual relationship*”.¹⁴⁷⁶

¹⁴⁶⁸ Van Harten, pp. 99 *et seq.*

¹⁴⁶⁹ See, e.g. the Iran-US Claims Commission after the Islamic Revolution in Iran or the UN Compensation Commission after the Gulf War of 1990-91.

¹⁴⁷⁰ Van Harten, p. 100.

¹⁴⁷¹ Teitelbaum, p. 226 citing Parra.

¹⁴⁷² See Dolzer/Stevens, p. 132.

¹⁴⁷³ See Van Harten, pp. 99 *et seq.*

¹⁴⁷⁴ See Paulsson, *Privity*. Teitelbaum, p. 226.

¹⁴⁷⁵ Teitelbaum, p. 226.

¹⁴⁷⁶ See Werner, *Trade Explosion*, p. 6.

On the other hand, with regard to the arbitration agreement it has been observed that the *contractual arrangement must be understood broadly* in the sense that the *parties' consent can be given in different ways and subsequently*.¹⁴⁷⁷ Moreover, the contractual nature of arbitration does not entail that the arbitration agreement must be “mutual”, *i.e.* give the parties the same right to refer disputes to arbitration.¹⁴⁷⁸ Indeed, it is possible to confer upon one party the unilateral¹⁴⁷⁹ right to initiate an arbitration proceeding.¹⁴⁸⁰ Nevertheless, while most of the time there will be *no arbitration agreement in the traditional sense, in investment arbitration—like in commercial arbitration—the attempt to emancipate arbitration from a State justice system is clear and unavoidable*.¹⁴⁸¹

7.3.3. *Differences between retrospective consent and prospective consent*

It has been observed that retrospective consent differs from a general consent to the arbitration of future disputes, because:

- in the case of a retrospective consent, a State is more able to anticipate the significance of its acceptance of compulsory arbitration as the consent is given after the events in question have taken place and it is limited to disputes arising from a distinct period, series of events, or subject-matter; and,
- on the other hand, by giving a prospective consent in an investment treaty, the State exposes itself in principle to claims by any investor with economic interests that are subject to regulation by the State; consequently, investment treaty arbitration encompasses future disputes involving an indeterminate class of claimants in relation to a very broad range of governmental activity.¹⁴⁸²

7.3.4. *Comments*

Retrospective consent, permitting investors to bring international claims against States before tribunals, has been given by States for solving disputes arising because of unique

¹⁴⁷⁷ Poudret/Besson, para. 4.

¹⁴⁷⁸ *Ibid.*

¹⁴⁷⁹ On unilateral arbitration, see, *e.g.* Prujiner.

¹⁴⁸⁰ Poudret/Besson, para. 4.

¹⁴⁸¹ See Lew/Mistelis/Kröll, para. 5-21.

¹⁴⁸² Van Harten, p. 100.

and to some extent unforeseeable historical events like wars and revolutions.¹⁴⁸³ On the other hand, prospective consent in investment treaties is given by the States for events occurring in the global “economic playfield” where the States and the investors, are both “economic players”, albeit with (most of the time¹⁴⁸⁴) different roles.

Retrospective consent differs from a general consent to the arbitration of future disputes. Indeed, in the case of retrospective consent a State is more able to anticipate the significance of its acceptance of compulsory arbitration because the consent is given after the events in question have taken place.¹⁴⁸⁵ However, while it is true that in investment arbitration the State by giving a prospective consent in an investment treaty exposes itself to claims by *any* investor, one has to consider that, contrarily to disputes in the field of commercial arbitration where both parties to the arbitration agreement can breach the main contract, in investment arbitration the disputes giving rise to the investors’ claims against the State are caused by an action of the State itself.¹⁴⁸⁶ In other words, the exposure of the State has to be relativised, as it is the State itself who gives rise by its behaviour to this exposure. Rather *prospective and general consent is the price which the State has to pay for ensuring a certain security and foreseeability to the investors.*

8. THE AMICABLE NEGOTIATION PERIOD: PRECONDITION TO BE MET BEFORE CONSENT CAN BE PERFECTED

Often before consent can be perfected through a request of arbitration, investment treaties include other preconditions that are usually absent from commercial arbitrations.¹⁴⁸⁷ The cooling-off period differs from treaty to treaty.¹⁴⁸⁸ In order to minimise the number of cases which advance to arbitration, the offer of most States to arbitrate investment disputes is conditioned on the conclusion of an amicable

¹⁴⁸³ From the Jay Treaty of 1794 to the Iran-US Claims Tribunal, States authorised international tribunals to resolve regulatory disputes arising from one State’s treatment of the nationals of another and, in some cases, claims could be brought directly by investors; notwithstanding these historical tribunals did not involve *generalised* arbitration, based on comprehensive jurisdiction, because their authority was retrospective (Van Harten, pp. 99 *et seq.*).

¹⁴⁸⁴ An exception is when the State is acting *iure gestionis*.

¹⁴⁸⁵ Van Harten, p. 100.

¹⁴⁸⁶ *E.g.* expropriation.

¹⁴⁸⁷ Blackaby, *Tale*, para. 11-12.

¹⁴⁸⁸ McLachlan/Shore/Weiniger, para. 3.17.

negotiation period of between three¹⁴⁸⁹ to six¹⁴⁹⁰ months,¹⁴⁹¹ and sometimes even a twelve-month period.¹⁴⁹²

In practice, however, the *majority of tribunals have not penalised claimants for failing to observe these cooling-off periods*.¹⁴⁹³ Indeed, some tribunals have categorised this requirement as procedural rather than jurisdictional¹⁴⁹⁴ in order to break free from an excessive formalism that it might otherwise impose at a time when action needed to be taken.¹⁴⁹⁵ On the basis of this approach, if and when it is clear that the State does not intend to engage in discussions with the disgruntled investor, the *failure to observe the waiting period does not operate as a jurisdictional bar*.¹⁴⁹⁶ Two cases which decided the point differently are *Goetz v. Burundi*¹⁴⁹⁷ and *Enron and Ponderosa Assets v. Argentine Republic*,¹⁴⁹⁸ where the tribunals found that the cooling-off period was a jurisdictional, and not merely a procedural, requirement.¹⁴⁹⁹

The view that periods foreseen for negotiations are not of a jurisdictional nature is preferable, as by the time the tribunal makes a decision on this issue, any waiting period is likely to have elapsed and, therefore, insistence on compliance with the waiting period before the institution of proceedings would make little sense and would merely compel the claimant to start proceedings anew.¹⁵⁰⁰

It has been observed that *the amicable negotiation period is perhaps the other side of the coin of an open offer to arbitrate*.¹⁵⁰¹ Indeed, before being drawn into a long and expensive international procedure with potentially adverse political consequences, States have insisted on a prior notification and a cooling-off period within which they could seek to resolve the dispute amicably.¹⁵⁰² A cooling-off period of six months

¹⁴⁸⁹ See, e.g. UK Model BIT.

¹⁴⁹⁰ See, e.g. German Model BIT.

¹⁴⁹¹ Blackaby, *Tale*, para. 11-12.

¹⁴⁹² See, e.g. the Spain-Indonesia BIT.

¹⁴⁹³ McLachlan/Shore/Weiniger, para. 3.18.

¹⁴⁹⁴ See, e.g. *Ronald S. Lauder v. The Czech Republic*, Final Award (3 September 2001), 14 WTAM 35 (2002), para. 187; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, para. 100.

¹⁴⁹⁵ Blackaby, *Tale*, para. 11-13.

¹⁴⁹⁶ *Ibid.*

¹⁴⁹⁷ *Antoine Goetz and others v. Republic of Burundi*, Award embodying the parties' settlement agreement of 10 February 1999, 15 ICSID Review-FILJ 457 (2000).

¹⁴⁹⁸ *Enron Corporation y Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction (additional claim) of 2 August 2004.

¹⁴⁹⁹ McLachlan/Shore/Weiniger, para. 3.19.

¹⁵⁰⁰ Dolzer/Schreuer, pp. 248 *et seq.*

¹⁵⁰¹ See Blackaby, *Tale*, para. 11-12.

¹⁵⁰² *Ibid.*

before a disputing investor may submit a claim to arbitration is also provided for in Article 1120 NAFTA.¹⁵⁰³

9. THE INTERPRETATION OF CONSENT

Jurisdiction in international law *depends solely upon consent*.¹⁵⁰⁴ *This makes the question of interpretation so important.* Moreover, the question of the interpretation of investment treaties, and, thus, of the dispute settlement provisions contained therein, is relevant for a combination of reasons:

- first, because all investment treaties protect investments by granting investors certain rights which are materially identical or comparable; and
- second, because there is no doctrine of precedent.¹⁵⁰⁵

Although in international commercial arbitration there is no doctrine of precedent and no hierarchy of tribunals, the absence of a doctrine of precedent raises no difficulty because each decision involves a single contract or a series of contracts particularly negotiated between business partners.¹⁵⁰⁶ On the other hand, the position is different in treaty arbitration where a multiplicity of treaties often grants materially identical rights, and, even though their wording differs, the purpose of protecting and promoting investment is common to all of them.¹⁵⁰⁷ However, not only are the legal relationships to which the dispute resolution provisions refer and the processes of reaching consent different between international commercial arbitration and treaty arbitration, but so are the *objects* of interpretation themselves. Indeed, disputes on jurisdiction in investment arbitration are often not about interpreting a contract (arbitration agreement in the classical sense) between the parties, but rather the tribunal will interpret the statutes, treaties and conventions, to see whether the dispute falls within the ambit of the State's obligation to arbitrate in these instruments.¹⁵⁰⁸

¹⁵⁰³ See Alvarez H.C., pp. 403 *et seq.*

¹⁵⁰⁴ McLachlan/Shore/Weiniger, para. 7.168.

¹⁵⁰⁵ See Kaufmann-Kohler, *Interpretation*, paras 13-3 and 13-14. On the absence of the doctrine of precedent in international law, see also *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on Jurisdiction, Case No. ARB/02/6 (29 January 2004), para. 97. In the literature see, however, Gaillard/Banifatemi, *Precedent*.

¹⁵⁰⁶ Kaufmann-Kohler, *Interpretation*, para. 13-4.

¹⁵⁰⁷ *Ibid.*

¹⁵⁰⁸ See Lew/Mistelis/Kröll, para. 28-13.

While this section specifically deals with the interpretation of consent, it has to be observed that questions of interpretation will also be discussed in later sections of Chapter V., particularly with regard to most-favoured-nation clauses or umbrella clauses (under section 14.).

9.1. Approaches to investment arbitration and interpretation

In the literature a differentiation is made *between interpretation in private law and interpretation in public international law*.¹⁵⁰⁹ The approaches based on this differentiation *emphasise a reciprocal legal framework* in their conceptualisation of investment treaty arbitration:

- the first by treating it as a form of commercial arbitration;
- the second as public international law.¹⁵¹⁰

However, two more approaches have been pointed out which *recognise and focus on the regulatory character* of the underlying relationship between investors and State:

- the first does so by comparing investor protection to the protection of human rights;
- the second by applying a more prudential public law framework which moderates State liability in order to preserve governmental discretion.¹⁵¹¹

In the case of these latter two approaches the emphasis with regard to interpretation is more on the *question about inclination in interpreting*. In the first approach the inclination leans more towards an extensive interpretation in view of protecting the investor, whilst in the second approach the inclination leans more towards a restrictive interpretation in view of moderating the State's liability.

9.2. Interpretation under international or domestic law?

When the exact reach and scope of consent to ICSID's jurisdiction is unclear, the question arises as to how an expression of consent has to be interpreted:

- one possible approach is to treat the agreement between the parties on consent in analogy to treaties and to apply the established tenets of treaty interpretation,¹⁵¹² in particular Articles 31-32 of the Vienna Convention on the Law of Treaties (VCLT);

¹⁵⁰⁹ See, e.g. Kaufmann-Kohler, *Interpretation*, paras 13-10 *et seq.*; Kaufmann-Kohler, *Precedent*, pp. 369 *et seq.*; moreover, see also Van Harten, pp. 124 *et seq.*

¹⁵¹⁰ See Van Harten, p. 121.

¹⁵¹¹ *Ibid.*

¹⁵¹² On treaty interpretation, see, e.g. Gardiner.

- another approach would consist of interpreting consent agreements in the framework of the law applicable to the dispute between the parties.¹⁵¹³

This issue arose in particular in *SPP(ME) Ltd. and SPP Ltd. v. Egypt*¹⁵¹⁴ where jurisdiction was based on a provision in Egyptian legislation and not on a treaty. While Egypt maintained that the jurisdictional issues in the case were governed by Egyptian law either by virtue of an agreement between the parties or under the second sentence of Article 42(1) ICSID Convention, the claimants argued that the jurisdictional issues must be resolved by the application of international law.¹⁵¹⁵ The ICSID clause in the Egyptian law should therefore be construed with the help of the rules of interpretation of treaties as codified in the Vienna Convention on the Law of Treaties.¹⁵¹⁶

9.2.1. *Vienna Convention on the Law of Treaties*

It has been observed that the approach to treat the agreement between the parties on consent by analogy with treaties and, thus, to apply the established tenets of treaty interpretation, in particular Articles 31-33 VCLT, would appear particularly suitable where the original clause providing for settlement under the ICSID Convention is contained in a bilateral investment treaty or a multilateral convention.¹⁵¹⁷ Indeed, the aforementioned articles have been widely accepted:

- as stating rules of customary international law on treaty interpretation; and,
- by investment arbitration tribunals, as constituting rules of interpretation which are binding on them in the interpretation of investment treaties, whether by virtue of being directly binding on the parties to the BIT as treaty rules, or as customary international law.¹⁵¹⁸

9.2.1.1. **Article 31 VCLT**

Most tribunals start by invoking Article 31 VCLT when interpreting treaties.¹⁵¹⁹ The VCLT's approach to the interpretation of Article 31 VCLT was summarised by the

¹⁵¹³ Schreuer, *Convention*, para. 374.

¹⁵¹⁴ See the two awards on jurisdiction, 27 November 1985 and 14 April 1988, *Southern Pacific Properties Ltd (Middle East) et al. v. Arab Republic of Egypt*, XVI YBCA 16 (1991).

¹⁵¹⁵ Schreuer, *Convention*, para. 376.

¹⁵¹⁶ Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 140/1.

¹⁵¹⁷ Schreuer, *Convention*, para. 374.

¹⁵¹⁸ McLachlan/Shore/Weiniger, para. 7.64.

¹⁵¹⁹ Dolzer/Schreuer, p. 31. See, e.g. *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005).

tribunal in *AdT v. Bolivia*¹⁵²⁰ as follows: “Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with:

1. the ordinary meaning of the terms of the treaty,
2. in their context, and
3. in light of the treaty’s object and purpose, and by cycling through this three steps inquiry iteratively closes in upon the proper interpretation”.¹⁵²¹

Tribunals have often interpreted investment treaties in light of their object and purpose, frequently by looking at their preambles.¹⁵²² This development, which has typically led to an interpretation that is favourable to the investor,¹⁵²³ has also come under criticism, and one tribunal has warned against overextending the method of looking at object and purpose.¹⁵²⁴

9.2.1.2. Article 32 VCLT

Occasionally, tribunals will refer to the supplementary means of interpretation contained in Article 32 VCLT.¹⁵²⁵ Indeed, if the primary means of interpretation of Article 31 VCLT lead to an obscure, or manifestly absurd result or to one that needs confirmation, the tribunals may rely on supplementary means under Article 32 VCLT, *i.e.* on the *travaux préparatoires* and the circumstances of the conclusion of the treaty.¹⁵²⁶

However, while it is rare for bilateral negotiations to produce the kind of explanatory reports,¹⁵²⁷ or official records of plenary debates, which are characteristic of multilateral negotiation, when the confidential working papers on the negotiation of NAFTA were

¹⁵²⁰ *Aguas del Tunari S.A. v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005.

¹⁵²¹ McLachlan/Shore/Weiniger, para. 3.68.

¹⁵²² Dolzer/Schreuer, p. 32.

¹⁵²³ The *Amco v. Indonesia* tribunal in interpreting the ICSID Convention pointed out that investment protection was also in the longer term interest of host States (see *Amco Asia Corp. and others v. Republic of Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389, para. 23).

¹⁵²⁴ See *Plama Consortium Ltd et al. v. Republic of Bulgaria*, Decision on Jurisdiction, 8 February 2005, 44 ILM 721 (2005), para. 193 (see Dolzer/Schreuer, p. 32).

¹⁵²⁵ See, *e.g.* *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (see Dolzer/Schreuer, p. 32).

¹⁵²⁶ Kaufmann-Kohler, *Interpretation*, para. 13-9.

¹⁵²⁷ The negotiating history of BITs is typically not documented (Dolzer/Schreuer, p. 33).

produced in *Pope & Talbot v. Canada*,¹⁵²⁸ they did little to illuminate the matters in dispute.¹⁵²⁹ Indeed, references to *travaux préparatoires* in investment arbitration have not proved fruitful:

- in *AdT v. Bolivia*¹⁵³⁰ where the tribunal requested evidence of the negotiation history of the Netherlands/Bolivia BIT, but it received very limited information of little use;
- in *Pope & Talbot v. Canada*¹⁵³¹ where the tribunal received a substantial amount of information but it did little to illuminate the matters in dispute.¹⁵³²

Conversely, the drafting history of the ICSID Convention is documented in detail, readily available, and easily accessible through analytical index.¹⁵³³

9.2.1.3. Comments

It has been argued that in practice the VCLT is only of limited use in giving guidance to a tribunal in its interpretive task—problems arise because the VCLT’s rules of construction are capable of supporting a wide range of potential interpretations. Indeed, the fact that both parties to a dispute usually rely on its provisions is a good indication of its inherent flexibility.¹⁵³⁴

9.2.2. Law applicable to the dispute

In the absence of an agreement between the parties on choice of law, the law applicable to the dispute between the parties would be the law of the host State and applicable rules of international law.¹⁵³⁵ A method whereby expressions of consent are interpreted in the framework of domestic law appears particularly attractive if the original consent clause is contained in domestic legislation.¹⁵³⁶

¹⁵²⁸ *Pope & Talbot Inc. v. The Government of Canada*, Interim Award (26 June 2000) and Final Award (10 April 2001). *Pope & Talbot, Inc. v. Canada*, NAFTA/UNITRAL Tribunal, Damages Award (31 May 2002).

¹⁵²⁹ McLachlan/Shore/Weiniger, para. 7.72.

¹⁵³⁰ *Aguas del Tunari S.A. v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005.

¹⁵³¹ *Pope & Talbot Inc. v. The Government of Canada*, Interim Award (26 June 2000) and Final Award (10 April 2001). *Pope & Talbot, Inc. v. Canada*, NAFTA/UNITRAL Tribunal, Damages Award (31 May 2002).

¹⁵³² McLachlan/Shore/Weiniger, para. 3.70.

¹⁵³³ Dolzer/Schreuer, p. 33.

¹⁵³⁴ McLachlan/Shore/Weiniger, para. 3.71.

¹⁵³⁵ See Article 42(1) ICSID Convention.

¹⁵³⁶ Schreuer, *Convention*, para. 374.

9.2.3. Comments

9.2.3.1. In general

It has been observed that both these approaches, though tempting at first sight, are not convincing, as:

- an ICSID clause in a treaty is only the first step towards consent between the parties (the perfected consent is an agreement between the host State and the investor), as the host State's offer must be accepted in writing by the investor;
- in the same vein a provision in the host State's domestic legislation referring to dispute settlement under the ICSID Convention is transformed into consent between the parties merely upon its acceptance by the investor; and
- an investment agreement between the host State and the investor containing a consent clause is neither a treaty nor simply a contract under domestic law.¹⁵³⁷

Therefore, the *SPP Ltd. v. Egypt* tribunal,¹⁵³⁸ dealing with Egyptian national investment law, refused to accept the contentions of either party and chose to adopt a middle route: the fact that the ICSID clause was based on Egyptian legislation did not mean that this made other provisions of Egyptian law applicable to the jurisdictional issues, nor did the tribunal accept that the ICSID clause should be interpreted by the application of rules of treaty interpretation.¹⁵³⁹

9.2.3.2. In the case of consent clauses contained in contracts or investment agreements

In the case of contracts or investment agreements the same law governing the substantive validity of arbitration agreements in commercial arbitration should be applicable.¹⁵⁴⁰ Indeed, in such a situation the consent clause is an arbitration agreement specific by its very nature and shaped to meet the needs of a given transaction. Also, the interpretation should be based on that law.

9.2.3.3. In the case of treaties

It has been observed that while an arbitration agreement in a contract is specific by its very nature, as it is shaped to meet the needs of a given transaction, dispute resolution

¹⁵³⁷ Schreuer, *Convention*, para. 375.

¹⁵³⁸ *SPP(ME) Ltd. and SPP Ltd. v. Egypt*, Decision on Jurisdiction, 14 April 1988.

¹⁵³⁹ Schreuer, *Convention*, para. 377.

¹⁵⁴⁰ See under III.3.3.

provisions in treaties define jurisdiction in the abstract for an unlimited number of future investments.¹⁵⁴¹ Moreover, it has also been argued that the conditions that attach to the investor's consent flow not from an agreement to which the investor is a party but from an inter-State bargain, being therefore a consent of privilege rather than reciprocal obligation.¹⁵⁴² Indeed, the conditions of access to the system are stipulated by the States parties to the relevant investment treaty as part of their agreement to establish the investment treaty as a governing arrangement.¹⁵⁴³

However, perhaps already at the time when the investor makes his investment, or, at least, at the time *when the investor introduces a request for arbitration* (instituting proceeding), *a transformation process takes place*. In fact, while it is true that in treaty arbitration proceedings only one of the drafters of the BIT is present, *i.e.* the respondent State, and that for the claimant the dispute resolution provision is *res inter alios acta*,¹⁵⁴⁴ it has nevertheless to be considered that the investment, and the possible dispute arising out of it, is an individual and concrete (specific) one. Therefore, in treaty arbitration the dispute is ultimately not between the drafters of the BIT but between an investor and a State. Indeed, the *(host) State gives double consent*:¹⁵⁴⁵

- a consent which is general and abstract, to another State—in the BITs—or to various other States—in multilateral treaties—to use arbitration as a dispute resolution mechanism in investment disputes with investors of its counterpart/s (the other/s State/s); and
- a consent to the investor of its counterpart/s (the other State in the case of BITs or the others States in the case of a multilateral treaty) to resolve an individual and concrete investment dispute through arbitration. This consent arises from a standing offer (general and abstract consent) contained in a BIT or a multilateral treaty which is then transformed with the acceptance of the investor (individual and concrete consent) in a consent which relates to an individual and concrete dispute.¹⁵⁴⁶

¹⁵⁴¹ Kaufmann-Kohler, *Interpretation*, para. 13-12.

¹⁵⁴² Van Harten, p. 70.

¹⁵⁴³ *Ibid.*

¹⁵⁴⁴ See Kaufmann-Kohler, *Interpretation*, para. 13-12.

¹⁵⁴⁵ The expression “double consent” has also been used, however in a slightly different way, to express the consent given by the State on the one hand to the ICSID Convention and on the other hand in the arbitration agreement (Lew/Mistelis/Kröll, para. 28-46, footnote 53). Cremades, p. 153, speaks in this context of dual or two-phase consent.

¹⁵⁴⁶ See also Article 25(1) ICSID Convention: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, *between a Contracting State* (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a *national of another Contracting State*, which the *parties to the dispute consent in writing to submit to the Centre*. When the parties have given their consent, no party may withdraw its consent unilaterally”.

Under investment treaties *the investor's consent is always specific, just as the State's consent is always general*,¹⁵⁴⁷ even though the latter then gets transformed into a consent which relates to an individual and concrete dispute. Due to the particularity of this transformation process of the State's consent, *a two-stage interpretation process seems to be appropriate*:

- in the first stage, the general and abstract BIT/multilateral treaty in which the respondent State has given its general and abstract consent (standing offer) has to be interpreted; and, then,
- in the second stage, the interpretation of the individual and concrete consent of the investor takes place as well as the consent given by the State in light of the individual and concrete dispute which has arisen.¹⁵⁴⁸

The view that has been expressed that in treaty arbitration more objective criteria will by essence prevail and the subjective element will play a lesser role, because for the claimant the dispute resolution provision is *res inter alios acta*,¹⁵⁴⁹ should in my opinion be differentiated. In fact, while in the *first stage* of the interpretation process there is not a meeting of the minds of individuals or corporations, there is a meeting of the minds between two (in the case of BITs) or more (in the case of multilateral treaties) States. Therefore, subjective elements may play a role. Moreover, also in the *second stage*, where there is a concrete investment, or where a concrete dispute has arisen, subjective elements may play a role, particularly in the interpretation of the investor's consent.

9.2.3.4. In the case of unilaterally enacted national legislation

As with treaty arbitration, dispute resolution provisions contained in national legislations define jurisdiction in the abstract for an unlimited number of future investments. However, contrary to treaty arbitration, the conditions that attach to the investor's consent flow neither from an agreement to which the investor is a party nor from an inter-State bargain. Indeed, the standing offer of the State (consent) derives from unilaterally enacted legislation.

In *SPP Ltd. v. Egypt* the issue was, therefore, whether certain unilaterally enacted legislation had created an international obligation under a multilateral treaty (ICSID).

¹⁵⁴⁷ Van Harten, p. 69.

¹⁵⁴⁸ The standard arbitration clauses in BITs make a clear distinction between investment disputes arising between investors and host States, and disputes concerning the interpretation and application of the BIT arising between the States parties to the BIT (Crawford, p. 362).

¹⁵⁴⁹ See Kaufmann-Kohler, *Interpretation*, para. 13-12.

This involved statutory and treaty interpretation as well as certain aspects of international law governing unilateral juridical acts.¹⁵⁵⁰ In dealing generally with the interpretation of dispute settlement provisions in national investment laws the tribunal held that it was not bound by the interpretation of the provisions submitted by the State party which drafted them. These provisions are governed by the principles of statutory interpretation which may be influenced by the rules of interpretation of treaty law; this is particularly true where the provisions of the national laws relate to obligations under international treaties.¹⁵⁵¹ Also of relevance are the principles of international law applicable to unilateral declarations.¹⁵⁵²

The *SPP* tribunal proceeded to interpret the jurisdictional clause with the help of general principles of statutory interpretation, by relying on a decree implementing the original legislation, by reference to historical considerations and in the light of its object and purpose. On the other hand, the dissenting opinion, while agreeing that the question of interpretation of the jurisdictional clause was not governed by Article 42 ICSID Convention which only deals with the substance of the dispute, argued that the jurisdictional clause in the Egyptian legislation had only to be construed in its context as national law and that, consequently, rules of treaty interpretation and the principles of international law were inapplicable.¹⁵⁵³

9.3. Inclinations in interpreting?

Closely related to a treaty's object and purpose is the issue of a restrictive or effective interpretation of treaties.¹⁵⁵⁴ The question of whether consent should be construed in a restrictive or effective way primarily affects the relationship between host State and investor. Indeed, the fact that the State, in giving prospective consent in an investment treaty, exposes itself to claims by any investor with economic interests that are subject to regulation by the State may lead to arguments that the State's general consent should be interpreted restrictively. Moreover, the fact that arbitral proceedings constitute a derogation from the right to have recourse to national courts may also lead to the same conclusion. On the other hand, the need for security and foreseeability for investors could result in the opposite conclusion (extensive interpretation).

¹⁵⁵⁰ Schreuer, *Convention*, para. 377.

¹⁵⁵¹ Lew/Mistelis/Kröll, para. 28-20.

¹⁵⁵² *SPP Ltd. v. Egypt*, Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 143.

¹⁵⁵³ Schreuer, *Convention*, para. 377.

¹⁵⁵⁴ Dolzer/Schreuer, p. 32.

While some tribunals seem to have favoured a restrictive interpretation of treaty provisions that led to a limitation of the State's sovereignty,¹⁵⁵⁵ others have rejected a restrictive interpretation, at times favouring an interpretation that gives full effect to the rights of investors.¹⁵⁵⁶ Yet other tribunals have distanced themselves from either approach and have followed a balanced approach to interpretation.¹⁵⁵⁷

9.3.1. *Restrictive interpretation*

It has been observed that a recurrent theme in the pleadings before ICSID tribunals is the argument that consent by the host State to the Centre's jurisdiction should be construed restrictively.¹⁵⁵⁸ This argument is normally brought forward by the State party interested in moderating State liability in order to preserve governmental discretion. Thus, in *Holiday Inns v. Morocco*, the respondent Government insisted on the need for a restrictive interpretation of a State's consent to arbitrate—which has to be seen as a derogation from its sovereignty.¹⁵⁵⁹ Also in *Amco v. Indonesia* the tribunal, which was confronted with the argument that consent given by a sovereign State to an arbitration convention amounted to a limitation of its sovereignty and should be construed restrictively,¹⁵⁶⁰ rejected this contention categorically.¹⁵⁶¹

In *SOABI v. Senegal*,¹⁵⁶² the Government argued that Article 25 ICSID Convention had to be interpreted strictly “as with any provision derogating from general rules of municipal law”.¹⁵⁶³ The tribunal noted that consent to arbitral proceedings constituted a derogation from the right to have recourse to national courts. Such consent should not be presumed. But it *refused* to accept the consequence that the interpretation of an

¹⁵⁵⁵ *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406, para. 171; *Noble Ventures v. Romania*, Award, 12 October 2005, para. 55.

¹⁵⁵⁶ *Methanex v. United States*, Preliminary Award on Jurisdiction, 7 August 2002, paras 103-105; *Agua del Tunari, S.A. v. Bolivia*, Decision on Jurisdiction, 21 October 2005, para. 91; *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518, para. 116; *Eureko v. Poland*, Partial Award, 19 August 2005, 12 ICSID Reports 335, para. 248; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, Decision on Jurisdiction, 16 May 2006, paras 59 and 64.

¹⁵⁵⁷ Dolzer/Schreuer, pp. 32 *et seq.*

¹⁵⁵⁸ Schreuer, *Convention*, para. 380. See also *UNCTAD*, p. 33.

¹⁵⁵⁹ Lalive, *World Bank*, pp. 153 and 158.

¹⁵⁶⁰ *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 393, 397.

¹⁵⁶¹ *Ibid.*, p. 394.

¹⁵⁶² *SOABI v. Senegal*, Decision on Jurisdiction, 1 August 1984.

¹⁵⁶³ *SOABI v. Senegal*, Award, 25 February 1988, 2 ICSID Reports 185, 205.

expression of *consent should be stricter with regard to the consent of a State than with regard to that of an investor*.¹⁵⁶⁴

In *SPP v. Egypt*¹⁵⁶⁵ the argument of the restrictive interpretation of jurisdictional instruments was raised once again, this time in relation to an ICSID clause in national legislation. The tribunal found that there was no presumption of jurisdiction, particularly where a sovereign State was involved, and that jurisdiction only existed insofar as consent thereto had been given by the parties; equally, there was no presumption against the conferment of jurisdiction with respect to a sovereign State.¹⁵⁶⁶ Therefore, “jurisdictional instruments are to be *interpreted* neither restrictively nor expansively, but rather *objectively and in good faith*”.¹⁵⁶⁷

It has been observed that in investment arbitration, due to the circumstances that consent has to be constructed from the standing consent given by the host State through the treaty and the subsequent consent given by the investor at the time the claim is submitted to arbitration, it is particularly important to construe the ambit of the host State’s consent strictly.¹⁵⁶⁸ *I do not agree with this view which stems from the assumption that there is no meeting of the minds between investor and host State*.¹⁵⁶⁹ Indeed also in treaty arbitration there is a meeting of the minds, even though of a different type than the one in commercial arbitration. A meeting of the minds only presupposes that there is a valid offer which can be accepted, whilst the temporal sequence or the fact that the outcome is not written down in a single document do not really matter.

One could even argue that the consent between the host State and investor should, following the principle of “*in dubio contra stipulatorem*” (or interpretation *contra proferentem*), be interpreted in an extensive way when the wording of the BIT is not clear. Indeed, the investor has no influence with regard to the wording used for dispute resolution provisions contained in BITs, even though the standing offer is not the result of a unique drafter (host State) but of an agreement (international treaty) between two States. However, it has also to be asked whether this principle should be applied to a State-investor relationship. In my opinion the latter question has to be answered in the

¹⁵⁶⁴ Schreuer, *Convention*, para. 383.

¹⁵⁶⁵ *SPP(ME) Ltd. and SPP Ltd. v. Egypt*, Decision on Jurisdiction, 14 April 1988.

¹⁵⁶⁶ Schreuer, *Convention*, para. 384.

¹⁵⁶⁷ *SPP v. Egypt*, Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 143/4.

¹⁵⁶⁸ McLachlan/Shore/Weiniger, para. 7.168.

¹⁵⁶⁹ *Ibid.*

affirmative. Indeed, with the BIT the host State not only concludes an international treaty with the investor's State, but in the meantime it also makes a standing offer to potential investors of the latter State. Nevertheless, the use of *the principle "in dubio contra stipulatorem"* should not lead to an inclination in interpreting, but should be a rule when the wording of the standing offer is unclear.

9.3.2. *Effective/extensive interpretation*

While the respondent governments have insisted on the need for a restrictive interpretation of a State's undertakings to arbitrate which had to be seen as a derogation from its sovereignty, the claimants have at times attempted to invoke an alleged principle of interpretation in the opposite sense:¹⁵⁷⁰ that of effective interpretation epitomised in the Latin phrase *ut res magis valeat quam pereat*.¹⁵⁷¹ That said, even where tribunals do not boldly declare their colours for the investor rights position, they advance it none the less by the common practice of resolving doubts arising from ambiguity in the treaty in favour of investor protection. A clear statement of this presumption was enunciated by the tribunal in *SGS v. Philippines*:

"The object and purpose of the BIT supports an effective Interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended 'to create and maintain favourable conditions for Investments by Investors of one Contracting Party in the territory of the other'. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments".¹⁵⁷²

The same presumption has been adopted by other tribunals,¹⁵⁷³ usually to support a finding in favour of jurisdiction.¹⁵⁷⁴ *The adoption of these interpretive presumptions in favour of investor protection evokes the rights-based school of interpretation* that deems it appropriate to resolve legal uncertainty *in favour of the protection of individuals from the State*.¹⁵⁷⁵

¹⁵⁷⁰ See, e.g. in *Holiday Inns S.A. and others v. Morocco* (see Lalive, *World Bank*, p. 153).

¹⁵⁷¹ Schreuer, *Convention*, para. 380. See also *UNCTAD*, p. 33.

¹⁵⁷² *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on Jurisdiction, Case No. ARB/02/6 (29 January 2004), para. 116.

¹⁵⁷³ For a listing of cases, see Van Harten, p. 138, footnote 78.

¹⁵⁷⁴ Van Harten, p. 138.

¹⁵⁷⁵ *Ibid.*

9.3.3. *Objective interpretation*

It has been observed that neither of the two presumptions or alleged principles of interpretations carry much weight when applied to expressions of consent to the jurisdiction of ICSID, because neither a principle of restrictive interpretation nor a doctrine of “*effet utile*” will do justice to a consent clause.¹⁵⁷⁶

In *Amco v. Indonesia*,¹⁵⁷⁷ the tribunal was confronted with the argument that the consent given by a sovereign State to an arbitration convention amounting to a limitation of its sovereignty should be construed restrictively and stated that an arbitration agreement “*is not to be construed restrictively, nor as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and respect the common will of the parties*”.¹⁵⁷⁸ Also, in *SPP v. Egypt* the tribunal held that “jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if—but only if—the force of the arguments militating in favour of it is preponderant”.¹⁵⁷⁹ Therefore, expressions of consent to ICSID’s jurisdiction will rather have to be read on their own merits and with the help of the usual methods of interpretation both national and international.¹⁵⁸⁰

9.4. Principles of interpretation

9.4.1. *Pacta sunt servanda*

The *Amco* tribunal not only held that a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact broadly or liberally, but also that it is to be construed in a way which leads to finding and respecting the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common to all systems of internal law and to international law.¹⁵⁸¹ The principle of *pacta sunt servanda* is considered to be a principle forming part of the *lex mercatoria*.¹⁵⁸²

¹⁵⁷⁶ UNCTAD, p. 34.

¹⁵⁷⁷ *Amco Asia Corp and others v. Republic of Indonesia*, Decision on Jurisdiction, 25 September 1983, 89 ILR 379 (1992), 1 ICSID Reports 389 (1993).

¹⁵⁷⁸ *Amco v. Indonesia*, Decision on Jurisdiction, p. 394. See also Weiniger, para. 12-8.

¹⁵⁷⁹ *SPP v. Egypt*, Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 143/4.

¹⁵⁸⁰ Schreuer, *Convention*, para. 385.

¹⁵⁸¹ ICSID Award in Case No. ARB/81/1, *Amco Asia Corp v. Republic of Indonesia*, 21 ILM 1022 (1985), 134, p. 398.

¹⁵⁸² See Lew/Mistelis/Kröll, paras 18-56 *et seq.*

It has been critically observed that the reasoning of the *Amco* tribunal, in rejecting Indonesia's argument that the tribunal should adopt a restrictive interpretive approach in favour of the sovereign, by applying instead the principle of *pacta sunt servanda* between investor and State (*i.e.* party autonomy), may be appropriate in contract-based arbitration because, when interpreting an agreement to arbitrate between private parties to a contract or between States parties to a treaty, the underlying reciprocity of the private law framework is maintained.¹⁵⁸³ However, a problem arises when this analysis is transferred into the realm of treaty arbitration—as has been the case in numerous awards¹⁵⁸⁴—and more broadly when the specific consent of an investor and the general consent of the State are equated to construct artificially an agreement to arbitrate, as if in a commercial arbitration.¹⁵⁸⁵

9.4.2. Interpretation in good faith

In *Amco v. Indonesia*¹⁵⁸⁶ the tribunal held that as a general principle of law “any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged”.¹⁵⁸⁷ Moreover, it has to be observed that the theoretical foundation underlying the concept of estoppel¹⁵⁸⁸ is that of good faith.¹⁵⁸⁹

9.4.3. According the spirit of ICSID: teleological approach

The *Amco* tribunal also expressed the view that the proper method for interpretation of the consent agreement is to read it in the spirit of the ICSID Convention and in light of

¹⁵⁸³ Van Harten, p. 125.

¹⁵⁸⁴ See, *e.g.* *AES Corporation v. Argentine Republic*, Decision on Jurisdiction, 26 April 2005, ICSID Case No. ARB/02/17, para. 60; *CSOB v. Slovak Republic*, Decision on Jurisdiction, 24 May 1999, para. 34; *Ethyl Corporation v. Government of Canada*, Decision on Jurisdiction, 24 June 1998, 38 ILM 708, para. 55. *Mondev International Ltd. v. United States of America*, Decision on Merits, 11 October 2002, 42 ILM 85, 6 ICSID Rep. 192, 15(3) WTAM 273, para. 43.

¹⁵⁸⁵ See, *e.g.* *Ethyl v. Canada*, Decision on Jurisdiction, 24 June 1998, paras 59-60; *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, Decision on Jurisdiction, 29 January 2004, (2004), 8 ICSID Rep. 518, 16(3) WTAM 91, para. 145 (Van Harten, p. 125).

¹⁵⁸⁶ *Amco Asia Corp and others v. Republic of Indonesia*, Decision on Jurisdiction, 25 September 1983, 89 ILR 379 (1992), 1 ICSID Reports 389 (1993), para. 14.

¹⁵⁸⁷ *Amco v. Indonesia*, Decision on Jurisdiction, p. 394.

¹⁵⁸⁸ On “estoppel” in international law, see Brownlie, pp. 643 *et seq.*

¹⁵⁸⁹ See Hirsch, p. 54; Brownlie, p. 644.

its objectives.¹⁵⁹⁰ *ICSID arbitration is in the interest of both parties*, as expressed in the first paragraph of the Convention's Preamble. Indeed, *the investor's interest in submitting investment disputes to international arbitration is matched by a parallel interest of the host State*: to protect investments is to protect the general interests of development and of developing countries.¹⁵⁹¹

9.5. Applicability of consent clauses to successive legal instruments

As investment operations frequently involve complex arrangements expressed in a number of successive agreements, a special problem of interpretation is the applicability of consent clauses to successive legal instruments.¹⁵⁹² These agreements may be concluded in stages and over a period of time, and, although economically interrelated, they are legally distinct and often have different features.¹⁵⁹³ Sometimes, ICSID clauses are included in some of these agreements but not in others.¹⁵⁹⁴ If ICSID clauses are neither repeated nor incorporated by reference in related agreements, the issue arises as to whether the parties' consent to ICSID's jurisdictions extends to matters regulated by these related agreements.¹⁵⁹⁵

ICSID tribunals have dealt with this question in a number of cases.¹⁵⁹⁶ These cases suggest that *ICSID tribunals are inclined to take a broad view of consent clauses where the agreement between the parties is reflected in several successive instruments*, and, thus, expressions of consent are not applied narrowly to the specific document in which they appear but are read in the context of the parties' overall relationship.¹⁵⁹⁷ It has been observed that while the need to settle an investment dispute finally and comprehensively would make any other solution impracticable, on the other hand, this approach can be maintained only to the extent that it reflects the parties' presumed intentions.¹⁵⁹⁸

¹⁵⁹⁰ UNCTAD, p. 33.

¹⁵⁹¹ *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, p. 400. This teleological approach to interpretation has been to some extent also followed in *SPP(ME) Ltd. and SPP Ltd. v. Egypt*, Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 158. Schreuer, *Convention*, para. 382.

¹⁵⁹² UNCTAD, p. 34.

¹⁵⁹³ Schreuer, *Convention*, para. 361.

¹⁵⁹⁴ See UNCTAD, p. 34.

¹⁵⁹⁵ Delaume, *How to Draft*, pp. 171 *et seq.* Schreuer, *Convention*, para. 361.

¹⁵⁹⁶ *Holiday Inns S.A. and others v. Morocco*, Decision on Jurisdiction, 12 May 1979; Lalive, *World Bank*, pp. 123, 156-159; *Klöckner v. Cameroon*, Award, 21 October 1983, Decision on Annulment, 3 May 1985, 2 ICSID Reports 13-18, 65-69, 89-93, 97-117; *SOABI v. Senegal*, Decision on Jurisdiction, 1 August 1984, Award, 25 February 1988, 2 ICSID Reports 185-188, 204-208, 293-322.

¹⁵⁹⁷ See UNCTAD, pp. 34 *et seq.*

¹⁵⁹⁸ *Ibid.*

9.6. Comments

Increasingly counsel and arbitrators who have a commercial or private law background, and are used to construing arbitration agreements by application of the rules of contract interpretation, also act in investment arbitrations.¹⁵⁹⁹ It has been observed that, even though it may be too early to make an assessment, there are signs pointing in the direction that the increasing presence on international tribunals of arbitrators trained in commercial arbitration will influence interpretation methods.¹⁶⁰⁰

It should also be underlined that, similarly to commercial arbitration, there are *different schools of thought for interpretation in public international law*: according to the subjective school, the goal of the interpretation is to ascertain the intent; pursuant to the objective school, the goal of interpretation must be to ascertain the meaning of the text, there being a presumption that the parties' intent is reflected in this text; and in the teleological school, the focus is primarily placed on the object and purpose of the treaty.¹⁶⁰¹

Moreover, *the borders between* what is classically considered to be *public international law*, on the one hand, *and private international law respectively commercial/private law*, on the other hand, *are getting more and more diffuse*. This phenomenon is supported by the fact that in the globalised economic arena the State is often an economic player¹⁶⁰² as is the investor. Thus, it may nowadays be questioned if, for instance, the relationship between a State and a multinational (or transnational) corporation is really a “vertical” one. Indeed, while with a view to the State's sovereignty and of the “law-making” process this may be true, from an optic of bargaining powers and allocation of economic resources the relationship would rather seem to be a “horizontal” one.

While, on the one hand, there are structural differences between commercial and investment arbitration, on the other hand, it should also be clearly differentiated in the case of the latter type of arbitration between:

¹⁵⁹⁹ Kaufmann-Kohler, *Interpretation*, para. 13-10.

¹⁶⁰⁰ See, e.g. a reference to the UNCITRAL Model Law on Commercial Arbitration in the context of the interpretation of the MFN-clause in *Plama v. Bulgaria* (Kaufmann-Kohler, *Interpretation*, para. 13-13).

¹⁶⁰¹ Kaufmann-Kohler, *Interpretation*, para. 13-11; Sinclair I., pp. 114 *et seq.*; Brownlie, p. 602 *et seq.*

¹⁶⁰² See, e.g. the phenomenon of State funds.

- situations where the host State gives its standing offer—as is often, but not always,¹⁶⁰³ the case—on the basis of an international treaty with another or other State/s (BITs or multilateral treaty); and
- situations where there is an agreement to arbitrate between the host State and the investors.

Indeed, the situation in investment arbitration, where the conditions that attach to the investor's consent do not flow from an agreement to which the investor is a party but from an inter-State bargain,¹⁶⁰⁴ is to a certain extent comparable to that of arbitration clauses contained in standard form contracts where the conditions are not really bargained and there is a sort of general consent (open offer to arbitrate) from which has drafted the standard form contracts. As the consumer accepts the arbitration clause contained in standard form contracts, the investor accepts the conditions made by a standing offer of the host State. Nevertheless, *both consumer and investor have a possibility of choice, albeit, possibly, only a limited one*. Indeed, although this will not be the primary criterion when deciding to invest in a particular country, the investor is able to decide whether to invest in one country or another, therefore accepting arbitration, when this form of dispute resolution method is provided for in the BIT between his home country and the host State. Furthermore, the fact that the investor may also not accept arbitration as a dispute resolution form is even truer when “fork in the road” provisions are contained in BITs. Indeed, in those cases the investor may also choose the State courts as dispute resolution *fora*.

Moreover, in investment arbitration the standing offer of arbitration as a neutral forum for solving disputes is provided for in a treaty between the host State and the *investor's State*. In other words, *the standing offer of the host State stems from a bargained international treaty with the investor's State which is often a strong capital-exporting State*. Therefore, the issue encountered in consumer arbitration—of an abuse of the bargaining power and, thus, of the validity of the arbitration agreement—is in investment arbitration, with regard to the relation between investor and host State, attenuated by the fact that the standing offer stems from a bargained international treaty.

It can also be observed that, with the expanding network of BITs, *arbitration becomes, increasingly, not only the neutral forum but also the natural forum for solving international investment disputes*, and that, furthermore, there are harmonisation

¹⁶⁰³ See national investment laws.

¹⁶⁰⁴ See Van Harten, p. 68.

tendencies going on.¹⁶⁰⁵ These tendencies also lead to the question about precedents in investment arbitration. In fact, while a coherent case law strengthens the predictability of decisions and enhances their authority, in investment arbitration each tribunal is constituted *ad hoc* for the particular case, and it is therefore more difficult to develop a consistent case law than in international courts such as the ICJ or the ECHR.¹⁶⁰⁶ Thus, although discussion of previous cases and of interpretations adopted in them is a regular feature in almost every decision, at the same time it is also well-established that tribunals in investment arbitration are not bound by previous decisions of other tribunals.¹⁶⁰⁷ Nevertheless, in *AES Corp. v. Argentina*¹⁶⁰⁸ the tribunal entered into an extensive discussion of the value of previous decisions as “precedents” and held that:

“each decision or award delivered by an ICSID Tribunal is only binding on the parties to the dispute settled by this decision or award. There is so far no rule of precedent in general international law; nor is there any within the specific ICSID system”.¹⁶⁰⁹

Finally, with regard to the inclination in interpreting, the structure of investment arbitration, as well as its development, and the interests at stake, *do not really make it appear as necessary to interpret consent with a particular inclination (neither restrictive nor expansive)*. This is even truer considering that, as was held by the *Amco* tribunal, the fundamental principle of *pacta sunt servanda* is common to all systems of internal law and to international law.¹⁶¹⁰

10. TREATY v. CONTRACT CLAIMS

The distinction between contract claims and treaty claims has emerged in many investment arbitrations.¹⁶¹¹ It has been observed that no issue in the field of investment arbitration is more fundamental, or more disputed, than the distinction between treaty

¹⁶⁰⁵ The tribunal in *Saipem v. Bangladesh*, Decision on Jurisdiction, 21 March 2007, para. 67, saw it as its duty to contribute to a harmonious development of law.

¹⁶⁰⁶ Dolzer/Schreuer, p. 35 *et seq.*

¹⁶⁰⁷ Tribunals have pointed out repeatedly that they are not bound by previous cases. See *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 395; *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 521, para. 44; *LETCO v. Liberia*, Award, 31 March 1986, 2 ICSID Reports 346, para. 352; *Feldman v. Mexico*, Award, 16 December 2002, 7 ICSID Reports 341, para. 107; *Enron v. Argentina*, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, 11 ICSID Reports 295, para. 25; *Gas Natural SDG, S.A. v. Argentina*, Decision on Jurisdiction, 17 June 2005, paras 36-52.

¹⁶⁰⁸ *AES Corp. v. Argentina*, Decision on Jurisdiction, 26 April 2005, 12 ICSID Reports 312.

¹⁶⁰⁹ *Ibid.*, at para. 23. Footnote omitted.

¹⁶¹⁰ See ICSID Award in Case No. ARB/81/1, *Amco Asia Corp v. Republic of Indonesia*, 21 ILM 1022 (1985), 134, p. 398.

¹⁶¹¹ Dolzer/Schreuer, p. 220.

and contract.¹⁶¹² Indeed, the jurisdictional issues in treaty arbitration are particularly complex because of the difficult co-existence of treaty and contract dispute resolution mechanisms.¹⁶¹³ The respondent's objection that the case merely involves contract claims, and the claimant's insistence that treaty rights are involved have become routine features of many recent cases.¹⁶¹⁴

While the general notion is that the BIT tribunal has been created in order to arbitrate so-called treaty claims, *i.e.* claims based on a breach of rights granted to the investor by the host State, on the other hand, mere contract-based claims where the investor alleges nothing else than a breach of the commercial contract by the State party to this contract should principally not be brought before the BIT stipulated panel.¹⁶¹⁵ However, things are not that easy and there are exceptions:

- parties can agree to submit a contractual dispute to ICSID, provided that the jurisdictional requirements of the ICSID Convention are met.¹⁶¹⁶ Indeed, in particular, a BIT may also define the jurisdiction of the tribunal such that it comprises all claims in relation to an investment regardless of the nature of the claim;¹⁶¹⁷
- alternatively, the breach of the contract by the State may be such that it amounts to a breach of international law;
- finally, a so-called umbrella clause in a BIT may elevate the contract breach to a treaty claim.¹⁶¹⁸

10.1. Distinction between BIT claims and contract claims

The need to make such a distinction arises in a particularly acute form where the parties are also in contractual relations with each other—typically by means of a concession contract.¹⁶¹⁹ Indeed, most treaty arbitrations involve an investment that gave rise to a contract.¹⁶²⁰ The well accepted distinction between treaty and contract claims was described in *Vivendi* in the following way:

¹⁶¹² Crawford, p. 351.

¹⁶¹³ Kaufmann-Kohler, *Interpretation*, para. 13-15.

¹⁶¹⁴ Dolzer/Schreuer, p. 220.

¹⁶¹⁵ Zeiler, p. 5.

¹⁶¹⁶ Gill/Gearing/Birt, p. 398.

¹⁶¹⁷ See also Crawford, p. 361.

¹⁶¹⁸ Zeiler, p. 5. See also McLachlan/Shore/Weiniger, para. 4.34. This point is, however, not undisputed (see Dolzer/Schreuer, p. 220).

¹⁶¹⁹ McLachlan/Shore/Weiniger, para. 4.33.

¹⁶²⁰ Kaufmann-Kohler, *Interpretation*, para. 13-15.

“A State may breach a treaty without breaching a contract, and *vice versa*, and this is certainly true of these provisions of the BIT ... Whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract”.¹⁶²¹

Therefore, where the contract itself contains a dispute resolution clause, it will be essential to distinguish between disputes covered by that clause and those amenable to treaty arbitration.¹⁶²² This distinction found emphasis in *Lanco v. Argentina*¹⁶²³ and *Salini v. Morocco*,¹⁶²⁴ as well as in the annulment decision rendered in *Vivendi v. Argentina*¹⁶²⁵ and, later on, in the decision on jurisdiction in *Azurix v. Argentina*.¹⁶²⁶ The evidence resulting from these cases, although on the basis of somewhat diverging rationales, is that the investor has a right to seek the international responsibility of the host State on the basis of the applicable investment treaty notwithstanding the forum selection clause contained in the investment agreement.¹⁶²⁷ This reasoning was also adopted by the tribunal in *SGS v. Pakistan*:

“As a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders; the municipal and the international legal orders”.¹⁶²⁸

10.2. Contractual claims

The constant conclusion of the tribunals has been that a valid and effective contractual dispute resolution clause deprives the ICSID tribunal of its jurisdiction, and that even the fact that the investor has accepted the host States offer to ICSID arbitration cannot

¹⁶²¹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision on annulment, 3 July 2002, 19(1) ICSID Review-FILJ, paras 95-96 (2004). A distinction between treaty claims and contract claims was also made by other ICSID tribunals, e.g. *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, Decision on Jurisdiction, 6 August 2003, (2003) 18 ICSID Review-FILJ 301 paras 146 *et seq.* (2003); *Azurix Corp. v. Argentina*, Decision of 8 December 2003, (2004) 43 ILM 262, paras 75 *et seq.* and 88 *et seq.*; *CMS Gas Transmission Company v. Republic of Argentina*, Decision on Jurisdiction, Case No. ARB/01/8 (17 July 2003), 42 ILM 788 (2003), para. 80.

¹⁶²² McLachlan/Shore/Weiniger, para. 4.33.

¹⁶²³ *Lanco International Inc. v. Argentine Republic*, Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, 40 ILM 457 (2001).

¹⁶²⁴ *Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco*, Decision on Jurisdiction, Case No. ARB/00/4 (23 July 2001), 42 ILM 609 (2003) or 1 Clunet 196 (2002).

¹⁶²⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Case No. ARB/97/3, Decision on Annulment, 3 July 2002, 41 ILM 1135 (2002).

¹⁶²⁶ *Azurix Corp. v. Argentina*, Decision of 8 December 2003, (2004) 43 ILM 262 (Gaillard, *SGS*, p. 328).

¹⁶²⁷ Gaillard, *SGS*, p. 328 *et seq.*

¹⁶²⁸ *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, para. 147.

affect this proposition; in other words, when the investor agrees with a contractual dispute resolution clause, it waives its right to bring its contractual claims before an ICSID tribunal.¹⁶²⁹

The *SGS v. Philippines* tribunal¹⁶³⁰ declined its jurisdiction for such contract claims which became treaty claims by virtue of an umbrella agreement, “where the essential basis of a claim” is “a breach of contract”.¹⁶³¹ In such a case, “any valid choice of forum clause in the contract” prevails.¹⁶³²

10.3. Referring contractual disputes to an ICSID tribunal

An investor could seek to include in its contract with a State an arbitration clause that refers contractual disputes to ICSID, as opposed to the traditional private international arbitration institutions such as the ICC or the LCIA, provided that the jurisdictional requirements of the ICSID Convention are met.¹⁶³³ Indeed, ICSID has published a set of model clauses to guide those wishing to submit either existing or future disputes to ICSID arbitration. There are a small minority of cases before ICISD where jurisdiction is conferred under an investment contract and where the dispute is wholly contractual in nature.¹⁶³⁴

10.4. Usefulness of the distinction with regard to consent to arbitration

10.4.1. When the investment contract contains a jurisdiction clause

The distinction between treaty and contract claims is especially useful when the investment contract contains an exclusive choice of court or an arbitration clause.¹⁶³⁵

¹⁶²⁹ Zeiler, p. 6.

¹⁶³⁰ *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, Decision on Jurisdiction, 29 January 2004.

¹⁶³¹ Zeiler, p. 6.

¹⁶³² *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, para. 153.

¹⁶³³ See Gill/Gearing/Birt, p. 398.

¹⁶³⁴ See, e.g. *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14. The parties expressly submitted disputes to ICSID in the loan contract, which became the subject of the dispute that led to arbitration (Gill/Gearing/Birt, p. 398).

¹⁶³⁵ Kaufmann-Kohler, *Interpretation*, para. 13-16.

The issue is whether an investor, by agreeing to the choice of domestic forum in a contract, waives its right, granted by a BIT, to go to international arbitration.¹⁶³⁶

10.4.1.1. Priority of ICSID arbitration over domestic courts

In *Lanco v. Argentina*,¹⁶³⁷ jurisdiction was based on an offer of ICSID arbitration, accepted by the investor, in the BIT between Argentina and the United States. While the concession contract contained a contractual choice of forum clause, the ICSID tribunal rejected the respondent's objection to ICSID's jurisdiction first on the ground that the clause did not constitute a "previously agreed dispute settlement procedure" under the terms of the BIT; moreover, the *Lanco* tribunal also upheld the ICSID's jurisdiction on the additional ground that an exclusive jurisdiction clause in a contract did not defeat ICSID's jurisdiction.¹⁶³⁸ Indeed, the *Lanco* tribunal found that:

"when the parties give their consent to ICSID arbitration, they lose their right to seek to settle the dispute in any other forum".¹⁶³⁹

Thus, in *Lanco* the BIT procedure referring the dispute to ICSID prevailed over the purported contractual forum selection clause not so much on the basis of a distinction between contract claims and BIT claims but more on a general concept of priority of ICSID arbitration over domestic courts.¹⁶⁴⁰ Indeed, the tribunal relied on the wording of Article 26 ICSID Convention, namely that consent to ICSID arbitration is "to the exclusion of any other remedy".¹⁶⁴¹

10.4.1.2. Distinction between BIT claims and contract claims

In *Salini v. Morocco*,¹⁶⁴² on the one hand ICSID jurisdiction was based on an offer of consent, accepted by the investor, in the BIT between Italy and Morocco, and, on the other hand, a contract between the investors and ADM, a State entity that contained a clause referring disputes to the administrative courts of Rabat.¹⁶⁴³ While the respondent objected to ICSID's jurisdiction on the basis of that clause, the claimants argued that the

¹⁶³⁶ Schreuer, *Vivendi*, p. 289.

¹⁶³⁷ *Lanco International Inc. v. Argentine Republic*, Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, 40 ILM 457 (2001).

¹⁶³⁸ See Schreuer, *Vivendi*, pp. 289 *et seq.*

¹⁶³⁹ *Lanco v. Argentina*, para. 36.

¹⁶⁴⁰ Schreuer, *Vivendi*, p. 290.

¹⁶⁴¹ Gill/Gearing/Birt, p. 400.

¹⁶⁴² *Salini Costruttori and Italstrade v. Morocco*, Decision of 23 July 2001, (2003) 42 ILM 609.

¹⁶⁴³ Schreuer, *Vivendi*, pp. 290 *et seq.*

consent to ICSID's jurisdiction, contained in the BIT, should prevail over the contractual acceptance of another forum.¹⁶⁴⁴ The tribunal found that the competence of the administrative courts was not subject to the parties' agreement, and that, therefore, ***there was no true choice of forum.***¹⁶⁴⁵ It followed that the contractual forum selection clause did not oust ICSID's jurisdiction.¹⁶⁴⁶ The *Salini* tribunal clearly adopted the distinction between BIT claims and contract claims which has since found unequivocal acceptance in subsequent cases.¹⁶⁴⁷

The *Vivendi I* tribunal, in distinguishing between claims based on the BIT between Argentina and France and claims based on a Concession Contract held that ***the forum selection clause in the Concession Contract did not affect the claimant's right to go to international arbitration to pursue violations of the BIT.***¹⁶⁴⁸ The central point in *Vivendi I* was the decision that the forum selection clause in the Concession Contract did not oust the ICSID's jurisdiction based on the BIT, the decisive reason for this finding being that ***contract claims and BIT claims have to be distinguished because they have different legal bases.*** Therefore, even though the two types of claims are intimately linked and appear indistinguishable, an ICSID tribunal may not decline jurisdiction over BIT claims on the ground that there is a selection of another forum with respect to contract disputes.¹⁶⁴⁹ The tribunals have since followed the distinction between contract claims, which are subject to contractual forum selection clauses, and treaty claims, which are not affected by such clauses.¹⁶⁵⁰

However, ***in the presence of a jurisdiction clause, the investor can resort to investment arbitration for treaty claims, but not for contract claims,*** as was found in, among other cases, *CMS v. Argentina*:¹⁶⁵¹

“As contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration”.¹⁶⁵²

¹⁶⁴⁴ *Salini Costruttori and Italstrade v. Morocco*, paras 25 and 26.

¹⁶⁴⁵ *Ibid.*, para. 27.

¹⁶⁴⁶ Schreuer, *Vivendi*, p. 291.

¹⁶⁴⁷ *Ibid.*

¹⁶⁴⁸ Dolzer/Schreuer, p. 218. See *Vivendi v. Argentina*, Award, 21 November 2000 (“*Vivendi I*”), paras 53-54.

¹⁶⁴⁹ Schreuer, *Vivendi*, p. 288.

¹⁶⁵⁰ Dolzer/Schreuer, p. 219.

¹⁶⁵¹ *CMS Gas Transmission Company v. Republic of Argentina*, Decision on Jurisdiction, Case No. ARB/01/8 (17 July 2003), 42 ILM 788 (2003).

¹⁶⁵² *CMS v. Argentina*, para. 80.

Indeed, “where ‘the fundamental basis of the claim’ is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard”.¹⁶⁵³

10.4.1.3. Comments

Under this consistent practice the treaty-based jurisdiction of international arbitral tribunals, to decide on violations of BITs, is not affected by domestic forum selection clauses in contracts.¹⁶⁵⁴ Indeed, this coherent line of decisions demonstrates that a forum selection clause contained in a contract between the investor and the host State does not affect the competence of a tribunal, based on a BIT, because the two proceedings are based on different causes of action even though they may arise from the same set of facts.¹⁶⁵⁵ The contractual selection of domestic courts is only restricted to violations of the respective contract.¹⁶⁵⁶ Therefore, while dispute settlement clauses in contracts are only designed to deal with contract claims, ICSID tribunals based on BITs are competent to hear claims arising from the terms of the BIT.¹⁶⁵⁷

10.4.2. *In presence of a “fork in the road” provision in the investment treaty*

The question of the effect of a choice of court clause in a contract is sometimes linked to a so-called “fork in the road” provision contained in the investment treaty providing for the investor’s right to start arbitration under specified rules, most often under the ICSID Convention or the UNCITRAL Arbitration Rules, provided that it has not submitted the dispute to the local courts or to a previously agreed dispute settlement procedure.¹⁶⁵⁸ Here again, the distinction between treaty claim and contract claim is useful, because if no treaty claim has been brought before the local courts or in a previously agreed procedure, the treaty arbitration option remains available; nevertheless, difficulties arise because treaty and contract claims often overlap in terms of the actual losses they seek to recover.¹⁶⁵⁹

¹⁶⁵³ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision on annulment, 3 July 2002, 19(1) ICSID Review–FILJ, para. 101.

¹⁶⁵⁴ Dolzer/Schreuer, p. 219.

¹⁶⁵⁵ Schreuer, *Vivendi*, p. 293.

¹⁶⁵⁶ Dolzer/Schreuer, p. 219.

¹⁶⁵⁷ See Schreuer, *Vivendi*, p. 293.

¹⁶⁵⁸ Kaufmann-Kohler, *Interpretation*, paras 13-19 *et seq.*

¹⁶⁵⁹ *Ibid.*

A number of awards in Argentinean cases¹⁶⁶⁰ hold that the claims are distinct whenever they do not involve the same parties, “cause of action”, and “instrument”, as was, for instance, expressed in *CMS v. Argentina*:

“even if TGN had done so [*i.e.*, applied to local courts],—which is not the case—, this would not result in triggering the “fork in the road” provision against CMS. Both the parties and the causes of action under separate instruments are different”.¹⁶⁶¹

While this approach appears to restate the traditional requirements set to the application of the principles of *res iudicata* or *lis alibi pendens*, *i.e.* identity of parties, object or *petitum*, and ground or *causa petendi*,¹⁶⁶² as opposed to this line of cases, an *obiter dictum* in the *Vivendi* annulment decision¹⁶⁶³ seems to imply that treaty and contract claims are not distinct as soon as they involve the same facts:

“In the Committee’s view, a claim by CAA against the Province of Tucumán for breach of the Concession Contract, brought before the contentious administrative courts of Tucumán would *prima facie* ... constitute a “final” choice of forum and jurisdiction, if that claim was coextensive with a dispute relating to investments made under the BIT”.¹⁶⁶⁴

Considering that the test applied in *Vivendi* is different from the one applied in *CMS*, it has been observed that although the principle is well-established, its implementation varies.¹⁶⁶⁵

10.5. Competence of international tribunals to deal with contract claims

The distinction between claims under domestic law (contract claims) and claims under international law (treaty claims) does not mean that an international tribunal never has jurisdiction to deal with claims arising under a contract; indeed, there are several situations in which the tribunal may also deal with claims arising from an alleged breach of contract.¹⁶⁶⁶

¹⁶⁶⁰ See, *e.g.* *Azurix Corp. v. Argentina*, Decision of 8 December 2003, 43 ILM 262 (2004); *Enron Corp. and Ponderosa Assets, LP v. Argentine Republic*, Decision on Jurisdiction, 14 January 2004.

¹⁶⁶¹ *CMS v. Argentina*, para. 80. See also *Azurix v. Argentina*, para. 89; *Enron v. Argentina*, para. 97.

¹⁶⁶² Kaufmann-Kohler, *Interpretation*, para. 13-21. For a discussion of these principles, see Reinisch.

¹⁶⁶³ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision on Annulment, Case No. ARB/97/3 (3 July 2002).

¹⁶⁶⁴ *Ibid.*, para. 55.

¹⁶⁶⁵ Kaufmann-Kohler, *Interpretation*, para. 13-23.

¹⁶⁶⁶ Schreuer, *Vivendi*, p. 295.

10.5.1. *Breach of contract amounting to breach of international law*

One such situation involves a breach of contract that, at the same time, amounts to a breach of international law, specifically an applicable BIT. While not every breach of contract by a State automatically amounts to a violation of international law, it does not follow that because a breach of contract is involved there cannot be a breach of international law: indeed, the standards are simply different.¹⁶⁶⁷ For instance, it is generally accepted that an indirect expropriation may occur in the form of a material breach or cancellation of a contract.¹⁶⁶⁸

10.5.2. *Competence of the tribunal extending to all investments disputes*

Another situation in which an international tribunal is competent for contract claims arises where the *jurisdiction* conferred upon the tribunal is *defined broadly* and relates to all disputes regarding investments.¹⁶⁶⁹ In such a situation, where the issue is connected to the scope of the dispute settlement option offered,¹⁶⁷⁰ the tribunal is also competent for contract claims not necessarily amounting to a claim for violation of a treaty or other provision of international law.¹⁶⁷¹ For instance, where a BIT provides for investors/State arbitration in respect of all investment disputes rather than disputes concerning violations of the BIT, the tribunal is competent even for pure contract claims,¹⁶⁷² as was the case in:

- *Salini v. Morocco*,¹⁶⁷³ where Article 8 of the applicable BIT defined ICSID jurisdiction in terms of “[t]ous les différends ou divergences ... concernant un investissement”; or
- *Vivendi I*,¹⁶⁷⁴ where Article 8 of the BIT between France and Argentina, applicable in that case, referred to “[a]ny dispute relating to investments”.

¹⁶⁶⁷ Schreuer, *Vivendi*, p. 295.

¹⁶⁶⁸ See, e.g. *Amco v. Indonesia*, Award, 20 November 1984, 1 ICSID Reports 454 *et seq.*; *LETCO v. Liberia*, Award, 31 March 1986, 2 ICSID Reports 366 (Schreuer, *Vivendi*, p. 296).

¹⁶⁶⁹ *Ibid.*

¹⁶⁷⁰ See Kaufmann-Kohler, *Interpretation*, para. 13-24.

¹⁶⁷¹ Schreuer, *Vivendi*, p. 296.

¹⁶⁷² *Ibid.*

¹⁶⁷³ *Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco*, Decision on Jurisdiction, Case No. ARB/00/4 (23 July 2001), 42 ILM 609 (2003).

¹⁶⁷⁴ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision on Annulment, Case No. ARB/97/3 (3 July 2002).

Indeed, there is no reason why contract claims cannot be submitted to an international tribunal under the terms of a consent clause.¹⁶⁷⁵ On the other hand, despite the presence of similar clauses which provided for settlement of “disputes with respect to investments”, diverging approaches were adopted in the *SGS* cases.¹⁶⁷⁶ While in *SGS v. Pakistan* the tribunal concluded that it had no jurisdiction with respect to contract claims which did not constitute breaches of the substantive standards of the BIT,¹⁶⁷⁷ in *SGS v. Philippines* the tribunal held an opposite view.¹⁶⁷⁸

It has been observed that the distinction between contract claims and BIT claims does not mean that these claims must be presented in different forums—an arrangement that leads to the adjudication of all claims arising from an investment dispute in one forum is clearly the preferable solution.¹⁶⁷⁹

10.5.3. *Umbrella clauses*

Another situation in which a tribunal may deal with contract claims is where there is an umbrella clause. This issue will be dealt with later on.¹⁶⁸⁰

11. THE ESSENTIAL CRITERIA FOR ARBITRATIONS UNDER ICSID, THE ROLE OF CONSENT IN DEFINING THEM AND ITS EXPANSION

In traditional international commercial arbitration, administered by private institutions and even more so in *ad hoc* proceedings, the jurisdictional power of an arbitral tribunal stands entirely on the consent of the parties, who can freely choose to submit their disputes to arbitrators, subject to some residual rules of public policy relating to arbitrability.¹⁶⁸¹ Conversely, in arbitration proceedings conducted under ICSID one cannot ignore the fact that “*ICSID jurisdiction is limited by the nature of the operation*

¹⁶⁷⁵ Schreuer, *Vivendi*, p. 296.

¹⁶⁷⁶ See Kaufmann-Kohler, *Interpretation*, paras 13-26 *et seq.*

¹⁶⁷⁷ *SGS v. Pakistan*, Decision on jurisdiction, 6 August 2003, paras 161 and 162.

¹⁶⁷⁸ *SGS v. Philippines*, Decision on jurisdiction, 29 January 2004, paras 130 *et seq.* and para. 155.

¹⁶⁷⁹ Schreuer, *Vivendi*, p. 299.

¹⁶⁸⁰ See under V.14.2.

¹⁶⁸¹ Yala, p. 108.

at hand”.¹⁶⁸² Article 25 ICSID Convention sets forth three cumulative conditions for the establishment of the Centre’s jurisdiction:

1. jurisdiction *rationae personae*—one of the parties to the dispute must be a State which has acceded to the Convention, and the other party must be a national of another Contracting State;
2. jurisdiction *ratione materiae*—the dispute must be a legal dispute arising directly out of an investment; and
3. the consent of the parties to submit certain disputes to the Centre.¹⁶⁸³

The importance of consent in relation to the essential criteria for arbitration under ICSID may be twofold. On the one hand, the *question as to whether and how far the parties may define the objective criteria* (jurisdiction *rationae personae* and jurisdiction *ratione materiae*) has to be answered. Indeed, to a limited extent, fulfilment of the other two jurisdictional requirements, jurisdiction *rationae personae* and jurisdiction *ratione materiae*, may be influenced by the terms of the parties’ mutual consent.¹⁶⁸⁴ On the other hand, *the issue of the expansive effect of interpretation of the two objective criteria by the tribunals arises*, while not forgetting that consent itself is a criteria to be fulfilled for arbitration under ICSID and that between the objective and subjective sides of jurisdiction there is an interplay.

11.1. Dispute between a Contracting State and a national of another Contracting State (*ratione personae*)

11.1.1. In general

Investment arbitration is mixed in the sense that it involves a sovereign State (the host State), on the one side, and a private foreign investor, on the other.¹⁶⁸⁵ Indeed, for the ICSID Convention to be applicable, one of the parties to the dispute must be a Contracting State or a “constituent subdivision or agency” which has been registered with the Centre, and the other party must be an investor national of another Contracting State.¹⁶⁸⁶

¹⁶⁸² See Kahn, *Investissment*, p. 114.

¹⁶⁸³ Hirsch, pp. 21 and 41-42. See also Horn, p. 24.

¹⁶⁸⁴ See Lamm, p. 464. See also Szasz, *Guide*.

¹⁶⁸⁵ Dolzer/Schreuer, p. 233.

¹⁶⁸⁶ See Article 25(1) ICSID Convention.

The concept of a Contracting State is clearly defined by the Convention: Contracting States are States that have deposited their instruments of ratification, acceptance or approval.¹⁶⁸⁷ However, as the registration is primarily evidentiary in purpose and in order to avoid doubts as to whether a State entity can be a party to ICSID arbitration, the lack of formal registration will not prevent an entity becoming an eligible party if it has been made clear that it is a constituent subdivision or agency of a Contracting State.¹⁶⁸⁸ *Participation in the Convention of the State party to proceedings* is an *absolute requirement*, which is *not subject to waiver by agreement between the parties*, and, since the critical date for the status of Contracting State is the institution of ICSID proceedings and not the time of consent to jurisdiction, it is possible for a host State to consent to ICSID's jurisdiction before it becomes a Contracting State.¹⁶⁸⁹

Investors are either individuals (natural persons) or companies (juridical persons) and the foreignness of the investment is determined by the investor's nationality.¹⁶⁹⁰ On the other hand, the origin of the investment, particularly of the capital, is not decisive for the question of the existence of foreign investment.¹⁶⁹¹ The investor's nationality¹⁶⁹² decides from which treaties it may benefit; if the investor wishes to rely on a BIT, it must show that it has the nationality of one of the two States parties.¹⁶⁹³

11.1.2. Definition of "nationality" in case of silence of the treaty

In applying the nationality requirement under Article 25 ICSID Convention, the tribunal of *Autopista v. Venezuela*¹⁶⁹⁴—composed of arbitrators with a commercial background—determined that, when *the treaty was silent*, the parties to the investment

¹⁶⁸⁷ Schreuer, *Convention*, para. 125.

¹⁶⁸⁸ Lew/Mistelis/Kröll, para. 28-50. A list of Contracting States and Other Signatories of the Convention is available on the Centre's website under <http://icsid.worldbank.org/ICSID/Index.jsp>.

¹⁶⁸⁹ Schreuer, *Convention*, paras 127 *et seq.*

¹⁶⁹⁰ Dolzer/Schreuer, p. 46. On the "nationality requirements", see Sinclair A., "The Substance of Nationality Requirements in Investment Treaty Arbitration" (2005) 20 ICSID Review-FILJ 357; Wisner R. and Gallus R., "Nationality Requirements in Investor-State Arbitration" (2004) 5 JWIT 927.

¹⁶⁹¹ *Tradex v. Albania*, Award, 29 April 1999, 5 ICSID Reports 70, paras 108-111; *Olguín v. Paraguay*, Award, 26 July 2001, 6 ICSID Reports 164 (2004), para. 66, footnote 9; *Wena Hotels v. Egypt*, Award, 8 December 2000, 6 ICSID Reports 89, para. 126, *Wena Hotels v. Egypt*, Decision on Annulment, 5 February 2002, 6 ICSID Reports 129, paras 54, 55; *Tokios Tokelos v. Ukraine*, Decision on Jurisdiction, 29 April 2004, 20 ICSID Review-FILJ 205 (2005), paras 74-82. But see: *Yaung Chi Oo v. Myanmar*, Award, 31 March 2003, 8 ICSID Reports 463, paras 43-45.

¹⁶⁹² For an overview about the "Nationality of Individuals", see Dolzer/Schreuer, pp. 47 *et seq.*; and about the "Nationality of Corporations", see Dolzer/Schreuer, pp. 49 *et seq.*

¹⁶⁹³ Dolzer/Schreuer, p. 46.

¹⁶⁹⁴ *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, Case No. ARB/00/5, Award on Jurisdiction (27 September 2001), 16 ICSID Review-FILJ 469 (2001), para. 64.

agreement were *free to define nationality* as long as the definition was reasonable.¹⁶⁹⁵ This means that parties to the investment agreement *may define the ambit of consent to arbitration with regard to rationae personae in the case of silence of the treaty*.

11.1.3. Expansion of consent *ratione personae*

11.1.3.1. Consent to extension because of foreign control in the case of legal entities with the nationality of the host State

11.1.3.1.1. In general

Host States frequently require that investments be made through locally incorporated companies. While, normally, these local companies will not qualify as foreign investors and will not enjoy the ICSID Convention's protection, the ICSID Convention contains a specific provision to address the phenomenon of investments made through corporations that are registered in the host State.¹⁶⁹⁶ Indeed, the relevant part of Article 25(2)(b) ICSID Convention provides that:

“National of another Contracting State’ means: ... any judicial person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the *parties have agreed* should be treated as a national of another Contracting State for the purposes of this Convention”.

Article 25(2)(b) ICSID Convention deals with the juridical persons that are incorporated in the host State but are controlled by nationals of another State.¹⁶⁹⁷ This takes into account the fact that foreign investors are frequently required to channel an investment through locally incorporated companies.¹⁶⁹⁸ However, *the agreement under Article 25(2)(b) ICSID Convention is not enough, and must be supported by actual foreign control*.¹⁶⁹⁹ The notion of control is also of relevance in assisting a finding that a juridical person has the nationality of a Contracting State other than the host State where there are competing nationalities, including those of non-Contracting States.¹⁷⁰⁰

¹⁶⁹⁵ Kaufmann-Kohler, *Interpretation*, para. 13-13.

¹⁶⁹⁶ Dolzer/Schreuer, p. 52.

¹⁶⁹⁷ *Ibid.*

¹⁶⁹⁸ Lew/Mistelis/Kröll, para. 28-52.

¹⁶⁹⁹ Dolzer/Schreuer, p. 53.

¹⁷⁰⁰ Amerasinghe, *Jurisdiction*, p. 220.

11.1.3.1.2. Ways of giving consent

The agreement under Article 25(2)(b) ICSID Convention may be expressed in different ways:

- by express agreement;
- by provisions in the treaties;¹⁷⁰¹
- by implied agreement.¹⁷⁰²

11.1.3.1.3. The status as a “national of another Contracting State” in a pyramid of control

Due to the fact that the local company is often not directly controlled by the foreign investor but is at the end of a pyramid of control, questions as to the nationality of the controlling party may arise if certain parts of the pyramid are not nationals of Contracting States.¹⁷⁰³ Therefore, ***depending on how the expression “national of another Contracting State” in a pyramid of control is interpreted, consent to arbitration may be given or not.*** Of importance here are questions:

- about the relevant party for the control: whether the direct parent company¹⁷⁰⁴ or the entity at the top of the pyramid of control;¹⁷⁰⁵ and
- on how much control is necessary. The tribunal in *Vacuum Salt v. Ghana*¹⁷⁰⁶ held that foreign control within the context of Article 25(2)(b) ICSID Convention ***does not require or infer a particular percentage of share ownership and that each case must be looked at on the facts*** of the particular dispute.¹⁷⁰⁷ However, in *Tokios Tokelés v. Ukraine*¹⁷⁰⁸ the issue arose ***as to whether the economic reality beyond the legal structure should be considered***, because the ultimate shareholders of the investor/claimant were nationals themselves of the same State in which the investment and respondent were located.¹⁷⁰⁹

¹⁷⁰¹ See, e.g. Article 26(7) ECT.

¹⁷⁰² See, e.g. ICSID, *Amco Asia Corp and others v. Republic of Indonesia*, Decision on Jurisdiction, 23 ILM 351 (1984) 359 *et seq.* or *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports 16; *LETCO v Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 349-353.

¹⁷⁰³ Lew/Mistelis/Kröll, para. 28-53.

¹⁷⁰⁴ *Amco v. Indonesia*, Decision on Jurisdiction, pp. 362 *et seq.*

¹⁷⁰⁵ ICSID, Decision on Jurisdiction, *Société Ouest Africaine des Bétons Industriels v. Republic of Senegal*, 6 ICSID Review-FILJ 217 (1991) 225, paras 35 *et seq.* (SOABI).

¹⁷⁰⁶ *Vacuum Salt Production Limited v. Government of the Republic of Ghana*, 4 ICSID Reports 320 (1997) 346 (*Vacuum Salt*).

¹⁷⁰⁷ Lew/Mistelis/Kröll, para. 28-54.

¹⁷⁰⁸ *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, 29 April 2004.

¹⁷⁰⁹ Laird, p. 92.

11.1.3.1.4. Interpretation of the concept of “control”

Control over a juridical person is not a simple concept. Participation in the company’s capital stock or share ownership is not necessarily the only indicator of control. Indeed, the existence of foreign control is a complex question requiring the examination of several factors such as equity participation, voting rights, and management.¹⁷¹⁰ The development of international law in relation to corporate claims has largely focused on two basic tests to determine which country has jurisdiction to assert a claim on behalf of a company:

- the place of incorporation, or the *siège social*, and
- the nationality of the controlling shareholders.¹⁷¹¹

While the *Barcelona Traction* case is an example of the adoption of the first test, later NAFTA¹⁷¹² and BITs¹⁷¹³ cases are a repudiation of the *Barcelona Traction* case and have clearly adopted the second test¹⁷¹⁴ which relates to the nationality of the shareholders who wish to bring a claim on their own behalf, or on the behalf of their investment.¹⁷¹⁵

11.1.3.2. “Nationality planning”/“treaty shopping”¹⁷¹⁶

A prudent investor may organise its investment in a way that affords maximum protection under existing treaties. While “nationality planning” or “treaty shopping” is not illegal or unethical as such,¹⁷¹⁷ States may regard such practices as undesirable and take appropriate measures against them.¹⁷¹⁸ However, not every attempt at nationality planning will succeed.¹⁷¹⁹ In particular, it is not possible to bring a claim within the ambit of the Convention by assigning it to a party from a Contracting State which would

¹⁷¹⁰ Dolzer/Schreuer, p. 53.

¹⁷¹¹ Laird, pp. 86 *et seq.*

¹⁷¹² *S.D. Myers Inc. v. Government of Canada*, Award (13 November 2000).

¹⁷¹³ See in particular *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 (ICSID Case No. ARB/01/8). But also *Azurix*, para. 73 ; *LG&E*, paras 60-63 ; *Enron 1*, para. 49; *Enron 2*, paras 27-29.

¹⁷¹⁴ Involving concepts of ownership and control, direct or indirect.

¹⁷¹⁵ See Laird, p. 87.

¹⁷¹⁶ On “nationality planning”, see, *e.g.* Dolzer/Schreuer, pp. 54 *et seq.*

¹⁷¹⁷ For a case where the tribunal accepted the “migration” of the controlling company from one country to another, see *Aguas del Tunari S.A. v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, at paras 330, 332.

¹⁷¹⁸ Dolzer/Schreuer, p. 54.

¹⁷¹⁹ See, *e.g.* *Banro v. Congo*, Award, 1 September 2000 excerpts in 17 ICSID Review-FILJ 380 (2000), paras 330, 332.

fulfil the requirements of Article 25 ICSID Convention.¹⁷²⁰ Indeed, this would violate the basic principle that arbitration requires the consent of both parties and would defeat the carefully structured system of jurisdiction under the ICSID Convention.¹⁷²¹

11.1.4. Conclusion

The determination by the tribunal of *Autopista v. Venezuela*¹⁷²²—composed of arbitrators with a commercial background—that, in the silence of the treaty, the parties to the investment agreement were free to define nationality as long as the definition was reasonable has been criticised by a renowned specialist of public international law.¹⁷²³

Although these critics may be pertinent when taking an optic based on public international law, one should also consider that the ICSID Convention itself permits, in the case where foreign investors channel their investments through companies incorporated in the host State, agreement that these companies are treated as nationals of another Contracting State when there is foreign control.¹⁷²⁴ Indeed, the ICSID Convention follows a strong contractual approach and it does not define the terms “nationality” or “foreign control”, because the drafters wished to provide parties with maximum flexibility.¹⁷²⁵

Moreover, another aspect to be considered is that the determination of “foreign control” is not an easy task. The difficulties are mainly due to the fact that, on the one hand, different criteria may be applied to interpret the concept of “foreign control”, and, on the other hand, there is an area of conflict between economic reality and legal structure. Nevertheless, it has been observed that while the question of how much control is enough is not always easy to answer, it is of paramount importance for a large company seeking to commence a claim through one or more of its subsidiaries against a host State.¹⁷²⁶

¹⁷²⁰ Lew/Mistelis/Kröll, para. 28-55.

¹⁷²¹ ICSID, 15 March 2002, Case No. ARB/00/02, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, 17(7) Mealey's IAR A1 (2002) A2. See also Lew/Mistelis/Kröll, para. 28-55.

¹⁷²² *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, Case No. ARB/00/5, Award on Jurisdiction (27 September 2001), 16 ICSID Review-FILJ 469 (2001), para. 64.

¹⁷²³ See Prosper Weil in his dissenting opinion (29 April 2004) in *Tokios Tokelés v. Ukraine* (Kaufmann-Kohler, *Interpretation*, para. 13-13).

¹⁷²⁴ See Article 25(2)(b) ICSID Convention.

¹⁷²⁵ See Reed/Paulsson/Blackaby, p. 17.

¹⁷²⁶ Lew/Mistelis/Kröll, para. 28-54.

11.2. Legal dispute arising directly out of an investment (*ratione materiae*)

11.2.1. *The existence of a dispute*

Although it has been stated that the mere assertion by the claimant that a dispute exists¹⁷²⁷ or the mere denial by the respondent party that a dispute exists¹⁷²⁸ is not conclusive of either fact, a dispute has been defined in the *Mavrommatis Case*¹⁷²⁹ as a disagreement on a point of law or fact, a conflict of legal views or of interests between two parties.¹⁷³⁰

11.2.2. *The legal nature of the dispute*

Assuming there is a dispute, the next question to be raised is whether the dispute is a legal one. While no clear decision was taken on the meaning of the qualification “legal”, a reasonable interpretation might be that it must be concerned with a breach or violation of law in the fundamental sense—that what is basically in dispute is the violation of legal rights and obligations.¹⁷³¹

11.2.3. *Arising directly*

An investment operation involves a number of ancillary transactions and legal contracts which include financing,¹⁷³² the lease of property, purchase of various goods, marketing of produced goods and tax liabilities. While in economic terms these transactions and contracts are all more or less linked to the investment, the question of whether these peripheral activities arise directly out of an investment for the purposes of ICSID’s jurisdiction may be subject to doubt.¹⁷³³

¹⁷²⁷ *The South West Africa Cases* (P.O.), 1962, ICJ Reports, p. 328.

¹⁷²⁸ *The Peace Treaties Case* (1), 1950 ICJ Reports, p. 74.

¹⁷²⁹ PCIJ Series A, No. 2, p. 11.

¹⁷³⁰ Amerasinghe, *Jurisdiction*, p. 169. For further aspects, see in particular Amerasinghe, *Jurisdiction*, pp. 169 *et seq.*

¹⁷³¹ See Amerasinghe, *Jurisdiction*, p. 173. See also Delaume, *How to Draft*, p. 181, and Schreuer, *Convention*, para. 42.

¹⁷³² See, e.g. *Holiday Inns S.A. and others v. Morocco*, where the agreement for the establishment and operation of hotels had also provided for financing by the Government. This was done by means of separate loan contracts.

¹⁷³³ Schreuer, *Convention*, para. 63.

The requirement of directness is one of the objective criteria for jurisdiction and is, thus, *independent of the parties' consent*. This means that, no matter what the parties have agreed, the dispute must not only be connected to an investment but must also be reasonably closely connected.¹⁷³⁴ Nevertheless, *in practical terms, the objective and the subjective elements may be related*, as disputes arising from ancillary or peripheral aspects of the investment operation are likely to give rise to the objection that they do not arise directly from the investment and that they are not covered by the consent agreement.¹⁷³⁵

A number of cases¹⁷³⁶ suggest that ICSID tribunals are inclined to follow a *broad view of consent clauses where the agreement between the parties is reflected in several successive instruments*.¹⁷³⁷ Expressions of consent are not applied narrowly to the specific document in which they appear but are read in the context of the parties' overall relationship:

- a series of interrelated contracts may be regarded, in functional terms, as representative of the legal framework for one investment operation; and
- ICSID clauses contained in some, though not all, of the different contracts may be interpreted as applicable to the entire operation.¹⁷³⁸

It has been observed that the need to settle an investment dispute finally and comprehensively would make any other solution impracticable.¹⁷³⁹ Therefore, here the jurisdictional aspect of arbitration tends to prevail over the contractual one.

11.2.4. Investment

The existence of an investment is a keystone of ICSID's jurisdiction.¹⁷⁴⁰ However, despite the fact that the term "investment" appears at the heart of both the name of the ICSID as well as in the title of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, *no definition of this term is provided in*

¹⁷³⁴ Schreuer, *Convention*, para. 66.

¹⁷³⁵ *Ibid.*

¹⁷³⁶ See, e.g. *Holiday Inns S.A. and others v. Morocco*, Decision on Jurisdiction, 12 May 1979, Case No. ARB/72/1 (an unpublished ICSID award discussed in Lalive, *Holiday Inns and World Bank*); *Klöckner v. Cameroon*, Award, 21 October 1983, Decision on Annulment, 3 May 1985, 2 ICSID Reports 13-18, 65-69, 89-93, 97-117; *SOABI v. Senegal*, Decision on Jurisdiction, 1 August 1984, Award, 25 February 1988, 2 ICSID Reports 185-188, 204-208, 293-322.

¹⁷³⁷ UNCTAD, p. 34.

¹⁷³⁸ Schreuer, *Convention*, para. 372.

¹⁷³⁹ UNCTAD, p. 34.

¹⁷⁴⁰ Dolzer/Schreuer, p. 233.

*the text of the treaty.*¹⁷⁴¹ Definitions provided by treaties and national investment laws are often of little use as well. For the purpose of Article 25 ICSID Convention, tribunals have adopted a list of descriptors that they find typical for investments.¹⁷⁴² The descriptors include:

- a substantial commitment;
- a certain duration;
- an element of risk, and
- importance for the host State's development.¹⁷⁴³

11.2.4.1. In general

The importance of Article 25 ICSID Convention in ICSID arbitrations is that it *places a limit upon the parties' ability to consent to ICSID arbitration.*¹⁷⁴⁴ In *Fedax v. Republic of Venezuela*¹⁷⁴⁵ the tribunal held that Article 25(1) ICSID Convention covers direct and indirect foreign investments and that promissory notes as such were *not excluded from the Convention*, so that the *definition given to the term "investment" by the parties was of relevance.*¹⁷⁴⁶ The tribunal thus considered the BIT between the Netherlands and Venezuela.

11.2.4.2. The importance of parties' consent in defining "investment"

The ICSID Convention links its jurisdiction in Article 25 to "disputes arising directly out of an investment" but leaves the definition of "investment" to the parties' autonomy. Therefore, while, according to the ICSID Convention, ordinary financial transactions are not investments for objective reasons, *any investment can be defined by the parties*

¹⁷⁴¹ Yala, p. 105.

¹⁷⁴² *Salini Costruttori SpA et Italstrade SpA v. Morocco*, Decision on Jurisdiction, 23 July 2001, Clunet 196 (2002), 42 ILM (2003) 609, para. 53; *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406, para. 133, footnote 113; *Joy Mining Machinery Ltd. v. Egypt*, Award on Jurisdiction, 6 August 2004, paras 53, 57, 62; *AES Corporation v. Argentina*, Decision on Jurisdiction, 26 April 2005, para. 88; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, Decision on Jurisdiction, 14 November 2005, paras 130-138; *Jan de Nul et al. v. Egypt*, Decision on Jurisdiction, 16 June 2006, paras 90-96.

¹⁷⁴³ Dolzer/Schreuer, p. 233. The four criteria are considered to be embodied in Article 25 ICSID Convention. After having been clearly restated in *Salini v. Morocco* and having also been applied in subsequent decisions, the application of these criteria is now generally referred to as the *Salini test* (Dolzer/Schreuer, p. 68). On the notion of "investment", see also Rubins, *Investment*.

¹⁷⁴⁴ McLachlan/Shore/Weiniger, para. 6.06.

¹⁷⁴⁵ ICSID, Decision, 11 July 1997, on Objections to Jurisdiction and award, 9 March 1998, Case No. ARB/96/3, *Fedax NV v. Republic of Venezuela*, 37 ILM 1378 (1998), XXIVa YBCA 23 (1999).

¹⁷⁴⁶ Lew/Mistelis/Kröll, para. 28-61.

as “*investment*” in the meaning of Article 25 ICSID Convention *as far as it respects the objective limits of investments*.¹⁷⁴⁷

Bilateral investment treaties providing for ICSID jurisdiction do not refer to Article 25 ICSID Convention for the purposes of defining “investment”, but instead typically contain their own definitions of “investment”, mostly at the beginning of the agreement.¹⁷⁴⁸ This dual approach to the expression “investment” in the ICSID Convention and in investment treaties has led to distinct questions of application and interpretation.¹⁷⁴⁹

It has been observed that *an arbitration clause providing for ICSID arbitration is an implied agreement that their “investment” falls under Article 25*.¹⁷⁵⁰ Moreover, the *same applies to the unilateral offers to arbitrate* contained in the various investment protection laws and investment treaties which extend the ICSID arbitration option to all types of investment covered by the relevant legal instrument.¹⁷⁵¹ Indeed, the draftsmen wanted to leave it primarily to the parties to decide what constitutes an investment.¹⁷⁵²

The practice of the tribunals has been inclined to *interpret the expression “investment” in Article 25 ICSID Convention autonomously*, *i.e.* independently of the investment clause in the applicable BIT.¹⁷⁵³ However, while it was always obvious that *ordinary commercial transactions would not be covered* by the Centre’s jurisdiction *no matter how far-reaching the parties’ consent might be*,¹⁷⁵⁴ it is clear that the parties have nevertheless much freedom in describing their transaction as an investment.¹⁷⁵⁵ Therefore, in *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v. The Slovak Republic*¹⁷⁵⁶ the tribunal stated that whilst the *consent* given by the parties is an *important element in determining whether a dispute qualifies as an investment* under the Convention it is *not conclusive*.¹⁷⁵⁷ The tribunal considered that:

¹⁷⁴⁷ Kühn, p. 49.

¹⁷⁴⁸ Dolzer/Schreuer, p. 61.

¹⁷⁴⁹ *Ibid.*

¹⁷⁵⁰ Lew/Mistelis/Kröll, para. 28-56.

¹⁷⁵¹ *Ibid.*

¹⁷⁵² See Shihata, p. 5.

¹⁷⁵³ Dolzer/Schreuer, p. 61.

¹⁷⁵⁴ The parties can, however, agree to submit a contractual dispute to ICSID, provided that the jurisdictional requirements of the ICSID Convention are met (Gill/Gearing/Birt, p. 398).

¹⁷⁵⁵ Schreuer, *Convention*, paras 89 and 91.

¹⁷⁵⁶ ICSID, Decision on Objections to Jurisdiction, 24 May 1999, *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v. The Slovak Republic*, XXIVa YBCA 44 (1999), 14 ICSID Review-FILJ 250 (1999).

¹⁷⁵⁷ Lew/Mistelis/Kröll, para. 28-57.

“The concept of an investment as spelled out in ... [Article 25] is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre’s jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment”.¹⁷⁵⁸

In determining whether an ICSID tribunal has the competence to consider the merits of the claim, a two-fold test of the notion of investment, sometimes called the “double keyhole approach”,¹⁷⁵⁹ must therefore be applied:

- whether the dispute arises out of an *investment within the meaning of the Convention*; and, if so,
- whether the *dispute relates to an investment as defined in the parties’ consent to ICSID arbitration*, in their reference to the BIT and the pertinent definitions contained in the BIT.¹⁷⁶⁰

While the tribunals have, therefore, to ask whether the case falls within the scope of consent given by the host State in the light of the definition of “investment” in the BIT, the distinction gets, however, somewhat blurred if *both parties consent to submit the case to ICSID*, as this would imply a *strong (but rebuttable) presumption that the case involved an investment*.¹⁷⁶¹

11.2.4.3. The growing importance of the parties’ will in defining “investment”

Among scholars there is a lack of consensus as to the definition of the term “investment” and they can be divided into two main camps: the “*subjectivist movement*” which attaches *greater importance to the will of the parties* in defining an economic operation as an investment and the “*objectivist movement*” for which the *notion of investment entails a core of elements* which include a contribution from the foreign investor, a certain duration for the project and risk borne by the investor.¹⁷⁶²

ICSID tribunals have *for a long time* followed an *approach that combines the objectivist and subjectivist perspectives*, taking into account that the foreign investors have made certain capital contributions in the territory of the host States and that parties have agreed to consider their dispute as arising directly from an investment within the

¹⁷⁵⁸ *CSOB v. Slovak Republic*, Decision on Jurisdiction, 24 May 1999, para. 53.

¹⁷⁵⁹ See Dolzer/Schreuer, pp. 61 *et seq.*

¹⁷⁶⁰ See *CSOB v. Slovak Republic*, Decision on Jurisdiction, 24 May 1999, para. 68. See also *Salini Costruttori v. Morocco*, Decision on Jurisdiction, 23 July 2003, 42 ILM 609 (2003), paras 44, 52.

¹⁷⁶¹ Dolzer/Schreuer, p. 62.

¹⁷⁶² There is also a broad spectrum of alternative perspectives between these two main trends of thought. The most notable of these favours taking into account the criteria of the contribution to economic development of the host State or the growth of its patrimony (Yala, p. 106).

meaning of Article 25(1) ICSID Convention.¹⁷⁶³ However, at the end of the 1990s, in two decisions, *Fedax*¹⁷⁶⁴ and *CSOB v. Slovak Republic*,¹⁷⁶⁵ ICSID tribunals accepted jurisdiction over claims for breaches of loan contracts and *initiated a “liberal” trend* in the Centre’s case law on this issue.¹⁷⁶⁶

The decisions in *Salini*,¹⁷⁶⁷ *SGS v. Pakistan*,¹⁷⁶⁸ and *SGS v. Philippines*¹⁷⁶⁹ are in keeping with this liberal movement, even though they can be distinguished by their different methodological approaches and the weight the arbitrators respectively attached to the objective or subjective elements of the investment; on the other hand the liberal movement does know some limits as illustrated in *Mihaly v. Sri Lanka*¹⁷⁷⁰—in which the arbitrators refused to include pre-investment expenditures within the scope of their jurisdiction.¹⁷⁷¹

The practice of the tribunals has been inclined to *interpret* the expression “investment” in Article 25 ICSID Convention *autonomously*, *i.e.* independently of the investment clause in the applicable BIT.¹⁷⁷² In particular, the *Salini* tribunal was of the opinion that its jurisdiction depended upon the existence of an investment within the meaning of the bilateral treaty as well as that of the ICSID Convention, in accordance with the case law.¹⁷⁷³

On the other hand, in both *SGS* cases the arbitral tribunals limited themselves to the qualification of the claimant's rights under the BIT, without seeking to analyse the operation using the objective criteria established in previous cases.¹⁷⁷⁴ By abandoning the autonomous conditions for an “investment” within the meaning of Article 25(1) ICSID Convention, and by giving precedence to the very broad definitions provided in the BITs upon which the claims were based, the *SGS* decisions implicitly rejected the

¹⁷⁶³ Yala, p. 106.

¹⁷⁶⁴ *Fedax N.V. v. Venezuela*, 11 July 1997, 37 ILM 1531 (1997); 126 Clunet 278 (1999).

¹⁷⁶⁵ *CSOB v. Slovak Republic*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Rev. 251 (No. 1, 1999); 5 ICSID Reports 329 (2003).

¹⁷⁶⁶ Yala, p. 106.

¹⁷⁶⁷ *Salini and Italstrade v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, 1 Clunet 196 (2002).

¹⁷⁶⁸ *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, Decision on Jurisdiction, 6 August 2003, (2003) 18 ICSID Review-FILJ 301; (2003) 42 ILM 1290, para. 163.

¹⁷⁶⁹ *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, Decision on Jurisdiction, 29 January 2004, (2004) 19 Mealey’s IAR 15.

¹⁷⁷⁰ ICSID, 15 March 2002, Case No. ARB/00/02, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, 17(7) Mealey’s IAR A1 (2002).

¹⁷⁷¹ Yala, p. 106.

¹⁷⁷² Dolzer/Schreuer, p. 61.

¹⁷⁷³ *Salini*, para. 44.

¹⁷⁷⁴ See *Fedax N.V. v. Venezuela*, 11 July 1997, 37 ILM 1531 (1997); 126 Clunet 278 (1999); *CSOB v. Slovak Republic*, 24 May 1999, 14 ICSID Rev. 251 (No. 1, 1999); 5 ICSID Reports 329 (2003); *Salini and Italstrade v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, 1 Clunet 196 (2002).

method for differentiating the qualification of the claimant's rights and established the *arbitrators' preference for the subjective view* of the notion of investment, according to which the *will of the parties is the controlling criterion for purposes of ICSID jurisdiction*.¹⁷⁷⁵

11.2.4.4. Expansion of consent because of broad interpretation of the concept of “investment”

In dealing with the objective notion of “investment” under the ICSID Convention, the tribunal in *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v. The Slovak Republic*¹⁷⁷⁶ held:

“that investment as a concept *should be interpreted broadly* because the drafters of the Convention did not impose any restrictions on its meaning”.¹⁷⁷⁷

Two circumstances where the question of whether the concept of “investment” should be interpreted broadly or not have in particular arisen are:

- in the case of minority shareholding;¹⁷⁷⁸
- in the case of pre-investment expenditures.¹⁷⁷⁹

11.2.4.5. Conclusion

The fact that the concept of “investment” is not defined by the ICSID Convention permits an enlargement of the limits upon the parties' ability to consent to ICSID arbitration. Through the broad interpretation of the concept of “investment”, on the one hand, and the “subjectivist movement,” which attaches greater importance to the will of the parties in defining an economic operation as an investment, on the other hand, consent to arbitration experiences an expansion. However, while a broad interpretation stresses rather the jurisdictional side of arbitration and normally advantages one of the

¹⁷⁷⁵ Yala, p. 116.

¹⁷⁷⁶ ICSID, Decision on Objections to Jurisdiction, 24 May 1999, *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v. The Slovak Republic*, XXIVa YBCA 44 (1999), 14 ICSID Review-FILJ 250 (1999).

¹⁷⁷⁷ *CSOB v. Slovak Republic*, Decision on Jurisdiction, 24 May 1999, para. 49.

¹⁷⁷⁸ *CMS Gas Transmission Company v. Republic of Argentina*, Decision on Jurisdiction, Case No. ARB/01/8 (17 July 2003), 42 ILM 788 (2003). On this case, see also Weiniger.

¹⁷⁷⁹ ICSID, 15 March 2002, Case No. ARB/00/02, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, 17(7) Mealey's IAR A1 (2002). On this case, see also Lew/Mistelis/Kröll, para. 28-63.

parties, the “subjectivist movement” underlines the contractual side of arbitration by taking into account the will of both parties.

11.3. Consent

Like any form of arbitration, investment arbitration is always based on an agreement and consent to arbitration is an indispensable requirement for a tribunal’s jurisdiction.¹⁷⁸⁰

11.3.1. *In general*

Under Article 25 ICSID Convention, the parties’ consent to submit a dispute to an ICSID arbitration proceeding is a ***threshold requirement to establish an ICSID tribunal’s jurisdiction*** over the matter.¹⁷⁸¹ This requirement is so critical that the executive directors of the World Bank, in their 1965 Report on the ICSID Convention, observed: “Consent of the parties is the cornerstone of the jurisdiction of the Centre”.¹⁷⁸² Consent is the explicit expression of both parties’ acceptance of ICSID arbitration, where:

- the ***investor generally consents to arbitrate*** disputes under a ***specific investment***; and
- the ***host State may consent to arbitration*** of a ***specific dispute*** or ***anticipated classes of disputes***.¹⁷⁸³

While ICSID arbitrations require that all parties concerned have agreed to submit to ICSID arbitration, the mere ratification of the ICSID Convention is not in itself consent to arbitration by a State.¹⁷⁸⁴ As was made clear in the Preamble to the ICSID Convention, the State never consents by simply ratifying the ICSID Convention.¹⁷⁸⁵ Indeed, ratification serves only to make the State party to the ICSID Convention—it does not grant jurisdiction to an ICSID tribunal.¹⁷⁸⁶ Therefore, although participation in

¹⁷⁸⁰ Dolzer/Schreuer, p. 238.

¹⁷⁸¹ Reed/Paulsson/Blackaby, p. 21.

¹⁷⁸² International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965), in 1 ICSID Reports 23-33 (1993), p. 28. See also Reed/Paulsson/Blackaby, pp. 21 *et seq.*

¹⁷⁸³ Reed/Paulsson/Blackaby, p. 22. Here the asymmetry existing in investment arbitration between investor and host State comes at light.

¹⁷⁸⁴ Lew/Mistelis/Kröll, para. 28-46.

¹⁷⁸⁵ Reed/Paulsson/Blackaby, p. 22.

¹⁷⁸⁶ For the required “double consent” to the ICSID Convention and the arbitration agreement, see Cremades, pp. 152 *et seq.* (Lew/Mistelis/Kröll, para. 28-46).

treaties plays an important role for the jurisdiction of tribunals, it cannot, by itself, establish jurisdiction, but both parties must have expressed their consent.¹⁷⁸⁷

11.3.2. Consent to arbitration or conciliation? (the problem of the choice of the method of settlement)

The practice of ICSID shows a variety of consent clauses dealing with this question with different degrees of precision.¹⁷⁸⁸ Clauses in BITs and provisions in national investment legislation referring to the jurisdiction of ICSID are similarly diverse.¹⁷⁸⁹

The clauses can be grouped into four:

- clauses specifying that consent refers to arbitration only;¹⁷⁹⁰
- clauses providing for conciliation, failing which the dispute is to be settled by arbitration;¹⁷⁹¹
- clauses providing for “conciliation and arbitration” or “conciliation or arbitration”;¹⁷⁹²
- clauses providing for submission to the Centre without any reference to conciliation or arbitration.¹⁷⁹³

A case where the issue arose as to whether consent to arbitration was meant was *SPP v. Egypt*, where the relevant Egyptian law provided for the settlement of disputes “within the framework of the Convention”.¹⁷⁹⁴

11.3.3. The issue of counterclaims

The ICSID Convention contains two provisions which are of direct relevance to the question of counterclaims: Article 25 which deals with the jurisdiction of the Centre and Article 46 which deals with incidental or additional claims and counterclaims. The

¹⁷⁸⁷ Dolzer/Schreuer, p. 238.

¹⁷⁸⁸ See Schreuer, *Convention*, para. 22.

¹⁷⁸⁹ Schreuer, *Convention*, paras 23 and 25.

¹⁷⁹⁰ See, e.g. Denmark-Turkey BIT (1990) Article 8; Germany Model Agreement Article 11.

¹⁷⁹¹ See, e.g. the clause in *MINE v. Guinea*, Award, 6 January 1988, 4 ICSID Reports 67.

¹⁷⁹² See, e.g. Netherlands Model Article 9; Austria Model Agreement Article 8.

¹⁷⁹³ See, e.g. Lithuania-Poland BIT (1992) Article 7; Denmark Model Agreement Article 9.

¹⁷⁹⁴ Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 126. See then also Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 156; and 3 ICSID Reports 172.

question of counterclaims is further dealt with in Rule 40 ICSID Arbitration Rules—the ICSID Arbitration Rules are incorporated by reference in Article 44 ICSID Convention.

This series of provisions requires that for a matter to be admissible as a counterclaim it must arise directly out of an investment and *fall within the State party's consent and must as well arise directly out of the original claim filed by the investor*.¹⁷⁹⁵ It has been remarked that a claim may be within the Centre's jurisdiction but not arise directly from the subject matter of a particular dispute before the tribunal and, conversely, that a claim may arise directly from the subject matter of the dispute but may not be subject to ICSID's jurisdiction.¹⁷⁹⁶

Moreover, Article 46 ICSID Convention and Rule 40 ICSID Arbitration Rules directly raise the issue of the scope of consent of the parties. Indeed, since the *investor's consent will usually be given only after the dispute* has arisen, the *scope of its consent can be expected to be quite narrow, thus limiting the possibility of counterclaims by the disputing State party*.¹⁷⁹⁷

11.4. Relationship between the objective and consensual sides of jurisdiction

In contrast to commercial arbitration, where the jurisdiction of the arbitral tribunal is based exclusively on a valid arbitration clause contained in the contract between the parties or concluded *ad hoc*, the power of the tribunal in an investment dispute frequently emanates from an *interplay of parties' consent and objective legal rules* contained either in the investment protection law of the host State or in bilateral or multilateral investment treaties.¹⁷⁹⁸

Although the requirements, as described above, are in part regulated by the Convention—the nature of the dispute and of the parties—and in part left to the parties' disposition in framing their consent, the relationship between the objective and consensual sides of jurisdiction has given rise to some debate.¹⁷⁹⁹ Indeed, while in the course of the Convention's drafting, a number of delegates felt that the parties' consent

¹⁷⁹⁵ Alvarez H.C., p. 411.

¹⁷⁹⁶ Schreuer, *Convention II*, at 202.

¹⁷⁹⁷ Alvarez H.C., p. 411.

¹⁷⁹⁸ Horn, p. 23.

¹⁷⁹⁹ Schreuer, *Convention*, para. 5.

in a particular case implied their recognition that the objective criteria had been met,¹⁸⁰⁰ on the other hand, another group of delegates objected to an imprecise or open-ended description of the Centre's scope of activities, because they feared that the mere participation in a convention which opens the door to a far-reaching jurisdiction would create expectations that would make it difficult for host States to resist pressure to give their consent.¹⁸⁰¹

It has been observed that it would be inaccurate to assume that the general phrasing of the objective criteria in Article 25 ICSID Convention gives the parties complete freedom to determine, by the terms of their consent, which disputes they wish to submit to the Centre.¹⁸⁰² This fact has been borne out by the Report of the Executive Directors:

“While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, *consent alone will not suffice to bring a dispute within its jurisdiction*. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto”.¹⁸⁰³

On the other hand, parties can agree to submit a contractual dispute to ICSID, provided that the jurisdictional requirements of the ICSID Convention are met.¹⁸⁰⁴

12. THE SCOPE OF CONSENT AND ITS LIMITATIONS

12.1. Scope of consent

The scope of consent to arbitration offered in treaties may vary.¹⁸⁰⁵ Indeed, *while Article 25 ICSID Convention defines the outer limits of the consent that the parties may give, there is nothing to stop them from circumscribing it in a narrower way*.¹⁸⁰⁶ The parties are therefore free to delimit their consent by defining it in abstract terms, by excluding certain types of disputes or by listing the questions they are submitting to ICSID's jurisdiction.¹⁸⁰⁷

¹⁸⁰⁰ In other words, it should be the terms of consent that ultimately defined the Centre's jurisdiction.

¹⁸⁰¹ Schreuer, *Convention*, para. 5.

¹⁸⁰² See Schreuer, *Convention*, para. 6.

¹⁸⁰³ 1 ICSID Reports 28.

¹⁸⁰⁴ Gill/Gearing/Birt, p. 398.

¹⁸⁰⁵ See also Dolzer/Schreuer, p. 244.

¹⁸⁰⁶ Schreuer, *Convention*, para. 348.

¹⁸⁰⁷ UNCTAD, p. 29.

Many BITs in their consent clauses contain phrases such as “all disputes concerning investments” or “any legal dispute concerning an investment”.¹⁸⁰⁸ These provisions do not restrict a tribunal’s jurisdiction to claims arising from the BITs’ substantive standards, and by their own terms, these consent clauses encompass disputes that go beyond the interpretation and application of the BIT itself and would include disputes that arise from a contract in connection with the investment.¹⁸⁰⁹ In practice, broad inclusive consent clauses¹⁸¹⁰ are the norm and are generally to be preferred.¹⁸¹¹ In fact, narrow clauses, listing only certain questions or excluding some other questions, are liable to lead to difficulties in determining the tribunal’s precise competence, and may also, inadvertently, exclude essential aspects of the dispute.¹⁸¹²

Nevertheless, *ICSID Centre’s services are not available for just any dispute that the parties may wish to submit*. In particular, it has always been clear that ordinary commercial transactions would not be covered by the Centre’s jurisdiction, no matter how far-reaching the parties’ consent may be.¹⁸¹³

12.2. Limitations on consent

12.2.1. Limitations in the offer of the host State

12.2.1.1. In national investment legislations

References to ICSID provided for in national investment legislation typically relate to the application and interpretation of the piece of legislation in question.¹⁸¹⁴ While some national laws are more sweeping and simply refer to disputes “concerning foreign investment”,¹⁸¹⁵ others describe the questions covered by consent clauses in narrower terms which may include the requirement that “the dispute is fundamental to the

¹⁸⁰⁸ See, e.g. Article 8 UK Model BIT (2005), preferred version; Dolzer/Stevens, 244.

¹⁸⁰⁹ Dolzer/Schreuer, p. 244. On the differentiation between treaty and contract claims, see under V.10.

¹⁸¹⁰ Consent clauses contained in investment agreements typically make reference to “any dispute” or “all disputes” under the respective agreements (Schreuer, *Convention*, para. 350).

¹⁸¹¹ *UNCTAD*, p. 29.

¹⁸¹² Schreuer, *Convention*, para. 349.

¹⁸¹³ See Schreuer, *Convention*, para. 89.

¹⁸¹⁴ *UNCTAD*, p. 29.

¹⁸¹⁵ See, e.g. Albania Law on Foreign Investments, 1993, Article 8(2); El Salvador Foreign Investment Law 1988, Article 21; Botswana Settlement of Investment Disputes (Convention) Act 1970, section 11.

investment itself”¹⁸¹⁶ or that the dispute must be “in respect of any approved enterprise”.¹⁸¹⁷ Some national laws clearly circumscribe the issues that are subject to ICSID’s jurisdiction. This is, for instance, the case with the Albanian Law on Foreign Investment of 1993 which offers consent to ICSID’s jurisdiction but limits it, however, to the disputes which arise “out of or relates to expropriation, compensation for expropriation, or discrimination and also for the transfers in accordance with Article 7”.¹⁸¹⁸

12.2.1.2. In the BITs

Although clauses contained in BITs are generally quite broad, there are BIT clauses offering consent to arbitration which do not refer to investment disputes in general terms but circumscribe the types of disputes that are submitted to arbitration.¹⁸¹⁹

A narrower offer of consent to arbitration in BITs merely covers violations of the BIT’s substantive standards.¹⁸²⁰ Moreover, some expressions of consent to arbitration are narrowly confined as to their subject matter.¹⁸²¹ Indeed, there are also genuinely limiting clauses in some BITs such as those requiring that the investment has been specifically approved by the competent authority of the host State, or restricting jurisdiction to the amount of compensation due after an expropriation.¹⁸²²

12.2.2. Limitations in the acceptance by the investor

Where ICSID’s jurisdiction is based on an offer made by one party, subsequently accepted by the other, the parties’ consent exists merely to the extent that offer and acceptance coincide.¹⁸²³ While the host State’s investment legislation or its BIT with the investor’s home State may, for instance, provide for the Centre’s jurisdiction in broad

¹⁸¹⁶ See, e.g. Papua New Guinea Investment Disputes Convention Act 1978, section 2.

¹⁸¹⁷ Schreuer, *Convention*, para. 354.

¹⁸¹⁸ See *Tradex v. Albania*, Decision on Jurisdiction, 24 December 1996, 14 ICSID Review-FILJ 161, 174 (1999). *UNCTAD*, p. 29.

¹⁸¹⁹ See Dolzer/Schreuer, p. 246. A provision that is typical for United States BITs is, e.g. contained in Article VII of the Argentina-US BIT of 1991.

¹⁸²⁰ See, e.g. Article 9 of the BIT between El Salvador and the Netherlands: “disputes which arise within the scope of this agreement between one Contracting Party and the investor of the other Contracting Party concerning an investment”.

¹⁸²¹ Dolzer/Schreuer, p. 246.

¹⁸²² Schreuer, *Convention*, para. 355.

¹⁸²³ *UNCTAD*, p. 30.

terms,¹⁸²⁴ if the investor accepts ICSID jurisdiction only with regard to a particular dispute or in respect of certain investment operations, the consent between the parties will be limited.¹⁸²⁵ On the other hand, it is clear that the investor's acceptance may not validly go beyond the limits of the host State's offer.¹⁸²⁶ Thus, any limitations contained in the legislation or treaty would apply irrespective of the terms of the investor's acceptance, and, if the terms of acceptance do not correspond with the terms of the offer, there is no perfected consent.¹⁸²⁷

13. IRREVOCABILITY OF CONSENT

The issue of the "irrevocability of consent" shows the strong contractual approach followed by the ICSID Convention. Indeed, here it is primarily the relationship between host State and investor which is of importance. Once an arbitration agreement is concluded, no party can unilaterally revoke its effect. While this follows from general contract law and is clearly provided for in Article 25(1) ICSID Convention, the issue arose in *Alcoa v. Jamaica*.¹⁸²⁸

13.1. Irrevocability after perfection of consent

Consent to the Centre's jurisdiction cannot be unilaterally revoked when both parties have given their consent to the submission of their disputes to the Centre.¹⁸²⁹ The irrevocability of consent operates only after the consent has been perfected.¹⁸³⁰ Indeed, Article 25(1), last sentence, of the ICSID Convention provides that:

"When the *parties* have given *their* consent, no party may withdraw its consent unilaterally".¹⁸³¹

On the other hand, a mere offer of consent to ICSID's jurisdiction may be withdrawn at any time unless, of course, it is irrevocable by its own terms. However, in the case of

¹⁸²⁴ Schreuer, *Convention*, para. 356.

¹⁸²⁵ Amerasinghe, *Jurisdiction*, pp. 224 *et seq.*

¹⁸²⁶ *UNCTAD*, p. 30.

¹⁸²⁷ Schreuer, *Convention*, para. 356.

¹⁸²⁸ *Alcoa Minerals of Jamaica v. Government of Jamaica*, IV YBCA 206 (1979) 207 *et seq.*

¹⁸²⁹ Hirsch, p. 50.

¹⁸³⁰ See *UNCTAD*, p. 37. About the perfection of consent, see under V.6.

¹⁸³¹ Emphasis added.

national legislation and treaty clauses providing for ICSID jurisdiction, the investor must have accepted the consent in writing to make it irrevocable.¹⁸³² Moreover, while the parties are free to subject their consent to limitations and conditions, once consent has been given, its irrevocability also extends to the introduction of new limitations and conditions.¹⁸³³

13.2. The binding and irrevocable nature of consent as manifestation of “*pacta sunt servanda*”

It has been observed that the binding and irrevocable nature of consent to the jurisdiction of ICSID is a manifestation of the maxim “*pacta sunt servanda*” and applies to undertakings to arbitrate in general.¹⁸³⁴ While the applicability of this maxim is obvious where the consent is expressed in a compromissory clause contained in an agreement, it should apply equally where an offer of consent is contained in national legislation or in a treaty which has been accepted by the investor.¹⁸³⁵

13.3. Insulation-process through the acceptance by the investor of legislative or treaty-based offers

Even though a host State is free to change its investment legislation, including the provision concerning consent to ICSID’s jurisdiction, the situation is different if the *investor has accepted the offer* in writing while the legislation was still in force, as the *consent* agreed to by the parties then *becomes insulated* from the validity of the legislation containing the offer and it assumes a contractual existence independent of the legislative instrument that helped to bring it about.¹⁸³⁶

Although BITs and MITs that provide consent to ICSID’s jurisdiction are more difficult to terminate than national legislation, the fact remains that consent based on treaties is only perfected once it is accepted by the investor. Indeed, it is only *after its acceptance* by the investor that *an offer of consent* contained in a BIT or other international instrument *becomes irrevocable and hence insulated* from attempts by the host State to terminate the treaty.¹⁸³⁷

¹⁸³² UNCTAD, p. 37.

¹⁸³³ *Ibid.* On limitations on consent, see under V.12.2.

¹⁸³⁴ See Delaume, *Finality*, pp. 24 *et seq.*

¹⁸³⁵ UNCTAD, pp. 37 *et seq.*

¹⁸³⁶ *Ibid.*

¹⁸³⁷ *Ibid.*

13.4. No withdrawal of host State's legislative consent

Another question that may arise is whether there are cases in which the State will not be permitted to withdraw its legislative consent, even though the investor has not yet given its consent; such a situation is likely to arise when the laws of the host State declare that the legislative consent is irrevocable.¹⁸³⁸

On the one hand, following the rule of interpretation of treaties “in accordance with the ordinary meaning to be given to the terms of the treaty”,¹⁸³⁹ literal effect may be given to the provision contained at the end of Article 25(1) ICSID Convention, permitting the host State to withdraw its unilateral consent as long as the foreign investor has not agreed in writing to the jurisdiction of the Centre.¹⁸⁴⁰ For this reason it has been observed that it is inadvisable for an investor, to rely on an ICSID consent clause contained in the host State's domestic law or in a treaty without making a reciprocal declaration of consent.¹⁸⁴¹

On the other hand, it has also been argued that in accordance with accepted doctrines of public international law—which also apply to the internal legislation of States—a host State may not unilaterally withdraw consent given through legislation, and such consent is therefore irrevocable.¹⁸⁴² It is possible to base such an argument on the rule of “unilateral declarations”, which is well-founded in international law, and according to which—upon the fulfilment of certain conditions—a State may not retract a unilateral commitment.¹⁸⁴³ Moreover, the doctrine of estoppel, which was discussed in *Amco v. Indonesia*¹⁸⁴⁴—where it was confirmed that the doctrine is also applicable to international economic relations in which private parties are involved—is likely to be of assistance in arriving at such a determination. In accordance with these norms, a party is therefore precluded from acting contrary to its own declaration, when the declaration was made by an authorised person in unequivocal terms, and the other party relied on the declaration and prejudiced its own position because of the declaration.¹⁸⁴⁵

¹⁸³⁸ Hirsch, p. 53.

¹⁸³⁹ See Article 31(1) VCLT.

¹⁸⁴⁰ Hirsch, p. 53.

¹⁸⁴¹ See *UNCTAD*, p. 37.

¹⁸⁴² See Hirsch, pp. 53 *et seq.*

¹⁸⁴³ *Ibid.*

¹⁸⁴⁴ *Amco Asia Corp and others v. Republic of Indonesia*, Decision on Jurisdiction, 25 September 1983, 89 ILR 379 (1992), 1 ICSID Reports 389 (1993).

¹⁸⁴⁵ Hirsch, p. 54.

14. EXPANSION OF CONSENT BECAUSE OF TREATIES' PROVISIONS

14.1. Most-Favoured-Nation (MFN) clauses

An MFN-clause contained in a treaty will extend the better treatment granted to a third State or its nationals to a beneficiary of the treaty.¹⁸⁴⁶ Most BITs and some other treaties¹⁸⁴⁷ for the protection of investment include MFN-clauses.¹⁸⁴⁸ As many investment treaties provide that neither contracting State shall submit the investors of the other State to treatment less favourable than that which it accords to investors of any third country, the question in our context is whether such “no less favourable treatment” also applies to the dispute settlement options: can one incorporate into a treaty a dispute resolution provision of another treaty in whole or in part?¹⁸⁴⁹

14.1.1. General

14.1.1.1. Definition and goal of MFN-clauses

The MFN-clause has been defined as “a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured treatment in an agreed sphere of relationships”.¹⁸⁵⁰ Indeed, in its usual guise, the standard obliges a host State to treat investors from one foreign country no less favourably than investors from other foreign countries.¹⁸⁵¹ The basic goal of MFN-clauses is to guarantee equality of competitive opportunities for foreign investors in the host State.¹⁸⁵²

While the MFN standard is a *typical substantive commitment* of most modern investment treaties, an important question is *whether the MFN-clause* included in most BITs can be applied to the *procedural arrangements* embodied in that particular treaty *for the settlement of disputes* that may arise under it.¹⁸⁵³ Although the MFN-clause may specify that it includes or that it excludes dispute settlement, most MFN-clauses are worded in a general way and typically just refer to the treatment of investments.¹⁸⁵⁴

¹⁸⁴⁶ See also Dolzer/Myers, p. 49. See also Dolzer/Schreuer, p. 253.

¹⁸⁴⁷ See Article 1103 NAFTA; Article 10(7) ECT.

¹⁸⁴⁸ Dolzer/Schreuer, p. 253.

¹⁸⁴⁹ Kaufmann-Kohler, *Interpretation*, pp. 269 *et seq.*

¹⁸⁵⁰ Following the 1978 Draft Articles on Most-Favoured-Nation Clauses, prepared by the International Law Commission. See Faya Rodriguez, p. 90.

¹⁸⁵¹ Kurtz, p. 523.

¹⁸⁵² *Ibid.*

¹⁸⁵³ See Orrego Vicuña, p. 133.

¹⁸⁵⁴ Dolzer/Schreuer, p. 253.

14.1.1.2. BITs: emphasis on dispute settlement mechanisms

On the other hand, it has also been observed that under most BITs, and some multilateral treaties as well, the key to the protection of the investor lies not so much in the substantive provisions of the treatment accorded, which are rather scant and basic, but in the arrangements allowing for the submission of the disputes to arbitration.¹⁸⁵⁵ However, while some BITs have provided expressly that the MFN treatment extends to the provisions on settlement of disputes—and in these cases it is beyond doubt that the parties intended the MFN-clause to include dispute settlement in its scope—in most treaties the question is not addressed explicitly.¹⁸⁵⁶ Therefore, it follows that it must be established whether the parties intended to apply the clause to dispute settlement arrangements or if this can be reasonably inferred from the practice followed by the parties in their treatment of foreign investors and their own investors.¹⁸⁵⁷

14.1.2. *Substantive v. procedural rights*

While the application of an MFN-clause to substantive rights is relatively straightforward, the question of whether MFN rights apply to procedural matters is more controversial, as in particular there is conflicting authority on whether an MFN-clause will enable an investor to obtain the benefit of a direct right of arbitration contained in other investment treaties.¹⁸⁵⁸

In the *Maffezini* case¹⁸⁵⁹ the tribunal decided the question of whether more favourable provisions on dispute settlement contained in the basic treaty could be extended to the beneficiary of another treaty by operation of the MFN-clause in the affirmative on the ground that *procedural and substantive rights were intimately connected*.¹⁸⁶⁰ Indeed the tribunal considered “that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors”.

On the other hand, in two cases rendered in 2005 and 2006, namely *Plama*¹⁸⁶¹ and *Telenor*,¹⁸⁶² other ICSID arbitral tribunals considered that the *MFN-clause cannot*

¹⁸⁵⁵ See Orrego Vicuña, p. 138.

¹⁸⁵⁶ *Ibid.*

¹⁸⁵⁷ *Ibid.*

¹⁸⁵⁸ Turner/Mangan/Baykitch, p. 116.

¹⁸⁵⁹ *Emilio Agustín Maffezini v. Kingdom of Spain*, Case No. ARB/97/7, Award (13 November 2000), 16 ICSID Review-FILJ 248 (2001) and XXVII YBCA (2002) 13.

¹⁸⁶⁰ Kaufmann-Kohler, *Interpretation*, p. 270.

¹⁸⁶¹ *Plama Consortium Ltd et al. v. Republic of Bulgaria*, ICSID Case No. ARB/03/04, Decision on Jurisdiction, 8 February 2005.

*prevail on the fundamental arbitration requirement which is the meeting of the parties' consents to arbitrate.*¹⁸⁶³ Therefore, arbitral tribunals constituted in these two recent cases were reluctant to set up a procedural bridge between two bilateral instruments and to consider possible the application of a specific dispute settlement clause provided for in a given BIT to disputes raised under the realm of another BIT, and, consistently with this opinion, they held that an MFN-clause must apply merely to the “treatment of investments” understood as “substantial” not “procedural” rights applicable thereto.¹⁸⁶⁴

Other tribunals again,¹⁸⁶⁵ when dealing with the application of MFN-clauses to the requirement to seek a settlement in domestic courts for 18 months, confirmed that the claimants were entitled to rely on the MFN-clause in the applicable treaty to invoke the more favourable dispute settlement clause of another treaty that did not contain the 18 months' rule.¹⁸⁶⁶ The tribunals underlined the role of arbitration. In *Gas Natural*,¹⁸⁶⁷ for instance, the tribunal focused on the importance to be attached to the assurance of an independent international arbitration and concluded that, “*unless it appears clearly that the State parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise most-favoured-nation provisions in BITs should be understood to be applicable to dispute settlement*”.¹⁸⁶⁸

14.1.3. Interpretation

14.1.3.1. Identifying the basic treaty

The first question that needs to be discussed is that of the basic treaty governing the rights of the beneficiary of the clause because it is this treaty that will determine whether the MFN-clause can be rightly invoked.¹⁸⁶⁹

¹⁸⁶² *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006.

¹⁸⁶³ Poulain, p. 301.

¹⁸⁶⁴ *Ibid.*

¹⁸⁶⁵ *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, paras 32-110; *Gas Natural SDG, S.A. v. Argentina*, Decision on Jurisdiction, 17 June 2005, paras 24-31 and 41-49; *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, Decision on Jurisdiction, 16 May 2006, paras 52-66; *National Grid PCL v. Argentina*, Decision on Jurisdiction, 20 June 2006, paras 53-94; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina and AWG Group Ltd. v. Argentina*, Decision on Jurisdiction, 3 August 2006, paras 52-68.

¹⁸⁶⁶ Dolzer/Schreuer, p. 254.

¹⁸⁶⁷ As in *Gas Natural* the underlying IIA was Spain-Argentina, the MFN-clause is the same as in *Maffezini*.

¹⁸⁶⁸ *Gas Natural*, para. 49.

¹⁸⁶⁹ Orrego Vicuña, p. 134.

14.1.3.2. The scope of the MFN-clause

Most *MFN-clauses are highly generic and follow the very same purpose*, even though the wording may differ; such generic wording cannot be otherwise, or cannot become too specific, given the nature of the MFN-clause itself.¹⁸⁷⁰ Unless there is a specific note or otherwise a clear reference to the intent of the parties, most MFN-clauses should be interpreted the same way.¹⁸⁷¹

14.1.3.3. Establishing the intent of the parties

If there is *specific guidance in the text* regarding whether or not the MFN-clause applies to procedural or substantive provisions, of course the arbitrators have to abide by that as the State parties to the treaty left *no doubt as to their intent*.¹⁸⁷² However, due to the fact that in most of the cases arbitrators are confronted with a *very abstract and general clause, such a clause has to be interpreted*.¹⁸⁷³ The specific circumstances of each case will have a decisive influence on the finding and it cannot be assumed that provisions contained in other treaties will apply mechanically to the basic treaty.¹⁸⁷⁴ Among other elements, it is here that the *ejusdem generis* principle has a controlling role to play.¹⁸⁷⁵

14.1.3.4. *Ejusdem generis* principle

Already in the *Ambatielos* case¹⁸⁷⁶ the Commission of Arbitration confirmed the importance of the *ejusdem generis* rule and it affirmed that “the most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates”.¹⁸⁷⁷ However, while the public international law principle of *ejusdem generis* has been regularly applied by investment treaty tribunals,

¹⁸⁷⁰ Faya Rodriguez, p. 92.

¹⁸⁷¹ *Ibid.*

¹⁸⁷² See Faya Rodriguez, pp. 97 *et seq.*

¹⁸⁷³ *Ibid.*

¹⁸⁷⁴ Orrego Vicuña, p. 142.

¹⁸⁷⁵ *Ibid.*

¹⁸⁷⁶ *Ambatielos* Case, Decision on Jurisdiction, ICJ Reports 1952.

¹⁸⁷⁷ Orrego Vicuña, p. 136.

other tribunals¹⁸⁷⁸ have found that the particular MFN-clause under consideration did not extend to the procedure for settling disputes.¹⁸⁷⁹

14.1.3.5. Specification of categories of disputes

When there are *BITs entered into by a State* which provide for reference to *arbitration of all disputes*, and others entered into *by the same State that limit consent* to arbitration *to specified categories of dispute*, such as expropriation, it must be obvious that such a State, when reaching agreement on the latter form of dispute resolution clause, intends that the jurisdiction of the arbitral tribunal is to be limited to the specified categories and is not to be inferentially extended by an MFN-clause.¹⁸⁸⁰

Where *both parties to a BIT* which *restricts the reference to arbitration to specified categories* have *entered into other BITs* which *refer all disputes to arbitration* or where they have concluded other BITs, some of which refer all disputes to arbitration while others limit such a reference to specified categories of dispute, then it can fairly be assumed that in the BIT in question the two parties share a *common intention to limit the jurisdiction* of the arbitral tribunal to the categories so specified.¹⁸⁸¹

14.1.3.6. Perspective when interpreting a MFN-clause

The *Telenor* tribunal observed that “those who advocate a wide interpretation of the MFN-clause have almost always examined the issue from the perspective of the investor”.¹⁸⁸² However, according to the *Telenor* tribunal, “what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the *intention of the States who are the Contracting Parties*”.¹⁸⁸³ This was, however, done by the *Maffezini* tribunal which examined the treaty practice of both Argentina and Spain in great detail and devoted particular attention to the Spanish treaty practice and policies on protection of foreign investments, as it was there that the intent of Spain could be established.¹⁸⁸⁴

¹⁸⁷⁸ See the *Plama v. Bulgaria* and the *Salini v. Jordan* tribunals.

¹⁸⁷⁹ Turner/Mangan/Baykitch, pp. 116-117.

¹⁸⁸⁰ *Telenor*, § 95.

¹⁸⁸¹ *Ibid.*

¹⁸⁸² See *Telenor*, § 95.

¹⁸⁸³ *Ibid.*

¹⁸⁸⁴ Orrego Vicuña, p. 142.

Another aspect of particular interest is that by definition treaties operate both ways, and therefore, the treatment accorded to the foreign investor in the host country also applies to the treatment that its investors are entitled to receive from the other party.¹⁸⁸⁵

14.1.4. Different treatment of MFN-clauses depending on the type of procedural requirement in discussion

In light of the foregoing, there seems to be great inconsistency with respect to MFN-clause jurisprudence: while *Maffezini*,¹⁸⁸⁶ *Siemens*,¹⁸⁸⁷ *Gas Natural*¹⁸⁸⁸ and *Suez*¹⁸⁸⁹ interpreted silence or ambiguity as indicative that the MFN-clause included, with certain limits, procedural provisions, *Salini*,¹⁸⁹⁰ *Plama*¹⁸⁹¹ and *Telenor*¹⁸⁹² concluded just the opposite.¹⁸⁹³ However, it has been observed that this view is too simplistic, as the following has to be taken into account:

- *Maffezini*, *Siemens*, *Gas Natural* and *Suez* were about a less fundamental procedural requirement: a ***mere preliminary step for accessing arbitration***;
- by contrast, *Salini*, *Plama* and *Telenor Mobile* dealt with core matters¹⁸⁹⁴—basically an ***extension of jurisdiction***—which could easily have been categorised as “public policy provisions” following *Maffezini*. In all these cases a radical effect was intended by the claimant: in the words of *Plama*, to replace the dispute resolution clause in the basic treaty *in toto* by a dispute resolution mechanism from a third treaty.¹⁸⁹⁵

With regard to the MFN-clause at least three different issues of both a procedural and substantive nature can be distinguished:

¹⁸⁸⁵ Orrego Vicuña, p. 142.

¹⁸⁸⁶ *Emilio Augustín Maffezini v. Kingdom of Spain*, Case No. ARB/97/7, Award (13 November 2000), 16 ICSID Review-FILJ 248 (2001) and XXVII YBCA (2002) 13.

¹⁸⁸⁷ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

¹⁸⁸⁸ *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005.

¹⁸⁸⁹ *Suez, Sociedad General de Aguas de Barcelona S.A. & Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006.

¹⁸⁹⁰ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, Decision on Jurisdiction, ICSID Case No. ARB/02/13 2a, 29 November 2004.

¹⁸⁹¹ *Plama Consortium Ltd et al. v. Republic of Bulgaria*, ICSID Case No. ARB/03/04, Decision on Jurisdiction, 8 February 2005.

¹⁸⁹² *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Decision on Jurisdiction, 13 September 2006.

¹⁸⁹³ Faya Rodríguez, p. 95.

¹⁸⁹⁴ Basically an extension of jurisdiction.

¹⁸⁹⁵ Faya Rodríguez, pp. 95-96.

1. the ability to use MFN to avoid a local remedies procedural requirement;
2. the ability to use MFN to “shop” for a wholly different dispute resolution mechanism and forum; and
3. the ability to use MFN to seek arbitration of claims for compensation arguably broader than was originally provided in the BIT itself.¹⁸⁹⁶

These issues will now be analysed in the following sections (under 14.1.4.1.–14.1.4.3.). Then the limits to be observed in using the MFN-clause will be discussed (under 14.1.4.4.).

14.1.4.1. Preliminary steps for accessing arbitration

14.1.4.1.1. Shortening of waiting period

The *Siemens* tribunal,¹⁸⁹⁷ whilst relying on *Maffezini*, articulated a standard that appears to qualify *Maffezini* by emphasising the notion that a procedural inconsistency between similar treaties will be deemed arbitrary and subject to MFN invocation in the absence of evidence that such inconsistency derives from a “sensitive” policy objective.¹⁸⁹⁸ However, the extent to which the treaties must be similar, and the scope of a “sensitive” policy issue is not entirely clear. In *Gas Natural*¹⁸⁹⁹ the tribunal also focused on the importance to be attached to the assurance of independent international arbitration.¹⁹⁰⁰ A similar approach was also taken in the *Suez* case.¹⁹⁰¹

It has been observed that the shortening of a seemingly arbitrary waiting period for the submission of a dispute *affects the timing of a host State’s consent to arbitration* of investment disputes, but does *not necessarily undermine the host State’s consent as a whole*.¹⁹⁰²

¹⁸⁹⁶ Kreindler, p. 49.

¹⁸⁹⁷ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

¹⁸⁹⁸ Teitelbaum, p. 231.

¹⁸⁹⁹ *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005.

¹⁹⁰⁰ See Faya Rodriguez, p. 95.

¹⁹⁰¹ *Suez, Sociedad General de Aguas de Barcelona S.A. & Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006.

¹⁹⁰² See Teitelbaum, p. 232.

14.1.4.1.2. Retroactive application of the BIT: as a special case of change of dispute resolution mechanism

Although the *Tecmed*¹⁹⁰³ tribunal did not entertain the MFN claim, it did not completely reject the *Maffezini* approach, as it found that the limit on retroactive application of the BIT, unlike other procedural matters, was at the core of the parties' negotiations, or formed part of the parties' specific will.¹⁹⁰⁴ It also suggested that ***other procedural requirements would not go to the core of matters specifically negotiated, or would not expand the consent to arbitration beyond the limits clearly set forth in the relevant treaty.***¹⁹⁰⁵

14.1.4.2. Substitution of the dispute resolution system

14.1.4.2.1. Invoking other types of arbitration/invoking arbitration where there is no arbitration clause in the investment treaty

In *Plama v. Bulgaria*¹⁹⁰⁶ the tribunal did not extend the MFN-clause to arbitration. While the claimant argued that it was entitled to select the ICSID dispute resolution mechanism provided in another treaty instead of the *ad hoc* arbitration offered in the "basic" treaty, the tribunal did not accept this substitution of dispute resolution systems because it was not free from doubt that such an extension or incorporation of language from a third treaty reflected the intent of the contracting States:¹⁹⁰⁷

“An MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, ***unless the MFN provisions in the basic treaty leaves no doubt*** that the Contracting Party intended to incorporate them”.¹⁹⁰⁸

¹⁹⁰³ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, available at <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>.

¹⁹⁰⁴ Teitelbaum, p. 230.

¹⁹⁰⁵ *Ibid.*

¹⁹⁰⁶ *Plama Consortium Ltd et al. v. Republic of Bulgaria*, ICSID Case No. ARB/03/04, Decision on Jurisdiction, 8 February 2005. The MFN-clause in question provides for that: “Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third States”.

¹⁹⁰⁷ Kaufmann-Kohler, *Interpretation*, para. 13-40. See also Faya Rodriguez, p. 94.

¹⁹⁰⁸ *Plama*, para. 223.

Hence, according to the *Plama* tribunal, there is a sort of presumption that an MFN-clause does not extend to dispute resolution matters, except when the Contracting Parties have expressed a contrary interest.¹⁹⁰⁹

It has been observed that what is *more threatening to the scope of consent to arbitration* is the use of an MFN-clause to invoke ICSID or other types of arbitration *when there is no arbitration clause* in the investment treaty.¹⁹¹⁰ This happened in *Plama v. Bulgaria* as a secondary argument in the event that the tribunal would have decided that Bulgaria had not consented to jurisdiction under the ECT.¹⁹¹¹

14.1.4.2.2. Referring contractual disputes to arbitration

In *Salini v. Jordan*¹⁹¹² the claimants argued that other BITs between Jordan and countries such as the United Kingdom and the United States clearly allowed investors to refer contractual disputes to ICSID, and thus invoked the MFN-clause of the Italy-Jordan BIT to bypass the provision in the BIT that excluded contractual disputes from ICSID arbitration.¹⁹¹³ The tribunal distinguished the MFN-clause in the Italy-Jordan BIT, finding that it was not as broad and did not refer to “all matters subject to this agreement”. The tribunal therefore concluded that in this case the claimants had failed to establish that it was the common intention of the parties to have the MFN-clause applied to dispute settlement, and it found that the BIT clearly excluded from ICSID jurisdiction contractual disputes between an investor and an entity of a State party.¹⁹¹⁴

14.1.4.3. **Expanding the scope of host States’ consent to arbitration by using the MFN-clauses to bypass substantive treatment**

Another way of *expanding the scope of host States’ consent to arbitration is the use of MFN-clauses to bypass substantive treatment*, such as the minimum standard of treatment of investment, or fair and equitable treatment, as was the case in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*.¹⁹¹⁵

¹⁹⁰⁹ See also Kaufmann-Kohler, *Precedent*, p. 371.

¹⁹¹⁰ See Teitelbaum, pp. 232 *et seq.*

¹⁹¹¹ *Ibid.*

¹⁹¹² *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, Decision on Jurisdiction, ICSID Case No. ARB/02/13 2a, 29 November 2004.

¹⁹¹³ Teitelbaum, pp. 229 *et seq.*

¹⁹¹⁴ *Ibid.*

¹⁹¹⁵ *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, 44 ILM 91 (2005). On this case, see Teitelbaum, pp. 233 *et seq.*

14.1.4.4. The limits to be observed

14.1.4.4.1. Against disruptive “treaty-shopping”

Regarding the limits to be observed when deciding on the extension of the MFN-clause, the arbitral tribunal in *Maffezini* stated that:

“[a] distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand”.¹⁹¹⁶

Later the *Plama* and *Telenor* tribunals also underlined the risk of exposure to treaty-shopping.¹⁹¹⁷

14.1.4.4.2. Public policy exceptions

The *Maffezini* tribunal provided examples of some “public policy” provisions that could not be overridden by an MFN-clause, namely:

- the agreement of a particular forum such as the ICSID;
- when the parties have defined a highly institutionalised and very precise procedural mechanism to conduct arbitration, as happens under NAFTA and other specialised arrangements;
- the “fork in the road” clause; and
- when one party has conditioned the consent to arbitration to the prior exhaustion of local remedies.¹⁹¹⁸

14.1.5. *Views expressed in the literature*

McLachlan/Shore/Weiniger submitted that the reasoning of the tribunal in *Plama* is to be strongly preferred over that in *Maffezini*, because as the ICJ pointed out in *East*

¹⁹¹⁶ *Maffezini*, para. 63.

¹⁹¹⁷ See *Telenor*, § 93.

¹⁹¹⁸ See Faya Rodriguez, p. 93; see also Orrego Vicuña, pp. 143 *et seq.* and Kurtz, pp. 547 *et seq.*

Timor (Portugal v. Australia),¹⁹¹⁹ the scope of application of a substantive obligation is an entirely separate question to the conferral of jurisdiction upon an international tribunal. Indeed, according to this view, in investment arbitration, where consent has to be constructed from the standing consent given by the State by treaty, and the subsequent consent given by the investor at the time the claim is submitted to arbitration, it is particularly important to interpret the ambit of the State's consent strictly.¹⁹²⁰ Moreover, as the balance struck in investment treaties between the various dispute settlement options is often the subject of careful negotiation between the State parties, selecting from a range of different techniques, it is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in other treaties,¹⁹²¹ and, finally, it is in any event not possible to imply a hierarchy of favour to dispute settlement provisions.¹⁹²² Therefore, the result, following the approach in *Plama*, should be that the MFN-clause will not apply to investment treaties' dispute settlement provisions, save where the States expressly provide so. In other words, the domain of application of an MFN-clause will be as to the substantive rights vouchsafed to investors from third States to which special preferences have been granted.¹⁹²³

On the other hand, Kaufmann-Kohler observed that, even though, at first sight, they seem to conflict (*Maffezini* being *for* the application of the MFN-clause to dispute resolution rights and *Plama* *against* it) upon closer examination they appear, however, to supplement rather than contradict each other.¹⁹²⁴ Indeed, while *Maffezini* concerned MFN-clauses in the presence of an ICSID dispute resolution provision and sought to avoid a waiting period or similar requirement, *Plama* dealt with attempts to import, in whole or in part, the ICSID dispute settlement mechanism into a treaty that either provided for another dispute settlement method or limited the scope of the ICSID arbitration clause.¹⁹²⁵ Nevertheless, the *Maffezini* tribunal expressly limited the potential impact of the MFN-clause in such cases.¹⁹²⁶ Hence, while in theory there appears to be a clear distinction between the two schools, in practice, it has been submitted that they can easily be reconciled, as, in actual application, they can be combined without conflicting, and the rule that appears to emerge from this combination is the following:

¹⁹¹⁹ Case concerning East Timor (*Portugal v. Australia*) (1995) ICJ Reports 90.

¹⁹²⁰ See McLachlan/Shore/Weiniger, para. 7.168.

¹⁹²¹ Negotiated with other State parties and in other circumstances.

¹⁹²² *Ibid.* For a critical view on a hierarchy of favour to dispute settlement provisions in commercial arbitration, see, e.g. Brekoulakis, *Notion*.

¹⁹²³ See McLachlan/Shore/Weiniger, para. 7.169.

¹⁹²⁴ See Kaufmann-Kohler, *Precedent*, pp. 370 *et seq.*

¹⁹²⁵ *Ibid.*

¹⁹²⁶ See *Emilio Agustín Maffezini v. Kingdom of Spain*, para. 63.

MFN-clauses *can* be used to overcome waiting periods and comparable admissibility requirements, but *not* to replace, in whole or in part, the dispute resolution mechanism provided in the treaty upon which jurisdiction is based.¹⁹²⁷

In between the views of McLachlan/Shore/Weiniger and Kaufmann-Kohler, Dolzer/Schreuer observed that while the two sets of cases may be distinguishable on factual grounds, there is, however, a substantial contradiction in the reasoning of the tribunals. Indeed, both groups of tribunals made, in particular, broad statements as to the applicability, or otherwise, of MFN-clauses to dispute settlement in general, which are impossible to reconcile.¹⁹²⁸

14.1.6. Comments

Precisely because of the fact that a hierarchy of favour in dispute settlements provisions should be avoided, I do not agree with the view¹⁹²⁹ that it is important to construe the ambit of the State's consent strictly. On the other hand, the differentiation created by the different arbitral tribunals dealing with MFN-clauses and pointed out by Kaufmann-Kohler's analysis¹⁹³⁰ seems to me to be of importance. This leads me to the proposal for the interpretation of MFN-clauses explained below, in which for determining the consent of the parties to solve disputes through arbitration based on a MFN-clause, *a more-stage interpretation process should take place*.

14.1.6.1. Interpretation of the BIT: consent of the State

To establish whether the host State has consented to use arbitration as a dispute resolution mechanism or not, the following process of interpretation is suggested:

1. dispute settlement matters are expressly excluded from the field of application of the MFN-clause: in this case it is not possible to request the application of the MFN-clause;
2. dispute settlement matters are not expressly excluded from the field of application of the MFN-clause. In this case a further distinction should be drawn between:

¹⁹²⁷ Kaufmann-Kohler, *Precedent*, p. 371.

¹⁹²⁸ Dolzer/Schreuer, p. 256.

¹⁹²⁹ See McLachlan/Shore/Weiniger, para. 7.168.

¹⁹³⁰ See, in particular, Kaufmann-Kohler, *Precedent*, pp. 370 *et seq.*

- the ability to use MFN-clauses to avoid a local remedies procedural requirement (less fundamental procedural requirements, *i.e.* preliminary step for accessing arbitration/waiving a preliminary step in accessing a mechanism): in this case there should be a presumption that the MFN-clause applies;
 - the ability to use an MFN-clause to “shop” for a wholly different dispute resolution mechanism and forum. In this situation a careful analysis of all the BITs concluded with other States by the host State in dispute with the investor should be undertaken:
 - if the BITs, in particular those which are more recent than the BIT whose MFN-clause is invoked, all contain a similar dispute resolution mechanism, then there should be a presumption that this kind of dispute resolution mechanism applies;
 - if none of the BITs, in particular none of those which are more recent than the BIT whose MFN-clause is invoked, contain a similar dispute resolution mechanism, then there should be a presumption that this kind of dispute resolution mechanism does not necessarily apply;
 - in the other cases a careful analysis of the BITs should be undertaken, in particular considering the BITs concluded with those countries whose economies present structural similarities with the economy of the investor’s State in question.
3. with regard to the specification of categories of disputes the differentiation made by the *Teleonor* tribunal should be used (see under V.14.1.3.5.); and
 4. the interpretation of MFN-clauses should be done without inclination, *i.e.* be neither wide nor restrictive.

14.1.6.2. Consent of the investor

The investor gives his consent for solving disputes through the dispute resolution mechanism contained in another BIT in doing the investment or, at the latest, with the filing of the claim. His *consent is evidently less problematic* than the one of the host State, as *the investor will be the party who will invoke the dispute resolution provision* contained in another BIT *based on an MFN-clause* in the basic BIT.

14.2. Umbrella clauses: expansion of treaty's consent by elevating contractual disputes to treaty's disputes

A technique found in investment treaties, which may extend the scope of their protection, is the so-called “umbrella clause”.¹⁹³¹ An umbrella clause is a provision in an investment protection treaty that guarantees the observation of obligations assumed by the host State *vis-à-vis* the investor; the most contentious issue with regard to clauses of this kind is *whether, and under what circumstances, they place investment agreements, i.e. contracts between the host State and the investor, under the treaty's protection*.¹⁹³²

14.2.1. The concept

The host State guarantees by treaty the specific undertakings which it has entered into by contract or otherwise with investors of the other contracting State, bringing those undertakings under the umbrella of protection of the treaty,¹⁹³³ and therefore, possibly, also under its dispute resolution provisions. The tribunal in *LG&E v. Argentina*¹⁹³⁴ characterised the umbrella clause as one which

“creates a requirement by the host State to meet its obligations towards foreign investors, including those that derive from a contract; hence such obligations receive extra protection by virtue of their consideration under the bilateral treaty”.¹⁹³⁵

Umbrella clauses, thus, create a reciprocal international obligation owed by the Contracting States to each other that requires them, as host States, to observe obligations they have entered into with investors of the other Contracting State or with regard to their investments.¹⁹³⁶

¹⁹³¹ Weiniger, para. 4-40.

¹⁹³² Dolzer/Schreuer, p. 153.

¹⁹³³ McLachlan/Shore/Weiniger, para. 4-40.

¹⁹³⁴ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras 169-175.

¹⁹³⁵ *OECD Working Paper 2006/3*, p. 21.

¹⁹³⁶ Sinclair A., p. 411.

14.2.2. Current practice

14.2.2.1. Emergence of the umbrella clause in modern investment treaties

Although an umbrella clause is already to be found in the very first known BIT,¹⁹³⁷ the protection of contractual rights by treaty under an umbrella clause does not find universal application in modern investment treaties, but, on the contrary is notably absent from the model forms of many, in particular non-Western, States.¹⁹³⁸ On the other hand, the practice of Western States has been to seek to include such a protection as a distinct obligation.¹⁹³⁹

Of the major multilateral investment conventions today, the umbrella clause is not found in NAFTA Chapter 11 but it did make its way into the ECT.¹⁹⁴⁰ Until recently, it had retained only the attention of scholars, who in their majority considered it a clause elevating contractual obligations to treaty obligations. No arbitral tribunal had considered the issue until the ones arbitrating the *SGS v. Pakistan*¹⁹⁴¹ and *SGS v. Philippines*¹⁹⁴² cases. Since then, it has attracted considerable discussions both by arbitral tribunals and scholars.¹⁹⁴³ Indeed, the proper construction of the umbrella clause has become a matter of contention in a number of cases.¹⁹⁴⁴ While in recent years, *Noble Ventures*,¹⁹⁴⁵ *MTD Equity*,¹⁹⁴⁶ *CMS*¹⁹⁴⁷ and the majority in *Eureko*¹⁹⁴⁸ essentially

¹⁹³⁷ The Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments of 25 November 1959 (see also Sinclair A., p. 433).

¹⁹³⁸ McLachlan/Shore/Weiniger, para. 4-45.

¹⁹³⁹ *Ibid.* It has been said that one may estimate that about 1,000 treaties in force include umbrella clauses (Dolzer/Schreuer, p. 153).

¹⁹⁴⁰ Sinclair A., p. 434. See Article 10(1) ECT.

¹⁹⁴¹ *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, Decision on Jurisdiction, 6 August 2003, (2003) 18 ICSID Review-FILJ 301; (2003) 42 ILM 1290, para. 163.

¹⁹⁴² *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, Decision on Jurisdiction, 29 January 2004, (2004) 19 Mealey's IAR 15.

¹⁹⁴³ *OECD Working Paper 2006/3*, p. 22.

¹⁹⁴⁴ The first ICSID case that addressed the umbrella clause was *Fedax NV v. Republic of Venezuela*, Award, 9 March 1998, (1998) 37 ILM 1391; (2002) 5 ICSID Reports 186. However, in this case the tribunal made not an explicit reference to an umbrella clause (see *OECD Working Paper 2006/3*, p. 15).

¹⁹⁴⁵ *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, available *inter alia* at <http://ita.law.uvic.ca/documents/Noble.pdf>.

¹⁹⁴⁶ *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, see (2005) 20(2) ICSID Review-FILJ 615.

¹⁹⁴⁷ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, available *inter alia* at www.worldbank.org/icsid/cases/CMS_Decision_english.pdf.

¹⁹⁴⁸ *Eureko BV v. Republic of Poland*, *Ad Hoc* Proceedings, Partial Award, 19 August 2005, details of award available *inter alia* at www.asil.org/ilib/2005/09/ILIB050913.htm#j3.

allowed for such use of umbrella clauses, more recently, however, *BP-Pan American*¹⁹⁴⁹ and *El Paso*¹⁹⁵⁰ have rejected such use adopting a restrictive approach.¹⁹⁵¹ In the latter case the tribunal stated that:

“an umbrella clause cannot transform any contract claim into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims”.

14.2.2.2. The SGS cases

Much attention has been paid to the award in *SGS v. Pakistan*, and the contrasting one in *SGS v. Philippines*. Much of the interest generated by these awards arises from the two tribunals’ different approaches to the umbrella clauses contained in the respective BITs upon which the arbitrations were based.¹⁹⁵²

In *SGS v. Pakistan*, Pakistan objected to the ICSID tribunal’s jurisdiction on a number of grounds, including the fact that the dispute between the parties arose out of a contract rather than under the BIT. SGS however contended that, as a result of the “umbrella clause” in the Switzerland-Pakistan BIT, contractual disputes between the parties could be elevated to treaty disputes.¹⁹⁵³ The tribunal rejected SGS’s contention that this clause elevated breaches of a contract to breaches of the treaty.¹⁹⁵⁴ The *SGS v. Pakistan* tribunal held that the text fell considerably short of the alleged “*elevator effect*”, that the legal consequences of the elevator effect were so far reaching that it *could merely be accepted on the basis of clear and convincing evidence of the shared intent of the contracting States*—such evidence was not adduced.¹⁹⁵⁵

In *SGS v. Philippines* the tribunal, considering an “umbrella clause” in the Switzerland-Philippines BIT, which provided that the Contracting States “shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party”,¹⁹⁵⁶ accepted SGS’s argument that this clause *could*

¹⁹⁴⁹ *Pan American Energy LLC and BP Argentina Exploration Co. v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, available *inter alia* at <http://ita.law.uvic.ca/documents/PanAmericanBPJurisdiction-eng.pdf>.

¹⁹⁵⁰ *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, available *inter alia* at www.world-bank.org/icsid/cases/ARB0315-DOJ-E.pdf.

¹⁹⁵¹ Kreindler, p. 51. See also Kaufmann-Kohler, *Precedent*, p. 369.

¹⁹⁵² See Weiniger, para. 12-25.

¹⁹⁵³ Weiniger, para. 12-28.

¹⁹⁵⁴ *OECD Working Paper 2006/3*, p. 15.

¹⁹⁵⁵ Kaufmann-Kohler, *Interpretation*, para. 13-32.

¹⁹⁵⁶ *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, para. 34.

elevate the State's alleged breach of its contract with SGS to a treaty breach. The Philippines tribunal accepted that contract claims fell within the umbrella clause and that it therefore had *jurisdiction over the contract claims*. Its jurisdiction was, however, limited to the performance of contract obligations and did not extend to the scope of the obligation, as the scope¹⁹⁵⁷ remained within the jurisdiction of the local courts chosen in the contract.¹⁹⁵⁸ It has been observed that this reservation substantially mitigates the difference in outcome of the two cases.¹⁹⁵⁹

14.2.3. Interpretation of umbrella clauses

14.2.3.1. Placement of the umbrella clause within the BITs framework

The placement of the umbrella clause within the framework of the BIT is a point of variance in treaty practice:

- a number of BITs place the umbrella clause within an article detailing the substantive protections provided under the treaty;¹⁹⁶⁰
- the Swiss BITs usually place the umbrella clause in a provision entitled “other commitments”;¹⁹⁶¹
- a third variant is to place the umbrella clause in a separate provision from the substantive protections but before the dispute resolution clauses.¹⁹⁶²

The *effect of the placement* of the umbrella clause within the overall framework of the BIT is *uncertain*:

- the tribunal in *SGS v. Pakistan* was of the opinion that the placement of the clause near the end of the Swiss-Pakistan BIT, in the same manner as the Swiss Model BIT, was indicative of an intention on the part of the Contracting Parties not to provide a substantive obligation;
- by contrast, the *SGS v. Philippines* tribunal opined that while the placement of the clause may be “entitled to some weight,” it did not consider this factor as decisive.¹⁹⁶³

¹⁹⁵⁷ The amount of the debt due.

¹⁹⁵⁸ See Kaufmann-Kohler, *Interpretation*, para. 13-36.

¹⁹⁵⁹ *Ibid.*

¹⁹⁶⁰ See the Netherlands Model BIT and a number of BITs including those concluded by the United Kingdom, New Zealand, Japan, Sweden and the US.

¹⁹⁶¹ An exception is the Switzerland-Kuwait BIT 1998. The Swiss BIT format is also to be found in the Finnish and Greek Model BITs and the BITs concluded by Mexico.

¹⁹⁶² See German Model BIT (*OECD Working Paper 2006/3*, p. 10).

¹⁹⁶³ *OECD Working Paper 2006/3*, p. 10.

14.2.3.2. Scope and nature of the obligations undertaken

A *crucial issue* in respect of umbrella clauses *is the scope and nature of the obligations undertaken*, as textual differences can be seen between umbrella clauses that refer to “commitments”,¹⁹⁶⁴ “any obligation”¹⁹⁶⁵ and “any other obligation”.¹⁹⁶⁶ Moreover, while some umbrella clauses refer to obligations “*entered into*”¹⁹⁶⁷ by a State, others refer to obligations “*assumed*”¹⁹⁶⁸ by the State, and the Finnish Model BIT, for instance, refers to obligations which the State may “*have*” with regard to a specific investment.¹⁹⁶⁹ These variations raise the question of whether the obligation referred to is a contractual obligation between the State and the investor or whether it could extend to unilateral obligations undertaken by the State through, *inter alia*, promises, legislative acts or administrative measures:

- it has been suggested that the words “*obligations entered into*” may be interpreted as confining the obligations in question to those undertaken *vis-à-vis* the other Contracting Party;¹⁹⁷⁰
- on the other hand, the tribunal in *SGS v. Pakistan* found the language “*commitments entered into*” broad enough to encompass unilateral obligations, including municipal acts and administrative measures.¹⁹⁷¹

While some tribunals have noted that their decisions were dependent on the terms of the BIT involved, this explanation, however, does not provide a satisfactory justification for all of the discrepancies.¹⁹⁷²

14.2.3.3. Restrictive v. expansive interpretation

It is true, though, that there is no inconsistency in the interpretation of the *same* treaty provisions so far. Indeed, the umbrella clause contained in the United States-Argentina BIT, which has been put to the test on a number of occasions, has, for instance, been

¹⁹⁶⁴ See, e.g. Article 7(2) Belgium and Luxembourg-Saudi Arabia BIT 2002.

¹⁹⁶⁵ See, e.g. Article 11(2) Greek Model BIT 2001.

¹⁹⁶⁶ See, e.g. Article 2(3) Greece-Argentina BIT 1999 [not in force]. *OECD Working Paper 2006/3*, p. 10.

¹⁹⁶⁷ UK Model BIT, Article 2 “Promotion and protection of investment”.

¹⁹⁶⁸ UK-Lebanon BIT 1999, Article 10 “Other obligations”.

¹⁹⁶⁹ Finland Model BIT, Article 12 “Application of other rules”.

¹⁹⁷⁰ Ben Hamida, at 21.

¹⁹⁷¹ *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, paras 163-166.

¹⁹⁷² Kaufmann-Kohler, *Precedent*, footnote 76.

subject to quite consistent restrictive interpretation.¹⁹⁷³ Conversely, the approach of tribunals in interpreting umbrella clauses contained in different BITs has been different.

The *SGS v. Pakistan* tribunal, while accepting that a literal reading of the umbrella clause would support SGS in elevating contract claims into BIT claims, ***refused to adopt a literal meaning which would have given rise to such a broad effect.***¹⁹⁷⁴ Indeed, the tribunal avoided being confined to a literal reading by stating that any literal reading that would provide far-reaching consequences would have to be supported by evidence of the treaty's drafting history and that such evidence would need to indicate clearly that such wide-reaching consequences were intended.¹⁹⁷⁵ One of the three extra-textual reasons noted by the tribunal in *SGS v. Pakistan* was that ***if an investor were able to use an umbrella clause to elevate contract claims into BIT claims, the investor would be able to choose at will to nullify any freely negotiated dispute resolution provisions in State contracts.***¹⁹⁷⁶ Consequently, the tribunal emphasised the importance of neutrality in pointing out how allowing the investor to choose at will to nullify domestic dispute resolution provisions would create a situation where ***the benefit "would flow only to the investor"***.¹⁹⁷⁷

On the other hand, in *SGS v. Philippines* the tribunal signalled its ***intent to keep to a literal interpretation*** by stating that one must begin with the actual text of the BIT provision.¹⁹⁷⁸ Nevertheless, despite their statements of intent to keep to the "actual text" in their conclusion the majority of the tribunal ***decided not to follow the literal meaning of the clause to its full extent.***¹⁹⁷⁹ The *SGS v. Philippines* tribunal also used policy considerations to support the award and held:

"The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other. It is legitimate to resolve uncertainties in its interpretation ***so as to favour the protection of covered investments***".¹⁹⁸⁰

Taken together the two *SGS* awards are an illustration of the ***limitation inherent in relying upon policy considerations*** in interpreting treaties as the policy considerations

¹⁹⁷³ Kaufmann-Kohler, *Precedent*, p. 369.

¹⁹⁷⁴ Weiniger, paras 12-29 *et seq.*

¹⁹⁷⁵ *Ibid.*

¹⁹⁷⁶ See *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, para. 168.

¹⁹⁷⁷ *Ibid.* See also Weiniger, para. 12-32.

¹⁹⁷⁸ Weiniger, para. 12-38.

¹⁹⁷⁹ Weiniger, para. 12-42.

¹⁹⁸⁰ *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, para. 116.

taken into account by the *SGS v. Philippines* tribunal were directly opposite to the policy considerations relied upon in *SGS v. Pakistan* and led to the opposite result.¹⁹⁸¹

In *SGS v. Philippines* the tribunal's *attempt "to give effect to the parties' contracts while respecting the general language of BIT dispute settlement provisions,"*¹⁹⁸² *resulted in practice in an impossible situation* to the extent that it attempts to *render compatible two contradictory intentions*: the parties to the investment contract seek an exclusive forum, whereas the intention of the Contracting Parties to the BIT is to accord to the investors a choice of forum.¹⁹⁸³ Moreover, to the extent this solution recognises, "in principle", an investor's right to choose an international arbitral tribunal for the settlement of its investment disputes and, in the same breath, requires that the selected tribunal stay the proceedings on the basis of an exclusive forum selection clause contained in the investment contract, it results in the BIT tribunal having jurisdiction over an empty shell and depriving the BIT dispute resolution provision of any meaning.¹⁹⁸⁴

While the *SGS v. Philippines* tribunal, for instance, answered the question of whether interpretative doubts should be resolved *in favour of the investor* in the affirmative, the *El Paso* arbitrators favoured a *balanced interpretation*.¹⁹⁸⁵

14.2.4. Comments

14.2.4.1. The issue

The difficulties in relation to umbrella clauses are essentially due to the fact that the host State gives, on the one hand, in the BIT, a *double consent* with regard to the dispute resolution mechanism (to the investor's State, as party to the treaty, and to the investor himself) and, above all, on the other hand, a *parallel consent*. The latter (parallel consent) arises because between the host State and the investor there are two relationships: one based on a BIT and the other on an investment contract.

¹⁹⁸¹ Weiniger, para. 12-35.

¹⁹⁸² *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, para. 134.

¹⁹⁸³ Gaillard, *SGS*, p. 334.

¹⁹⁸⁴ *Ibid.*

¹⁹⁸⁵ Kaufmann-Kohler, *Precedent*, p. 370.

In such circumstances the problems clearly arise when there are different *fora* which are provided for in the BIT and in the investment contract. This can lead, for instance, to situations like the one in *SGS v. Philippines*, where the tribunal's attempt "to give effect to the parties' contracts while respecting the general language of BIT dispute settlement provisions", resulted in practice in an impossible situation to the extent that it tried to render compatible two contradictory intentions: the parties to the investment contract sought an *exclusive forum*, whereas the intention of the Contracting Parties to the BIT was to accord to the investors a *choice of forum*.¹⁹⁸⁶

The main issue in such situations is whether there is an overlap of the consent given in the investment contract through the consent expressed in the BIT, or, in other words, whether the umbrella clause, by elevating a contractual claim to a treaty claim, leads to a change of *fora*. Now it is clear that the question of whether there is such an overlap or not has to be interpreted.

The starting point of the interpretation process should be the umbrella clause contained in the BIT. Because of the diversity in the way an umbrella clause is formulated in investment agreements, the proper interpretation of the clause depends on the specific wording of the particular treaty, its ordinary meaning, the context, the object and purpose of the treaty as well as the negotiating history or other indications of the parties' intent.¹⁹⁸⁷ The time of concluding the BIT between the host State and the investor's State may also be of importance.

14.2.4.2. The language in BITs

The review of the language of umbrella clauses included in a number of treaties indicate that, although there are some disparities,

- the ordinary meaning of "*shall observe*",¹⁹⁸⁸ "*any commitments/obligations*"¹⁹⁸⁹ would seem to point towards an inclusive, wide interpretation which would cover all obligations assumed/entered into by the contracting States, including contracts, unless otherwise stated;

¹⁹⁸⁶ See Gaillard, *SGS*, p. 334.

¹⁹⁸⁷ *OECD Working Paper 2006/3*, p. 22.

¹⁹⁸⁸ See, e.g. Article 8(2) German Model BIT 1991(2).

¹⁹⁸⁹ See, e.g. Article 7(2) Belgium and Luxembourg-Saudi Arabia BIT 2002; Article 11(2) Greek Model BIT 2001.

- wording such as “*shall guarantee the observance*”¹⁹⁹⁰ or “*shall maintain a legal framework apt to guarantee the continuity of legal treatment*”¹⁹⁹¹ might lead to a narrower interpretation.¹⁹⁹²

There are also clauses which specifically exclude the jurisdiction of the treaty-based arbitral tribunal in favour of an administrative tribunal or a court, by preserving the distinctive jurisdictional order for the existing contracts.¹⁹⁹³

14.2.4.3. The interpretation by the arbitral tribunals

Although arbitral tribunals, in their majority, when faced with a “proper” umbrella clause¹⁹⁹⁴ seem to be adopting a fairly consistent interpretation which covers all State obligations, including contractual ones,¹⁹⁹⁵ the question of a BIT tribunal’s jurisdiction over contractual claims on the sole basis of a ***broadly drafted BIT dispute resolution clause*** remains unsettled in ICSID case law:

1. a first approach, adopted in *Salini v. Morocco*, *Vivendi v. Argentina*, and subsequently in *SGS v. Philippines*, consists of ***giving effect to the broad language*** of the dispute resolution clause;
2. under a second approach, espoused in *SGS v. Pakistan*, the ***broad wording*** of the dispute resolution clause found in the BIT ***is not sufficient justification*** for the jurisdiction of the BIT tribunal over purely contractual claims.¹⁹⁹⁶

It has been observed that a delicate balance must be struck between two conflicting considerations:

- on the one hand, it seems only reasonable to assume that the intention regarding the scope of the BIT dispute resolution provision will vary according to the language used; the fact that some treaties expressly restrict the BIT tribunal’s jurisdiction to treaty violations suggests that broader language is intended to encompass other types of disputes such as contractual ones;
- on the other hand, it may seem odd to interpret a treaty as creating a jurisdictional basis for the BIT tribunal in cases where it is not called upon to rule on an alleged violation of that treaty, as there is always a danger in separating the jurisdictional

¹⁹⁹⁰ See, e.g. the Switzerland-Pakistan BIT (the basis for the *SGS v. Pakistan* case).

¹⁹⁹¹ See, e.g. the Italy-Jordan BIT (the basis for the *Salini v. Jordan* case).

¹⁹⁹² *OECD Working Paper 2006/3*, p. 22.

¹⁹⁹³ *Ibid.*

¹⁹⁹⁴ *I.e.* one drafted in broad and inclusive terms.

¹⁹⁹⁵ *OECD Working Paper 2006/3*, p. 22.

¹⁹⁹⁶ Gaillard, *SGS*, p. 331.

provisions from the substantive terms of the same treaty—it may suggest that the arbitral tribunal has jurisdiction but is invited to rule in a vacuum.¹⁹⁹⁷

This tension does not exist, however, when the treaty contains an observance of undertakings clause according to which the breach of a contract entered into by the State party can also be characterised as a treaty violation.¹⁹⁹⁸

The *El Paso* tribunal called for a ***balanced approach*** to investment treaty interpretation, one which takes into account “both State sovereignty and the State’s responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow”.¹⁹⁹⁹ This ***rejection of the view that interpretive doubts should be resolved in favour of foreign investor*** interests would guide the interpretation of the tribunal with respect to the “umbrella clause” of the treaty.²⁰⁰⁰

While the tribunal in *CMS v. Argentina* found Argentina internationally responsible pursuant to the umbrella clause contained in Article II(2)(c) of the US-Argentina BIT, it expressed the view that the application of this ***“proper” umbrella clause was restricted to contracts concluded between an investor and the State acting as sovereign***.²⁰⁰¹

“Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investors”.

14.2.4.4. Unclear wording of the umbrella clause

It could be argued that when the wording of the umbrella clause is unclear a certain expansive effect should be derived from the interpretation principle in *dubio contra stipulatorem*. However, it should also be observed that while in the case of the consent contained in the investment contract the intents of both parties can be interpreted in a direct way, in the case of a ***standing offer contained in a BIT, the intent of the host State*** has to be interpreted starting from the interpretation of the ***consent of the BIT’s parties, i.e. in an indirect way***.

¹⁹⁹⁷ See Gaillard, *SGS*, p. 336.

¹⁹⁹⁸ *Ibid.*

¹⁹⁹⁹ *El Paso v. Argentine*, Decision on Jurisdiction, 27 April 2006, para. 70.

²⁰⁰⁰ See *OECD Working Paper 2006/3*, pp. 17 *et seq.*

²⁰⁰¹ *Ibid.*

A certain attenuation of this indirect interpretation could be reached in the *SGS v. Pakistan* case where the Swiss authorities explained in a letter their intention when entering into the Switzerland-Pakistan BIT. However, the problem here is that the investor's State could at least give an appearance of bias in favour of the investor who wants to claim against the host State. Nevertheless, further interpretations by governments, which are parties to investment agreements including an umbrella clause, as to their intention regarding this clause, as well as the insertion of clear language in new treaties, would be a welcome and much needed development.²⁰⁰²

14.2.4.5. The drafting of BITs

It has been observed that the clear message for the future drafting of BITs is to use greater precision in scoping out the obligations to which treaty arbitration is meant and not meant to apply and that likewise, it may make sense to undertake drafting which clarifies whether a contract with a State entity having a distinct legal personality will fall within the ambit of an umbrella clause, as was upheld in the *Eureko*²⁰⁰³ and *Noble Ventures*²⁰⁰⁴ cases but declined in the *Impregilo*²⁰⁰⁵ case.²⁰⁰⁶

15. RELEVANCE OF PARTIES' CONSENT WITH REGARD TO PROCEDURAL MECHANISMS: CONSOLIDATION IN INVESTMENT ARBITRATION

The same dispute or two closely related disputes may result in parallel proceedings before different arbitral tribunals (or between a national court and an arbitral tribunal), with a resulting risk of conflicting decisions and awards.²⁰⁰⁷ While there is no unanimous solution to this problem, different procedural mechanisms have been developed to avoid or mitigate the undesirable effects of parallel proceedings:

²⁰⁰² *OECD Working Paper 2006/3*, p. 22.

²⁰⁰³ *Eureko BV v. Republic of Poland, Ad Hoc Proceedings*, Partial Award, 19 August 2005, details of award available *inter alia* at www.asil.org/ilib/2005/09/ILIB050913.htm#j3.

²⁰⁰⁴ *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, available *inter alia* at <http://ita.law.uvic.ca/documents/Noble.pdf>.

²⁰⁰⁵ *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, available *inter alia* at www.worldbank.org/icsid/cases/impregilo-decision.pdf.

²⁰⁰⁶ Kreindler, p. 51.

²⁰⁰⁷ Cremades/Madalena, p. 507.

- the doctrines of *lis pendens* and *res judicata*, which apply to arbitration if certain identity requirements are met;
- the so-called “fork in the road” clauses and waivers.²⁰⁰⁸

The possibility of consolidation of proceedings has become a necessary feature to achieve legal certainty, but it usually requires consent of all parties.²⁰⁰⁹ Indeed, the consolidation of related investment arbitral proceedings will only be available if either:

- all parties consent; or
- there is an express provision in the treaty for the consolidation of claims, as is the case in Article 1126 NAFTA.²⁰¹⁰

If there is no such provision, but related claims are submitted to arbitration under the supervision of the same arbitration institution,²⁰¹¹ then it may be possible to reduce duplicative litigation by appointing the same tribunal to hear all of the claims, either together or *seriatim*.²⁰¹²

15.1. The ICSID Convention

Although it is commonly held that “the Convention does not contain any rules regarding possible parallel proceedings”, Article 26 ICSID Convention seems to achieve consolidation at least temporarily as it provides that only one procedure may be pending in relation to a certain dispute.²⁰¹³ Indeed, if consolidation is a means of ***avoiding competing proceedings***, then Article 26 ICSID Convention achieves that scope (at least until ICSID jurisdiction is decided).²⁰¹⁴ On the other hand, contrarily to some other institutional rules,²⁰¹⁵ the ICSID Arbitration Rules do not contain provisions allowing for the ***consolidation of parallel or related proceedings***.²⁰¹⁶

However, this does not prevent the ICSID Secretariat from making efforts to harmonise parallel proceedings when this is possible, as was for instance the case at the

²⁰⁰⁸ These techniques call for prudence and particular attention to the language of the treaty (see Cremades/Madalena, p. 507).

²⁰⁰⁹ *Ibid.*

²⁰¹⁰ McLachlan/Shore/Weiniger, paras 4.144 and 4.146.

²⁰¹¹ Such as ICSID.

²⁰¹² McLachlan/Shore/Weiniger, para. 4.145.

²⁰¹³ See Crivellaro, pp. 88 *et seq.*

²⁰¹⁴ *Ibid.*

²⁰¹⁵ See, *e.g.* CEPANI Rules or Swiss Rules.

²⁰¹⁶ Crivellaro, p. 89.

commencement of the *Salini v. Morocco* arbitration,²⁰¹⁷ where the ICSID Secretariat was aware of the fact that another parallel arbitration had been initiated by other Italian investors against Morocco based on the same BIT and on factual and legal backgrounds similar to those of the *Salini* case.²⁰¹⁸ The *de facto consolidation* suggested by the ICSID Secretariat, with the recommendation to appoint the same arbitrators, proved to be a very reasonable solution, as it had the effect of avoiding inconsistent decisions.²⁰¹⁹ Indeed, the arbitrator's decisions as to the scope and limits of their jurisdiction were the same in both cases.²⁰²⁰ The advantage of a *de facto consolidation* is that it is *respectful of parties' consent with regard to the method of dispute resolution, and their choice as to who they want to arbitrate with.*

15.2. Investment treaties

15.2.1. The provisions aimed at avoiding the duplication of proceedings

Investment treaties also contain provisions aimed at avoiding the duplication of proceedings. These provisions are of different types and require the claimant to either:

- irrevocably choose between pursuing its claim in domestic courts or in international arbitration (“fork in the road” clause);
- waive its rights to submit its claim to any other forum as a precondition to international arbitration; or
- have prior recourse to State courts for a fixed period of time.²⁰²¹

15.2.1.1. Three techniques aimed at avoiding the duplication of proceedings

15.2.1.1.1. The “fork in the road” clause

Many investment treaties provide that the investor has to choose between the litigation of its claims in the host State's domestic courts or international arbitration and that,

²⁰¹⁷ ICSID Case No. ARB/00/4, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (Decision of Jurisdiction of 23 July 2001).

²⁰¹⁸ The parallel arbitration proceeding was ICSID Case No. ARD/00/6, *Consortium R.F.C.C. v. Kingdom of Morocco*.

²⁰¹⁹ Crivellaro, p. 89.

²⁰²⁰ *Ibid.*

²⁰²¹ See Crivellaro, p. 97.

once made, the choice is final.²⁰²² However, while the “fork in the road” clause obliges the investor to make a forum selection which cannot be modified thereafter, it is questionable whether the “fork in the road” clause actually achieves consolidation.²⁰²³ Nevertheless, *the “fork in the road” clauses, when investors choose to initiate proceedings in State domestic courts, bar host State’s consent to arbitration for the same dispute*. Therefore, it becomes of prime importance how the concept of “same dispute” is interpreted. It has been observed that the case-law on “fork in the road” provisions in BITs is consistent.²⁰²⁴

15.2.1.1.2. The waiver of alternative forums

Article 1121(1)(b) NAFTA contains another approach to the *ne bis in idem* principle in the relationship between international tribunals and domestic courts.²⁰²⁵ This provision²⁰²⁶ requires, as a *condition for jurisdiction*, that the claimant submits a waiver of the right to initiate or continue before domestic judiciaries any proceedings with respect to the measures taken by the respondent that are alleged to be in breach of the NAFTA.²⁰²⁷ The NAFTA requires a specific declaration of waiver, *i.e.* the mere abstention from domestic proceedings may not be enough.²⁰²⁸ The waiver can be seen as a *material condition* to be fulfilled in order *to be able to accept the host State’s consent (in form of a standing offer) to arbitration*.

15.2.1.1.3. The prior recourse to State courts for a fixed period of time

A third technique used to prevent the duplication of proceedings, which is found in some BITs, requires the investor to first have recourse to the domestic courts for a certain period of time as a precondition to the right to refer the matter to international arbitration under the BIT after the expiration of the time limit (the “prior recourse” clause).²⁰²⁹

²⁰²² Schreuer, *Vivendi*, p. 301.

²⁰²³ Crivellaro, p. 98.

²⁰²⁴ See Schreuer, *Vivendi*, pp. 304 *et seq.*, with reference to cases of this consistent case-law.

²⁰²⁵ Schreuer, *Vivendi*, p. 308.

²⁰²⁶ The meaning of Article 1121 NAFTA was discussed extensively in *Waste Management Inc. v. United Mexican States*, Award, 2 June 2000, 40 ILM 56 (2001), 5 ICSID Reports 443.

²⁰²⁷ Schreuer, *Vivendi*, pp. 308 *et seq.*

²⁰²⁸ *Ibid.*

²⁰²⁹ Crivellaro, p. 100. Article X of the Spain-Argentina BIT, whose meaning was considered by the ICSID tribunal in the *Maffezini* case, contains such a clause.

Such a clause achieves consolidation—at least temporarily—by avoiding the split of the claims based on their legal nature²⁰³⁰ as well as their parallel referral to different forums.²⁰³¹ The “prior recourse” clause can be seen as a *temporal condition* to be fulfilled in order *to be able to accept the host State’s consent (in form of a standing offer) to arbitration*. However, unless the state has conditioned its consent on the exhaustion of such remedies, the general rule is that there is no such requirement, as recognised by the ICSID Convention.²⁰³²

15.2.1.2. The consolidating effects of “non-duplication” clauses

While the “non-duplication” clauses *may sometimes have effects comparable to the one of consolidation*,²⁰³³ on the other hand, *when considering issues related to parties’ consent they are less problematic*. Indeed, they may be seen as a condition to be fulfilled in order to be able to accept the host State’s consent (in form of a standing offer) to arbitration or as an investor’s choice barring the State’s consent to arbitration. Conversely, the true consolidation provisions raise a fundamental question with regard to consent: whether the original parties to the proceeding have all consented to arbitrate with the parties which are to be joined through the consolidation.

15.2.2. Consolidation

Although the consolidation of parallel proceedings has unquestionable advantages, guaranteeing a uniform application of the law and preventing unnecessary costs, consolidation raises difficult issues in relation to confidentiality and the effective administration of the case when the two proceedings were filed under different mechanisms.²⁰³⁴

15.2.2.1. NAFTA and consolidation

One peculiar feature of NAFTA arbitrations is the right to demand consolidation if a controversial State measure affects several investors under Article 1126 NAFTA.²⁰³⁵

²⁰³⁰ Treaty v. contract claims.

²⁰³¹ Crivellaro, p. 102.

²⁰³² Cremades/Madalena, p. 527. See the wording of Article 26 ICSID Convention. See also Schreuer, *Commentary*, p. 392.

²⁰³³ See, e.g. Article 1121 NAFTA (waiver of alternative forums). This is, however, not the case for prior-recourse clauses and uncertain for “fork in the road” ones (see Crivellaro, p. 103).

²⁰³⁴ Cremades/Madalena, p. 534.

²⁰³⁵ Lew/Mistelis/Kröll, para. 28-29.

Article 1126 NAFTA provides that a disputing party, whether a State party or an investor, may request the establishment of a special tribunal by the Secretary General of ICSID, pursuant to the UNCITRAL Arbitration Rules, to hear a request to consolidate claims.²⁰³⁶

Once such a tribunal has assumed jurisdiction, other tribunals lose their jurisdiction to resolve claims.²⁰³⁷ Indeed, in the event the tribunal established under Article 1126 NAFTA determines that claims have a question of law or fact in common and that the interests of fair and efficient resolution of claims favour consolidation, it may assume jurisdiction over, and hear and determine together, all or part of the claims or assume jurisdiction over and determine one or more of the claims in order to assist in the resolution of the others.²⁰³⁸

The consolidation provision of Article 1126 NAFTA allows multiple claims arising from a single measure taken by a NAFTA party to be decided consistently in a way that relieves States from the administrative difficulties and potential legal perils of facing a multiplicity of actions arising out of the same underlying facts.²⁰³⁹ On the other hand, Article 1126 NAFTA cannot be construed as a possible means to consolidate claims which are unrelated but filed by the same investor.²⁰⁴⁰ As stated in the *Pope & Talbot* case:

“consolidation under the NAFTA provision appears to be directed to consolidation of cases involving different investors making similar claims, rather than a single investor making different claims”.²⁰⁴¹

15.2.2.1.1. Characteristics of the NAFTA consolidation provision

The NAFTA consolidation provision is very innovative and unique because of the following characteristics:

a. “*Same State measure*”: a more precise criterion

Article 1126 NAFTA addresses the possibility of multiple arbitral claims arising from a “same State measure”, whilst usually the other provisions address the possibility of

²⁰³⁶ Alvarez H.C., p. 413.

²⁰³⁷ McLachlan/Shore/Weiniger, para. 2.44.

²⁰³⁸ Alvarez H.C., p. 413.

²⁰³⁹ McLachlan/Shore/Weiniger, para. 2.44.

²⁰⁴⁰ Cremades/Madalena, p. 533.

²⁰⁴¹ *Pope & Talbot, Inc. v. Canada*, award regarding the “Super Fee”, 7 August 2000.

parallel referral of a “same dispute” to arbitration and to court proceedings.²⁰⁴² It has been observed that this is a positive development in respect of traditional arbitration law. The concept of State “*measure*” is a much *more precise notion* to determine and identify claims than the concept of “dispute” used in traditional legal terms, as, on the one hand, there might be, within a same “dispute”, several claims involving different parties, possibly based on different legal grounds, and, on the other hand, the rule applies to two or more arbitrations, not to arbitration and court proceedings.²⁰⁴³

b. A State does not have to defend itself in multiple arbitrations

In particular the State party should be protected from having to defend numerous arbitrations for the same measures with the threat of conflicting awards.²⁰⁴⁴ Article 1126 NAFTA *relieves a State from the burden of having to defend against multiple claims* (arising from a same measure) in scattered arbitrations, as a State may request the consolidation of related claims.²⁰⁴⁵ On the other hand, while it may be assumed that this consolidation provision is primarily intended to relieve a State party from the hardship of having to defend multiple claims arising from the same measure, it is interesting to note that consolidation can be requested by either disputing party.²⁰⁴⁶

c. The risk of inconsistent decisions is avoided

Article 1126 NAFTA *avoids the risk of inconsistent decisions* in arbitrations arising from a same measure—including the risk that the State be condemned in one arbitration and absolved in another.²⁰⁴⁷

d. A hierarchy of arbitral tribunals is created

Consolidation is made by order of a new tribunal constituted pursuant to a request for consolidation.²⁰⁴⁸ The tribunal previously constituted in a specific arbitration is subject to the authority of the consolidation tribunal.²⁰⁴⁹ Indeed, if the consolidation tribunal assume jurisdiction, the previously constituted tribunal loses its jurisdiction to the extent

²⁰⁴² See Crivellaro, p. 105.

²⁰⁴³ *Ibid.*

²⁰⁴⁴ Lew/Mistelis/Kröll, para. 28-29.

²⁰⁴⁵ Crivellaro, p. 105.

²⁰⁴⁶ Alvarez H.C., p. 414. See also Eklund, p. 149.

²⁰⁴⁷ Crivellaro, p. 105.

²⁰⁴⁸ Eklund, p. 149.

²⁰⁴⁹ See Crivellaro, p. 105.

that it is assumed by the consolidation tribunal.²⁰⁵⁰ The *consolidation decision is final* and no challenge or appeal against it is possible.²⁰⁵¹

e. *Consolidation must be requested by one of the parties*

Although the consolidation tribunal renders a binding final decision, consolidation can never be decided *ex officio* by either the consolidation tribunal, the arbitration tribunal firstly constituted in a specific case, the NAFTA Secretariat or the ICSID Secretary-General, even though they might be aware of the existence of parallel arbitration claims—consolidation can only be *decided upon the request of one the parties* involved in one of the arbitrations.²⁰⁵²

15.2.2.1.2. The Corn Products and Softwood Lumber disputes

The provisions of Article 1126 NAFTA have been considered by two consolidation tribunals established under the distinctive provisions of that Article:

- in the first case, the *Corn Products* dispute,²⁰⁵³ the consolidation tribunal found against consolidation of two claims brought in relation to the same excise tax measure against Mexico;
- in the second case, the *Softwood Lumber* dispute,²⁰⁵⁴ the consolidation tribunal decided to consolidate and hear a series of cases on antidumping duty in the softwood lumber industry against the United States.²⁰⁵⁵

The order in the *Softwood Lumber* dispute represents a particularly elaborate consideration of the requirements of Article 1126 NAFTA.²⁰⁵⁶

²⁰⁵⁰ Alvarez H.C., p. 413.

²⁰⁵¹ See Crivellaro, p. 105.

²⁰⁵² Crivellaro, p. 106.

²⁰⁵³ *Corn Products Int'l, Inc. v. United Mexican States* and *Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, Order of the Consolidation Tribunal, 20 May 2005, available at

http://www.economiasnci.gob.mx/sphp_pages/importa/sol_control/consultoria/Casos_Mexico/Consolidacion/acuerdos/050520_Orden_de_Tribunal_de_Acumulacion.pdf.

²⁰⁵⁴ See Order of the Consolidation Tribunal: *Canfor Corp., Tembec et al. and Terminal Forest Products Ltd. v. United States*, available at US Department of State, available at:

<http://www.state.gov/documents/organization/53113.pdf>.

²⁰⁵⁵ McLachlan/Shore/Weiniger, para. 4.146.

²⁰⁵⁶ *Ibid.* On the examination of the key principles of the *Softwood Lumber* Dispute Order, see in particular Loong.

15.2.2.1.3. Is consolidation ultimately based on consent?

It has been argued that mandatory consolidation makes good sense in the case of NAFTA Chapter 11, which is not the usual private, consensual context of international commercial arbitration, but creates a broad range of claims which may be brought by an equally broad range of claimants who have mandatory access to a binding arbitration process without the requirement of an arbitration agreement in the conventional sense nor even the need for a contract between the disputing parties.²⁰⁵⁷ Conversely, it has also been observed that NAFTA consolidation ultimately takes its source from the parties' consent, as:

- an investor, by submitting a claim to arbitration under NAFTA Chapter 11B, inevitably agrees to the NAFTA rules, which include the consolidation rule; and
- the State consents to arbitration under the same rules, being a party of the NAFTA treaty.²⁰⁵⁸

However, while consolidation primarily affects the investors, it has to be observed that in the *Corn Products* dispute as well as in the *Softwood Lumber* dispute ***the requests of consolidation were introduced by the States parties***. Furthermore, the ***question has to be posed as to whether the investors, if they wish to benefit from NAFTA, really have any other choice than to agree to the NAFTA rules***. This question can be answered in the negative. In fact, the investors by choosing to begin an arbitration proceeding also accept conducting the proceeding under the relevant NAFTA arbitration rules. Therefore, the possibility of ***consolidation seems to be “the price to be paid” by the investors for the open standing offer to arbitrate by the host State***. Indeed, the States parties to the NAFTA make arbitration available to the investors as an alternative dispute resolution mechanism to the State courts where consolidation is a well known mechanism. For this reason, it could even be argued that it would not be comprehensible why the investors—to whom the States make available a neutral dispute resolution forum (arbitration)—should be better placed than claimants in State courts. This makes it also appear as less compelling to have the possibility of opting-out from the consolidation rules.

²⁰⁵⁷ Alvarez H.C., p. 414.

²⁰⁵⁸ Crivellaro, p. 106.

15.2.2.2. BITs/free trade agreements and consolidation

15.2.2.2.1. In general

Recent model BITs²⁰⁵⁹ and similar free trade agreements²⁰⁶⁰ follow the NAFTA example with regard to consolidation.²⁰⁶¹ Similarly to Article 1126 NAFTA, the new BIT practice provides for consolidation of multiple claims which arise from a same fact, usually a State measure which is alleged to be in breach of the State's obligations, only upon application by a disputing party.²⁰⁶²

However, whereas under the US Model BIT and the Free Trade Agreements, a consolidation tribunal assumes jurisdiction over, hears and determines either treaty claims, contract claims, or both, under the Canada Model BIT²⁰⁶³ only treaty claims may be referred to arbitration and possibly consolidated under the BIT provisions.²⁰⁶⁴

15.2.2.2.2. With regard to consent

It has been observed that the consolidation provisions *rest on a treaty regime that is consented to by all the parties involved*. Therefore, even though consolidation results from an order provoked by one of the parties which is finally binding upon all other parties and on previously established tribunals, consolidation ultimately remains a consensual mechanism.²⁰⁶⁵

This *view needs in my opinion to be refined*. While it is true that the States parties consent to consolidation by signing the BITs or the free trade agreements, the situation is different for the *investors*. Although it might be said that they consent to the eventuality of consolidation by beginning the arbitration proceeding, on the other hand one may question *if they really have an alternative to arbitration when they wish to have a neutral dispute resolution forum*.

²⁰⁵⁹ See the New US Model BIT or the New Canada Model BIT.

²⁰⁶⁰ See the Chile-US Free Trade Agreement, the Morocco-US Free Trade Agreement, the Singapore-US Free Trade Agreement, the Canada-Chile Free Trade Agreement.

²⁰⁶¹ Crivellaro, p. 106.

²⁰⁶² See also Crivellaro, p. 111.

²⁰⁶³ See Articles 22, 23 and 24 Canada Model BIT.

²⁰⁶⁴ Crivellaro, p. 112.

²⁰⁶⁵ See Crivellaro, pp. 111 *et seq.*

This issue is accentuated by the fact that consolidation is certainly an advantage for a State called to respond for a measure it has taken in respect of a certain investment, as without consolidation, the State would be a respondent in multiple parallel cases, whereas, on the other hand, it is not as certain that consolidation is as equally advantageous to an investor.²⁰⁶⁶ Nevertheless, the possibility provided for consolidation strengthens the jurisdictional side of arbitration.

15.3. Consolidation in commercial and investment arbitration: different approaches

15.3.1. Consolidation with regard to parties' consent

Although consolidation of related commercial arbitrations remains in principle²⁰⁶⁷ fully dependent on the consent of all the parties involved,²⁰⁶⁸ the consolidation of related investment arbitrations may be achieved by a tribunal's binding order, as the guiding consolidation principles in international investment law are the unity of the economic transaction affected by a same State measure.²⁰⁶⁹

15.3.2. The justification of the difference in approach

In commercial disputes, the parties are equal, *i.e.* no party has a right or a legitimate interest which is superior or deserves a higher legal protection over the right or the legitimate interest of the other party; on the contrary, in investment disputes one of the parties is inevitably a State, and a State can legitimately rely on its superior interest not to be judged twice for the same action or omission.²⁰⁷⁰ Moreover, the situation of conflicting awards rendered in commercial arbitration may receive judicial redress, because the conduct of various related tribunals and the coordination between different arbitral awards (or between awards and court decisions) remain subject to the courts'

²⁰⁶⁶ Crivellaro, pp. 111 *et seq.*

²⁰⁶⁷ An exception is, *e.g.* Article 1046 Netherlands CCP which provides for the possibility of mandatory consolidation. About this provision, see under IV.7.2.2.2.2.b.

²⁰⁶⁸ See, *e.g.* the consent given by the parties by choosing the Swiss Rules to consolidation according to Article 4 Swiss Rules.

²⁰⁶⁹ Which on the other hand do not find application in international commercial arbitration (Crivellaro, p. 119).

²⁰⁷⁰ *Ibid.*

control in the annulment or enforcement phase, while two ICSID conflicting awards escape any further remedy, because the annulment of ICSID awards by domestic courts is excluded by the Convention and their enforcement is immediate and does not allow for any judicial control over the award as such.²⁰⁷¹

²⁰⁷¹ Crivellaro, p. 120.

VI. SPORT ARBITRATION

The explosion of what is called the sport phenomenon, which has found its most notable expression in worldwide events like the Olympic Games, the Football World Cup, Formula 1, and the considerable economic and financial interests involved have provoked deep changes in the nature of sport's relationships.²⁰⁷² One of the most distinctive characteristics of sport is its vertical/pyramidal structure²⁰⁷³ and Chapter VI. begins by dealing with the structural organisation of sport (section 1.).

Sport is characterised by its particular rules²⁰⁷⁴ and by what has also be perceived as the *lex sportiva*.²⁰⁷⁵ Therefore, and even though the Swiss Federal Tribunal has held that rules issued by private associations²⁰⁷⁶ could neither be characterised as “law” nor be recognised as “*lex sportiva transnationalis*”,²⁰⁷⁷ unsurprisingly arbitration has been seen as the privileged dispute resolution method in the field of sport. After discussing the main arbitral instances in the sport's area (section 2.), where the focus will clearly be on the leading institution, the Court of Arbitration for Sport (CAS),²⁰⁷⁸ the thesis will then examine the reasons for the use of arbitration in the field of sport, the specific needs of sport in terms of dispute resolution and the acceptance of arbitration by the sport community (section 3.). Indeed, most sport organisations provide for arbitration to resolve all kinds of dispute, such as disputes between international or national federations and their member-federations, but also between federations and individual athletes.²⁰⁷⁹ The proceedings are frequently based on arbitration clauses contained in the

²⁰⁷² Simon, p. 187.

²⁰⁷³ So, e.g. Netzle p. 46 for the traditional structure of sport organisations in continental Europe. See also DFT 133 III 235 (*Cañas* decision).

²⁰⁷⁴ See, e.g. the eligibility rules for participating to sport competitions or the rules in the field of doping. However, there are also further rules. For an overview, see in particular Rigozzi, paras 31 *et seq.* On the distinction between “*Spielregel*” (“game rules”—not considered to be subject to judicial review) and “*Rechtsregel*” (“legal rules”—considered to be subject to judicial review), see in particular Kummer.

²⁰⁷⁵ See, e.g. Simon, p. 190. See also CAS 15 July 2005, No. 2004/A/776, Clunet 2005, p. 1322; CAS 2005/A/983 & 984, *CA Penarol v. PSG et al.*, 12 July 2006, paras 66-69.

²⁰⁷⁶ In the case in question it was the FIFA.

²⁰⁷⁷ DFT 132 III 285, consid. 1.3. (Poudret/Besson, para. 702). In relation to the *Cañas* decision (DFT 133 III 235), see also Oschütz, paras 20 *et seq.*

²⁰⁷⁸ Due to the fact that the CAS has its seat in Lausanne, Switzerland, the State court where appeals against CAS awards are heard is the Swiss Federal Tribunal. It has also to be observed that many sport organisations (FIFA, FIS, IOC, UEFA, etc.) have their seat in Switzerland (see also Walter, p. 133).

²⁰⁷⁹ Netzle, p. 45.

statutes or by-laws of the governing sport organisation;²⁰⁸⁰ *the applicability of such statutory arbitration clauses on individual athletes may generate, with regard to the athlete's consent to arbitration, two main issues:*

- usually, no complete, mutually signed arbitration agreements between sport organisations and athletes exist, as the federations trust in arbitration clauses in their own statutes or in rather general references in the licence forms;
- even if the athlete signed an arbitration agreement with a sport organisation, the question remains as to whether the athlete had a real choice not to sign.²⁰⁸¹

After analysing arbitration agreements in sport (section 4.) and how consent to arbitration is reached, the substantive validity of the arbitration agreement with regard to consent will be more deeply discussed (section 5.) as well as the role of mandatory arbitration to solve disputes in the sport's field (section 6.). The final part will be devoted to the relevance of parties' consent with regard to procedural aspects, in particular the identifying and joining of parties (section 7.).

1. THE STRUCTURAL ORGANISATION OF SPORT

1.1. The federation's structure

1.1.1. Evolution and characteristics

Historically, the federation's structure has built up from the bottom in accordance to a relatively uniform mechanism, although in different epochs depending upon the countries and the sport disciplines.²⁰⁸² Starting from the clubs, sport federations have developed, beginning from a regional level, then national, and lastly international and worldwide.²⁰⁸³ Sport clubs represent at the same time the basic cell and the initial grouping of the federation's structure.²⁰⁸⁴ Sport clubs can be party to international litigations in team sports, for instance when they participate in international

²⁰⁸⁰ On sport associations, see Baddeley, *Association*, and on the autonomy of sport associations in Swiss law, thus also in the adoption of their statutes, see Baddeley, *Autonomie*. Moreover, see also Baddeley, *Le sportif*.

²⁰⁸¹ Netze, pp. 45 *et seq.*

²⁰⁸² Rigozzi, para. 59.

²⁰⁸³ Simon, pp. 3 *et seq.*

²⁰⁸⁴ See Rigozzi, para. 60.

competitions like the Champions League organised by the UEFA,²⁰⁸⁵ or when they engage a player playing in a foreign club.²⁰⁸⁶ In disciplinary matters the World Anti-Doping Code also provides consequences for teams.²⁰⁸⁷

The *traditional structure of sport organisations is that of a pyramid*: the base consists of individuals who are members of associations which constitute regional or national federations; the national federations are then eventually combined in a single international federation.²⁰⁸⁸ The main characteristic of the federative movement resides in its *monopolistic character*: indeed for almost all sport disciplines²⁰⁸⁹ at every level only one federation exists²⁰⁹⁰ (“one flag” principle).²⁰⁹¹ It is also important to note that there is a membership merely between individuals (*e.g.* athletes) and associations, or associations and national federations, but not between individuals and organisations of the level after next; also neither athletes nor any federation can be members of the International Olympic Committee (IOC).²⁰⁹²

1.1.2. *The relationships between athlete and sport organisation*

1.1.2.1. **The indirect membership**

The different regional, national or international federations do not usually have individuals as members, because, as a principle, the athlete is only a member of his sport club.²⁰⁹³ An individual joining an association at a lower level has no obligation to clarify what other organisations the association is a member of—directly or indirectly—and what implications this could have on his own legal status.²⁰⁹⁴ In such a structure the *qualification of the relations* linking the athletes to the federations of their sport is *problematic*,²⁰⁹⁵ but in the meantime of great relevance.

International federations usually invoke the *theory of “indirect membership”* to establish jurisdiction upon all national and regional federations, associations or

²⁰⁸⁵ CAS 98/199, *Real Madrid v. Uefa*, in Reeb, *Digest II*, p. 479.

²⁰⁸⁶ CAS 2003/O/486, *Fulham FC v. Olympique Lyonnais*.

²⁰⁸⁷ See Article 11 WADA-Code.

²⁰⁸⁸ So Netzle, p. 46 for Europe.

²⁰⁸⁹ An exception can be found in boxing with several organisations: IBF, WBA, WBC.

²⁰⁹⁰ See, *e.g.* Articles 5.2. and 11.1. of UCI Constitution.

²⁰⁹¹ Rigozzi, para. 65.

²⁰⁹² Netzle, p. 46.

²⁰⁹³ Rigozzi, para. 85.

²⁰⁹⁴ Netzle, p. 47.

²⁰⁹⁵ See Vigoriti, p. 654.

individuals exercising a particular sport, therefore the member-associations are required to insert a clause in their regulations, referring to the statutes of the international federation or national federation.²⁰⁹⁶ The German BGH, in a landmark decision,²⁰⁹⁷ held that such a construction may theoretically work but the requirements (*e.g.* an uninterrupted “chain of references”, complete coverage of all entities and individuals participating in the particular sport) are almost impossible to meet in practice.²⁰⁹⁸ Moreover, the BGH rejected the so-called “dynamic reference”, *i.e.* a general reference to the provisions in the statutes of the federation “in their actual stage”: Any alteration of the regulations of the federation must be explicitly followed by the statutes of the subordinated entities.²⁰⁹⁹ On the other hand, Swiss scholars²¹⁰⁰ and jurisprudence²¹⁰¹ speak of “indirect membership” and this approach has also been followed by the CAS:

“The Appellant, through his membership to the Olympiakos Sport Club and the National Team of Greece, is an indirect member of the FINA, the former being a member of the latter”.²¹⁰²

However, it has been observed that contrarily to the Swiss Federal Tribunal (which has held²¹⁰³ that, independently from any contractual relationship, a sport organisation had an enforceable duty to act in good faith *vis-à-vis* athletes and to account for their legitimate expectations) the CAS by making reference to the Swiss Federal Tribunal’s decision—though the Swiss Supreme Court had precisely denied the existence of any contract binding the parties²¹⁰⁴—has conceded the existence of “reciprocal contractual obligations” between the athlete (a member of the national federation which was in its turn member of the Norwegian Olympic Committee) and the IOC.²¹⁰⁵ Nevertheless, even if the links between international federations, national federations, and clubs, etc. are seen as a ***chain of contractual obligations***²¹⁰⁶ and not as a relationship of membership, the relationship between athlete and sport organisation remains ***indirect*** and, therefore, problematic.²¹⁰⁷ Yet, since the Olympic Movement and most international federations have given up the concept of amateurism, the jurisdiction of sport organisations based on the notion of membership has been fading out. Indeed,

²⁰⁹⁶ Netzle, p. 46.

²⁰⁹⁷ BGH 28.11.1994 “*Reiter*”, SpuRt 1995 43.

²⁰⁹⁸ Netzle, p. 46.

²⁰⁹⁹ *Ibid.*

²¹⁰⁰ See Hausheer/Aebi-Müller, p. 375.

²¹⁰¹ See *Gundel* decision, DFT 119 II 271 (*Gundel v. FEI*).

²¹⁰² CAS 2002/A/432, *Demetis v. FINA*, p. 2

²¹⁰³ *Grossen* decision, DFT 121 III 350 (*FSLA v. Grossen*).

²¹⁰⁴ See DFT 121 III 354.

²¹⁰⁵ CAS 2002/O/372, *NOC et al. v. IOC*, p. 23 (note 27). See also Rigozzi, para. 87.

²¹⁰⁶ So in a common law approach *Beloff/Kerr/Demetriou*, p. 27.

²¹⁰⁷ Rigozzi, para. 87.

today, the *relationship* between sport organisations and athletes is *increasingly defined by licences and contracts*.²¹⁰⁸

1.1.2.2. The licence and the athlete's contract

Increasingly, federations and athletes are bound by a licence which authorises the athletes to compete in sport competitions organised by the federation under the condition that the athletes accept the statutes and the federation's regulations.²¹⁰⁹ The exact qualification and the question of whether a licence creates a contractual relationship is, however, controversial.²¹¹⁰ While in Germany in the *Reiter* decision²¹¹¹ the BGH has considered that the issuing of a licence is nothing else than a particular modality of submission to a federation's regulations which leads to a "*quasi associative*" relationship and does not change fundamentally the qualification, in Swiss law the licence is considered to be a *sui generis contract*.²¹¹² In the measure that the licence²¹¹³ contains a written arbitral clause, the issuing of a licence is of particular utility for assuring the (formal) validity of the arbitration agreement.²¹¹⁴ For this reason more and more sport organisations make recourse to arbitration agreements expressly contained in competition inscription forms or in licences.²¹¹⁵ When receiving the licence the athletes submit themselves to the body of rules then in force.²¹¹⁶

It has been observed that the issue of the juridical links between athlete and sport organisation is particularly acute with regard to the *Olympic Games*, as neither the international federations nor the National Olympic Committees (NOCs)—recognised by the IOC—are members of the IOC. This particularity has been solved with the *entry forms* by which the athletes (as well as the coaches, officials and the NOCs) submit themselves to the Olympic Charter and the applicable sport regulations.²¹¹⁷ Consequently, by signing the entry form the *Olympic Games' participants are bound to the IOC by a direct contractual link*.²¹¹⁸ The entry forms are therefore an important

²¹⁰⁸ See Netzle, p. 47.

²¹⁰⁹ Rigozzi, para. 88.

²¹¹⁰ *Ibid.*

²¹¹¹ BGH 28.11.1994 "*Reiter*", SpuRt 1995 43, 48.

²¹¹² See Hausheer/Aebi-Müller, p. 341.

²¹¹³ Or the documentation related to its issue.

²¹¹⁴ Rigozzi, para. 89.

²¹¹⁵ Rochat, *Arbitrage*, p. 69. See also Netzle, p. 55; Rigozzi, para. 804.

²¹¹⁶ See Fenner, para. 150.

²¹¹⁷ Rigozzi, para. 90.

²¹¹⁸ Which has also been defined as "*Teilnahmevertrag*" (contract of participation). See Bernasconi, pp. 113 *et seq.*

aspect of the *growing contractualisation* of the relationships between athletes and sport organisations.²¹¹⁹

1.2. The Olympic solution

The International Olympic Committee²¹²⁰ is an organisation based in Lausanne, Switzerland, created by Pierre de Coubertin in Paris in 1894.²¹²¹ Its membership comprises 205 NOCs. The IOC organises the modern Olympic Games held in summer and winter, every four years.²¹²²

Like sport federations the Olympic authorities are organised in a *pyramidal way*.²¹²³ However, while the pyramid of the international sport federations has grown from the bottom, the pyramid of the Olympic Movement has been created from the top.²¹²⁴ The juridical form of the NOCs varies from country to country.²¹²⁵ From a structural point of view the “Olympic pyramid” and the “Federation’s pyramid” are bounded in what is called the “*Olympic Movement*”. The authority of the IOC over the Olympic Movement is exercised in two ways:

- on the one hand, the IOC recognises only one international federation for each Olympic sport discipline,²¹²⁶ which in its turn only recognises one national federation²¹²⁷ for each country;²¹²⁸
- on the other hand, the NOCs do only recognise one national federation for each sport discipline, and the NOCs are in their turn only recognised by the IOC when they regroup all the national federations (affiliated to their respectively international federation as recognised by the IOC).²¹²⁹

²¹¹⁹ Rigozzi, para. 91.

²¹²⁰ See under http://www.olympic.org/uk/index_uk.asp.

²¹²¹ See, e.g. Zen-Ruffinen, para. 425.

²¹²² Beginning in 1994 the Olympic games have alternated on different 4-year cycles.

²¹²³ See, e.g. Baddeley, *Association*, p. 7; Fennessy, para. 17.

²¹²⁴ Rigozzi, para. 71.

²¹²⁵ For some chosen examples, see Rigozzi, para. 77.

²¹²⁶ Rules 26 and 30 of the Olympic Charter.

²¹²⁷ See, e.g. Article 10 para. 1 of the FIFA Statutes: “only one Association shall be recognised in each country”.

²¹²⁸ So called “*Ein-Platz-Prinzip*” (“one-place-principle”).

²¹²⁹ Rules 29 and 30 of the Olympic Charter (see also Rigozzi, para. 79).

The national federations are therefore, at the same time members of the NOC of their respective countries as well as of the international federations of their respective sports (*principle of the double affiliations of national federations*).²¹³⁰

The overview of the structures of worldwide sport within the Olympic Movement shows a basically *monopolistic character of the sport organisations*.²¹³¹ This has *great importance with regard to consent to arbitration*, as an athlete who wishes to carry out an Olympic sport will have to do it in the ambit of the given structure. When the latter provides that disputes have to be solved through arbitration, the athlete will have to accept this clause,²¹³² without really having the choice to do otherwise. The Olympic Charter has, since 1995, contained an arbitration clause referring “any dispute arising on the occasion of or in connection with, the Olympic Games ... exclusively to the Court of Arbitration for Sport”.²¹³³ The clause becomes binding by an *explicit reference* in the entry form that every athlete, official and coach has to sign as a condition precedent to participation in the Olympic Games.²¹³⁴ In addition, the entry form already includes an *express acceptance of the jurisdiction of the CAS*.²¹³⁵

1.3. Other structures

The organisation of sport in the United States does not correspond to the European model—in America the Olympic movement is only one of the three main structures of organised sport, the other two being sport at University level (Intercollegiate Sport) and sport at professional level (Professional Sport).²¹³⁶

A bigger commercialisation of sport is not only to be observed with regard to the professional leagues of the big four North American Team Sports,²¹³⁷ but also in other big sport competitions which are organised outside the Olympic movement, for instance: Formula 1, the America’s Cup (sailing), the Six Nations Championship (rugby) and the Cricket World Cup.

²¹³⁰ Zen-Ruffinen, para. 110.

²¹³¹ See, e.g. Zen Ruffinen, paras 103 *et seq.*

²¹³² Rigozzi, para. 84.

²¹³³ See Article 59 of the Olympic Charter (as in force as from 7 July 2007).

²¹³⁴ Netze, p. 53.

²¹³⁵ See Kaufmann-Kohler, *Olympics*, p. 107, with regard to arbitration at the Atlanta Games.

²¹³⁶ See Rigozzi, para. 93.

²¹³⁷ MBL, NBA, NFL and NHL.

2. THE MAIN ARBITRAL INSTANCES IN THE SPORT'S FIELD

2.1. The ordinary arbitral tribunals

2.1.1. *Ad hoc arbitration*

A major international sport competition where *ad hoc* arbitration is used is the America's Cup. Indeed, the Protocol governing the 32nd America's Cup provided that disputes related to the financing and organisation of the competition had to be solved by an *ad hoc* tribunal with seat in Geneva in accordance with the provisions of Chapter 12 of the Swiss Federal Act on International Private Law.²¹³⁸ However, due to the generalisation of the CAS competences at the international level, it is particularly in national (or internal) disputes where *ad hoc* arbitration still plays a significant role in sport arbitration.²¹³⁹

2.1.2. *Institutional arbitration*

Although the most widely used and accepted international arbitration institution is the ICC,²¹⁴⁰ the one which has the longest experience in solving sport related disputes is without doubt the AAA. The biggest part of the disputes to be solved by the AAA in the field of sport is between the athletes and the owners of the clubs playing in the professional leagues of the big four North American Team Sports because arbitration, especially for solving salary disputes, is systematically provided for in collective bargaining agreements and standard player contracts.²¹⁴¹ However, AAA arbitration also plays a growing role in the context of Olympic sport. Indeed, the existing AAA Commercial Arbitration Rules²¹⁴² were adapted²¹⁴³ in the course of the implementation

²¹³⁸ See Article 22.3(g) of the Protocol governing the 32nd America's Cup. In the 33rd America's Cup the Arbitration Panel will have its seat in New York and it will act in accordance with the New York arbitration law (see Articles 23 and 24 of the Protocol governing the 33rd America's Cup).

²¹³⁹ Rigozzi, para. 225.

²¹⁴⁰ On ICC arbitration, see in particular Craig/Park/Paulsson and Derains/Schwartz. The Concorde Agreement, governing the Formula One World Championship, provides for that disputes between the racing teams and the FIA will be solved by an arbitral tribunal in accordance to the ICC Rules (see Beloff/Kerr/Demetriou, p. 256). Moreover, the Concorde Agreement also requires that the disputes between drivers and racing teams are solved by an arbitral tribunal in accordance to the ICC Rules (see *Walkinshaw v. Diniz*, Arb. Int. 2001, pp. 193 and 205).

²¹⁴¹ Rigozzi, para. 229.

²¹⁴² Which applies to internal commercial arbitration and should not to be confused with the AAA International Arbitration Rules.

of the United States Anti-Doping Agency.²¹⁴⁴ Recently, the DIS has also issued sport arbitration rules (“*DIS-Sportschiedsgerichtsordnung*”).²¹⁴⁵ The German sport arbitral tribunal is a common initiative of the National Anti-Doping Agency²¹⁴⁶ and the DIS.²¹⁴⁷

Despite its name, the CAS—like the AAA, the DIS or the ICC—is a permanent arbitration institution. Its mission is to settle sport-related disputes through arbitration,²¹⁴⁸ and it can be said that the CAS is a specialised arbitration institution.²¹⁴⁹

2.2. The Court of Arbitration for Sport (CAS)

With regard to the CAS it has been observed that the specific position occupied by this specialised arbitration institution within the sport system, in particular with regard to its international dimension, and the authority which is attached to its awards shows the CAS as a sort of supranational sport organism with the task to develop a *lex sportiva* applicable to the ensemble of sport community and recognised by the States.²¹⁵⁰

2.2.1. Brief historical overview of the CAS

2.2.1.1. The origins

The CAS, created in 1983 and headquartered in Lausanne, Switzerland, is an arbitration institution devoted to the resolution of sports disputes, which now operates under the auspices of the International Council of Arbitration for Sport (ICAS). In 1996, the ICAS founded a special body for the settlement of all disputes arising in the course of and in connection with Olympic Games—to be known as the *ad hoc* Division of the CAS.²¹⁵¹

From the beginning it was established that the *jurisdiction of the CAS should in no way be imposed on athletes or federations, but remain freely available to the parties.*²¹⁵²

²¹⁴³ Leading to the American Arbitration Association Supplementary Rules for Arbitration initiated by the United States Anti-Doping Agency (USADA). See under <http://www.adr.org/sp.asp?id=28627>.

²¹⁴⁴ See Rigozzi, para. 405.

²¹⁴⁵ See Mertens. These Rules, which entered into force on the 1 January 2008, can be found under <http://www.dis-arb.de/sport/default.htm>.

²¹⁴⁶ *Nationale Anti Doping Agentur* (NADA).

²¹⁴⁷ See Berninger/Theissen, pp. 185 *et seq.*

²¹⁴⁸ See Article S1 CAS Code.

²¹⁴⁹ Rigozzi, para. 230.

²¹⁵⁰ Simon, p. 190.

²¹⁵¹ Kaufmann-Kohler, *Olympics*, p. 1.

²¹⁵² See Reeb, p. xxiv.

Several courts have held that arbitral tribunals constituted under the CAS Code for Sports-related Arbitration are true tribunals,²¹⁵³ unlike the internal “tribunals” of sport federations.²¹⁵⁴

At the beginning the CAS Statute and the Regulations provided for just one type of contentious proceedings, whatever the nature of the dispute, in which the claimant had to lodge his request with the CAS, accompanied by the arbitration agreement. However, in 1991 the CAS published a Guide to arbitration which included several *model arbitration clauses*, and among these there was *one for inclusion in the statutes or regulations of sports federations or clubs*.²¹⁵⁵ This clause prefigured the subsequent creation of special rules to settle disputes related to decisions taken by sports federations or associations (appeals procedure).²¹⁵⁶ The International Equestrian Federation (FEI) was the first sports body in 1991 to adopt this clause.²¹⁵⁷ This was the starting point for several “appeals” procedures even though, in formal terms, such a procedure did not yet exist.²¹⁵⁸

2.2.1.2. The *Gundel* case: recognition of CAS awards by the Swiss Federal Tribunal

Despite some concerns among scholars the Swiss Federal Tribunal has recognised the CAS as a true arbitral tribunal.²¹⁵⁹ Although in the case of other arbitral tribunals in the field of sport²¹⁶⁰ the procedural requirements have always to be assessed, the CAS generally fulfils these requirements.²¹⁶¹ The *Gundel* case has been defined as the cornerstone on which the arbitration system of the CAS is built.²¹⁶²

Gundel was a member of his country’s equestrian team. He held a license granted by the German equestrian federation which entitled him to compete in national and international meetings. On the occasion of every renewal of his licence, Gundel

²¹⁵³ See, e.g. the Court of Appeals of Munich, Germany, in a decision of 26 October 2000 (SpuRt 2/2001, p. 64), involving the basketball player Stanley Roberts; the Swiss Federal Tribunal in its leading decision of 1992 (DFT 119 II 271), involving the horse rider *Gundel* (on this case, see under VI.2.2.1.2.).

²¹⁵⁴ Kaufmann-Kohler, *Olympics*, p. 3.

²¹⁵⁵ Reeb, pp. xxiv *et seq.*

²¹⁵⁶ *Ibid.*

²¹⁵⁷ Simon, p. 198.

²¹⁵⁸ Reeb, p. xxv.

²¹⁵⁹ Baddeley, *Unterwerfungserklärungen*, p. 377. See DFT 4P.105/2006, 4.8.2006; DFT 129 III 445, consid. 3.3.; DFT 119 II 271, *Gundel*.

²¹⁶⁰ See, e.g. the Swiss Olympic Disciplinary Board on doping. On the latter, see Peter/Paparelli/Fioravanti.

²¹⁶¹ See Baddeley, *Unterwerfungserklärungen*, p. 377 *et seq.*

²¹⁶² See Rigozzi, para. 522.

undertook to submit himself to the rules of the German federation, which with respect to international competitions, in turn referred to the rules of the FEI.²¹⁶³

After a CAS award²¹⁶⁴ was rendered, Gundel applied to the Swiss Supreme Court for the annulment of it.²¹⁶⁵ The *appellant primarily disputed the validity of the award*, which he claimed was rendered by a court which did not meet the conditions of impartiality and independence needed to be considered a proper arbitration court.²¹⁶⁶ In the *Gundel* case the *central issue* defined by the Swiss Federal Tribunal was “*the legal nature of awards rendered by CAS*” and it remained to be seen whether the Swiss courts would acknowledge CAS awards in situations where its *jurisdiction was not created by a negotiated contract, but by virtue of the conditions stipulated in a licence*. The Court held that the FEI’s Legal Commission was an organ of FEI and therefore did no more than express the will of one of the parties to the dispute.²¹⁶⁷ The Court then considered that the *CAS decision* was rendered on the *basis of an arbitration agreement* by a *private tribunal* to which the parties had entrusted the task of ruling on a dispute dealing with “patrimonial” interests and having an international character.²¹⁶⁸ It observed that a *true award supposes that the arbitral tribunal is sufficiently impartial and independent*.²¹⁶⁹

A party considering itself adversely affected by a decision of an association should be entitled, in the reasoning of the court, to *challenge the decision even* if the complainant was only an “*indirect*” *member of the association*²¹⁷⁰ and indeed even if he was *not a member at all*.²¹⁷¹ The challenged decision had to be subject to *independent judicial control*. This control, however, *might be entrusted to an arbitral tribunal provided* that it was “a veritable judicial authority and *not a mere organ* of the association interested in the outcome of the dispute”.²¹⁷²

²¹⁶³ The FEI is an association comprised entirely of national equestrian federations. It has its seat in Lausanne. Under the 1991 edition of its Rules a party dissatisfied with a decision rendered by the FEI’s “Legal Commission” may appeal to the CAS for a “definitive” decision.

²¹⁶⁴ See arbitration CAS 92/63 *G. v. FEI* in Digest of CAS Awards 1986-1998.

²¹⁶⁵ Kaufmann-Kohler/Peter, p. 184.

²¹⁶⁶ Reeb, p. xxv.

²¹⁶⁷ Paulsson, *Sport disputes*, pp. 364 *et seq.*

²¹⁶⁸ DFT 119 II 275.

²¹⁶⁹ *Ibid.*

²¹⁷⁰ *I.e.* a member of another association which in turn is a member of the association, or rather federation, in question.

²¹⁷¹ *E.g.* a person required to accept certain rules as a condition of participating in an event organised by the association.

²¹⁷² Paulsson, *Sport disputes*, pp. 365 *et seq.*

After having undertaken a careful analysis of the CAS, the Swiss Federal Tribunal concluded that one may accept that *the CAS is possessed of the degree of independence which Swiss law requires as a condition of the waiver of recourse to the ordinary courts*. On the other hand, the Swiss Supreme Court expressed its own view to the effect that this analysis of the role of the CAS was acceptable “not without hesitation”, given the “organic and economic” connections between the CAS and the IOC.²¹⁷³ Indeed, in the view of the Swiss Supreme Court, such links would have been sufficiently serious to call into question the independence of the CAS in the event of the IOC’s being a party to proceedings before it. The Swiss Federal Tribunal’s message was thus perfectly clear: the CAS had to be made more independent of the IOC both organisationally and financially.²¹⁷⁴

2.2.1.3. The Paris agreement

The creation of the ICAS²¹⁷⁵ and the new structure of the CAS were approved in Paris, on 22 June 1994.²¹⁷⁶ The agreement was signed by the highest authorities representing the sports world.²¹⁷⁷ Since the Paris Agreement was signed, all Olympic International Federations and many NOCs have recognised the jurisdiction of the CAS and included in their statutes an arbitration clause referring disputes to the CAS.

The only incertitude which remained was to know whether *after the reform the CAS could be considered a true arbitral tribunal in proceedings where the IOC is a party*.²¹⁷⁸ It was not until 27 May 2003 that the Swiss Federal Tribunal assessed the Court’s independence in detail, having heard an appeal by two Russian cross-country skiers, Larissa Lazutina and Olga Danilova, against a CAS award disqualifying them from an event at the Olympic Winter Games in Salt Lake City. In a remarkably detailed and exhaustive judgment,²¹⁷⁹ the Swiss Supreme Court dissected the current organisation and structure of the ICAS and CAS, concluding that *the CAS was not “the vassal of the IOC” and was sufficiently independent of it*, as it was of all other parties that called upon its services, for *decisions it made in cases involving the IOC to be*

²¹⁷³ Paulsson, *Sport disputes*, pp. 365 *et seq.*

²¹⁷⁴ Reeb, p. xxvi.

²¹⁷⁵ The main task of the ICAS is to safeguard the independence of the CAS and the rights of the parties. Moreover, the ICAS also appoints the CAS arbitrators and approves the budget and accounts of the CAS.

²¹⁷⁶ Reeb, p. xxvi.

²¹⁷⁷ See Simon, p. 198.

²¹⁷⁸ See Rigozzi, para. 539.

²¹⁷⁹ DFT 129 III 445.

considered as true awards, comparable to the judgments of a State tribunal.²¹⁸⁰ The Swiss Federal Tribunal also noted the widespread recognition of the CAS amongst the international sporting community, showing that the CAS was meeting a real need.²¹⁸¹

2.2.1.4. The *ad hoc* Division of the CAS

In 1996, the ICAS founded a special body for the settlement of all disputes arising in the course of and in connection with Olympic Games, to be known as the *ad hoc* Division of the CAS.²¹⁸² The Arbitration Rules for the Olympic Games provide the *resolution of any disputes by arbitration* insofar as they arise during the Olympic Games or during the ten days preceding the Opening Ceremony.²¹⁸³ Without question, in the context of disputes relating to Olympic Games, the precedence-setting decision was rendered by the New South Wales Court of Appeal in *Raguz v. Sullivan*.²¹⁸⁴ Indeed, in the run up to the Olympic Games in Sydney, this court rejected its own jurisdiction and *recognised the CAS as the global court for sports*. It has been stated that “the New South Wales Court of Appeal set a remarkable precedent and lent support to the CAS’ effort to create a global system of dispute resolution consistent with the needs of global sports”.²¹⁸⁵

While, formerly, an athlete’s signature on the entry form alone was not considered sufficient to establish the CAS’ jurisdiction and required the endorsement by the athlete’s NOC, now *every participant at the Olympic Games, by signing the entry form, agrees that any dispute, controversy or claim arising out of, in connection with, or on the occasion of the Olympic Games, shall be submitted exclusively to the CAS for final and binding arbitration*.²¹⁸⁷

2.2.1.5. Comments

This brief historical overview of the CAS shows how in sport arbitration, when jurisdiction is *not* created by a *negotiated contract* but by virtue of the conditions stipulated in a licence, the *focus, rather than being on the qualification of arbitration*

²¹⁸⁰ Reeb, p. xxvi.

²¹⁸¹ *Ibid.*

²¹⁸² Kaufmann-Kohler, *Olympics*, p. 1.

²¹⁸³ See Article 1 of the Arbitration Rules for the Olympic Games.

²¹⁸⁴ New South Wales Court of Appeal, *Angela Raguz v. Rebecca Sullivan*, 1 September 2000, referred to as *Raguz*, in Mealey’s IAR 2000, Issue #10, p. 3D; and also in ASA Bulletin (2001), pp. 335-354.

²¹⁸⁵ See Kaufmann-Kohler, *Olympics*, p. 20.

²¹⁸⁶ *I.e.* athlete, coach, trainer, official, other member of the NOC Delegation.

²¹⁸⁷ Nater, pp. 200 *et seq.*

as a consensual dispute resolution mechanism, lies on whether the organisation and structure of the CAS within the sport is such that the CAS can be considered an *impartial and independent arbitral tribunal*. Indeed, an arbitral tribunal with such characteristics should be able *to conduct fair proceedings*.

2.2.2. Characteristics of the disputes submitted to the CAS

2.2.2.1. Types of proceedings before the CAS

Generally speaking, a dispute may be submitted to the Court of Arbitration for Sport only if there is an arbitration agreement between the parties which specifies recourse to the CAS. Such disputes may arise out of an arbitration clause inserted into a contract or regulations, or of a later arbitration agreement (ordinary arbitration proceedings), or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings).²¹⁸⁸

2.2.2.2. Connection of the dispute with sport

Article R27 of the Code stipulates that the CAS has jurisdiction solely to rule on disputes related to sport. Nevertheless, since its creation, the CAS has never declared itself lacking jurisdiction on the grounds of a dispute not being linked to sport.²¹⁸⁹ In fact, for the CAS to have jurisdiction it is enough that the dispute has some connection with sport.²¹⁹⁰ This *general competence of the CAS to resolve disputes—conceived in such an extensive manner*—is not only valid *with regard to the object of dispute but also with regard to territoriality*, as the competence of the tribunal extends to all sport disputes whether their character is national or international.²¹⁹¹

2.2.2.3. Types of dispute

In principle, two types of dispute may be submitted to the CAS: those of a commercial nature, and those of a disciplinary nature.

²¹⁸⁸ See Article R27 CAS Code.

²¹⁸⁹ Reeb, p. xxix. See on this regard the award delivered in the arbitration CAS 92/81 in the *Digest of CAS Awards 1986-1998*.

²¹⁹⁰ Simon, p. 191.

²¹⁹¹ *Ibid.*

2.2.2.3.1. Commercial cases

The first category essentially involves disputes relating to the execution of contracts, such as those relating to sponsorship, the sale of television rights, the staging of sports events, player transfers and relations between players or coaches and clubs and/or agents.²¹⁹² Disputes relating to civil liability issues²¹⁹³ also come under this category.²¹⁹⁴ These so-called commercial disputes are handled by the CAS acting as a court of sole instance.²¹⁹⁵ The CAS is *directly and exclusively competent* because of a *submission agreement or an arbitration clause*.²¹⁹⁶

2.2.2.3.2. Disciplinary cases

Disciplinary cases represent the second group of disputes submitted to the CAS, of which a large number are doping-related. In addition to doping cases, the CAS is called upon to rule on various disciplinary cases.²¹⁹⁷ Such disciplinary cases are generally dealt with in the *first instance by the competent sports authorities*, and subsequently become the subject of an *appeal to the CAS*, which then acts as a court of last instance.²¹⁹⁸ However, it has been observed that it should not be abused of the qualification as “appeal”, because this would presuppose that the competent sports authorities cast themselves as arbitrators.²¹⁹⁹

2.3. Other arbitral tribunals

In addition to the ordinary arbitral tribunals and to the CAS there are other arbitral tribunals:²²⁰⁰

- the arbitral tribunals of the international federations which have lost more and more of their importance;
- the national sport arbitral tribunals which, on the other hand, are expanding;²²⁰¹ and

²¹⁹² Employment contracts and agency contracts.

²¹⁹³ *E.g.* an accident to an athlete during a sports competition

²¹⁹⁴ Reeb, p. xxix.

²¹⁹⁵ See Rochat, *Procédure*, p. 18.

²¹⁹⁶ See Simon, p. 194.

²¹⁹⁷ Reeb, p. xxix.

²¹⁹⁸ See under <http://www.tas-cas.org/en/infogenerales.asp/4-3-239-1011-4-1-1/5-0-1011-3-0-0/>.

²¹⁹⁹ Simon, p. 194.

²²⁰⁰ For an overview, see Rigozzi, paras 251 *et seq.*

- the arbitral tribunals outside the Olympic movement, for instance the Contract Recognition Board (CRB) in Formula 1²²⁰² or the America's Cup Arbitration Panel.²²⁰³

3. ARBITRATION FOR RESOLVING SPORT DISPUTES

International sports law has been described as a process for avoiding and resolving disputes.²²⁰⁴ In this process *arbitration plays a main role*. Indeed, on the one hand arbitration constitutes a smoother and softer form of dispute resolution than making recourse to ordinary State courts which function in the “classical” way,²²⁰⁵ and, on the other hand, athletes and officials are familiar with the idea of resolving sport disputes by arbitration.²²⁰⁶ Furthermore, it has also been observed that while organised sport is one of the most regulated domains of social life with a superposition of regulations of different orders, most of the time the association regulations are primarily applied, and these are often very technical, complex and difficult to learn.²²⁰⁷ Therefore, because ordinary State judges²²⁰⁸ have little opportunity to use these regulations, they do not always understand their *ratio* and their spirit.²²⁰⁹

3.1. Reasons for the use of arbitration

Historically three main reasons can be identified for the use of arbitration for resolving sport disputes:

- the aspiration of autonomy of the sport organisations;
- the financial risks linked with the intervention of State courts in disputes between athletes and federations;

²²⁰¹ See, e.g. in Italy the “Camera di conciliazione e di arbitrato per lo sport (CCAS)” created by the “Comitato olimpico nazionale italiano (CONI)”, in New Zealand the “Sport Disputes Tribunal of New Zealand” or in the United Kingdom the “Sport Dispute Resolution Panel”.

²²⁰² On the CRB in Formula 1, see Peter H., *Contracts*; Kaufmann-Kohler/Peter.

²²⁰³ On the America's Cup Arbitration Panel, see Foster/Manasse/Peter/Tomkins, Peter H., *America's Cup*; Peter/Faire/Foster; Peter/Züblin; Tompkins.

²²⁰⁴ Nafziger, p. 130.

²²⁰⁵ Oswald, p. 4.

²²⁰⁶ Netzle, p. 47.

²²⁰⁷ See Oswald, p. 4.

²²⁰⁸ It was observed that the role of national courts is among the most difficult issues of international sport today, as some would argue that they are too intrusive in the sport arena, whereas others would argue the opposite (see Nafziger, p. 131).

²²⁰⁹ Oswald, p. 4.

- the wish of the State.²²¹⁰

3.1.1. *The aspiration towards autonomy of the sport movement*

The aspiration towards autonomy of the sport organisations finds the most manifest expression in their wish to avoid making recourse to the State justice system and stays at the origin of the creation of sport arbitral tribunals.²²¹¹ However, not only is there the wish to resolve sport disputes by specialised tribunals within the sport family, but proceedings in the field of sport before State courts have also proved to be, on different occasions, unsatisfactory.²²¹² On the other hand, arbitration appears to be adapted to the organisation and functioning of sport relationships: indeed the internalisation of the sport movement and its very strong cohesion, which even includes the recognition of the existence of an autonomous juridical order,²²¹³ justify a system of dispute resolution which espouses this autonomy.²²¹⁴

3.1.2. *The financial aspect*

Another reason for independence was the awareness of the financial risks that actions in State courts could bring for the sport federations.²²¹⁵ In the *Reynolds* case²²¹⁶ the IAAF was condemned by a US judge and ordered to pay to Harry “Butch” Reynolds a sum of USD 27.4 million for having suspended him from competitions due to the fact that he had tested positive on doping substances which the athlete had always denied taking.²²¹⁷

3.1.3. *The wish of the State*

Considering the traditional reluctance of State courts in solving sport disputes, it is not surprising that the State, many of whose tribunals are overloaded, has a direct interest in

²²¹⁰ See Rigozzi, para. 213.

²²¹¹ Rigozzi, para. 215.

²²¹² See Oswald, p. 4 *et seq.* The establishment of the CRB was, *e.g.* the consequence of what has been called a “multiparty drama” before State courts (see Kaufmann-Kohler/Peter, p. 174).

²²¹³ See in particular Karaquillo.

²²¹⁴ Simon, p. 186.

²²¹⁵ Rigozzi, para. 221.

²²¹⁶ On the Reynolds case, see in particular Nafziger, pp. 134 *et seq.*

²²¹⁷ Simon, p. 187. See also Paulsson, *Sport disputes*, p. 360.

seeing sport disputes solved by private arbitral tribunals.²²¹⁸ Inaugurated by the US legislator who rendered compulsory for the national federations to provide for an arbitration system for solving disputes related to participation at the Olympic Games,²²¹⁹ this tendency now seems to have found its definitive affirmation with the adoption by the governments of the WADA-Code which makes the CAS the exclusive forum²²²⁰ for the resolution of international doping cases arising in an international event or involving international-level athletes.²²²¹

3.2. Specific needs of sport in terms of dispute resolution

3.2.1. Maintenance of uniform standard/harmonisation

The main advantage of making recourse to arbitration for solving international sport disputes has been seen in ensuring equality of treatment of the athletes across borders.²²²² Indeed, in *sport, which is international by nature, it is essential that all athletes in the world are treated in the same way.*²²²³

The strongest argument in favour of arbitration derives from the fundamental principles in sport, namely *fairness and equal opportunity*, which *require that same rule violations must be treated and sanctioned alike.*²²²⁴ In international sport, this can only be achieved through arbitration instead of different national or even local court decisions.²²²⁵ In fact, an arbitral tribunal is in a better position to ensure the indispensable *unity of jurisprudence* requested by sport.²²²⁶ Moreover, at most levels of sport, where federations struggle against considerable odds to maintain uniform standards of sportsmanship and organisational quality, it would seem irresponsible to insist that they should be routinely subjected to judicial review, and obliged to defend

²²¹⁸ Rigozzi, para. 222.

²²¹⁹ Already in 1974 the statutes of the US Olympic Committee had been amended with two provisions permitting to bring disputes concerning the participation at the Olympic Games before an arbitral tribunal constituted according to the AAA. In 1978 the statutes of the the USOC have then been integrated in the US Amateur Sports Act where the possibility of making recourse to arbitration was maintained and even rendered compulsory for certain types of disputes. The role of arbitration has also been recognised and reinforced with the 1998 revision of the US Amateur Sports Act.

²²²⁰ Therefore, it has been defined as a system of “mandatory arbitration” (see, e.g. Rigozzi, para. 472).

²²²¹ Rigozzi, paras 222 and 229. See Article 13.2.1 WADA-Code.

²²²² Mannig/Dithie, pp. 263 *et seq.*

²²²³ Oswald, p. 5.

²²²⁴ See Pfister, p. 202.

²²²⁵ Netze, p. 47.

²²²⁶ Oswald, p. 5.

themselves in the courts of any country where their activity may have some ramification.²²²⁷

*The need of uniformity is particularly necessary with regard to disciplinary disputes.*²²²⁸ Indeed, in disputes regarding sport arbitration in disciplinary matters, which represent 85% of the cases submitted to the CAS, the awards need to be executed in all the countries where the athlete will be participating in competitions.²²²⁹ Moreover, in doping cases an athlete must be sanctioned with the same severity irrespective of his nationality or domicile.²²³⁰

3.2.2. Speed

In traditional commercial arbitration, there is already much talk about speed.²²³¹ While the development of fast-track or expedited arbitration is welcome and may contribute to the appeal of arbitration to potential users who have been reluctant because of costs and time spent, fast-track or expedited proceedings can only be used for issues which are capable of being resolved in such a manner.²²³²

The realities of *international sport call for a decision-making speed rarely found in national judicial systems.*²²³³ As a suspension measure or a ban of participation can have *direct and immediate economic and financial consequences* on the career of an athlete or a club's situation, the contestation of such measures, and the resolution of a particular dispute must be done rapidly.²²³⁴ In disciplinary matters one of the parties is almost always an individual whose *personal fundamental rights* have been affected.²²³⁵

Moreover, the dispute mostly arises in the context of a *competition which continues to evolve* and whose regularity would be compromised by a decision taken with delay.²²³⁶

²²²⁷ Paulsson, *Sport disputes*, p. 361.

²²²⁸ Rigozzi, para. 453.

²²²⁹ Oswald, p. 6.

²²³⁰ Oswald, p. 5. This is the reason why the WADA-Code for appeals in cases arising from competition in an international event or in cases involving international-level athletes provides for that the decision may exclusively be appealed to the CAS in accordance with the provisions applicable before such court (see Article 13.2.1 WADA-Code).

²²³¹ On fast track arbitration, see, e.g. Rovine; ICC Final award in cases No. 7385 (1992) and No. 7402 (1992), XVIII YBCA 68 (1993). See also Davis; Müller E. with a comparative table. See as well the special issue—10(4) J Int'l Arb (1993).

²²³² Lew/Mistelis/Kröll, para. 21-87.

²²³³ Paulsson, *Sport disputes*, p. 362.

²²³⁴ Simon, p. 195.

²²³⁵ Oswald, p. 9.

²²³⁶ *Ibid.*

Therefore, what is needed within the shortest amount of time possible is not *any decision*, but a *final* decision binding all persons affected by it.²²³⁷ Especially at the Olympics speed is not only an issue for debate: it is a must. In fact, in the case of the Olympic Games the advantage of the expedited *ad hoc* process is obvious: the resolution of all disputes before the close of the Games.²²³⁸

However, in order for the decision to be made quickly, it is not only necessary to have an appropriate procedure and organisational structure, but arbitrators who know the subject.²²³⁹

3.2.3. *Specialisation*

Ordinary judges may not be best suited to deal with specialised areas of sports discipline.²²⁴⁰ Therefore, in order to be accepted by the sporting community, it is desirable for arbitrators to reflect the diversity of the community and that former athletes are included.²²⁴¹

3.2.4. *Finality*

When competitions are ongoing, arbitration cases need to be solved speedily, but also in a final way. For instance, in creating the Olympic Division, the CAS was pursuing the objective of providing athletes and other participants with a body able to resolve disputes occurring during the Games in a final manner within the time limits appropriate to the pace of the competition.²²⁴² In order for the decisions to be final, a “real” arbitral tribunal was thus required, *i.e.* an independent tribunal following the fundamental principles of procedure.²²⁴³ The same need, however, also arises in other areas of sport arbitration.²²⁴⁴

²²³⁷ Kaufmann-Kohler, *Olympics*, pp. 35 *et seq.*

²²³⁸ Rivkin, p. 187 and pp. 191 *et seq.*

²²³⁹ So Kaufmann-Kohler, *Olympics*, p. 105, for the Olympic Division.

²²⁴⁰ Paulsson, *Sport disputes*, p. 361.

²²⁴¹ So Kaufmann-Kohler, *Olympics*, p. 105, for the Olympic Division.

²²⁴² Kaufmann-Kohler, *Olympics*, p. 105.

²²⁴³ *Ibid.*

²²⁴⁴ So, *e.g.* the purpose of the CRB system is to provide for the speedy and final resolution of disputes regarding the team for which a particular driver will render his racing services in any given Formula 1 Championship (see Kaufmann-Kohler/Peter, p. 174).

3.3. Acceptance of arbitration in sport

3.3.1. *In general*

Originally, sport arenas have been considered “law-free zones” and related disputes as non-justiciable controversies.²²⁴⁵ However, some violations of the rules require more severe sanctions than just a penalty kick or a free throw, but sanctions that exceed the frame of a particular competition, such as fines, bans or exclusions, are inevitably subject to judicial review and the *only way to keep the ordinary courts out of such review proceedings is to provide for arbitration.*²²⁴⁶

3.3.2. *Balance between the necessities of sport competitions and the respect of fundamental rights*

Arbitration has been seen as a third jurisdictional way *to avoid conflicts among juridical orders by combining the necessities of sport competitions and the respect of fundamental rights.*²²⁴⁷ Given this context of tension between fundamental individual rights and equally legitimate institutional objectives, the challenge is striking the right balance.²²⁴⁸ This synthesis is well illustrated by the organisation and the functioning of the CAS: while its organisation—notably the composition of its members—let it appear as a component of the sport movement, at the same time, the procedural guarantees and the independence of the arbitration panels ensure the effective exercise of a sport justice which merits its name.²²⁴⁹

3.3.3. *Presumption in favour of arbitration, with particular regard to consent to arbitration*

In sport, there has always been a strong tendency to resolve any kind of dispute by excluding the ordinary courts. It has been observed that whatever the legal deficiencies and flaws of the internal arbitration systems of the sport organisations may be, there is

²²⁴⁵ On the distinction between “*Spielregel*” (“game rules”—not considered to be subject to judicial review) and “*Rechtsregel*” (“legal rules”—considered to be subject to judicial review), see Kummer.

²²⁴⁶ Netze, p. 47.

²²⁴⁷ Simon, p. 189.

²²⁴⁸ Paulsson, *Sport disputes*, p. 362.

²²⁴⁹ Simon, p. 189.

probably no other area in life where arbitration is equally accepted.²²⁵⁰ Therefore, the fact that there is *at least a certain presumption in favour of arbitration* as the preferred method of dispute resolution in sports has to be remembered when the *validity* of an arbitration agreement, *especially one by reference*, has to be determined.²²⁵¹

Rigozzi has argued²²⁵² that the presumption in favour of arbitration could be inspired by the attitude of jurisprudence—particularly French—in the field of international commercial arbitration which considers that arbitrators have become the natural judges of international commerce, and are therefore recognised by the professionals as such,²²⁵³ leading to the fact that it is logical and legitimate *to presume consent to arbitration*.²²⁵⁴ However, the Swiss Supreme Court²²⁵⁵ has not considered the *issue on consent to arbitration either from the point of view of athletes' professionalism*²²⁵⁶ *or from the point of view of the more or less usual character of the CAS arbitration clause*.²²⁵⁷

Finally, it can also be observed that in the WADA-Code a provision has been inserted according to which “every government will respect *arbitration as the preferred means* of resolving doping-related disputes”.²²⁵⁸

3.4. Structural specificities of sport arbitration with regard to consent

It has been observed that sport arbitration seems to be qualitatively different from commercial arbitration, because like arbitration of working disputes²²⁵⁹ and consumer arbitration²²⁶⁰ it is characterised by an inequality among the parties which can be qualified as structural.²²⁶¹ In the *Cañas* case the Swiss Federal Tribunal held that this *structural difference* between the two types of relationship is *not without influence on*

²²⁵⁰ Netzle, p. 47.

²²⁵¹ *Ibid.*

²²⁵² Rigozzi, para. 833.

²²⁵³ See Oppetit, *Référence*, p. 558.

²²⁵⁴ Simon, p. 204.

²²⁵⁵ It is remembered that all CAS's arbitrations have their seat in Lausanne, Switzerland, independently from where they take place. See in particular R28 (Seat) of the CAS Code. See also Kaufmann-Kohler, *Lieu de l'arbitrage*, p. 526.

²²⁵⁶ See the DFT 4P.230/2000 of 7 February 2001 (*Roberts v. FIBA*), ASA Bulletin, Vol. 19 No. 3 (2001), p. 528. On the other hand, the CAS arbitral tribunal had held that Stanley Roberts was “experienced in the field of professional sports” (CAS 2000/A/262, *Roberts v. FIBA*, in Reeb, *Digest II*, p. 385).

²²⁵⁷ Rigozzi, para. 833.

²²⁵⁸ Article 22.3 WADA-Code.

²²⁵⁹ On voluntary consent in employment arbitration, see, e.g. Ware.

²²⁶⁰ On consumer arbitration, see, e.g. Brafford, with numerous references, or Alpa.

²²⁶¹ Rigozzi, para. 330.

*the consensual process leading to the formation of any agreement.*²²⁶² While, in principle, when two parties are treated equally each of them expresses its will without being subject to the will of the other—as is the case in international commercial arbitration, *the situation is very different in the field of sport.*²²⁶³ Indeed, as is the case in mandatory arbitration, an *athlete* who wishes to participate in a competition has *no other choice than to accept the arbitration clause*, because this form of dispute resolution is not negotiable and imperatively provided for by the regulations of sport organisations, which, it has been sustained, in the sport juridical order represents the functional equivalent of the law in the State juridical order.²²⁶⁴ This is even more true in the case of a *professional athlete* who will be confronted with the following *dilemma: to consent to arbitration or practice his sport as an amateur.*²²⁶⁵ Therefore, the athlete will not have any choice other than *nolens volens* to accept arbitration.²²⁶⁶ However, it should also be remarked that, contrarily to workers and consumers, the protection of athletes appears to be sometimes less indispensable, as their bargaining strength (individually and, above all, as a group) is usually quite high. Besides, in arbitration for disciplinary matters it is the athlete himself who infringes the rules and creates a possible case to be solved through arbitration.

Furthermore, it has been observed that sport arbitration is, in some aspects, similar to treaty arbitration:

- from the moment when it is provided for by the pertinent sport regulation, arbitration will apply to every athlete who is participating in a competition held in accordance with that regulation, and this is independent from the existence of any contractual (or other) relationship between the sport organisation and the participant; and
- the sport organisation gives its consent to submit to arbitration disputes, without knowing their nature and exact importance, with parties whose identities are not yet known.²²⁶⁷

However, although arbitration clauses included in sport regulations may be seen as a sort of standing offer to arbitrate on the part of sport organisations, there is in my opinion a difference with treaty arbitration where the investor often consents to arbitration by instituting the proceeding. Indeed, while in the latter case the investor's

²²⁶² DFT 133 III 235, consid. 4.3.2.2.

²²⁶³ *Ibid.*

²²⁶⁴ See Rigozzi, para. 331.

²²⁶⁵ See DFT 133 III 235, consid. 4.3.2.2.

²²⁶⁶ *Ibid.*

²²⁶⁷ See Rigozzi, para. 332.

consent is given *after* a dispute case has arisen, in sport arbitration the athletes mainly give their consent to arbitration *prior* to the break-out of the dispute. Moreover, the view that arbitration will apply independently from the existence of any contractual (or other) relationship between sport organisations and the participant has in my view to be differentiated. Indeed, for instance under English law some situations have been seen as *contracts of adhesion*,²²⁶⁸ and the Swiss Federal Tribunal recently held in the *Cañas* case that an athlete who wishes to participate in competitions organised under the control of a federation whose regulations provide for recourse to arbitration will not have any other choice than to accept the arbitration clause, notably *by adhering* to the statutes of the said sport federation where the clause is inserted.²²⁶⁹

4. THE PLACE WHERE CONSENT TO ARBITRATION IS EXPRESSED: ARBITRATION AGREEMENTS IN THE FIELD OF SPORT

As in commercial arbitration or investment arbitration, in sport arbitration the parties express their consent to arbitrate in an arbitration agreement. Indeed, although like in investment arbitration there is not always an arbitration agreement in the traditional sense, the resolution of a dispute by private judges without the parties' consent would not be arbitration.²²⁷⁰

In sport arbitration there are different types of arbitration clauses. While already in commercial arbitration arbitration clauses by reference are important, in sport arbitration they are central. Another particularity is also the place where arbitration clauses are often found: the regulations of sport organisations, the Olympic Charter or the entry forms for competitions.

4.1. Different types of arbitration clauses

With respect to the form of arbitration agreements in the field of sport, there are two main categories:

²²⁶⁸ See *Walkinshaw & Ors v. Diniz*, High Court of Justice, Chancery Division, Commercial Court, 19 May 1999, Arbitration International, Vol. 17 No. 2 (2001).

²²⁶⁹ DFT 133 III 235, consid. 4.3.2.2.

²²⁷⁰ So for investment arbitration Lew/Mistelis/Kröll, para. 5-21.

- complete arbitration clauses contained in sport-related contracts; and
- arbitration clauses by reference to another document.²²⁷¹

Through the membership in his sport club the athlete submits himself to the articles of association and, through the therein contained *reference*, generally also to the rules of the hierarchal higher sport organisations, in particular those of the international federation of its sport discipline, of the IOC and of the WADA.²²⁷² However, also in the agreements between athletes and other contractual partners of the sport world—typically in work, licence and participation contracts—reference is made to the rules of the hierarchal higher sport organisations, and therewith the athletes’ submission to the corresponding duties.²²⁷³ Sometimes jurisdiction of the CAS is also given by a *compromis arbitral* after the dispute has arisen.²²⁷⁴

4.1.1. Complete arbitration clauses in sport-related contracts

Within this category, two kinds of contracts may be distinguished:

- contracts with partners outside sport, *e.g.* sponsorship contracts, and
- contracts within sport, *i.e.* between sport organisations and athletes, *e.g.* licences.²²⁷⁵

4.1.1.1. Arbitration clauses in sponsorship contracts

Arbitration clauses in contracts between sport organisations and outside business partners²²⁷⁶ do not pose particular issues just because the contracts are somehow sport-related and the *general rules on the validity of contractual arbitration clauses apply*.²²⁷⁷ Because of the commercial nature of the relationships, the recourse to arbitration corresponds to the classical method of solving disputes.²²⁷⁸ The principal reason for submitting purely commercial cases involving sport to arbitration is expertise

²²⁷¹ Netzle, p. 48.

²²⁷² Baddeley, *Unterwerfungserklärungen*, p. 357.

²²⁷³ *Ibid.*

²²⁷⁴ See, *e.g.* *Arbitrage TAS 87/10, X./HC Y., sentence du 15 juillet 1989*, Digest of CAS Awards 1986-1998, pp. 3 *et seq.*

²²⁷⁵ See also Netzle, p. 48.

²²⁷⁶ Such as sponsors, suppliers, service providers, advertising and marketing agencies, merchandisers, broadcasters and others.

²²⁷⁷ Netzle, p. 48. See also Simon, p. 196 *et seq.*

²²⁷⁸ Simon, p. 197.

in the technical areas concerned,²²⁷⁹ as in construing contracts and assessing damages, a detailed knowledge of sport-related commercial law is essential.²²⁸⁰

There may also be situations where the *extension of a contractual arbitration clause to non-signatories* could be an issue, for example, the question of whether an athlete-member of a national sports team is bound by an arbitration clause between his federation and the “official sponsor of the national team”?²²⁸¹

4.1.1.2. Arbitration clauses in athletes’ agreements or submissions forms

Although athletes are not usually members of their national federations,²²⁸² on the other hand, they may participate in international competitions only through their national federations.²²⁸³ Thus, there is a need for an immediate legal relationship because there are a number of issues to regulate, such as coaching, financial support, training camps, medical care, advertising activities, etc. While in the past such issues have been regulated by unilateral orders of the federations, today it is usual to conclude *athletes’ agreements*.²²⁸⁴ Such agreements *may well contain a comprehensive arbitration clause*, which is at least binding upon the contractual parties, *i.e.* the athlete and the national federation.²²⁸⁵

In the case of licences the sport organisations give a general authorisation to the single athlete for participating in particular sport competitions of the federation,²²⁸⁶ usually for a certain period.²²⁸⁷ Increasingly, international federations are issuing so-called *athletes’ declarations* to be signed by all athletes participating in international competitions.²²⁸⁸ While the original purpose of such declarations was to enforce uniform doping regulations, athletes’ declarations are also *excellent opportunities to provide immediately applicable arbitration agreements*.²²⁸⁹ It has been observed that, like in commercial arbitration, the main defect of arbitration clauses in such forms is their often

²²⁷⁹ Each sport has its own operational context and commercial language which have to be understood by an arbitral tribunal.

²²⁸⁰ Samuel/Gearhart, p. 40.

²²⁸¹ Netzle, p. 48.

²²⁸² See, *e.g.* Hausheer/Aebi-Müller, p. 340.

²²⁸³ Netzle, p. 49.

²²⁸⁴ See Haas/Prokop, pp. 109 and 187.

²²⁸⁵ Netzle, p. 49.

²²⁸⁶ Hausheer/Aebi-Müller, p. 341.

²²⁸⁷ Fenners, para. 149.

²²⁸⁸ See, *e.g.* CAS 94/129, *USA Shooting v. UIT*.

²²⁸⁹ Netzle, p. 49.

too broad scope.²²⁹⁰ The *athlete consents* therefore *in advance to a wide range of possible disputes to be solved through arbitration*. In doing so *the consensual character of arbitration declines*.

4.1.2. Arbitration clauses in the regulations of sport organisations

The meaning of arbitration clauses in the regulations of sport organisations is threefold:

- the clause can be directly applied based upon membership of the federation;
- the clause can be applied by reference if there is a corresponding agreement; or
- the clause can be understood as offer of the federation to submit to arbitration.²²⁹¹

4.1.2.1. Direct application based upon membership

An arbitration agreement is applicable if the dispute arises in relation to a particular legal relationship. While it is undisputed that arbitration clauses incorporated in statutes are, in principle, binding upon the members of that legal entity, the requirement of a direct application based upon membership is merely met in disputes between an association and its immediate members.²²⁹² Therefore, in international federations, *membership* may only serve as a sufficient legal base for *arbitration of disputes between the international federation and its member-federations* and also *between two member-federations*.²²⁹³ Indeed, the arbitration agreement in the statutes of an association not only applies to disputes between a member and the association, but between two members of the same association, as long as the dispute relates to their affiliation to that association.²²⁹⁴ When an association's statutes or contract designate an arbitral tribunal to resolve disputes based on Article 75 of the Swiss Civil Code between the association and its members two conditions are laid down in the CAS case-law:

- first, that *consent to arbitration* should be given *knowingly and willingly*;²²⁹⁵ and
- second, that the *arbitral tribunal* should *act with full independence*, offering complete *equality between the parties in proceedings that are fully lawful*.²²⁹⁶

²²⁹⁰ See Rüede/Hadenfeldt, footnote 12, pp. 43, 46; Netzle, p. 49.

²²⁹¹ Netzle, p. 49.

²²⁹² *Ibid.*

²²⁹³ See Netzle, pp. 49 *et seq.*

²²⁹⁴ Such as, *e.g.* a dispute on the transfer of an athlete from one club to another (*ibid.*).

²²⁹⁵ DFT 112 II 254.

²²⁹⁶ DFT 97 I 488 and DFT 67 I 214. See Arbitration CAS 98/185, *Royal Sporting Club Anderlecht v. Union des Associations Européennes de Football (UEFA)*, award of 22 July 1998 (translation), Digest of CAS Awards 1998-2000, pp. 469 *et seq.*

On the other hand, since only the national federations are members of the international organisation and not the individual athletes,²²⁹⁷ when a *dispute between an international federation and an individual athlete* arises, the application of the arbitration clause without *further reference* may not be based upon membership.²²⁹⁸

4.1.2.2. Application by reference²²⁹⁹

Arbitration clauses in the statutes of a federation may also be applicable to disputes in which a party is involved that is not itself a member of the federation when both a sufficient reference and a satisfactory arbitration clause are present in the statutes.²³⁰⁰

4.1.2.3. Offer to submit to arbitration

It has been observed that even though the reference in the primary document does not meet the criteria for being considered an application by reference, the arbitration clause in the statutes or regulations of a sport organisation may still serve as the starting point for an arbitration proceeding.²³⁰¹ Indeed, it may bind the sport federation unilaterally and be accepted by all persons or organisations to which such an offer is directed.²³⁰²

4.1.2.4. Terms of reference

When the CAS receives a request for arbitration, the court office summarily reviews whether there is an arbitration agreement providing for the CAS. While in many cases the CAS is confronted with arbitration agreements that would probably not meet the above standards, particularly because there is no sufficient reference or their scope is too broad, any *deficiencies are regularly cured by the terms of reference*.²³⁰³

²²⁹⁷ See Baddeley, *Association*, p. 6; Fenner, para. 16.

²²⁹⁸ See Netze, p. 50. Baddeley, *Unterwerfungserklärungen*, p. 357.

²²⁹⁹ See more in detail under VI.5.1.

²³⁰⁰ Netze, p. 50.

²³⁰¹ See Netze, p. 52.

²³⁰² See, e.g. Baddeley, *Association*, p. 283.

²³⁰³ The award then usually states: “*La compétence du TAS pour réexaminer en appel les décisions de la Commission juridique dérive de l’art. ... des Statuts de la Fédération. Par surabondance de droit, la compétence du Tribunal de céans est donné par l’ordonnance no. 1 du ... contresignée par les deux parties pour valoir compromise arbitral*” (Netze, p. 53 and footnote 34).

4.1.3. *Contract of adhesion*²³⁰⁴

The institutionalisation of the relationships in sport is reached through the adhesion to the statutes and the regulations of the national and international federations. The *materialisation of the adhesion* happens through the *delivery of a licence to the athletes* and the *affiliation of the clubs to the federations*, which have the significance of an engagement to respect the statutes and the regulations.²³⁰⁵ The submission to the CAS of the disputes within the members of the sport community happens with the insertion of an arbitration clause into the statutes or the regulations with the effect of obtaining not only the *adhesion to arbitration of the sport federations but in an indirect manner of the totality of the athletes* who have adhered to the statutes and regulations.²³⁰⁶

Submission declarations of athletes have to be seen as standard form contracts in which the *single clauses are not negotiated by the parties*.²³⁰⁷ This would also not be possible in professional competition sport *due to the number of athletes and sport organisations*, and also due to the fact that the competition can only take place on the basis of uniform rules—in particular *uniform competition rules*.²³⁰⁸ This is even the case for top sportsmen who, possibly, benefit from individual contracts.²³⁰⁹ Therefore, it has been observed that the athlete is in a similar position, with respect to the knowledge of the content of the contract and his bargaining power, as a consumer²³¹⁰ who enters an agreement in which only little is bargained and most is established in pre-printed clauses and cannot be changed.²³¹¹

In *Walkinshaw & Ors v. Diniz*²³¹² the court, considering the importance placed on consent in the definition of arbitration provided by Mustill and Boyd, held that the jurisdiction of the CRB is conferred by the contracts between the FIA and the teams and by those between the teams and the drivers.²³¹³ Indeed, the fact that there is no bilateral

²³⁰⁴ The term “contract of adhesion” refers to a standardised contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a “take it or leave it” basis, without opportunity for bargaining and under such conditions that the “adherer” cannot obtain the desired product or service save by acquiescing in the form agreement.

²³⁰⁵ Simon, p. 197.

²³⁰⁶ *Ibid.*

²³⁰⁷ Baddeley, *Unterwerfungserklärungen*, pp. 367 *et seq.*

²³⁰⁸ *Ibid.*

²³⁰⁹ See Thaler, p. 60 *et seq.*

²³¹⁰ On arbitration clauses in consumer contracts of adhesion, see Brafford.

²³¹¹ See Baddeley, *Unterwerfungserklärungen*, p. 368.

²³¹² Thomas J, Commercial Court, 19 May 1999 (unreported), 1999 Folio No. 522.

²³¹³ Kaufmann-Kohler/Peter, p. 183.

contract between the teams does not matter, nor does—in Thomas J.’s words—the fact that “these are *contracts of adhesion* and the *parties have to assent thereto* if they wish to participate in Formula 1 racing”.²³¹⁴ On the other hand, the *global acceptance of standard clauses does not include the acceptance of unusual provisions* which have to be judged in accordance to the knowledge and experience of the athletes.²³¹⁵ With regard to arbitration clauses, the Swiss Federal Tribunal has, however, traditionally taken a particular, liberal position.²³¹⁶

4.2. Olympic arbitration

4.2.1. Arbitration clause contained in the Olympic Charter

The Olympic Charter has contained since 1995 an arbitration clause referring “any dispute arising on the occasion of or in connection with, the Olympic Games ... exclusively to the Court of Arbitration for Sport”.²³¹⁷ The *clause becomes binding by an explicit reference in the entry form* that every athlete, official and coach has to sign as a condition precedent to participation in the Olympic Games.²³¹⁸ To make sure that the athlete is really conscious of what he or she has signed, the declaration further states: “The relevant provisions and rules have brought to my attention by my National Olympic Committee and/or my National Sports Federation”. And as an additional precaution, the IOC makes the NOCs responsible that its competitors are fully aware of and comply with the Olympic Charter.²³¹⁹

4.2.2. Jurisdiction of the *ad hoc* Division

During the Olympic Games in Sydney the *ad hoc* Division for the first time considered the basis for its jurisdiction over all of the different parties involved in Olympic arbitration. Some aspects were uncontroversial:

²³¹⁴ See *Walkinshaw & Ors v. Diniz*, High Court of Justice, Chancery Division, Commercial Court, 19 May 1999, *Arbitration International*, Vol. 17 No. 2 (2001), p. 209. See also Kaufmann-Kohler/Peter, p. 183.

²³¹⁵ Baddeley, *Unterwerfungserklärungen*, p. 371.

²³¹⁶ *Ibid.*, footnote 46.

²³¹⁷ See Article 59 Olympic Charter (in force from 7 July 2007).

²³¹⁸ Netzle, p. 53. See also Kaufmann-Kohler, *Olympics*, p. 107, with regard to arbitration at the Atlanta Games.

²³¹⁹ Olympic Charter, by-laws to Rule 49. See also Netzle, p. 53.

- first, it is obvious that the IOC is bound by the arbitration agreement inserted in the Olympic Charter;²³²⁰
- second, it is equally clear that a claimant voluntarily submits to CAS arbitration by filing an application;²³²¹ and
- finally, a respondent who does not raise a defence at the outset of the arbitration is deemed to have submitted to jurisdiction.²³²²

4.2.2.1. Athletes

Athletes are usually the claimants, so that the issue of challenging the *ad hoc* Division does not even arise. However, the *ad hoc* Division's jurisdiction over the athlete arises out of the arbitration clause which is inserted in the entry form to the Games signed by each participant, and that clause is further supported by Article 59 of the Olympic Charter, to which the athletes *consent in the entry form by way of a global reference*.²³²³ The language of the entry form to the Sydney Olympic Games, which qualified the disputes submitted to the CAS as disputes “not resolved after exhaustion of the legal remedies established by my NOC, the International Federation governing my sport, SOCOG and the IOC”, and which was already present in earlier entry forms, did not give rise to difficulties.²³²⁴

In the *Melinte* case,²³²⁵ however, the *internal remedies of the international federation had not been exhausted* as this would have been unfeasible due to time constraints. The panel thus held that the *existence of a dispute was sufficient to create jurisdiction* under Article 74 (now Article 59) of the Olympic Charter and, at the same time, it expressly *limited the scope of its decision to the Olympic Games*, thereby preserving the federation's role in assessing the doping offence and related sanctions.²³²⁶

Similarly, the fact that the IOC had not (until then) acted to remove an athlete's accreditation, which might suggest that the athlete had not suffered an adverse decision from which to appeal, was held not to affect jurisdiction.²³²⁷ In two cases, the panel held that the *claimant had a dispute with the respondent* and the *competition schedule*

²³²⁰ E.g. *Andreea Raducan v. IOC*, referred to as *Raducan*, CAS Awards—Sydney 2000, para. 3 *in fine*.

²³²¹ E.g. *Dieter Baumann v. IOC, National Committee of Germany and IAAF*, 22 September 2000, referred to as *Baumann*, CAS Awards—Sydney 2000, para. 11.

²³²² See Article 186(2) Swiss PIL; *Baumann*, para. 16 (Kaufmann-Kohler, *Olympics*, p. 23).

²³²³ See Kaufmann-Kohler, *Olympics*, p. 23. See also under VI.4.2.1.

²³²⁴ Kaufmann-Kohler, *Olympics*, p. 24.

²³²⁵ *Michaela Melinte v. IAAF*, referred to as *Melinte*, CAS Awards—Sydney 2000.

²³²⁶ *Melinte*, paras 6 and 9 (Kaufmann-Kohler, *Olympics*, p. 24).

²³²⁷ Kaufmann-Kohler, *Olympics*, p. 24.

required prompt clarification of the athlete's status, or in the words of the *Tzagaev* panel:

“the fact is, however, that the Claimant clearly has a dispute with the Respondent [...]; and above all that the schedule for this event requires clarity with respect to its Status within a matter of hour”.²³²⁸

4.2.2.2. International federations

At the time of the Olympic Games in Sydney all of the summer sports international federations had adopted the CAS arbitration clauses in their by-laws with the exception of FIFA and the IAAF.²³²⁹ The latter was a respondent in several cases and, with one exception, raised a defence of lack of jurisdiction. However, the panels consistently held that they *had jurisdiction* by virtue of Article 74 (now Article 59) of the Olympic Charter *because of the federation's very close integration within the Olympic Movement*.²³³⁰ In other words, as a result of their commitment to the Olympic Movement and their participation in the Games, the international federations were *deemed to have subscribed to the arbitration clause in the Olympic Charter*, this conclusion was further buttressed by Article 29 (now Article 26) of the Olympic Charter which provided that the international federations' statutes, practice and activities must conform to the Olympic Charter.²³³¹

4.2.2.3. National Olympic Committees (NOCs)

Similar reasoning was applied to affirm jurisdiction over NOCs, as under the Olympic Charter NOCs are entrusted with developing the Olympic Movement and ensuring compliance with the Charter in their home countries.²³³²

4.2.2.4. National federations

The *ad hoc* Division's jurisdiction over a national federation was addressed in *FFG*,²³³³ where the federation was the claimant: the application suggested that jurisdiction arose

²³²⁸ *Alan Tzagaev v. International Weightlifting Federation*, referred as *Tzagaev*, CAS Awards—Sydney 2000, para. 7. See also *Melinte*, para. 6.

²³²⁹ See Kaufmann-Kohler, *Olympics*, p. 24.

²³³⁰ *Baumann*, paras 12 and 13; and *Melinte*, para. 5.

²³³¹ Kaufmann-Kohler, *Olympics*, p. 24.

²³³² *Baumann*, para. 14 (Kaufmann-Kohler, *Olympics*, p. 24).

out of the arbitration clause inserted in the entry form for the Olympic Games. That form states that the NOC signs on behalf of the national federation; additionally, the panel considered that *national federations accepted jurisdiction by being members of international federations* which are themselves subject to the CAS's jurisdiction.²³³⁴

4.2.2.5. Organising Committee of the Olympic Games

One arbitration also involved the Sydney Organising Committee for the Olympic Games (SOCOG) as a respondent.²³³⁵ The application challenged a decision of the SOCOG at the medals ceremony for the rhythmic gymnastics which ordered French gymnasts to hide the trademark logo that appeared on their clothing.²³³⁶ The panel held that the SOCOG received its instructions for the Organisation of the Olympic Games from the IOC, that the Organisation included decisions as to advertising made under the Olympic Charter, and that *the SOCOG was thus necessarily bound by the Charter, including the arbitration clause* in Article 74 (now Article 59).²³³⁷

4.2.2.6. Manufacturers of sports equipment

In the same *FFG* arbitration, the respondent (SOCOG) opposed jurisdiction because the manufacturer of the clothing bearing the litigious trademark was not a party to the proceedings; the panel held that it lacked jurisdiction over the manufacturer, which *was not a party to any instrument giving the CAS jurisdiction*, but that the manufacturer's absence was immaterial.²³³⁸

A similar fact pattern involving the display of a trademark on sports equipment had given rise to a dispute at the Nagano Games; there, the *manufacturer itself filed the application*, which explained that the *ad hoc* Division *exercised jurisdiction*.²³³⁹

²³³³ *Fédération Française de Gymnastique v. Sidney Organising Committee for the Olympic Games*, referred as *FFG*, CAS Awards—Sydney 2000.

²³³⁴ *FFG*, paras 1 and 2 (Kaufmann-Kohler, *Olympics*, p. 25).

²³³⁵ See the *FFG* case.

²³³⁶ Kaufmann-Kohler, *Olympics*, p. 25.

²³³⁷ *FFG*, para. 4 (Kaufmann-Kohler, *Olympics*, p. 25).

²³³⁸ *FFG*, para. 3 (*ibid.*).

²³³⁹ CAS Award 98/003, unreported (see Kaufmann-Kohler, *Olympics*, p. 25).

5. THE SUBSTANTIVE VALIDITY OF THE ARBITRATION AGREEMENT WITH REGARD TO ISSUES RELATED TO PARTIES' CONSENT

The substantive validity of arbitration agreements raises issues with regard to parties' consent to arbitration because *sport arbitration is often induced* and the arbitration agreement results from arbitration clauses by reference. Rigozzi observed that in sport arbitration to *shift the issue of consent from the stage of qualification to the one on the validity of the arbitration agreement* would have a big practical advantage when one considers that *most of the time it is the athlete who decides to begin the arbitration proceeding*. In doing so he accepts the arbitration clause and therefore renders the issue of consent to the clause contained in the by-laws superfluous.²³⁴⁰

5.1. Arbitration clauses by reference

International federations provide, often in a mandatory way, that their members and the persons validly subordinated to their regulation submit their disputes to an arbitral jurisdiction.²³⁴¹ Most of the time the arbitration clause is not contained in the contractual documents signed by the parties, but reference is made to the association's regulation to which the athlete is subordinated or to the qualification that he has obtained for a particular competition.²³⁴²

Generally the athletes are not members of the international federation whose statutes contain an arbitration clause. The athletes submit themselves to the arbitration agreement essentially in two ways:

- by adhering to a club or a (local or national) federation whose statutes make reference to the regulation of the international federation;²³⁴³ or
- by subscribing to a licence.²³⁴⁴

In both cases the *arbitration agreement is concluded by reference to another document*. The references can be *specific or global*. The Swiss Federal Tribunal tends

²³⁴⁰ See Rigozzi, para. 478.

²³⁴¹ Rochat/Cuendet, p. 53.

²³⁴² Zen Ruffinen, para. 144.

²³⁴³ See also under VI.4.1.2.2.

²³⁴⁴ Rigozzi, para. 821.

to analyse the question of the arbitration clause by reference *under the angle of consent*.²³⁴⁵ In particular, usually an athlete is considered to know and thus explicitly accept the arbitration clause of a body of rules of a sport organisation of which he is a direct or indirect member.²³⁴⁶

5.1.1. *The specific reference*

The case of a specific reference, *i.e.* a reference referring explicitly to the arbitration agreement contained in another document, does not give rise to problems, as the agreement between the parties *clearly expresses the will* to submit the dispute to arbitration and the fact that this *will is contained in a separate document is of little importance*.²³⁴⁷

5.1.2. *The global reference*

In the presence of a global reference, the classical jurisprudence of the Swiss Federal Tribunal tends to distinguish in function as to the circumstances of the particular case.²³⁴⁸ The global consent to pre-formulated wordings does *not include the consent of unusual provisions*.²³⁴⁹ While this issue arises in particular with respect to arbitration clauses which may be on the whole known to the athletes, but whose details need not be clear, it can nevertheless be observed that the Swiss Federal Tribunal traditionally has a *quite liberal approach* to arbitration clauses.²³⁵⁰

5.1.2.1. *The Nagel case*

Nagel was disqualified by the *Fédération Equestre Internationale* (FEI) for a period of six months, as his horse was found positive on an anti-doping control during a competition. Nagel was not a member of the FEI, but of an equestrian club which was a member of the national federation which was in its turn a member of the FEI. While

²³⁴⁵ See also Rigozzi, para 822.

²³⁴⁶ *A fortiori* a signed submission declaration of an athlete leads to the same result (see Baddeley, *Unterwerfungserklärungen*, p. 378).

²³⁴⁷ Poudret/Besson, para. 214.

²³⁴⁸ See *Tradax v. Amoco*, DFT 110 II 54 = YBCA 1986, p. 532.

²³⁴⁹ Which provisions of the declaration of submission have to be considered as unusual and which not has to be judged in accordance with the knowledge and the experience of the athletes (Baddeley, *Unterwerfungserklärungen*, pp. 370 *et seq.*).

²³⁵⁰ Baddeley, *Unterwerfungserklärungen*, p. 371 and footnote 46.

Nagel brought a court action against his disqualification, the FEI raised the exception of arbitration.²³⁵¹

The Swiss Federal Tribunal considered that in the presence of a global reference accepted in writing the *issue shifts from the question about the observance of the form to the one of consent* and then applied the *principle of confidence*.²³⁵² In this particular case, the Swiss Federal Tribunal held that the athlete was bound by the arbitration clause. Indeed, the following *circumstances* led the Supreme Court to conclude that the *athlete had accepted submission to the arbitration agreement, in validly giving his consent*:

- the athlete already knew the arbitration clause contained in the regulation when he signed the document referring to it;
- he had already made use of the clause for applying the CAS in occasion of a previous dispute;
- the clause in question had been communicated to him textually and he made no objection to such clause.²³⁵³

Moreover, the Swiss Federal Tribunal considered that the athlete had, through his subsequent behaviour, regarded himself as bound.²³⁵⁴ This is the expression of the principle generally recognised by the Swiss Federal Tribunal according to which the *circumstances or the behaviour may replace, due to rules of good faith, the observation of form rules*.²³⁵⁵

5.1.2.2. The Stanley Roberts case²³⁵⁶

5.1.2.2.1. In general

Roberts was a professional basketball player, who played in the NBA. On 24 November 1999, the NBA banned Roberts from its league for two years because of a violation of the Anti-Drug Program agreed by the NBA and the National Basketball Players

²³⁵¹ See DFT 4C.44/1996 dated 31 October 1996 (*Nagel v. FEI*), p. 585 (translation from Digest of CAS Awards 1986-1998, pp. 585 *et seq.*).

²³⁵² *Ibid.*

²³⁵³ *Ibid.*

²³⁵⁴ *Ibid.*

²³⁵⁵ DFT 129 III 727, p. 735, citing DFT 121 III 38, p. 45.

²³⁵⁶ Preliminary Award of 28 July 2000—CAS 2000/A/262, *Roberts v. FIBA*, in Reeb, *Digest II*, pp. 377 *et seq.*

Association following a positive test for amphetamine.²³⁵⁷ While on 3 March 2000 Roberts lodged a “Further Appeal” with the CAS against the arbitral award of the Appeals Commission of FIBA dated 4 February 2000, in his statement of appeal the athlete nevertheless contested the existence of a legally effective arbitration agreement.²³⁵⁸

There is no doubt that the statutes and regulations of FIBA clearly stipulated the settlement of any dispute arising from the enforcement of the by-laws and other internal regulations solely and exclusively by way of arbitration before the CAS.²³⁵⁹

5.1.2.2.2. CAS tribunal’s award

The CAS tribunal remembered that the Swiss Federal Tribunal considers that in the case of a *global reference* accepted in writing *the issue shifts from the question about the observance of the form to the one of consent* and the Swiss Supreme Court then applies the *principle of trust*. The CAS Tribunal then held that:

- a global reference is *not sufficient* when the party proposing an arbitration clause in this way knew or should have known by experience that the *other party did not want to agree* to such a clause or if such a *clause was unusual* under the given circumstances;
- a global reference on the other hand *is valid* and sufficient between two parties, who are *experienced in the field* or when an *arbitration clause is customary* in the particular sector of business, regardless of whether the other party has indeed read the document of reference and therefore knew that it contained such a clause.²³⁶⁰

The Swiss Federal Tribunal has applied and confirmed this principle of trust in sports related disputes. The *CAS tribunal* in affirming its jurisdiction on the base of a global reference *considered* in particular the *following circumstances*:

- a professional basketball player can be considered experienced in the field of professional sports;
- arbitration clauses have become customary in most international sports federations and many by-laws or procedural regulations of these organisations refer to CAS arbitration with the explicit exclusion of the right to appeal to ordinary courts;

²³⁵⁷ Preliminary Award of 28 July 2000—CAS 2000/A/262, *Roberts v. FIBA*, in Reeb, *Digest II*, pp. 377 *et seq.*

²³⁵⁸ *Ibid.*

²³⁵⁹ *Ibid.*

²³⁶⁰ *Ibid.*

- arbitration is also a widely applied way of dispute resolution in sport in the US and an arbitration clause such as the one contained in the FIBA Rules can therefore not be considered unusual.²³⁶¹

5.1.2.2.3. Swiss Federal Tribunal's decision

The Swiss Federal Tribunal, by later confirming the *Roberts* award, has generalised the *Nagel* decision in the sense that normally it should be admitted that:

- a party who accepts without any reservation a global reference and thereby knows the arbitration clause contained in the referenced document, consents to the arbitration clause; and, further, that
- an athlete recognises the regulation of a federation, when he asks the latter for a general admission to compete.²³⁶²

5.1.2.2.4. Comments

It has been observed that while, *contrarily to the CAS, the Swiss Federal Tribunal did not mention that Roberts was a professional basketball player and thus experienced in the field of professional sports*, an area in which dispute resolution through arbitration was not unusual, it is not however insensible to the specificity of the sport context, particularly when the Swiss Supreme Court added that *the clause incorporated in the regulations of a federation can not only have an effect on direct or indirect members, but to those who simply ask to be admitted*.²³⁶³ Indeed, with his appeal, without any reservation with regard to the known arbitration clause, the athlete has implicitly requested the issuing of a general admission to competition and therefore it can be held that he has also recognised the relevant regulations of the federation as well as the arbitration clause.²³⁶⁴

²³⁶¹ Preliminary Award of 28 July 2000—CAS 2000/A/262, *Roberts v. FIBA*, in Reeb, *Digest II*, pp. 377 *et seq.*

²³⁶² See DFT 4P.230/2000 of 7 February 2001 (*Roberts v. FIBA*), consid. 2a. See also ASA Bulletin, Vol. 19 No. 3 (2001), p. 528.

²³⁶³ Rigozzi, para. 834.

²³⁶⁴ See DFT 4P.230/2000 of 7 February 2001, consid. 2b.

5.1.2.3. Knowledge of the arbitration clause

5.1.2.3.1. Presumption of the knowledge of the arbitration clause

It has been observed that the *CAS establishes a sort of presumption of the knowledge of the arbitration clause by the participants*.²³⁶⁵ Although from a point of view of the need of uniformity in sport matters this approach is interesting because it permits avoidance of the question as to whether the sportsman knew about the arbitration clause, it is however doubtful if it corresponds to the current jurisprudence of the Swiss Federal Tribunal.²³⁶⁶ Nevertheless, while in the past it has been observed that arbitration was not considered the natural method of dispute resolution in the sport area,²³⁶⁷ with the development and the generalisation of the competence of the CAS this position needs to be reconsidered, particularly in light of the current case law of the CAS where it has been held that:

“the *arbitration clause in favour of the CAS was and is in no way unusual*. In fact it is in line with similar regulations of many other international sports federations. The *objection* from the part of the Appellant, that *‘knowledge does not amount to consent’ cannot be heard*”.²³⁶⁸

Furthermore, the Swiss Supreme Court has already seen in the adoption of the World Anti-Doping Code a *true recognition of the role of the CAS by the international community*.²³⁶⁹

5.1.2.3.2. Distinction between professional athletes and amateurs with regard to form requirements

Despite the fact that, in decisions regarding the CAS, the Swiss Supreme Court does not consider the issue of the presumption of consent from the point of view of an athlete’s professionalism, nor under the more or less usual character of the CAS arbitration clause,²³⁷⁰ it is particularly at these times—when the athletes are not professionals and

²³⁶⁵ See Rigozzi, para. 835.

²³⁶⁶ *Ibid.*

²³⁶⁷ So Simon, p. 204, in the year 1995.

²³⁶⁸ CAS 2000/A/262, *Roberts v. FIBA*, in Reeb, *Digest II*, p. 387.

²³⁶⁹ DFT 129 III 462 (*Lazutina v. CIO & FIS*), (Rigozzi, para. 835).

²³⁷⁰ Rigozzi, para. 833.

the arbitration clause appears to be unusual—that the requirements of form reacquire their importance.²³⁷¹

5.2. Induced arbitration

Despite the issues which are debated among scholars, CAS-awards in which arbitrators are confronted with the *question of the arbitration agreement's validity*, from the *point of view of parties' consent*, are rare.²³⁷² This is primarily due to the fact that *the athlete is commonly the claimant in disciplinary matters*.²³⁷³ The same is true for challenges of the Olympic *ad hoc* Division, here again athletes are usually the claimants.²³⁷⁴

5.2.1. Specificity of sport arbitration

In the domain of sport the recourse to arbitration is often the only route to protection which is, on the one hand, efficacy for the athletes, and, on the other hand, open to all of them.²³⁷⁵ Indeed, arbitration in sport can be an effective instrument in safeguarding the equal application of the competition rules across the borders of local and national jurisdictions and, therefore, serves the fundamental principles in sport—fairness and equal opportunity.²³⁷⁶ *The preponderant interests of the sport organisations and all the athletes (considered as a group) have to prevail over the interests of a single athlete* who would, possibly, not be willing to submit to arbitration.²³⁷⁷ It has also been underlined that the objective of the international sport federations to *avoid a splitting of the control of their decisions* justifies the obligation for athletes to sign the arbitration agreement.²³⁷⁸

However, while this obligation seems to be necessary to avoid a situation where the athletes who have voluntarily accepted the arbitration agreement are judged differently from the others, *the question about the limits arises*.

²³⁷¹ Simon, p. 204.

²³⁷² One case has been *Royal Sporting Club Anderlecht v. Union des Associations Européennes de Football* (UEFA), award of 22 July 1998 (translation), Digest of CAS Awards 1998-2000, pp. 469 *et seq.* (Rigozzi, para. 812).

²³⁷³ Rigozzi, para. 812.

²³⁷⁴ Kaufmann-Köhler, *Olympics*, p. 23.

²³⁷⁵ *Ibid.*

²³⁷⁶ Netze, p. 54.

²³⁷⁷ Rigozzi, para. 817.

²³⁷⁸ Adolphsen, p. 295.

5.2.2. *Consent and different bargaining power*

Among scholars the question of whether a sport organisation may make the participation of an athlete to the sport competitions dependent from the signing of an arbitration clause is discussed.²³⁷⁹ *Athletes do not really have the option to not sign declarations containing or making reference to an arbitration clause*,²³⁸⁰ because acceptance of such declarations is usually required before admittance to competitions.²³⁸¹ Such “pressure” is also exercised by the IOC before the Olympic Games, as only athletes who have signed a declaration in which they recognise the jurisdiction of the CAS for all disputes arising during the Olympic Games are allowed to participate in the competitions.²³⁸²

In sport the *unequal bargaining power* when concluding a contract is *accentuated by the strong position of power of the sport organisations*.²³⁸³ Indeed, since the international federations are organisations enjoying a world-wide monopoly,²³⁸⁴ the athletes have little opportunity to exercise their sports and compete elsewhere.²³⁸⁵ But how can this affect the arbitration agreement? Are such arbitration clauses invalid because of the predominant position of sport organisations? Some authors suggest that an arbitration clause concluded under economic or social pressure goes against Article 27 Swiss Civil Code and that it has, in accordance to Articles 19 and 20 of the Swiss Code of Obligation, to be considered null and void.²³⁸⁶ On the other hand, other scholars sustain that the non-voluntary submission to arbitration of an athlete is justified by the preponderant interest of the sport organisations, even though they use their freedom to contract and their monopolistic position to oblige the athlete to sign the arbitration clause.²³⁸⁷

There have been cases, with the CAS,²³⁸⁸ where the plaintiffs have raised fundamental objections based on Article 20 CO and Article 27 CC (unjustified restraint upon

²³⁷⁹ Fenness, para. 614.

²³⁸⁰ See also DFT 133 III 235, consid. 4.3.2.2. (*Cañas* case).

²³⁸¹ Netze, p. 53. See also Schillig, p. 78 and Haas/Prokop, p. 187.

²³⁸² Fenness, para. 614.

²³⁸³ Baddeley, *Unterwerfungserklärungen*, p. 373.

²³⁸⁴ An exception can be found in boxing with several organisations: IBF, WBA, WBC.

²³⁸⁵ Netze, p. 53.

²³⁸⁶ Zen-Ruffinen, para. 1445.

²³⁸⁷ See, e.g. Fenness, paras 614 *et seq.*

²³⁸⁸ See, e.g. CAS 96/160, *Chiandiani v. FEI*; CAS 96/166, *Kierkegaard v. FEI*.

personality) or brought up anti-trust issues.²³⁸⁹ According to the case-law there is no doubt that *agreements between individual athletes and international sport organisations are basically valid, although the parties provide for different bargaining powers*—the mere fact that sport organisations are monopolies does not render their orders or agreements invalid.²³⁹⁰

The answer to the question of whether such a powerful sport organisation abused its supremacy²³⁹¹ depends on the content of the individual agreement and a fair balance of interests. In this balance of interests the crucial point is whether a certain duty to which an athlete is required to accept as a condition to participate in competitions is qualified to safeguard a fair and safe sport event.²³⁹² *Normally, an international sport federation does not abuse its supremacy by requiring the athletes to sign an arbitration agreement, if the athletes are informed* on the content and meaning of the clause²³⁹³ and may expect *fair arbitral proceedings*.²³⁹⁴ This principle has also been acknowledged in other areas of different bargaining powers, *i.e.* where a party has no real alternative but to accept a contract submitted by the other party.²³⁹⁵

The Swiss Federal Tribunal, on the one hand, considers that *excessive binding* in accordance with Article 27(1) Swiss Civil Code *is given when the agreed arbitral tribunal does not give enough guarantees for an independent judgment of the dispute*,²³⁹⁶ but, on the other hand, it recognises an independent arbitral tribunal as a full and equivalent alternative to State courts.²³⁹⁷ Among scholars it has been observed that when one accepts that arbitration represents the functional equivalent of State justice,²³⁹⁸ precisely because of its guarantees of independence and impartiality, *the fact that a party can impose arbitration on the other does not mean that the latter is disadvantaged*.²³⁹⁹ With regard to the CAS, in the *Nagel* case the Swiss Federal Tribunal observed that the *CAS has sufficient independence* and its *awards can, thus, be assimilated to the judgments of State's courts*. The Swiss Federal Tribunal therefore concluded that under such circumstances it is excluded that the signing of an arbitration

²³⁸⁹ Netzle, p. 53.

²³⁹⁰ See, *e.g.* CAS 96/166, *Kierkegaard v. FEI* (own translation).

²³⁹¹ On this aspect, see, *e.g.* Hoffet, pp. 182 and 187.

²³⁹² Netzle, p. 54.

²³⁹³ See, *e.g.* Decision of the *Tribunal civil de l'arrondissement de la Sarine* of 20 June 1997, *Monn et al. v. Fédération Suisse de Basketball et al.* (not published).

²³⁹⁴ Röhrich, pp. 23 and 26. See also BGH NJW 84, 1355.

²³⁹⁵ See Netzle, p. 54.

²³⁹⁶ DFT 85 II 489. See also DFT 119 II 271.

²³⁹⁷ Fenners, para. 616.

²³⁹⁸ See Adolphsen, p. 550.

²³⁹⁹ Rigozzi, para. 814.

agreement for being able to participate to a sport competition can be considered as an unjustified restraint upon personality in accordance with Article 27 Swiss Civil Code.²⁴⁰⁰

5.2.3. *The relevance of the social context*

A scholar (Rigozzi) argued that in the field of sport the issue of consent to arbitration must take account of the *social context* where arbitration is used. Indeed, *in sport arbitration consent to arbitration is necessarily mediated and not direct*. Basing his view on the theoretical approach of legal pluralism he sustained the idea that the athlete's *consent to arbitration is expressed in a social contract* (binding also the other members of the sport organisation to which he adheres)—social contract which is at the origin of the sport juridical order.²⁴⁰¹ Therefore, according to him *arbitration has still to be seen as consensual*.²⁴⁰²

6. MANDATORY ARBITRATION

6.1. In general

Sport arbitration is one of the new fields of arbitration in which there is a growing tendency toward compulsory arbitration forms. While, increasingly, the word “arbitration” is used to designate dispute resolution mechanisms when parties’ consent is inexistent, for some scholars the absence of parties’ consent excludes the qualification as arbitration.²⁴⁰³

In the United States, according to the *Ted Stevens Olympic and Amateur Sports Act*,²⁴⁰⁴ the United States Olympic Committee has “to provide swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sport organisations”. The latter are only eligible to be recognised, or to continue to be recognised, as a national governing body if they agree to submit to binding arbitration in any controversy involving the opportunity of any US athlete to participate in the

²⁴⁰⁰ DFT 4C.44/1996 dated 31 October 1996 (*Nagel v. FEI*), pp. 583 *et seq.*

²⁴⁰¹ Rigozzi, para. 819.

²⁴⁰² See Punzi, p. 243. See also Napolitano, p. 1159.

²⁴⁰³ See, *e.g.* Jarrosson, *Frontières*, p. 15.

²⁴⁰⁴ See section 220509 of the United States Code.

Olympic Games, World Championships or other international competition where the athletes represent the United States.²⁴⁰⁵ According to Rigozzi this *tendency toward creating arbitration mechanisms through legislative acts* for resolving sport disputes seems to expand, and there is no doubt that the *jurisdictions of the States whose law imposes recourse to arbitration in the field of sport will consider these proceedings true arbitrations*.²⁴⁰⁶

Moreover, in my view, one should distinguish between classical commercial arbitration cases and regulatory (disciplinary or allocation) matters. While in the former the *consensual character of arbitration* has to be strictly observed, in the latter this aspect *is less compelling because the function is that of accomplishment of a governmental task* which is delegated by the State who would act by virtue of its sovereignty (*iure imperii*).

In *international sport* the most significant area where the States have delegated their role in the resolution of disputes to private tribunals is in the *fight against doping*. Indeed, with the World Anti-Doping Code (WADA-Code)²⁴⁰⁷ *arbitration* has become in the international sport arena *de facto compulsory* for solving disputes concerning doping cases.²⁴⁰⁸

6.2. The fight against doping

6.2.1. The legal framework

In 1998 a large number of prohibited medical substances were found by police in a raid during the Tour de France; the scandal led to a major reappraisal of the role of public authorities in anti-doping affairs.²⁴⁰⁹ Therefore, the IOC decided to convene a world conference on doping, bringing together all parties involved in the fight against it.²⁴¹⁰ The conference held in Lausanne in February 1999 produced the *Lausanne Declaration on Doping in Sport*. This document provided for the creation of an independent

²⁴⁰⁵ Rigozzi, para. 470.

²⁴⁰⁶ *Ibid.*

²⁴⁰⁷ The World Anti-Doping Code is mandatory for the whole Olympic Movement (see Rule 44 of the Olympic Charter).

²⁴⁰⁸ See under VI.6.2.2.

²⁴⁰⁹ See <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=312>.

²⁴¹⁰ See <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=253>.

international anti-doping agency to be fully operational for the Games of the XXVII Olympiad in Sydney in 2000:²⁴¹¹ the *World Anti-Doping Agency* (WADA).²⁴¹²

One of WADA's main activities is the surveillance of the *World Anti-Doping Code* (WADA-Code) adoption and implementation to ensure a *harmonised approach to anti-doping in all sports and all countries*.²⁴¹³ *More than 570 sport organisations* have already *adopted the WADA-Code*.²⁴¹⁴ The ultimate goal of the latter is for all athletes to benefit from the same anti-doping procedures and protections, no matter the sport, nationality, or country where tested. The WADA-Code, which entered into force on January 1, 2004, has already undergone a thorough review and consultation with WADA stakeholders for its practical improvement. The revised WADA-Code is effective as of January 1, 2009.

Each government's commitment to the WADA-Code is evidenced by its signatory to the *Copenhagen Declaration* on Anti-Doping in Sport of March 3, 2003,²⁴¹⁵ and by ratifying, accepting, approving or acceding to the *UNESCO International Convention against Doping in Sport* (UNESCO Convention).²⁴¹⁶ Indeed, as most governments cannot be parties to, or bound by, private non-governmental instruments such as the WADA-Code, governments are not asked to be signatories to the WADA-Code but rather to sign the Copenhagen Declaration and ratify, accept, approve or accede to the UNESCO Convention.²⁴¹⁷ On the other hand the UNESCO Convention applies only among signatory States, and is not binding therefore on the sport organisations or the athletes.²⁴¹⁸

The *Anti-Doping Convention of the Council of Europe* served as a basis for the UNESCO Convention,²⁴¹⁹ whose drafting happened in the unusually short time—for international treaties—of two years.²⁴²⁰ On November 12, 2008, the 100th country ratified the UNESCO Convention.²⁴²¹ The UNESCO Convention enables the States to align their domestic legislation with the WADA-Code and thereby *harmonise the sport*

²⁴¹¹ See <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=253>.

²⁴¹² The WADA is a Swiss private law Foundation, with its seat in Lausanne, Switzerland.

²⁴¹³ See Kohler, para. 6 citing <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=255>.

²⁴¹⁴ See <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=273>.

²⁴¹⁵ 192 governments have signed the Copenhagen Declaration (see the list of countries under <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=391>).

²⁴¹⁶ See preamble to Article 22 WADA-Code.

²⁴¹⁷ Comment to Article 22 WADA-Code.

²⁴¹⁸ Kohler, para. 32.

²⁴¹⁹ Kamber, para. 31.

²⁴²⁰ See <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=273>.

²⁴²¹ See the list of countries under <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=484>.

*and public legislation in the fight against doping in sport.*²⁴²² However, it has been observed that the UNESCO Convention brings only a relative harmonisation of the law and cannot be qualified as *loi uniforme*.²⁴²³

6.2.2. *The compulsory transposition of CAS arbitration for international doping cases*

The most significant area in sport with compulsory arbitration is the WADA-Code which designates the *CAS as the exclusive competent instance* to hear appeal in doping cases arising from *participation in an international event or in cases involving international-level athletes*.²⁴²⁴ In fact, with the transposition of this provision into different national legislations, *arbitration before the CAS is de facto compulsorily provided for by the law*.²⁴²⁵

Each government's commitment to the WADA-Code had to be evidenced by signing a declaration on or before the first day of the Athens Olympic Games; this had to be followed by a process leading to a convention or other obligation to be implemented as appropriate to the constitutional and administrative context of each government on or before the first day of the Turin Winter Olympic Games.²⁴²⁶ Moreover, the *transposition and implementation* of the anti-doping policies and rules, and therefore also of the arbitration mechanisms to resolve disputes in this area, are *supported by different means*:

- The *failure* of a government to ratify, accept, approve or accede to the UNESCO Convention by January 1, 2010, or to comply with the UNESCO Convention thereafter could result in *ineligibility to bid for the organisation* of Olympic Games,²⁴²⁷ World Championships²⁴²⁸ or other major events.²⁴²⁹
- According to the WADA-Code the IOC has the responsibility to *withhold Olympic funding* of sport organisations that are *not in compliance with the Code*.²⁴³⁰

²⁴²² See <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=273>.

²⁴²³ Kohler, para. 32.

²⁴²⁴ See Article 13.2.1 WADA-Code.

²⁴²⁵ Rigozzi, para. 472.

²⁴²⁶ See preamble to Article 22 WADA-Code 2003.

²⁴²⁷ See Article 20.1.8 WADA-Code.

²⁴²⁸ See Article 20.3.10 WADA-Code.

²⁴²⁹ See Article 20.6.6 WADA-Code and Article 22.6 WADA-Code. See also Kohler, para. 13.

²⁴³⁰ See Article 20.1.3 WADA-Code.

- The IOC,²⁴³¹ the international federations²⁴³² and major event organisations²⁴³³ also have to require that all athletes and the athlete support personnel who participate at the Olympic Games, competitions, events or activities organised by them, *agree to be bound by anti-doping rules* in conformity with the WADA-Code *as a condition of such participation*.²⁴³⁴

Finally, the *uniformity in the application* of the WADA-Code is guaranteed by the fact that it has to be interpreted as an *independent and autonomous text* and not by reference to the existing law or statutes of the signatories or governments.²⁴³⁵

7. RELEVANCE OF PARTIES' CONSENT WITH REGARD TO PROCEDURAL ASPECTS: IDENTIFYING AND JOINING THE PARTIES

7.1. Sport arbitration as structurally inherent multiparty situation

The issue with parties' consent in multiparty arbitration—well known in commercial arbitration—is in sport arbitration, particularly in disputes between an athlete or a club against a sport federation, not the most difficult aspect to cope with, as *most of the time all other interested parties will be bound by the same arbitration agreement*²⁴³⁶ *from the beginning*.

This was the situation in the *Raguz* case,²⁴³⁷ where the athletes Mrs. Raguz and Mrs. Sullivan and the Australian Judo Federation were parties²⁴³⁸ to a relevant arbitration agreement, which had been initially entered by the Australian Olympic Committee and the Judo Federation. This *agreement set up a resolution mechanism for athletes' nomination disputes*. While, at the outset, it bound only the Olympic Committee and the Federation and was *open-ended as to other parties*, thereafter, *individual athletes*

²⁴³¹ See Article 20.1.6 WADA-Code.

²⁴³² See Article 20.3.3 WADA-Code.

²⁴³³ See Article 20.6.4 WADA-Code.

²⁴³⁴ See also Kohler, para. 13.

²⁴³⁵ See Article 24.3. WADA-Code.

²⁴³⁶ Rigozzi, para. 1057. This is due to the fact that the athletes are subject to the same sport regulation containing the arbitration agreement.

²⁴³⁷ New South Wales Court of Appeal, *Angela Raguz v. Rebecca Sullivan*, 1 September 2000, referred to as *Raguz*, in Mealey's IAR 2000, Issue #10, p. 3D; and also in ASA Bulletin (2001), pp. 335-354.

²⁴³⁸ The Judo Federation Appeal Tribunal and the CAS were also parties.

were invited to adhere to the selection agreement through the execution of so-called nomination and team membership forms, which both athletes had done.²⁴³⁹ The nomination form reiterated the critical provisions of the selection agreement, *i.e.* the arbitration and the exclusion agreements. In the Court’s view, these interlocking documents constituted a *single arbitration agreement* between the Judo Federation and the Olympic Committee, on the one hand, and all relevant athletes, on the other; this resulted in an *integrated arbitration scheme*, which was particularly warranted considering that, when signing the nomination form, each athlete knew that *a claim by another athlete on the right of nomination may have the consequence of eliminating the first athlete from the team.*²⁴⁴⁰

Like investment arbitration, where the host State gives its consent in a BIT to arbitrate to a group of *investors of a particular State*, the sport federations give their consent to arbitrate to a group of *athletes of a particular sport discipline*. Additionally in sport arbitration the individual athletes also give their *consent to arbitrate among each other*, and this is not necessarily an—in advance—clearly identifiable set of “concrete” athletes but rather an “abstract” group of athletes.

7.2. Participation of third parties to arbitration

7.2.1. Joinder and intervention of third parties

In CAS arbitrations, for the cases where a respondent intends to cause a third party to participate in the arbitration (see Article R41.2 CAS Code on Joinder) or where a third party intends to participate as a party in the arbitration (see Article R41.3 CAS Code on Intervention), Article R41.4 CAS Code (Joint Provisions on Joinder and Intervention) provides that “a third party may only participate in the arbitration if it is *bound by the arbitration agreement or if itself and the other parties agree in writing*”.

Due to the open-ended arbitration agreements of the sport federations the following can be observed: while the single athlete (by adhering to the arbitration agreement of a sport federation) gives—when neither the dispute has broken out nor the proceeding begun—its consent to arbitrate to a *group of athletes*, during the proceeding before the CAS,

²⁴³⁹ Kaufmann-Kohler, *Olympics*, pp. 22 *et seq.*

²⁴⁴⁰ *Ibid.*

when in the case of joinder and intervention of third parties an athlete agrees in writing, he consents to arbitration with a *concrete party*.

7.2.2. *Joining of proceedings in the case of the ad hoc Division*

On the other hand, the arbitration rules of the *ad hoc* Division merely refer to the claimant and to the respondent without further specification.²⁴⁴¹ The only possibility provided for by the arbitration rules of the CAS *ad hoc* Division which permits a “practical consolidation” of the proceedings to be reached is given by the possibility of joining two related cases by assigning the second dispute to the panel appointed to decide the first dispute.²⁴⁴² In order to decide upon the joining of the proceedings, the President of the *ad hoc* Division will take into account all the circumstances, including the relation between the two cases and the progress already made in the first case.²⁴⁴³ Therefore, the President of the *ad hoc* Division is vested with *more power than the “habitual” CAS panels* which in the absence of specific provisions in the CAS Code can only join proceedings with the agreement of all parties involved.²⁴⁴⁴

7.3. **Determination of the parties who can participate to the arbitration proceeding**

7.3.1. *The issue of the “other athlete”*

The true problem in the sport field is *determining the parties who can participate* in an arbitration proceeding because they have an *interest in the dispute between the original parties*.²⁴⁴⁵ Indeed, the issue of the “*other athlete*”²⁴⁴⁶ can have important practical repercussions:

- on the one hand, if arbitration is opened too much the risk is one of organisational problems, particularly with regard to the nomination of the arbitrators; and

²⁴⁴¹ Article 9 *ad hoc* Rules.

²⁴⁴² See also Rigozzi, para. 1070.

²⁴⁴³ See Article 11 *ad hoc* Rules.

²⁴⁴⁴ See, e.g. CAS 2007/A/1298, *Wigan Athletic FC v. Heart of Midlothian*; CAS 2007/A/1299, *Heart of Midlothian v. Webster & Wigan Athletic FC*; CAS 2007/A/1300, *Webster v. Heart of Midlothian*, p. 10. See also Rigozzi, para. 1070.

²⁴⁴⁵ Rigozzi, para. 1058. In commercial arbitration the parties are normally the persons or entities named by the claimant in the request for arbitration.

²⁴⁴⁶ Rowan, p. 4, cited by Rigozzi, para. 1059.

- on the other hand, if a too restrictive approach is adopted the risk is that situations like the one of the *Lindland-Sieracki* case²⁴⁴⁷ arise, where both athletes obtained an arbitral award ordering the US Olympic Committee to select them for the Olympic Games, even though according to the rules of the IOC there was only one place available.²⁴⁴⁸

It has been observed that the possibility to join connected affairs is only of use when the third party also begins an arbitration proceeding. Thus, the third party must be informed about the first arbitration²⁴⁴⁹ and from there he will, possibly, decide to begin an arbitration.²⁴⁵⁰ For this reason there have been situations where the secretary of the CAS took the initiative to inform athletes who would be affected by an eventual change of the results and of their NOCs.²⁴⁵¹

The issue with regard to parties' consent to arbitration is the following: while the parties have in the arbitration agreement consented to arbitrate, *the question is how open-ended their consent has to be considered with respect to the jurisdiction *ratione personae**. In answering this question one has to bear in mind that the parties are usually bound by the same arbitration agreement, and the particularities of sport arbitration where disputes in disciplinary or allocation matters have to be solved.

7.3.2. *In arbitration at the Olympics*

7.3.2.1. Who can join them?

Whereas in commercial arbitration it is unheard-of for the arbitration institution to *sua sponte* identify and join additional parties, in sport arbitration this has proved to be a necessity.²⁴⁵² For instance, in arbitration at the Olympics, if after an initial review of the application it turns out that the relevant parties are not named as respondents, the *ad hoc Division, as an institution*,²⁴⁵³ *adds these parties to the proceedings* when issuing the

²⁴⁴⁷ *Keith Sieracki v. IOC*, 21 September 2000, referred to as *Sieracki*, CAS Awards—Sydney 2000.

²⁴⁴⁸ Rigozzi, para. 1059.

²⁴⁴⁹ And this in a sufficiently early stage.

²⁴⁵⁰ Rigozzi, paras 1070 *et seq.*

²⁴⁵¹ This has been the case in disputes over the award of medals in certain cross-country skiing competition in the the 2002 Salt Lake City Olympic Winter Games (see CAS 2002/O/372, *NOC et al. v. IOC*; CAS 2002/O/373, *COC et al. v. IOC*; CAS 2002/A/370, *Lazutina v. IOC*; CAS 2002/A/371, *Danilova v. IOC*; CAS 2002/A/374, *Muehlegg v. IOC*).

²⁴⁵² Kaufmann-Kohler, *Olympics*, p. 35.

²⁴⁵³ Not the panel for reasons of timing.

summons to appear at the hearing.²⁴⁵⁴ It has been observed that, while this practice is well accepted and efficient, it would certainly be on safer ground if it were contained in an express provision of the arbitration rules.²⁴⁵⁵

7.3.2.2. Who must be joined?

The rules applicable in commercial arbitration and in civil procedure are of little assistance to answer this question which does not arise in these areas,²⁴⁵⁶ as *dispute resolution in sports is closer to administrative or criminal procedures*; in the latter fields, under varying conditions of course, a *person whose legal interests may be affected may become a party to the proceedings*.²⁴⁵⁷ Here the *jurisdictional nature of arbitration* can be well seen.

While it is obvious that the athlete whose result is being challenged should be made a party, whenever possible, the question arises as to what has to happen with the other athletes. In each of the following cases: *Segura*,²⁴⁵⁸ *Raducan*,²⁴⁵⁹ and *Neykova*,²⁴⁶⁰ where the gold medal was at stake, the *ad hoc* Division joined all of the medalists.²⁴⁶¹ Although, strictly speaking, one could argue that the outcome of the arbitration equally threatened the ranking of all the other competitors, a reasonable balance must be achieved or the process would become unmanageable.²⁴⁶²

7.3.3. In appeal cases

The Swiss Federal Tribunal requires the *existence of an interest to appeal* for all legal remedies.²⁴⁶³ The CAS had occasion to apply this principle in deciding the appeal of some athletes against the decision of the IOC to not disqualify other competitors.²⁴⁶⁴ Making reference to the situation in civil procedural law, the arbitral tribunal held that:

²⁴⁵⁴ See Kaufmann-Kohler, *Olympics*, p. 36.

²⁴⁵⁵ *Ibid.*

²⁴⁵⁶ Rowan, para. IV.

²⁴⁵⁷ Kaufmann-Kohler, *Olympics*, p. 36.

²⁴⁵⁸ *Bernardo Segura v. IAAF*, CAS Awards—Sydney 2000.

²⁴⁵⁹ *Raducan*, CAS Awards—Sydney 2000.

²⁴⁶⁰ *Rumyana Dimitrova Neykova v. International Rowing Federation and IOC*, CAS Awards—Sydney 2000.

²⁴⁶¹ Kaufmann-Kohler, *Olympics*, p. 36.

²⁴⁶² *Ibid.*

²⁴⁶³ DFT 127 III 429, p. 431.

²⁴⁶⁴ CAS 2002/O/372, *NOC and others v. IOC*.

“In Swiss civil procedural law, the basic principle is that a claimant has standing to sue and the claim is admissible providing the person is *invoking a substantive right of its own, i.e.* a right deriving from contract, tort or another source”.²⁴⁶⁵

On this basis, the arbitral tribunal accorded the quality to appeal to the athletes, but not to the NOCs.²⁴⁶⁶ Moreover, the tribunal also made reference to the situation in administrative procedural law:

“Alternatively under Swiss rules of administrative procedure, the claim would also be admissible; the basic principle being that an appellant has standing to sue if she/he *has an interest worthy of protection*. This is deemed to be the case if the appellant is actually and directly affected by the litigious decision in a fashion that can be eliminated by its annulment and if the appellant did not have the opportunity to be heard in the first instance”.²⁴⁶⁷

²⁴⁶⁵ CAS 2002/O/372, *NOC and others v. IOC*, para. 71.

²⁴⁶⁶ Rigozzi, para. 1061.

²⁴⁶⁷ CAS 2002/O/372, *NOC and others v. IOC*, para. 73.

CONCLUSION

The purpose of this thesis was to examine the notion, nature and extent of consent in international arbitration. Starting from the traditional field of commercial arbitration, a comparison has been drawn with two other areas in the international context where arbitration as a dispute resolution mechanism is employed: investment arbitration and sport arbitration.

When speaking of arbitration as a consensual dispute resolution mechanism several distinctions are needed:

1. from a definition perspective, while the consensual nature is one of the essential criteria for arbitration's qualification, consent is a condition as well for the validity of the arbitration agreement;
2. from a historical perspective the concept of arbitration has evolved in time and the dispute resolution mechanism of arbitration is today the most common method of settling international disputes, this is also the case in areas other than the traditional one of international commerce;
3. from a scope/extent perspective a tendency can be perceived to define the scope of arbitration as widely as possible and to enlarge the field of application of arbitration;
4. from a chronological perspective a differentiation might be required by taking into account the different needs before the arbitral proceeding has begun and once the proceeding is ongoing;
5. from a structural perspective in the time there has been an increase of circumstances which cannot anymore be explained with the typical bi-polar horizontal arbitration scheme, but where there are situations characterised by multi-polarism and/or a rather vertical structure. This can—broadly speaking—be ascribed to two reasons:
 - a. a growing complexity of the facts of the cases in dispute which often leads to multiparty situations where non-signatories can also be involved;
 - b. the steadily growing importance of new types of arbitration, *i.e.* in particular investment arbitration and sport arbitration, where the structure and needs are different from those in the traditional field of commercial arbitration.

All these perspectives have then to be considered with respect to the relation of consent with the juridical nature of arbitration.

1. The definition perspective

In Chapter I. it has been shown that when speaking about consent it is important to differentiate between the characterisation of “consensual” as one of the essential criteria for arbitration’s qualification and “consent” as a condition for the (substantive) validity of the arbitration agreement.

It has been observed that with the growing acceptance of arbitration as a dispute resolution mechanism and its use in areas other than the traditional one of commercial arbitration, the consensual character of arbitration tends to decrease. This is mainly due to the fact that the relationships between the parties in investment dispute arbitration and sport arbitration have—when compared to commercial arbitration—another structure, with the consequence that the process of reaching an agreement to arbitrate appears to be different. Thus, also in consideration of the particularities of these new areas where arbitration is used, it has then been suggested under I.5. that distinct types of consent should be differentiated. Starting from the fact that:

- on the one hand, consent to arbitration can be directed to a defined person, *i.e.* be individual, or be addressed to a group of persons who are not yet identified, *i.e.* be general; and
- on the other hand, consent to arbitration can be expressed after a dispute has arisen or can be given before and for the case of the breaking out of a dispute, *i.e.* consent can refer either to a concrete dispute or to an abstract one,

the following categories for the classification of different types of consent have been proposed:

- individual-concrete consent;
- individual-abstract consent;
- general-abstract consent; and
- general-concrete consent.

Such categorisation could have several advantages—for instance, it could permit:

- a better explanation of the reach of an agreement to arbitrate where there is no horizontal and bi-polar situation, like in the traditional situations of commercial arbitration;
- to distinguish different types of consent in investment arbitration and sport arbitration; and
- the making of a distinction as to how consent has to be interpreted.

On the other hand, while it is important to differentiate between the characterisation of “consensual” as one of the essential criteria for arbitration’s qualification and “consent” as a condition for the validity of the arbitration agreement, in the thesis it has also been shown that these two aspects influence each other. Therefore, the interplay between the process of reaching consent and the consensual character of arbitration remains important. In fact, it is the process of reaching consent which influences the perception of the consensual character of arbitration.

Nevertheless in this thesis it has been argued that also when the process of reaching consent differs due to structural diversities or because consent to arbitrate is reached through clauses by reference, arbitration is not a less consensual dispute resolution mechanism.

2. The historical perspective

Under II.2. it has been shown, within a historical perspective, that there has been a shift from an understanding of arbitration where consent was given by the parties after the dispute had broken out to one where consent is expressed before the dispute has arisen. This evolution brings a reduction of the pure consensual character of arbitration, but also a bigger acceptance of arbitration as a mechanism for the resolution of international disputes. Today, arbitration is therefore considered the natural forum for the resolution of international disputes.

This development has also led to the use of arbitration in new fields where the consensual nature of arbitration seems to be different. In an international context two of these new fields are: investment arbitration and sport arbitration.

2.1. *Investment arbitration*

In investment arbitration consent is often based on national legislation, bilateral and multilateral investment treaties. In the last two decades there has been an exponential growth in the number of BITs. The particularity of this type of arbitration is that the State gives in advance a unilateral standing offer (consent) to arbitrate. In other words, there has been an evolution from retrospective to prospective consent (see under V.7.). This implies consent more than requiring an express and specific manifestation of it. However, although there is no arbitration agreement in the traditional sense, the

resolution of a dispute by private judges without the parties' consent would not be arbitration. In investment arbitration we can see a "verticalisation" of arbitration, and a declining importance of the classic "mirror arbitration" scheme. In fact, it is only the aggrieved investor that can bring a claim against the State.

2.2. *Sport arbitration*

Another field where the consensual character of arbitration has at first sight lost its importance, or at least is of a different nature, is sport arbitration. Indeed, in relation to sport arbitration, it has been observed that when one examines the circumstances of the purported consent to arbitration, it often appears to have been entirely fictional. Therefore, "induced arbitration" has been spoken of, and the suggestion has been made to shift the focus on consent from the question about the qualification of arbitration as a consensual dispute resolution mechanism to one of (substantive) validity of the arbitration agreement (see under II.2.3.2. and VI.5.). This is particularly the case when considering arbitration clauses by reference of sport organisations.

Moreover, in the field of sport a tendency to create arbitration mechanisms for resolving sport disputes through legislative acts can be perceived. The most significant area in sport with compulsory arbitration today is the World Anti-Doping Code (WADA-Code) which designates the CAS as the exclusive competent instance to hear appeals in cases relating to doping arising from competitions at an international event or in cases involving international-level athletes. It has been observed that by rendering compulsory arbitration in a particular domain the State includes in some way this type of dispute resolution in the application field of the law of arbitration, so that the question of its qualification as arbitration in the sense of the aforementioned legislation has no real scope anymore. Nevertheless, the arbitrators remain individuals who are not vested with any prerogative of public power (see under II.2.3.3. and VI.6.).

In the field of sport, arbitration is seen as a third jurisdictional way permitting the avoidance of conflicts among juridical orders by combining the necessities of sport competitions and the respect of fundamental rights. Given this context of tension between fundamental individual rights and equally legitimate institutional objectives, the challenge is naturally to strike the right balance. Therefore, procedural guarantees and the independence/impartiality of arbitrators become of paramount importance (see under VI.3.3.2.).

2.3. *Differentiation between investment and sport arbitration compared to commercial arbitration*

In the thesis it has been observed (see under VI.6.1.) that differentiation should be made between classical commercial arbitration cases and those regarding regulatory (disciplinary or allocation) matters. While in the former the consensual character of arbitration should be strictly observed, in the latter this aspect is less compelling because the function is often that of the accomplishment of a governmental task which is delegated by the State who would act by virtue of its sovereignty (*iure imperii*).

3. The scope/extent perspective

While the scope in commercial arbitration is defined by the parties, the situation is different in investment arbitration where the parties are also bound by the conditions of the ICSID Convention and by limitations in investment legislations and BITs. In sport arbitration the scope is circumscribed by the regulations of the sport federations, by the CAS Rules and sometimes also by the law (anti-doping legislation). The scope is therefore essentially defined before the dispute has broken out. On the other hand, expansion happens rather on the ground of courts' decisions and tribunals' awards once the dispute has arisen. Indeed, courts and arbitral tribunals tend to enlarge the field of application of arbitration.

3.1. *Commercial arbitration*

3.1.1. Scope

In commercial arbitration most arbitration agreements are broadly worded (see under IV.2.1.2.), and, usually, when parties agree to resolve any disputes between them by arbitration, they intend to resolve all disputes between them by this method (unless a specific exception is made).

The parties to the arbitration agreement, by choosing corresponding arbitration rules, may consent in advance to leave some discretion to the arbitral tribunal, respectively to the arbitration institution, in defining the scope—in particular the personal scope—of an arbitration (see under IV.7.1.2.5. and IV.7.2.2.1.4.e.).

Important issues relating to the scope of the arbitration agreement also arise with regard to cross-claims (see under IV.3.3.1.). The basic procedural prerequisite where the cross-claim is not subject to a jurisdiction or a different arbitration clause is derived from the consensual character of arbitration: the cross-claim has to be within the scope of the arbitration agreement. Conversely, although for cross-claims subject to a jurisdiction or a different arbitration clause the simultaneous adjudication of claim and cross-claim via the set-off defence is alleged to be in the presumed interest of the parties to the arbitration, taking a purely pragmatic approach to this problem would neglect the will of the parties. Instead, the arbitrators have to determine the will of the parties at the moment of conclusion of the arbitration agreement covering the main claim on the one hand and the different forum clause covering the cross-claim on the other.

Finally, counterclaims must also fall under an arbitration agreement between the parties, although not necessarily that upon which the jurisdiction of the arbitral tribunal over the principal claims is based. In the latter case, however, the admissibility of the counterclaim presupposes that the modalities of arbitration pursuant to both agreements are compatible (see under IV.3.3.2.).

3.1.2. Expansion of consent

Already the model clauses recommended by the various institutions have an expansive effect on parties' consent to arbitration. Indeed, with their broad wording parties agree that a bigger number of disputes fall within the scope of the arbitration agreement. However, as consent is given before disputes break out, there is at the same time a reduction of the pure consensual character of arbitration. This leads to a phenomenon which I have called the "paradox of consent": the expansion of parties' consent to arbitration causes a reduction of the pure consensual character of arbitration itself (see under IV.2.1.2.).

An expansion of consent to arbitration between the same parties may also exist because of related agreements between them. Whether the arbitration clause in the main contract can, in such cases, be extended to other related contracts is usually a question of interpretation (see under IV.3.4.).

A further type of expansion occurs when the arbitration agreement is extended to non-signatories within a group of companies (see under IV.6.). This happens particularly in France—where there is no exigency for the form of the agreement to arbitrate in international cases—in arbitrations according to the ICC Rules. On the other hand, in other countries the “group of companies” doctrine is rejected. Here the question as to which law governs arbitration, respectively the arbitration agreement, is thus of paramount importance (see under III.3.). In the ICC award No. 4131, *Dow Chemical v. Isover*, the arbitrators found that they should decide “based on the mutual will of the parties” and “usage conforming to the needs of international commerce, notably where a group of companies is concerned”. Indeed, in all “group of companies” decisions the finding of an (implied) consensus of the parties remains key in binding non-signatories to an arbitration clause.

Finally, although these cases have to be seen rather as an exception, there are also situations where an extension takes place on grounds unrelated to consent (see under IV.6.5.). This is in particular the case when the corporate veil is pierced. While the French courts, due to their following of the “group of companies” doctrine, have rarely had to rely on notions such as fraud in order to pierce the corporate veil, the situation is different in other countries.

3.2. *Investment arbitration*

3.2.1. Scope

While in commercial arbitration the parties are free to determine the scope of arbitration, in investment arbitration the situation is different. Indeed, Article 25 ICSID Convention sets forth three cumulative conditions for the establishment of the Centre’s jurisdiction. These conditions are that:

1. one of the parties to the dispute must be a State which has acceded to the Convention, whereas the other party (investor) must be a national of another Contracting State;
2. the dispute must be a legal dispute arising directly out of an investment; and
3. there must be the consent of the parties to submit certain disputes to the Centre (see under V.11.).

Moreover, the scope may also be limited by national investment legislations or by BITs (see under V.12.).

3.2.2. Expansion of consent

For investment arbitration it has been shown that several types of expansion of consent have to be distinguished:

a. Expansion ratione personae

As Article 25(2)(b) ICSID Convention already deals with the juridical persons that are incorporated in the host State but are controlled by nationals of another State, in investment arbitration the issue with regard to the expansion of consent because of *ratione personae* is primarily one of how the concept of “control” has to be defined (see under V.11.1.3.). In a pyramid of control two aspects may be controversial:

- Which is the relevant party for the control? and
- How much control is necessary? (see under V.11.1.3.1.3.).

However, the determination of “foreign control” is not an easy task. The difficulties are mainly due to the fact that different criteria may be applied to interpret the concept of “foreign control”, and there is an area of conflict between economic reality and legal structure (see under V.11.1.4.).

b. Expansion ratione materiae

The fact that the concept of “investment” is not defined by the ICSID Convention permits an enlargement of the limits upon the parties’ ability to consent to ICSID arbitration. Through the broad interpretation of the concept of “investment”, and the “subjectivist movement”, which attaches greater importance to the will of the parties in defining an economic operation as an investment, consent to arbitration experiences an expansion. However, while a broad interpretation stresses rather the jurisdictional side of arbitration, and normally goes to the “advantage” of one of the parties, the “subjectivist movement” underlines the contractual side of arbitration by taking into account the will of both of them (see under V.11.2.).

c. Expansion because of treaties' provisions

aa. *MFN-clause*

Although in the *Maffezini* case the tribunal decided the question of whether more favourable provisions on dispute settlement contained in the basic treaty can be extended to a beneficiary of another treaty by operation of the MFN-clause in the affirmative on the ground that procedural and substantive rights were intimately connected, other ICSID arbitral tribunals considered that the MFN-clause cannot prevail over the fundamental arbitration requirement—which is the meeting of the parties' consents to arbitrate (see under V.14.1.2.).

In the thesis it has been suggested that where the dispute settlement matters are not expressly excluded from the field of application of the MFN-clause, a careful interpretation of the BIT should be undertaken in order to determine whether the State has consented to use arbitration as a dispute resolution mechanism or not. In such a case further distinction should be drawn between:

- the ability to use MFN-clauses to avoid a local remedies procedural requirement: in this case there should be a presumption that the MFN-clause applies;
- the ability to use MFN-clauses to “shop” for a wholly different dispute resolution mechanism and forum. In this situation a careful analysis of all the BITs concluded with other States by the host State in dispute with the investor should be undertaken (see under V.14.1.6.1.).

On the other hand the investor's consent is evidently less problematic than the one of the host State, as the investor will be the party who invokes the dispute resolution provision contained in another BIT based on an MFN-clause in the basic BIT (see under V.14.1.6.2.).

bb. *Umbrella clause*

Another technique found in investment treaties, which may extend the scope of their protection, is the so-called “umbrella clause”. With umbrella clauses an expansion of treaty's consent takes place by elevating contractual disputes to treaty's disputes.

In the thesis it has been argued that the difficulties in relation to umbrella clauses are essentially due to the fact that the host State gives, on the one hand, in the BIT a double

consent with regard to the dispute resolution mechanism (to the investor's State, as party to the treaty, and to the investor) and, above all, on the other hand, a parallel consent. The latter (parallel consent) arises because there are two relationships between the host State and the investor: the one based on a BIT and the other on an investment contract. In such a situation the problems clearly occur when there are different *fora* which are provided for in the BIT and in the investment contract. It is therefore important how umbrella clauses are interpreted and drafted (see under V.14.2.4.).

3.3. *Sport arbitration*

3.3.1. Scope

Article R27 CAS Code stipulates that the CAS has jurisdiction to rule on disputes related to sport. The CAS has conceived this general competence in the field of sport in an extensive manner not only with regard to the object of the dispute but also with regard to territoriality (see under VI.2.2.2.2.).

It has also been observed that sport arbitration may be seen as a structurally inherent multiparty situation. Indeed, most of the time all interested parties will be bound by the same arbitration agreement from the beginning (see under VI.7.1.). However, with regard to proceedings the issue of the "other athlete" arises. The dilemma is the following: while the parties have in the arbitration agreement all consented to arbitrate, the question is how open-ended their consent has to be considered with respect to the jurisdiction *ratione personae* (see under VI.7.3.).

3.3.2. Expansion of consent

In sport there has always been a strong tendency to resolve any kind of dispute by exclusion of the ordinary courts. Consequently, the fact that there is at least a certain presumption in favour of arbitration as the preferred method of dispute resolution has to be remembered when the validity of an arbitration agreement, especially the one by reference, has to be determined. In the WADA-Code a provision has even been inserted according to which "every government will respect arbitration as the preferred means of resolving doping-related disputes"²⁴⁶⁸ (see under VI.3.3.3.).

²⁴⁶⁸ Article 22.3 WADA-Code.

4. The chronological perspective with regard to the course of the proceeding

From a chronological perspective the thesis discussed the requirements for the validity of the arbitration agreement—and more in particular of its substantive validity, respectively consent—at the outset of the proceeding, and issues of consent with regard to procedural mechanisms once the proceeding has begun.

4.1. *Validity at the beginning of the proceeding*

4.1.1. Ways of reaching an agreement to arbitrate

In the thesis the ways in which agreements to arbitrate are reached have been discussed:

- in commercial arbitration the arbitration agreement is a contract which is concluded through an offer and its acceptance (see under I.2. and I.4.). Of particular importance is the determination of which law governs the validity of the arbitration agreement. This has been examined under III.3. Issues may also arise in relation to questions about who can consent to arbitration on behalf of another person (agency) and when a transfer of arbitration agreements should be possible (see under IV.4. and IV.5.);
- due to the different modalities of reaching consent in investment arbitration the ways of expressing agreement to arbitrate have been extensively dealt with in respect of this type of arbitration (see under V.6.). With regard to the arbitration agreement it has been observed that the contractual arrangement must be understood broadly in the sense that the parties' consent can be given in different ways and also subsequently (see under V.7.3.2.);
- although they are also an issue in commercial arbitration, arbitration clauses by reference have in this thesis in particular been considered when discussing sport arbitration. With the CAS having its seat in Lausanne, it was the Swiss Federal Tribunal which primarily dealt with arbitration clauses by reference in the field of sport. The Swiss Supreme Court considers that in the case of a global reference accepted in writing the issue shifts from the question about the observance of the form to one of consent and applies then the principle of confidence. Moreover, it should also be submitted that a party who accepts without any reservation a global reference knowing the arbitration clause contained in the referenced document,

recognises the regulation of the federation, and consents by this fact to the arbitration clause itself. Finally, the arbitration clause incorporated in the regulations of a federation cannot only have an effect on direct or indirect members, but also those who simply ask to be admitted (see under VI.5.1.2.).

4.1.2. Interplay between form and consent

The development which could be observed is that, as a tendency, while still important, the weight of formal requirements is decreasing (see under III.5.3. and III.5.4.).

4.1.3. The essential elements/criteria for which consent is required

The essential elements for which consent is required in commercial arbitration have been discussed under IV.2. A controversial question here is whether the determination of the seat of arbitration has to be seen as one of the essential elements of the arbitration agreement or not (see under IV.2.2.2.). Moreover, in commercial arbitration issues with regard to consent may also arise because of implied terms (see under IV.2.3.).

While in traditional international commercial arbitration—administered by private institutions and even more so in *ad hoc* proceedings—the jurisdictional power of an arbitral tribunal stands entirely on the consent of the parties, in investment arbitration the situation is different. Indeed, in arbitration proceedings conducted under ICSID one cannot ignore the fact that ICSID jurisdiction is limited by the nature of the operation at hand. The essential criteria for arbitrations according to the ICSID Convention have been discussed under V.11.

In sport arbitration the characteristics of the disputes submitted to the CAS have been discussed under VI.2.2.2. Although Article R27 CAS Code stipulates that the CAS has jurisdiction solely to rule on disputes related to sport, since its creation, the CAS has never declared itself lacking in jurisdiction on the grounds that a dispute is not linked to sport. Indeed, for the CAS to have jurisdiction it is enough that the dispute has some link with sport. This general competence conceived in such an extensive manner is not only valid with regard to the object of dispute but also with regard to territoriality, as the competence of the CAS extends to all sport disputes without distinction whether their character is national or international.

4.1.4. Interpretation

It has also been discussed how the parties' consent has to be interpreted. For both commercial arbitration and investment arbitration it has been concluded that a neutral manner of interpretation has to be preferred:

- for commercial arbitration it has been sustained (see under IV.3.1.2.3.) that arbitration agreements should be interpreted in a neutral way—therefore neither restrictively nor extensively—not simply with regard to their validity, but also in relation to their scope. Indeed, in respect to consent to arbitration, not only the question of whether the parties prefer arbitration over State courts as a dispute resolution mechanism is important, but also the extent of what is covered by the parties' consent to arbitration. Furthermore, it has also been observed that a neutral manner of interpretation is even more appropriate with the steadily diminishing importance of the formal requirements of arbitration agreements. A rule of “in favour of arbitration” should only be applied when the goal is to eliminate barriers against parties' consent to arbitration, *i.e.* limitations on the subject matter at issue (objective arbitrability);
- with regard to investment arbitration it has been concluded (see under V.9.6.) that the structure of investment arbitration, as well as its development and the interests at stake, do not really make it appear as necessary to interpret consent with a particular inclination (neither restrictive nor expansive).

Finally, in the field of sport the fact that there is at least a certain presumption in favour of arbitration as the preferred method of dispute resolution has to be remembered when the validity of an arbitration agreement, especially of clauses by reference, has to be determined (see under VI.3.3.3.).

4.2. *Consent with regard to procedural mechanisms*

Under IV.7. it has been suggested that, in respect of the relevance of parties' consent with regard to procedural mechanisms, in commercial arbitration a strong contractual approach should be preferred. Indeed, the opinion has been expressed that in the traditional field of commercial arbitration, where the parties who oust State courts are in a horizontal relationship, the consensual character of arbitration finds its major expression. Therefore, for the case of joinder and intervention of third parties in arbitral proceedings a distinction was made as to whether the new party to the arbitral

proceeding is a party to the arbitration agreement or not (see under IV.7.1.5.). Only when this is the case should a joinder or intervention, without the consent of the parties already involved in the proceeding, be possible. However, for the joining party consent may be necessary, even though the joining party is a party to the arbitration agreement, when the arbitral tribunal is already constituted and the principle of equality of the parties in the appointment of the arbitrators cannot be waived before the dispute has arisen, as is the case when the seat of arbitration is in France.

This strong contractual approach also led me to the conclusion that it is preferable if the issue of consolidation is first solved at the level of the institutional arbitration rules, and only in a second step at the level of statutory regulations, which should in my view be opt-in provisions in order to ensure the awareness of the parties (see under IV.7.2.2.3.). Nevertheless, in commercial arbitration there have also been attempts to strengthen the jurisdictional side of arbitration by conferring more discretionary powers to the arbitration institution and the arbitral tribunals—as has been done by the Swiss Rules for the case of joinder (see under IV.7.1.2.5.) and consolidation (see under IV.7.2.2.1.4.e.). Moreover, efforts in this direction have also been made in some arbitration laws (see under IV.7.2.2.2.2.). However, in this respect the question arises as to whether the parties can be considered to have really consented to a consolidation provision like the Dutch one or not.

Under V.15. it has been observed that in investment arbitration, in situations where the BITs or the free trade agreements provide for the possibility to consolidate proceedings, the State party consents to consolidation by signing the treaties, but the situation is different for the investors who might be obliged to participate in a proceeding which has been joined. For instance in the case of NAFTA, although the investors, by choosing to begin an arbitration proceeding under NAFTA, also accept the relevant consolidation provision contained therein, if they wish to benefit from the NAFTA they have no other choice than to agree to the NAFTA rules. Moreover, the consolidation of related investment arbitrations may be achieved by a tribunal's binding order, as the guiding consolidation principles in international investment law are primarily the unity of the economic transaction affected by a same State measure. The reason for this differentiation is that a State should be able to legitimately rely on its superior interest not to be judged twice for the same action or omission. Furthermore, the situation of conflicting awards in investment arbitration is different from the one in commercial arbitration.

Under VI.7. it has been observed that in the area of sport arbitration the issue with parties' consent in multiparty arbitration is not the most difficult aspect to cope with, as most of the time all interested parties will be bound by the same arbitration agreement from the beginning. Therefore, sport arbitration has been viewed as a structurally inherent multiparty situation (see under VI.7.1.). On the other hand, the real problem in the sport field consists of determining the parties who can participate in an arbitration proceeding because they have an interest in the dispute between the original parties (see under VI.7.3.).

5. The structural perspective

The structural diversities among the different types of arbitration may influence, on the one hand, the formation and the validity of the arbitration agreement and, on the other hand, herewith related questions of interpretation.

5.1. *Commercial arbitration*

In the classical field of commercial arbitration the consensual character of arbitration has in the past been questioned with regard to proceedings with the former socialist countries of Central and Eastern Europe. Today the same issue arises with regard to the People's Republic of China. However, in this thesis it has been sustained that arbitration with parties of (former) communist countries is not really an exception from the consensual character of commercial arbitration. Indeed, the parties had, and will have, a possibility of choice, although perhaps more limited. Also the aspects related to the unequal bargaining powers should not be seen as an exception from the consensual character of commercial arbitration but rather as a question about the validity of the arbitration agreement (see under IV.1.2.3.).

The growing complexity of the facts of the cases is taken into account by recent arbitration rules, for instance the Swiss Rules which deal with aspects like consolidation of proceedings (see under IV.7.2.2.1.4.e.) and participation of third parties (see under IV.7.1.2.5.). Here the initial parties to the proceeding consent in advance to, possibly, have further parties participating or joining the proceeding in due course. They do this by increasing the jurisdictional power of the arbitrators or of the institution. However, in this thesis it has been advocated that in commercial arbitration a strong contractual (consensual) approach has to be preferred (see under IV.7.1.5. and IV.7.2.2.3.).

5.2. *Investment arbitration*

In investment arbitration the impressive number of investment laws and treaties implement a process which allows private complainants direct access to arbitration against a State and public authorities, irrespective of the existence of a contractual agreement to that effect. It has been observed that through these new types of investment conventions we have entered the era of arbitration without contractual relationship between the parties to the dispute—or arbitration without privity. This has been seen as nothing short of a revolution of the (traditional) arbitration theory, which postulates that arbitration is the product of a contract: either an arbitration clause for future disputes or an arbitration agreement for existing disputes.

In investment arbitration we look at the “verticalisation” of arbitration, but also at the declining importance of the classic “mirror arbitration” scheme. Whereas the classic theory (commercial arbitration) postulates the equal situation of both contracting parties, in which each of them can initiate arbitration proceedings and each of them—if a defendant—can counterclaim, under the investment conventions, it is not so: only the aggrieved investor can bring a claim, and whether the defending State can bring a counterclaim is unclear (see under II.2.3.1.).

In the thesis it has been suggested that the interpretation in the presence of a standing offer of a State in a treaty should be differentiated from the interpretation of arbitration clauses contained in contracts or investment agreements, as the (host) State in the case of a treaty gives a double consent: not only to the investor, but also to the other State party to the treaty (see under V.9.2.3.).

However, it has also been observed that the borders between what is classically considered to be public international law, on the one hand, and private international law respectively commercial/private law, on the other hand, are getting more and more diffuse. This phenomenon is accentuated by the fact that in the global economic arena the State is often an economic player, as is the investor (see under V.9.6.).

5.3. *Sport arbitration*

With regard to sport arbitration it has to be borne in mind that competition sport is characterised by a very hierarchical structure, both at the international and national

level. Established on a vertical axis, the relationships between athletes and the organisations of the different sport disciplines are distinct from the horizontal relations which bind the parties of a contractual relationship. According to the Swiss Federal Tribunal this structural difference between the two types of relationship is not without influence on the consensual process leading to the formation of any agreement. While, in principle, two parties are treated equally and each of them expresses its will without being subject to the will of the other, as is the case in international commercial arbitration, the situation is very different in the field of sport. Indeed, an athlete wishing to participate in competitions organised under the control of a federation whose regulation provides for recourse to arbitration will not have any other choice than to accept the arbitration clause, notably by adhering to the statutes of the said sport federation where the clause is inserted. This is even more true in the case of a professional athlete who will be confronted with the following dilemma: to consent to arbitration or to practice his sport as an amateur. Therefore, the athlete will not have any other choice than *nolens volens* to accept arbitration (see under VI.3.4.).

However, in relation to the fundamental principles in sport—fairness and equal opportunity—the preponderant interests of the sport organisation and the athletes considered in their ensemble have to prevail over the interest of a single athlete who would not be intentioned to submit to arbitration. Indeed, sport arbitration is primarily concerned with disciplinary matters which in one way or another also affect the other competing athletes (see under VI.5.2.1.).

6. Consent with respect to the juridical nature of arbitration

The reason why the consensual nature of arbitration has evolved over time and why it is different among the various fields of arbitration might be attributed to the fact that there is an inherent tension between the contractual and the jurisdictional side of arbitration.

Under II.3. the four traditional theories (jurisdictional, contractual, mixed/hybrid and autonomous) used to explain the juridical nature of arbitration have been illustrated. While in these theories the relationship between State and arbitration as a private dispute resolution mechanism is of central importance, in the thesis other possible approaches have been suggested—without exploring them fully, as this would have gone beyond the scope of the present study—which could explain the interaction of arbitration with the areas/fields where arbitration is expected to resolve disputes:

- Legal pluralism: in the thesis it was mentioned that one scholar in particular has suggested that there is a distinct legal order for each type of arbitration. The notion of arbitral legal order would then cover an ensemble of juridical principles which are necessary and sufficient for the existence of arbitration. The arbitral legal order would have its source in the will of the parties, and this would be independent from all national references (see under II.3.5.1.).
- Systems theory: systems are seen as being both open to the environment and adaptive. Therefore, they can be directly influenced, regulated, and even determined, by their environment. It has been observed that the adaptive feature is one of the most distinctive characteristics of arbitration, and that in all the adaptation processes parties' consent seems to play a fundamental, although differing role. The consensual nature of arbitration may be more (in commercial arbitration) or less (for instance, in sport arbitration) present. Therefore, it could be spoken of as a sort of "relativity of consent" (see under II.3.5.2.).
- Self-referentiality and autopoiesis: the idea of self-reference and autopoiesis presupposes that systems seek the fixed points of their mode of operation in themselves and not in the environmental conditions to which they adapt themselves as best they can (in other words, the perspective is rather inverted compared to the systems theory). In the case of self-referentiality parties' consent may be seen as the foundation stone on which the ability of the arbitral system to produce an autonomous order rests. However, the degree of the consensual character for different types of arbitration may vary: sometimes the contractual characteristics may appear to prevail, at other times the jurisdictional ones (see under II.3.5.3.).

* * * * *

In my opinion the qualification of arbitration as a "consensual" mechanism for dispute resolution needs to be differentiated, but not abandoned. Indeed, while at first sight it might be tempting to speak of the "dogma of consent", I think that it is more useful to employ the consensual nature of arbitration as a point of departure to better understand the differences among the diverse types of arbitration.

This is very well illustrated and has been done in an exemplary manner by the Swiss Federal Tribunal in the *Cañas* case²⁴⁶⁹ in relation to the differences between commercial arbitration and sport arbitration (see under VI.3.4.). In its decision the Swiss Federal

²⁴⁶⁹ Decision dated 22 March 2007, 4P.172/2006; DFT 133 III 235. See also ASA Bulletin 3/2007, p. 592. On the *Cañas* case, see, e.g. Baddeley, *Cañas*; and Brunner.

Tribunal recognised the special factors inherent in international sports and sport arbitration and held that the provisions of the Swiss PIL, which are tailored to arbitration in the area of commerce, had to be adapted to these specific features. In particular, the Swiss Supreme Court found that the relationships between athletes and the organisations of the different sport disciplines are, when compared to the horizontal relations which bind the parties of a contractual relationship, structurally different. After having concluded that this is not without influence on the consensual process leading to the formation of any agreement, the Swiss Federal Tribunal then considered the substantive validity of the agreement.²⁴⁷⁰

On the other hand, in the case of compulsory arbitration it could be asked whether the qualification of consensual still has a *raison d'être* or rather should it be abandoned? Indeed, in this type of arbitration the consensual boundaries of arbitration are reached. However, in my opinion mandatory arbitration has to be seen as the exception which confirms the rule of the consensual character of arbitration.

In the international context a field where compulsory arbitration was implemented is the WADA-Code (see under VI.6.). This field is fundamentally different from commercial arbitration. Indeed, it is not contractual disputes that are solved, but disciplinary ones. Thus, the dispute does not arise because of the breach of a contract but due to a breach of rules/law provisions. It could even be argued—although this would undoubtedly be a quantum leap—that the athletes consent to arbitration by breaching the anti-doping rules/law provisions. It has also been sustained that in the case of mandatory arbitration the question of the qualification of arbitration loses its importance, as it is the State itself which decides that arbitration is the most appropriate means for resolving disputes. Moreover, in the case of the WADA-Code it does so in an area (disciplinary matter in the field of sport) where arbitration is widely accepted as a dispute resolution mechanism.

In the case of compulsory arbitration it is not the relationship between State and arbitration which is of importance, as the State itself chooses the dispute resolution mechanism of arbitration, but the interaction of arbitration with the area/field in which arbitration is expected to resolve disputes. Therefore, the traditional theories (jurisdictional, contractual, mixed/hybrid and autonomous) seem to explain the nature of arbitration only partially. For this reason further possible approaches, some of which

²⁴⁷⁰ In the case in question, it was a waiver of the right to appeal.

have their origin in fields other than law, have been indicated for a tentative explanation of the increasing pervasiveness of arbitration in areas other than international commercial arbitration. It has also been stressed that for the explanation of these approaches “consent” could play a key role.

The searching of possible alternative explications for the expansion of arbitration in fields other than commercial arbitration could be one of the most fascinating intellectual challenges for future research in the field of international arbitration. It could be challenging, in particular to find converging points, but also to stress diverging features among the different types of arbitration. Phenomena of amalgamation of private/commercial law and international law are already to be found in investment arbitration, and in the field of disciplinary sanctions in sport arbitration even analogies to aspects of criminal and/or administrative law might be of relevance.

The contribution of this thesis was to point out the possible role played by parties’ consent in the different fields of arbitration in an international context, and to show the evolution of the consensual character of arbitration; while remembering that the resolution of a dispute by private judges without the parties’ consent is not arbitration.²⁴⁷¹

²⁴⁷¹ See Lew/Mistelis/Kröll, para. 5-21.

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CONVENTIONS, NATIONAL LAWS, ARBITRATION RULES, STANDARD FORMS AND CODES

I. CONVENTIONS

1. ECT

PART I. DEFINITIONS AND PURPOSE

ARTICLE 1

DEFINITIONS

As used in this Treaty:

...

(6) “Investment” means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
- (d) Intellectual Property;
- (e) Returns;
- (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the “Effective Date”) provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

“Investment” refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as “Charter efficiency projects” and so notified to the Secretariat.

PART III. INVESTMENT PROMOTION AND PROTECTION

ARTICLE 10

PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by

unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

(2) Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).

(3) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.

(4) A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3). That treaty shall be open for signature by the states and Regional Economic Integration Organizations which have signed or acceded to this Treaty. Negotiations towards the supplementary treaty shall commence not later than 1 January 1995, with a view to concluding it by 1 January 1998.

(5) Each Contracting Party shall, as regards the Making of Investments in its Area, endeavour to:

- (a) limit to the minimum the exceptions to the Treatment described in paragraph (3);
- (b) progressively remove existing restrictions affecting Investors of other Contracting Parties.

(6)

(a) A Contracting Party may, as regards the Making of Investments in its Area, at any time declare voluntarily to the Charter Conference, through the Secretariat, its intention not to introduce new exceptions to the Treatment described in paragraph (3).

(b) A Contracting Party may, furthermore, at any time make a voluntary commitment to accord to Investors of other Contracting Parties, as regards the Making of Investments in some or all Economic Activities in the Energy Sector in its Area, the Treatment described in paragraph (3). Such commitments shall be notified to the Secretariat and listed in Annex VC and shall be binding under this Treaty.

(7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

(8) The modalities of application of paragraph (7) in relation to programmes under which a Contracting Party provides grants or other financial assistance, or enters into contracts, for energy technology research and development, shall be reserved for the supplementary treaty described in paragraph (4). Each Contracting Party shall through the Secretariat keep the Charter Conference informed of the modalities it applies to the programmes described in this paragraph.

(9) Each state or Regional Economic Integration Organization which signs or accedes to this Treaty shall, on the date it signs the Treaty or deposits its instrument of accession, submit to the Secretariat a report summarizing all laws, regulations or other measures relevant to:

- (a) exceptions to paragraph (2); or
- (b) the programmes referred to in paragraph (8).

A Contracting Party shall keep its report up to date by promptly submitting amendments to the Secretariat. The Charter Conference shall review these reports periodically.

In respect of subparagraph (a) the report may designate parts of the energy sector in which a Contracting Party accords to Investors of other Contracting Parties the Treatment described in paragraph (3).

In respect of subparagraph (b) the review by the Charter Conference may consider the effects of such programmes on competition and Investments.

(10) Notwithstanding any other provision of this Article, the treatment described in paragraphs (3) and (7) shall not apply to the protection of Intellectual Property; instead, the treatment shall be as specified in

the corresponding provisions of the applicable international agreements for the protection of Intellectual Property rights to which the respective Contracting Parties are parties.

(11) For the purposes of Article 26, the application by a Contracting Party of a trade-related investment measure as described in Article 5(1) and (2) to an Investment of an Investor of another Contracting Party existing at the time of such application shall, subject to Article 5(3) and (4), be considered a breach of an obligation of the former Contracting Party under this Part.

(12) Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.

PART V. DISPUTE SETTLEMENT

ARTICLE 26

SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

- (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
- (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
- (c) in accordance with the following paragraphs of this Article.

(3)

(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5)

(a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

- (i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;
- (ii) an “agreement in writing” for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the “New York Convention”); and
- (iii) “the parties to a contract [to] have agreed in writing” for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a “national of another Contracting State” and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a “national of another State”.

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

ARTICLE 27

SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

(1) Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels.

(2) If a dispute has not been settled in accordance with paragraph (1) within a reasonable period of time, either party thereto may, except as otherwise provided in this Treaty or agreed in writing by the Contracting Parties, and except as concerns the application or interpretation of Article 6 or Article 19 or, for Contracting Parties listed in Annex IA, the last sentence of Article 10(1), upon written notice to the other party to the dispute submit the matter to an ad hoc tribunal under this Article.

(3) Such an ad hoc arbitral tribunal shall be constituted as follows:

- (a) The Contracting Party instituting the proceedings shall appoint one member of the tribunal and inform the other Contracting Party to the dispute of its appointment within 30 days of receipt of the notice referred to in paragraph (2) by the other Contracting Party;
- (b) Within 60 days of the receipt of the written notice referred to in paragraph (2), the other Contracting Party party to the dispute shall appoint one member. If the appointment is not made within the time limit prescribed, the Contracting Party having instituted the proceedings may, within 90 days of the receipt of the written notice referred to in paragraph (2), request that the appointment be made in accordance with subparagraph (d);
- (c) A third member, who may not be a national or citizen of a Contracting Party party to the dispute, shall be appointed by the Contracting Parties parties to the dispute. That member shall be the President of the tribunal. If, within 150 days of the receipt of the notice referred to in paragraph (2), the

Contracting Parties are unable to agree on the appointment of a third member, that appointment shall be made, in accordance with subparagraph (d), at the request of either Contracting Party submitted within 180 days of the receipt of that notice;

- (d) Appointments requested to be made in accordance with this paragraph shall be made by the Secretary-General of the Permanent Court of International Arbitration within 30 days of the receipt of a request to do so. If the Secretary-General is prevented from discharging this task, the appointments shall be made by the First Secretary of the Bureau. If the latter, in turn, is prevented from discharging this task, the appointments shall be made by the most senior Deputy;
- (e) Appointments made in accordance with subparagraphs (a) to (d) shall be made with regard to the qualifications and experience, particularly in matters covered by this Treaty, of the members to be appointed;
- (f) In the absence of an agreement to the contrary between the Contracting Parties, the Arbitration Rules of UNCITRAL shall govern, except to the extent modified by the Contracting Parties parties to the dispute or by the arbitrators. The tribunal shall take its decisions by a majority vote of its members;
- (g) The tribunal shall decide the dispute in accordance with this Treaty and applicable rules and principles of international law;
- (h) The arbitral award shall be final and binding upon the Contracting Parties parties to the dispute;
- (i) Where, in making an award, a tribunal finds that a measure of a regional or local government or authority within the Area of a Contracting Party listed in Part I of Annex P is not in conformity with this Treaty, either party to the dispute may invoke the provisions of Part II of Annex P;
- (j) The expenses of the tribunal, including the remuneration of its members, shall be borne in equal shares by the Contracting Parties parties to the dispute. The tribunal may, however, at its discretion direct that a higher proportion of the costs be paid by one of the Contracting Parties parties to the dispute;
- (k) Unless the Contracting Parties parties to the dispute agree otherwise, the tribunal shall sit in The Hague, and use the premises and facilities of the Permanent Court of Arbitration;
- (l) A copy of the award shall be deposited with the Secretariat which shall make it generally available.

PART VIII. FINAL PROVISIONS

ARTICLE 44

ENTRY INTO FORCE

(1) This Treaty shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance or approval thereof, or of accession thereto, by a state or Regional Economic Integration Organization which is a signatory to the Charter as of 16 June 1995.

(2) For each state or Regional Economic Integration Organization which ratifies, accepts or approves this Treaty or accedes thereto after the deposit of the thirtieth instrument of ratification, acceptance or approval, it shall enter into force on the ninetieth day after the date of deposit by such state or Regional Economic Integration Organization of its instrument of ratification, acceptance, approval or accession.

(3) For the purposes of paragraph (1), any instrument deposited by a Regional Economic Integration Organization shall not be counted as additional to those deposited by member states of such Organization.

ARTICLE 45

PROVISIONAL APPLICATION

(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

(2)

(a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a

declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.

- (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).
- (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.

(3)

- (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.
- (b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).
- (c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.

(4) Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.

(5) The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat.

(6) The signatories shall, in accordance with and subject to the provisions of paragraph (1) or subparagraph (2)(c) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties under Article 37(3). Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty.

(7) A state or Regional Economic Integration Organization which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.

2. ICSID Convention

Chapter II. Jurisdiction of the Centre

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

- (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration

as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

- (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Chapter III. Conciliation/request for conciliation

Article 28

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Chapter IV. Arbitration

Article 36

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Article 39

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Article 40

(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

Article 42

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide ex aequo et bono if the parties so agree.

Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Article 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

3. NAFTA

NAFTA - PART FIVE: INVESTMENT, SERVICES AND RELATED MATTERS,

Chapter 11: Investment

Section A. Investment

Article 1101

Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) investors of another Party;
 - (b) investments of investors of another Party in the territory of the Party; and

(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

2. A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).

4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.

Section B. Settlement of Disputes between a Party and an Investor of Another Party

Article 1116

Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

Article 1117

Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section.

Article 1120

Submission of a Claim to Arbitration

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:
 - (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
 - (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
 - (c) the UNCITRAL Arbitration Rules.
2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

Article 1121

Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
 - (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and
 - (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
 - (a) consent to arbitration in accordance with the procedures set out in this Agreement; and
 - (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.
4. Only where a disputing Party has deprived a disputing investor of control of an enterprise:
 - (a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and
 - (b) Annex 1120.1(b) shall not apply.

Article 1122

Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

- (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;
- (b) Article II of the New York Convention for an agreement in writing; and
- (c) Article I of the InterAmerican Convention for an agreement.

Article 1125

Agreement to Appointment of Arbitrators

For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on Article 1124(3) or on a ground other than nationality:

- (a) the disputing Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
- (b) a disputing investor referred to in Article 1116 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor agrees in writing to the appointment of each individual member of the Tribunal; and
- (c) a disputing investor referred to in Article 1117(1) may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor and the enterprise agree in writing to the appointment of each individual member of the Tribunal.

Article 1126

Consolidation

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Section.

2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General to establish a Tribunal and shall specify in the request:

- (a) the name of the disputing Party or disputing investors against which the order is sought;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

4. The disputing party shall deliver to the disputing Party or disputing investors against which the order is sought a copy of the request.

5. Within 60 days of receipt of the request, the Secretary-General shall establish a Tribunal comprising three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster referred to in Article 1124(4). In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of

the Parties. The Secretary-General shall appoint the two other members from the roster referred to in Article 1124(4), and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that Panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of a Party of the disputing investors.

6. Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under Article 1116 or 1117 and that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

- (a) the name and address of the disputing investor;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

7. A disputing investor referred to in paragraph 6 shall deliver a copy of its request to the disputing parties named in a request made under paragraph 3.

8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

9. On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 2, may order that the proceedings of a Tribunal established under Article 1120 be stayed, unless the latter Tribunal has already adjourned its proceedings.

10. A disputing Party shall deliver to the Secretariat, within 15 days of receipt by the disputing Party, a copy of:

- (a) a request for arbitration made under paragraph (1) of Article 36 of the ICSID Convention;
- (b) a notice of arbitration made under Article 2 of Schedule C of the ICSID Additional Facility Rules; or
- (c) a notice of arbitration given under the UNCITRAL Arbitration Rules.

11. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 3:

- (a) within 15 days of receipt of the request, in the case of a request made by a disputing investor;
- (b) within 15 days of making the request, in the case of a request made by the disputing Party.

12. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 6 within 15 days of receipt of the request.

13. The Secretariat shall maintain a public register of the documents referred to in paragraphs 10, 11 and 12.

NAFTA - PART FIVE: INVESTMENT, SERVICES AND RELATED MATTERS,

Chapter 15: Competition Policy, Monopolies and State Enterprises

Article 1502

Monopolies and State Enterprises

1. Nothing in this Agreement shall be construed to prevent a Party from designating a monopoly.
2. Where a Party intends to designate a monopoly and the designation may affect the interests of persons of another Party, the Party shall:

- (a) wherever possible, provide prior written notification to the other Party of the designation; and
 - (b) endeavor to introduce at the time of the designation such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits in the sense of Annex 2004 (Nullification and Impairment).
3. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates:
- (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges;
 - (b) except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale;
 - (c) provides non-discriminatory treatment to investments of investors, to goods and to service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market; and
 - (d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, its subsidiary or other enterprise with common ownership, in anti-competitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct.
4. Paragraph 3 does not apply to procurement by governmental agencies of goods or services for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the provision of services for commercial sale.
5. For purposes of this Article "maintain" means designate prior to the date of entry into force of this Agreement and existing on January 1, 1994.

Article 1503

State Enterprises

1. Nothing in this Agreement shall be construed to prevent a Party from maintaining or establishing a state enterprise.
2. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.
3. Each Party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to investments in the Party's territory of investors of another Party.

4. New York Convention

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

5. UNESCO International Convention against Doping in Sport

Article 37 – Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession.

2. For any State that subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date of deposit of its instrument of ratification, acceptance, approval or accession.

6. VCLT

Article 31 General rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the Interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a) leaves the meaning ambiguous or obscure; or
- b) leads to a result which is manifestly absurd or unreasonable.

Article 33 Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

II. NATIONAL LAWS

1. Australia (International Arbitration Act 1974-1989)

22. APPLICATION OF OPTIONAL PROVISIONS

If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that the other provisions, or any of the other provisions, of this Division are to apply in relation to the settlement of any dispute (being a dispute that is to be settled in accordance with the Model Law) that has arisen or may arise between them, those provisions apply in relation to the settlement of that dispute.

24. CONSOLIDATION OF ARBITRAL PROCEEDINGS

(1) A party to arbitral proceedings before an arbitral tribunal may apply to the tribunal for an order under this section in relation to those proceedings and other arbitral proceedings (whether before that tribunal or another tribunal or other tribunals) on the ground that:

- (a) a common question of law or fact arises in all those proceedings;
- (b) the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or
- (c) for some other reason specified in the application, it is desirable that an order be made under this section.

(2) The following orders may be made under this section in relation to 2 or more arbitral proceedings:

- (a) that the proceedings be consolidated on terms specified in the order;
- (b) that the proceedings be heard at the same time or in a sequence specified in the order;
- (c) that any of the proceedings be stayed pending the determination of any other of the proceedings.

(3) Where an application has been made under subsection (1) in relation to 2 or more arbitral proceedings (in this section called the “related proceedings”), the following provisions have effect.

(4) If all the related proceedings are being heard by the same tribunal, the tribunal may make such order under this section as it thinks fit in relation to those proceedings and, if such an order is made, the proceedings shall be dealt with in accordance with the order.

(5) If 2 or more arbitral tribunals are hearing the related proceedings:

- (a) the tribunal that received the application shall communicate the substance of the application to the other tribunals concerned; and
- (b) the tribunals shall, as soon as practicable, deliberate jointly on the application.

(6) Where the tribunals agree, after deliberation on the application, that a particular order under this section should be made in relation to the related proceedings:

- (a) the tribunals shall jointly make the order;
- (b) the related proceedings shall be dealt with in accordance with the order; and
- (c) if the order is that the related proceedings be consolidated - the arbitrator or arbitrators for the purposes of the consolidated proceedings shall be appointed, in accordance with Articles 10 and 11 of the Model Law, from the members of the tribunals.

(7) If the tribunals are unable to make an order under subsection (6), the related proceedings shall proceed as if no application has been made under subsection (1).

(8) This section does not prevent the parties to related proceedings from agreeing to consolidate them and taking such steps as are necessary to effect that consolidation.

2. Belgium

Article 1696bis Belgian Judicial Code

1. Any affected third party may request the arbitral tribunal to intervene in the proceedings. Such request shall be addressed in writing to the arbitral tribunal which shall communicate it to the parties.

2. A party may serve a notice of joinder on a third party.

3. In any event, in order to be admitted, the intervention of a third party requires an arbitration agreement between the third party and the parties in dispute. Furthermore, it is subject to the unanimous consent of the arbitral tribunal.

3. China

Chapter 3. Arbitration Agreement

Article 16

An arbitration agreement includes an arbitration clause included in the contract, and an agreement on submission to arbitration that is concluded in other written forms before or after the dispute arises.

An arbitration agreement shall contain the following particulars:

- (1) an expression of the intention to apply for arbitration;
- (2) matters for arbitration; and
- (3) a designated arbitration commission.

Article 18

If an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be void.

4. England

3. THE SEAT OF THE ARBITRATION

In this Part “the seat of the arbitration” means the juridical seat of the arbitration designated-

- (a) by the parties to the arbitration agreement, or
- (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
- (c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.

7. SEPARABILITY OF ARBITRATION AGREEMENT

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or

ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

35. CONSOLIDATION OF PROCEEDINGS AND CONCURRENT HEARINGS

- (1) The parties are free to agree-
- (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or
 - (b) that concurrent hearings shall be held, on such terms as may be agreed.
- (2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.

5. France

Article 1443

To be valid, an arbitration clause shall be in writing and included in the contract or in a document to which it refers.

To be valid, an arbitration clause shall furthermore appoint the arbitrator or arbitrators, or provide for the method of their appointment.

Article 1458

If a dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a State court, it shall declare itself incompetent.

If the dispute is not yet before an arbitral tribunal, the State court shall also declare itself incompetent, unless the arbitration agreement is manifestly null and void.

In neither case may the State court declare itself incompetent at its own motion.

Article 1493

An arbitration agreement may, directly or by reference to arbitration rules, appoint the arbitrator or arbitrators or provide for the method of their appointment.

If in an arbitration taking place in France or subjected by the parties to French procedural law difficulties arise in the constitution of the arbitral tribunal, the interested party may bring the matter before the President of the Tribunal de Grande Instance of Paris as provided in Art. 1457, unless the parties agree otherwise.

6. Germany

Old section 1025(2) ZPO

The arbitration agreement is not valid if one of the parties has used any superiority it possesses by virtue of economic or social position in order to constrain the other party to make this agreement or to accept conditions therein, resulting in the one party having an advantage over the other in the procedure, and more especially in regard to the nomination or the non-acceptance of the arbitrator.

7. Hong Kong

Cap. 341 of the Laws of Hong Kong

6B. CONSOLIDATION OF ARBITRATIONS

- (1) Where in relation to two or more arbitration proceedings it appears to the Court –
 - (a) that some common question of law or fact arises in both or all of them, or
 - (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or
 - (c) that for some other reason it is desirable to make an order under this section, the Court may order those arbitration proceedings to be consolidated on such terms as it thinks just or may order them to be heard at the same time, or one immediately after another, or may order any of them to be stayed until after the determination of any other of them.
- (2) Where the Court orders arbitration proceedings to be consolidated under subsection (1) and all parties to the consolidated arbitration proceedings are in agreement as to the choice of arbitrator or umpire for those proceedings the same shall be appointed by the Court but if all parties cannot agree the Court shall have power to appoint an arbitrator or umpire for those proceedings.
- (3) Where the Court makes an appointment under subsection (2) of an arbitrator or umpire for consolidated arbitration proceedings, any appointment of any other arbitrator or umpire that has been made for any of the arbitration proceedings forming part of the consolidation shall for all purposes cease to have effect on and from the appointment under subsection (2).

8. The Netherlands

Article 1045 Netherlands CCP (Third parties)

1. At the written request of a third party who has an interest in the outcome of the arbitral proceedings, the arbitral tribunal may permit such party to join the proceedings, or to intervene therein. The arbitral tribunal shall send without delay a copy of the request to the parties.
2. A party who claims to be indemnified by a third party may serve a notice of joinder on such a party. A copy of the notice shall be sent without delay to the arbitral tribunal and the other party.
3. The joinder, intervention or joinder for the claim of indemnity may only be permitted by the arbitral tribunal, having heard the parties, if the third party accedes by agreement in writing between him and the parties to the arbitration agreement.
4. On the grant of a request for joinder, intervention, or joinder for the claim of indemnity, the third party becomes a party to the arbitral proceedings. Unless the parties have agreed there on the arbitral tribunal shall determine the further conduct of the proceedings.

Article 1046 Netherlands CCP (Consolidation of arbitral proceedings)

1. If arbitral proceedings have been commenced before an arbitral tribunal in the Netherlands concerning a subject matter which is connected with the subject matter of arbitral proceedings commenced before another arbitral tribunal in the Netherlands, any of the parties may, unless the parties have agreed otherwise, request the President of the District Court in Amsterdam to order a consolidation of the proceedings.
2. The President may wholly or partially grant or refuse the request, after he has given all parties and the arbitrators an opportunity to be heard. His decision shall be communicated in writing to all parties and the arbitral tribunals involved.

3. If the President orders consolidation in full, the parties shall in consultation with each other appoint one arbitrator or an uneven number of arbitrators and determine the procedural rules which shall apply to the consolidated proceedings. If, within the period of time prescribed by the President, the parties have not reached agreement on the above, the President shall, at the request of any of the parties, appoint the arbitrator or arbitrators and, if necessary, determine the procedural rules which shall apply to the consolidated proceedings. The President shall determine the remuneration for the work already carried out by the arbitrators whose mandate is terminated by reason of the full consolidation.

4. If the President orders partial consolidation, he shall decide which disputes shall be consolidated. The President shall, if the parties fail to agree within the period of time prescribed by him, at the request of any of the parties, appoint the arbitrator or arbitrators and determine which rules shall apply to the consolidated proceedings. In this event the arbitral tribunals before which arbitrations have already been commenced shall suspend those arbitrations. The award of the arbitral tribunal appointed for the consolidated arbitration shall be communicated in writing to the other arbitral tribunals involved. Upon receipt of this award, these arbitral tribunals shall continue the arbitrations commenced before them and decide in accordance with the award rendered in the consolidated proceedings.

5. The provisions of article 1027(4) shall apply accordingly in the cases mentioned in paragraphs (3) and (4) above.

6. An award rendered under paragraphs (3) and (4) above shall be subject to appeal to a second arbitral tribunal if and to the extent that all parties involved in the consolidated proceedings have agreed upon such an appeal.

9. New Zealand

Second Schedule - Additional Optional Rules Applying to Arbitration

Section 2 CONSOLIDATION OF ARBITRAL PROCEEDINGS

- (1) Where arbitral proceedings all have the same arbitral tribunal,-
 - (a) The arbitral tribunal may, on the application of at least one party in each of the arbitral proceedings, order-
 - (i) Those proceedings to be consolidated on such terms as the arbitral tribunal thinks just; or
 - (ii) Those proceedings to be heard at the same time, or one immediately after the other; or
 - (iii) Any of those proceedings to be stayed until after the determination of any other of them:
 - (b) If an application has been made to the arbitral tribunal under paragraph (a) and the arbitral tribunal refuses or fails to make an order under that paragraph, the High Court may, on application by a party in any of the proceedings, make any such order as could have been made by the arbitral tribunal.
- (2) Where arbitral proceedings do not all have the same arbitral tribunal,-
 - (a) The arbitral tribunal for any one of the arbitral proceedings may, on the application of a party in the proceedings, provisionally order-
 - (i) The proceedings to be consolidated with other arbitral proceedings on such terms as the arbitral tribunal thinks just; or
 - (ii) The proceedings to be heard at the same time as other arbitral proceedings, or one immediately after the other; or
 - (iii) Any of those proceedings to be stayed until after the determination of any other of them:
 - (b) An order ceases to be provisional when consistent provisional orders have been made for all of the arbitral proceedings concerned:
 - (c) The arbitral tribunals may communicate with each other for the purpose of conferring on the desirability of making orders under this subclause and of deciding on the terms of any such order:

- (d) If a provisional order is made for at least one of the arbitral proceedings concerned, but the arbitral tribunal for another of the proceedings refuses or fails to make such an order (having received an application from a party to make such an order), the High Court may, on application by a party in any of the proceedings, make an order or orders that could have been made under this subclause:
- (e) If inconsistent provisional orders are made for the arbitral proceedings, the High Court may, on application by a party in any of the proceedings, alter the orders to make them consistent.
- (3) When arbitral proceedings are to be consolidated under subclause (2), the arbitral tribunal for the consolidated proceedings shall be that agreed on for the purpose by all the parties to the individual proceedings, but, failing such an agreement, the High Court may appoint an arbitral tribunal for the consolidated proceedings.
- (4) An order or a provisional order may not be made under this clause unless it appears-
- (a) That some common question of law or fact arises in all of the arbitral proceedings; or
- (b) That the rights to relief claimed in all of the proceedings are in respect of, or arise out of, the same transaction or series of transactions; or
- (c) That for some other reason it is desirable to make the order or provisional order.
- (5) Any proceedings before an arbitral tribunal for the purposes of this clause shall be treated as part of the arbitral proceedings concerned.
- (6) Arbitral proceedings may be commenced or continued, although an application to consolidate them is pending under subclause (1) or (2) and although a provisional order has been made in relation to them under subclause (2).
- (7) Subclauses (1) and (2) apply in relation to arbitral proceedings whether or not all or any of the parties are common to some or all of the proceedings.
- (8) There shall be no appeal from any decision of the High Court under this clause.
- (9) Nothing in this clause prevents the parties to 2 or more arbitral proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

10. Sweden

Section 48

Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place.

The first paragraph shall not apply to the issue of whether a party was authorised to enter into an arbitration agreement or was duly represented.

11. Switzerland

Swiss PIL

Article 178 (Arbitration agreement)

1. The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

2. Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject matter of the dispute, in particular the main contract, or to Swiss law.
3. The arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen.

Article 179 (Constitution of the Arbitral Tribunal)

1. The arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties.
2. In the absence of such agreement, the judge where the tribunal has its seat may be seized with the question; he shall apply, by analogy, the provisions of cantonal law on appointment, removal or replacement of arbitrators.
3. If a judge has been designated as the authority for appointing an arbitrator, he shall make the appointment unless a summary examination shows that no arbitration agreement exists between the parties.

Article 185 (Other judicial assistance)

For any further judicial assistance the state judge at the seat of the Arbitral Tribunal shall have jurisdiction.

Article 192 (Waiver of annulment)

1. If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the ground listed in Art. 190(2).
2. If the parties have waived fully the action for annulment against the awards and if the awards are to be enforced in Switzerland, the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.

Swiss Civil Code

Article 27 (Personality, how protected – excessive commitment)

1. No one may waive, in full or in part, his legal capacity or his capacity to act.
2. No one may relinquish his liberty or restrict the exercise of his liberty to an extent violating the law or morality.

Article 75 (Maintenance of members' right)

Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof.

Swiss Code of Obligations

Article 19 (Contents of the contract)

1. The content of a contract can, within the limits of the law, be established at the discretion of the parties.

2. Agreements deviating from what is provided for by law are valid only if the law does not contain mandatory provisions which may not be modified, or where such deviation does not violate public policy, *boni mores* or basic personal rights (Art. 20).

Article 20 (Nullity)

1. A contract providing for an impossibility, having illegal contents, or violating *boni mores*, is null and void.

2. If such defect only affects particular parts of the contract, however, then only those parts shall be null and void, unless it is to be presumed that the contract would not have been concluded without the defective parts.

12. UNCITRAL Model Law

Article 1 SCOPE OF APPLICATION

1. This Law applies to international commercial** arbitration, subject to any agreement in force between this State and any other State or States.

** The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

Article 16 COMPETENCE OF ARBITRAL TRIBUNAL TO RULE ON ITS JURISDICTION

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

13. USA

Revised Uniform Arbitration Act 2000

Section 10 (Consolidation of separate arbitration proceedings)

- a) Except as otherwise provided in subsection (c), upon [motion] of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:
 - (1) there are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;
 - (2) the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;
 - (3) the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and
 - (4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.
- b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.
- c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

United States Code

Chapter 2205 – United States Olympic Committee

§220509. Resolution of disputes

(a) General. – The corporation shall establish and maintain provisions in its constitution and bylaws for the swift and equitable resolution of disputes involving any of its members and relating to the opportunity of an amateur athlete, coach, trainer, manager, administrator, or official to participate in the Olympic Games, the Paralympic Games, the Pan-American Games, world championship competition, or other protected competition as defined in the constitution and bylaws of the corporation. ...

...

III. ARBITRATION RULES

1. CAS Rules

R27 Application of the Rules

These Procedural Rules apply whenever the parties have agreed to refer a sportsrelated dispute to the CAS.

Such disputes may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings) or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings). Such disputes may

involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport.

These Procedural Rules also apply where the CAS is called upon to give an advisory opinion (consultation proceedings).

R28 Seat

The seat of the CAS and of each Arbitration Panel ("Panel") is in Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel or, if he has not yet been appointed, the President of the relevant Division may decide to hold a hearing in another place and issues the appropriate directions related to such hearing.

R41 Multiparty Arbitration

R41.1 Plurality of Claimants / Respondents

If the request for arbitration names several Claimants and/or Respondents, the CAS shall proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties. In the absence of such an agreement, the President of the Division shall decide on the number of arbitrators in accordance with Article R40.1.

If a sole arbitrator is to be appointed, Article R40.2 shall apply. If three arbitrators are to be appointed and there are several Claimants, the Claimants shall jointly appoint an arbitrator. If three arbitrators are to be appointed and there are several Respondents, the Respondents shall jointly appoint an arbitrator. In the absence of such a joint appointment, the President of the Division shall proceed with the appointment in lieu of the Claimants/Respondents. If there are three or more parties with divergent interests, both arbitrators shall be appointed in accordance with the agreement between the parties. In the absence of such agreement, the arbitrators shall be appointed by the President of the Division in accordance with Article R40.2. In all cases, the arbitrators shall select the President of the Panel in accordance with Article R40.2.

R41.2 Joinder

If a Respondent intends to cause a third party to participate in the arbitration, it shall mention it in its answer, together with the reasons therefor, and file an additional copy of its answer. The Court Office shall communicate this copy to the person whose participation is requested and set such person a time limit to state its position on its participation and to submit a response pursuant to Article R39. It shall also set a time limit for the Claimant to express its position on the participation of the third party.

R41.3 Intervention

If a third party intends to participate as a party in the arbitration, it shall file with the CAS an application to this effect, together with the reasons therefor within the time limit set for the Respondent's answer to the request for arbitration. To the extent applicable, such application shall have the same contents as a request for arbitration. The Court Office shall communicate a copy of this application to the parties and set a time limit for them to express their position on the participation of the third party and to file, to the extent applicable, an answer pursuant to Article R39.

R41.4 Joint Provisions on Joinder and Intervention

A third party may only participate in the arbitration if it is bound by the arbitration agreement or if itself and the other parties agree in writing.

Upon expiration of the time limit set in Articles R41.2 and R41.3, the President of the Division or the Panel, if it has already been appointed, shall decide on the participation of the third party, taking into account, in particular, the prima facie existence of an arbitration agreement as referred to in Article R39

above. The decision of the President of the Division shall be without prejudice to the decision of the Panel on the same matter.

If the President of the Division accepts the participation of the third party, the CAS shall proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties. In the absence of such an agreement between the parties, the President of the Division shall decide on the number of arbitrators in accordance with Article R40.1. If a sole arbitrator is to be appointed, Article R40.2 shall apply. If three arbitrators are to be appointed, the arbitrators shall be appointed by the President of the Division and shall choose the President of the Panel in accordance with Article R40.2.

Regardless of the decision of the Panel on the participation of the third party, the formation of the Panel cannot be challenged. In the event that the Panel accepts the participation, it shall, if required, issue related procedural directions.

2. Cepani Rules

Article 12 (Multi-party arbitration)

When several contracts containing a CEPANI arbitration clause give rise to disputes that are closely related or indivisible, the Appointments Committee or the Chairman is empowered to order the joinder of the arbitration proceedings.

This decision shall be taken either at the request of the Arbitral Tribunal, or, prior to any other issue, at the request of the parties or of the most diligent party, or upon CEPANI's own motion.

Where the request is granted, the Appointments Committee or the Chairman shall appoint the Arbitral Tribunal that shall decide on the disputes that have been joined. If necessary, it shall increase the number of arbitrators to a maximum of five. The Appointments Committee or the Chairman shall take its decision after having summoned the parties, and, if need be, the arbitrators who have already been appointed.

They may not order the joinder of disputes in which an interim award or an award on admissibility or on the merits of the claim has already been rendered.

3. CIMAR

Rule 3.9

“Where the same arbitrator is appointed in two or more arbitral proceedings each of which involves some common issue, whether or not involving the same parties, the arbitrator may, if all the parties so agree, order that any two or more such proceedings shall be consolidated”.

4. Geneva Rules

Article 16

16.1 If an arbitration is initiated between parties already involved in another arbitration governed by these Rules, the CCIG may assign the second case to the arbitral tribunal appointed to decide the first case, in which case the parties shall be deemed to have waived their right to select an arbitrator in the second case.

16.2 In order to decide upon such assignment, the CCIG shall take into account all the circumstances, including the links between the two cases and the progress already made in the first case.

Article 18

18.1 If a respondent intends to cause a third party to participate in the arbitration, it shall so state in its answer and shall state the reasons for such participation. The respondent shall deliver to the CCIG an additional copy of its answer.

18.2 The CCIG shall send the answer to the third party whose participation is sought, the provisions of Articles 8 and 9 being applicable by analogy.

18.3 Upon receipt of the third party's answer the CCIG shall decide on the participation of the third party in the already pending proceeding, taking into account all of the circumstances. If the CCIG accepts the participation of the third party, it shall proceed with the formation of the arbitral tribunal in accordance with Article 17, if it does not accept the participation, it shall proceed according to Article 12.

18.4 The decision of the CCIG regarding the participation of third parties shall not prejudice the decision of the arbitrators on the same subject. Regardless of the decision of the arbitrators on such participation the formation of the arbitral tribunal cannot be challenged. Emphasis added.

5. ICC Rules

Article 4 (Request for Arbitration)

1. A party wishing to have recourse to arbitration under these Rules shall submit its Request for Arbitration (the "Request") to the Secretariat, which shall notify the Claimant and Respondent of the receipt of the Request and the date of such receipt.

2. The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitral proceedings.

3. The Request shall, *inter alia*, contain the following information:

- (a) the name in full, description and address of each of the parties;
- (b) a description of the nature and circumstances of the dispute giving rise to the claims;
- (c) a statement of the relief sought, including, to the extent possible, an indication of any amount(s) claimed;
- (d) the relevant agreements and, in particular, the arbitration agreement;
- (e) all relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of Articles 8, 9 and 10, and any nomination of an arbitrator required thereby; and
- (f) any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration.

4. Together with the Request, the Claimant shall submit the number of copies thereof required by Article 3(1) and shall make the advance payment on administrative expenses required by Appendix III ("Arbitration Costs and Fees") in force on the date the Request is submitted. In the event that the Claimant fails to comply with either of these requirements, the Secretariat may fix a time limit within which the Claimant must comply, failing which the file shall be closed without prejudice to the right of the Claimant to submit the same claims at a later date in another Request.

5. The Secretariat shall send a copy of the Request and the documents annexed thereto to the Respondent for its Answer to the Request once the Secretariat has sufficient copies of the Request and the required advance payment.

6. When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings provided that the Terms of Reference have not been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19.

Article 4(6) - (under Request for Arbitration)

When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings provided that the Terms of Reference have not been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19.

Article 8 (General Provisions)

1. The disputes shall be decided by a sole arbitrator or by three arbitrators.
2. Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such case, the Claimant shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the decision of the Court, and the Respondent shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the nomination made by the Claimant.
3. Where the parties have agreed that the dispute shall be settled by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the Claimant's Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.
4. Where the dispute is to be referred to three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation by the Court. If a party fails to nominate an arbitrator, the appointment shall be made by the Court. The third arbitrator, who will act as chairman of the Arbitral Tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 9. Should such procedure not result in a nomination within the time limit fixed by the parties or the Court, the third arbitrator shall be appointed by the Court.

Article 10 (Multiple Parties)

1. Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9.
2. In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman. In such case, the Court shall be at liberty to choose any person whom it regards as suitable to act as arbitrator, applying Article 9 when it considers this appropriate.

Article 15 (Rules governing the proceedings)

1. The proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent, any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.
2. In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

Article 19 (New Claims)

After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances.

ICC standard and suggested clauses for Dispute Resolution Services

For arbitration in Mainland China:

“All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

6. ICSID Rules

Rule 40 (Ancillary Claims)

(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.

(2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

(3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

Rule 41 (Objections to Jurisdiction)

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

(3) Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) The Tribunal shall decide whether or not the further procedures relating to the objection shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(5) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, it shall render an award to that effect.

7. ICSID Schedule C. Arbitration (Additional Facility) Rules

Article 7 (Nationality of Arbitrators)

(1) The majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.

(2) Arbitrators appointed by the Chairman shall not be nationals of the State party to the dispute or of the State whose national is a party to the dispute.

8. LCIA Rules

Article 22(1) - (under Additional powers of the arbitral tribunal)

Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views:

...

(h) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.

9. (The) L.M.A.A. Terms (2002)

Paragraph 14

In addition to the powers set out in the Act, the tribunal shall have the following specific powers to be exercised in a suitable case so as to avoid unnecessary delay or expense, and so as to provide a fair means for the resolution of the matters falling to be determined:

(a) The tribunal may limit the number of expert witnesses to be called by any party or may direct either that no expert be called on any issue(s) or that no expert evidence shall be called save with the leave of the tribunal.

(b) Where two or more arbitrations appear to raise common issues of fact or law, the tribunals may direct that the two or more arbitrations shall be heard concurrently. Where such an order is made, the tribunals may give such directions as the interests of fairness, economy and expedition require including:

(i) that the documents disclosed by the parties in one arbitration shall be made available to the parties to the other arbitration upon such conditions as the tribunals may determine;

(ii) that the evidence given in one arbitration shall be received and admitted in the other arbitration, subject to all parties being given a reasonable opportunity to comment upon it and subject to such other conditions as the tribunals may determine.

(c) If a party fails to comply with a preemptory order of the tribunal to provide security for costs, then without prejudice to the power granted by section 41(6) of the Act, the tribunal shall have power to stay that party's claim or such part of it as the tribunal thinks fit in its sole discretion.

10. NAI Rules

Article 41.4 (under Third Parties)

The joinder, intervention or joinder for the claim of indemnity may only be permitted by the arbitral tribunal, having heard the parties and the third party, if the third party accedes to the arbitration agreement by an agreement in writing between him and the parties to the arbitration agreement. On the grant of request for joinder, intervention or joinder for the claim of indemnity, the third party becomes a party to the arbitral proceedings.

11. Swiss Rules

Article 4 (Consolidation of arbitral proceedings (joinder), participation of third parties)

1. Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Chambers may decide, after consulting with the parties to all proceedings and the Special Committee, that the new case shall be referred to the arbitral tribunal already constituted for the existing proceedings. The Chambers may proceed likewise where a Notice of Arbitration is submitted between parties that are not identical to the parties in the existing arbitral proceedings. When rendering their decision, the Chambers shall take into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings. Where the Chambers decide to refer the new case to the existing arbitral tribunal, the parties to the new case shall be deemed to have waived their right to designate an arbitrator.

2. Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.

Article 15 paras. (1) and (2) - (under General provisions)

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard.

2. At any stage of the proceedings, the arbitral tribunal may hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. After consulting with the parties, the arbitral tribunal may also decide to conduct the proceedings on the basis of documents and other materials.

Article 21(5) - (under Pleas as to the jurisdiction of the arbitral tribunal)

5. The arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause.

12. UNCITRAL Arbitration Rules

Article 15 (General provisions)

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

Article 20 (Amendments to the claim or defence)

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

13. Zurich Rules**Article 13 (Multi-Party Arbitration)**

If there are several claimants or several respondents, or if the respondent, within the deadline for the answer, files a claim with the Zurich Chamber of Commerce, against a third party based on an arbitration clause valid according to Article 2 subs. 2 an identical three-men Arbitral Tribunal is appointed according to Article 12 subs. 3 for the first and all other arbitrations.

The Arbitral Tribunal may conduct the arbitrations separately, or consolidate them, partly or altogether.

Article 14 (Assignment of further Arbitrations)

A new dispute between parties which already have an arbitration pending under the International Arbitration Rules may be assigned by the President of the Zurich Chamber of Commerce to the existing Arbitral Tribunal.

The Arbitral Tribunal may conduct the arbitrations separately, or consolidate them, partly or altogether.

IV. STANDARD FORMS / CHARTERS / CODES**1. FCEC Standard Form of Subcontract****Clause 18(2)**

If any dispute arises in connection with the main contract and the contractor is of the opinion that such dispute touches or concerns the subcontract works, then provided that an arbitrator has not already been agreed or appointed in pursuance of the preceding sub-clause, the contractor may by notice in writing to the subcontractor require that any such dispute under this subcontract shall be dealt with jointly with the dispute under the main contract in accordance with the provisions of clause 66 thereof. In connection with such joint dispute the subcontractor shall be bound in like manner as the contractor by any decision of the engineer or any award by an arbitrator.

2. Olympic Charter**Article 26 Recognition of the IFs**

In order to develop and promote the Olympic Movement, the IOC may recognise as IFs international non-governmental organisations administering one or several sports at world level and encompassing organisations administering such sports at national level.

The statutes, practice and activities of the IFs within the Olympic Movement must be in conformity with the Olympic Charter, including the adoption and implementation of the World Anti-Doping Code. Subject to the foregoing, each IF maintains its independence and autonomy of its sport.

Article 29 Composition of the NOCs

1. Whatever their composition, NOCs must include:
 - 1.1. all IOC members in their country, if any. Such members have the right to vote in the general assemblies of the NOC. In addition, the IOC members in the country referred to in Rule 16.1.1.1 are ex officio members of the NOC executive body, within which they have the right to vote;
 - 1.2. all national federations affiliated to the IFs governing sports included in the Programme of the Olympic Games or their representatives;
 - 1.3. active athletes or retired athletes having taken part in the Olympic Games; however, the latter must retire from their posts at the latest by the end of the third Olympiad after the last Olympic Games in which they took part.
2. The NOCs may include as members:
 - 2.1. national federations affiliated to IFs recognised by the IOC, the sports of which are not included in the Programme of the Olympic Games;
 - 2.2. multi-sports groups and other sports-oriented organisations or their representatives, as well as nationals of the country liable to reinforce the effectiveness of the NOC or who have rendered distinguished Services to the cause of sport and Olympism.
3. The voting majority of an NOC and of its executive body shall consist of the votes cast by the national federations referred to in paragraph 1.2 above or their representatives. When dealing with questions relating to the Olympic Games, only the votes cast by such federations and by the members of the executive body of the NOC are taken into consideration. Subject to the approval of the IOC Executive Board, an NOC may also include in its voting majority as well as in the votes taken into consideration on questions relating to the Olympic Games, the votes cast by the IOC members in its country referred to in paragraph 1.1 above and by the active or retired athletes in its country referred to in paragraph 1.3 above.
4. Governments or other public authorities shall not designate any members of an NOC. However, an NOC may decide, at its discretion, to elect as members representatives of such authorities.
5. The area of Jurisdiction of an NOC must coincide with the limits of the country in which it is established and has its headquarters.

Article 30 The National Federations

To be recognised by an NOC and accepted as a member of such NOC, a national federation must exercise a specific, real and on-going sports activity, be affiliated to an IF recognised by the IOC and be governed by and comply in all aspects with both the Olympic Charter and the rules of its IF.

Article 59 Disputes - Arbitration

Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sport-Related Arbitration.

3. World Anti-Doping Code

Article 11 (Consequences to Teams)

11.1 *Testing of Team Sports*

Where more than one member of a team in a Team Sport has been notified of an anti-doping rule violation under Article 7 in connection with an Event the ruling body for the Event shall conduct appropriate Target Testing of the team during the Event Period.

11.2 *Consequences for Team Sports*

If more than two members of a team in Team Sport are found to have committed an anti-doping rule violation during an Event Period, the ruling body of the Event shall impose an appropriate sanction on the team (e.g. loss of points, Disqualification from a Competition or Event, or other sanction) in addition to any Consequences imposed upon the individual Athletes committing the anti-doping rule violation.

11.3 *Event Ruling Body May Establish Stricter Consequences for Team Sports*

The ruling body for an Event may elect to establish rules for the Event which impose Consequences for Team Sports stricter than those in Article 11.2 for purposes of the Event.

Article 13 (Appeals)

13.2. *Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions*

13.2.1 *Appeals*

In cases arising from participation in an International Event or in cases involving International-Level-Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court.

...

Article 20 (Additional Roles and Responsibilities of Signatories)

20.1 *Roles and Responsibilities of the International Olympic Committee*

- 20.1.1 To adopt and implement anti-doping policies and rules for the Olympic Games which conform with the Code.
- 20.1.2 To require as a condition of recognition by the International Olympic Committee, that International Federations within the Olympic Movement are in compliance with the Code.
- 20.1.3 To withhold some or all Olympic funding of sport organizations that are not in compliance with the Code.
- 20.1.4 To take appropriate action to discourage noncompliance with the Code as provided in Article 23.5.
- 20.1.5 To authorize and facilitate the Independent Observer Program.

- 20.1.6 To require all Athletes and each Athlete Support Personnel who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel in the Olympic Games to agree to be bound by anti-doping rules in conformity with the Code as a condition of such participation.
- 20.1.7 To vigorously pursue all potential anti-doping rule violations within its Jurisdiction including investigation into whether Athlete Support Personnel or other Persons may have been involved in each case of doping.
- 20.1.8 To accept bids for the Olympic Games only from countries where the government has ratified, accepted, approved or acceded to the UNESCO Convention and the National Olympic Committee, National Paralympic Committee and National Anti-Doping Organization are in compliance with the Code.
- 20.1.9 To promote anti-doping education.
- 20.1.10 To cooperate with relevant national organizations and agencies and other Anti-Doping Organizations.

20.3 Roles and Responsibilities of International Federations

- 20.3.1 To adopt and implement anti-doping policies and rules which conform with the Code.
- 20.3.2 To require as a condition of membership that the policies, rules and programs of National Federations are in compliance with the Code.
- 20.3.3 To require all Athletes and each Athlete Support Personnel who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel in a Competition or activity authorized or organized by the International Federation or one of its member organizations to agree to be bound by anti-doping rules in conformity with the Code as a condition of such participation.
- 20.3.4 To require Athletes who are not regular members of the International Federation or one of its member National Federations to be available for Sample collection and to provide accurate and up-to-date whereabouts information as part of the International Federations Registered Testing Pool consistent with the conditions for eligibility established by the International Federation or, as applicable, the Major Event Organization.
- 20.3.5 To require each of its National Federations to establish rules requiring all Athletes and each Athlete Support Personnel who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel in a Competition or activity authorized or organized by a National Federation or one of its member organizations to agree to be bound by anti-doping rules in conformity with the Code as a condition of such participation.
- 20.3.6 To take appropriate action to discourage noncompliance with the Code as provided in Article 23.5.
- 20.3.7 To authorize and facilitate the Independent Observer Program at International Events.
- 20.3.8 To withhold some or all funding to its member National Federations that are not in compliance with the Code.
- 20.3.9 To vigorously pursue all potential anti-doping rule violations within its Jurisdiction including investigation into whether Athlete Support Personnel or other Persons may have been involved in each case of doping.
- 20.3.10 After 1 January 2010, to do everything possible to award World Championships only to countries where the government has ratified, accepted, approved or acceded to the UNESCO Convention and the National Olympic Committee, National Paralympic Committee and National Anti-Doping Organization are in compliance with the Code.

- 20.3.11 To promote anti-doping education.
- 20.3.12 To cooperate with relevant national organizations and agencies and other Anti-Doping Organizations.

20.6 *Roles and Responsibilities of Major Event Organizations*

- 20.6.1 To adopt and implement anti-doping policies and rules for their Events which conform with the Code.
- 20.6.2 To take appropriate action to discourage noncompliance with the Code as provided in Article 23.5.
- 20.6.3 To authorize and facilitate the Independent Observer Program.
- 20.6.4 To require all Athletes and each Athlete Support Personnel who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel in the Event to agree to be bound by anti-doping rules in conformity with the Code as a condition of such participation.
- 20.6.5 To vigorously pursue all potential anti-doping rule violations within its Jurisdiction including investigation into whether Athlete Support Personnel or other Persons may have been involved in each case of doping.
- 20.6.6 After 1 January 2010, to do everything possible to award Events only to countries where the government has ratified, accepted, approved or acceded to the UNESCO Convention and the National Olympic Committee, National Paralympic Committee and National Anti-Doping Organization are in compliance with the Code.
- 20.6.7 To promote anti-doping education.
- 20.6.8 To cooperate with relevant national organizations and agencies and other Anti-Doping Organizations.

Article 22 (Involvement of Governments)

Each government's commitment to the Code will be evidenced by its signing the Copenhagen Declaration on Anti-Doping in Sport of March 3, 2003, and by ratifying, accepting, approving or acceding to the UNESCO Convention. The following Articles set forth the expectations of the Signatories.

- 22.1 Each government will take all actions and measures necessary to comply with the UNESCO Convention.
- 22.2 Each government will encourage all of its public Services or agencies to share information with Anti-Doping Organizations which would be useful in the fight against doping and where to do so would not otherwise be legally prohibited.
- 22.3 Each government will respect arbitration as the preferred means of resolving doping-related disputes.
- 22.4 All other governmental involvement with anti-doping will be brought into harmony with the Code.
- 22.5 Governments should meet the expectations of this Article by January 1, 2010.
- 22.6 Failure by a government to ratify, accept, approve or accede to the UNESCO Convention by January 1, 2010, or to comply with the UNESCO Convention thereafter may result in ineligibility to bid for Events as provided in Articles 20.1.8 (International Olympic Committee),

20.3.10 (International Federation), and 20.6.6 (Major Event Organizations) and may result in additional consequences, e.g., forfeiture of offices and positions within WADA; ineligibility or non-admission of any candidature to hold any International Event in a country, cancellation of International Events; symbolic consequences and other consequences pursuant to the Olympic Charter.

Article 24 (under Interpretation of the Code)

- 24.3 The Code shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or governments.

4. World Anti-Doping Code (2003)

Preamble to Article 22 (under Involvement of Governments)

Each government's commitment to the Code will be evidenced by its signing a Declaration on or before the first day of the Athens Olympic Games to be followed by a process leading to a convention or other obligation to be implemented as appropriate to the constitutional and administrative contexts of each government on or before the first day of the Turin Winter Olympic Games.

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