

ISSN: 2146-9717

**ULUSLARARASI TİCARET VE
TAHKİM HUKUKU
DERGİSİ**
*JOURNAL
OF INTERNATIONAL TRADE AND
ARBITRATION LAW*

Yıl 2012 Cilt 1 Sayı 2
Year 2012 Volume 1 Issue 2

Bu dergi yılda iki sayı olarak yayımlanan hakemli bir dergidir.
This journal is a peer-reviewed journal published two times in a year.



CONSENT TO ARBITRATE: A PREREQUISITE TO ARBITRATION



Av./ Atty. Frank SPOORENBERG*
Av./ Atty. Isabelle FELLRATH**



Özet

Tahkimin kalbini, tarafların rızası oluşturmaktadır: Taraflar, bağlayıcı bir kararlar aralarındaki hukuki uyuşmazlığın çözümlenmesi için üçüncü şahsı görevlendirmektedirler. Çok taraflı muameleler, uyuşmazlıklardaki artışlarla ve karışık sözleşmesel ilişkiler sonucunda tahkime tabi kılınan uyuşmazlıkların ne kadar karmaşık hale geldiğine bakılmaksızın özellikle spor ve şirketlerle ilgili tahkim klotları hangi standartta olursa olsun, rıza şartı kesinlikle uygulanabilir olmalı ve yokluğu tereddütsüz olarak yaptırıma tabi kılınmalıdır. Çalışmamızda, özellikle de İsviçre hukuku ve uygulaması açısından tahkime rıza şekil, esas ve kapsam yönleriyle incelenecektir.

Abstract

Consent lies at the heart of arbitration: it lies exclusively with parties to entrust a third party with the task of resolving their legal dispute in a binding decision. No matter how complex the disputes referred to arbitration have become, with a growing tendency to multiple parties transactions and disputes, and composite contractual schemes, and no

* Mr Frank Spoorenberg is a practicing attorney acting both as counsel and arbitrator in numerous proceeding (ICC, Swiss Rules, UNCITRAL, ad hoc); he co-heads the arbitration and litigation group at Tavernier Tschanz Attorneys-at-law, in Geneva. He holds an LL.M from the College of Europe (1993).

** Dr Isabelle Fellrath is a practicing attorney; she is part of the arbitration and litigation group at Tavernier Tschanz Attorneys-at-law, in Geneva, and a lecturer (energy law) at the Law Faculty of the University of Lausanne. She holds an LL.M. (1994) and a Ph.D. in law (1998) from the University of Nottingham. She is a Member from the Chartered Institute for Arbitrators (MCiarb.).

matter how standards arbitration clauses tend to be, more particularly in sport and corporate structures, the requirement of consent must be applied strictly, and the lack of it resolutely sanctioned. This contribution examines the consent requirement from the perspective of its form and content and scope mainly from the perspective of Swiss international arbitration law and practice.

Anahtar Kelimeler

Tahkime rıza, tahkime rızanın kapsamı, New York Konvansiyonu, tahkim anlaşmasının şekli şartları

Keywords

Consent to arbitration, scope of consent, New York Convention, formal requirements for arbitration agreement

CONTENTS

- I. Introduction
- II. Content and Form of the Primary Consent Requirement
- III. Concluding Remarks

I. Introduction

Consent lies at the root of arbitration; there can be no arbitration without consent. Arbitration rules are generally nonspecific on the requirement of consent to arbitrate and the requisite form and content thereof. Most of them propose model arbitration clauses and address the issue of the parties' consent to arbitrate from the limited perspective of their consent to a specific version of the applicable arbitration rules¹. This issue is more appropriately dealt with in international conventions (i.e. essentially the 1958 New York Convention on the Recognition and Enforcement of

¹ See for instance the 2012 ICC Arbitration Rules, Art. 6(1); 2004 Swiss Rules, Art. 1(1) (the Swiss Rules are currently being revised with a new version scheduled to apply in the course of 2012; no major modification of these provisions are being envisaged); UNCITRAL Arbitration Rules as revised in 2010, Art. 1(2), see however Art. 1(1), more specific on the parties' consent, *infra* B.

Foreign Arbitral Awards Convention²) and by the relevant domestic law: (mostly the law of the main contract, the law of the place of arbitration and as far as practically possible, the law(s) of the enforcement place(s))³ Underlying issues, such as the parties' existence and legal capacity to give such consent are reserved.

Thus, this short note examines the consent requirement from the perspective of its form and content (*infra* B), and scope (*infra* C), mainly from the perspective of Swiss international arbitration law and practice.

II. Content and Form of the Primary Consent Requirement

The primary consent to arbitrate is commonly expressed in an arbitration clause which is connected to a specific contractual relationship. It can also be given for an existing dispute, in a submission agreement. It is however, never presumed.

As to its content, the primary consent to arbitrate, whether given in an arbitration clause or in a submission agreement, must imperatively reflect the parties' converging agreement on all the objectively essential elements (*essentialia negotii*) of arbitration⁴, namely:

- the clear intent to submit their legal dispute to an arbitral tribunal for a binding determination;

² United Nations, Treaty Series, vol. 330, p. 3; as of January 5, 2011, the Convention has 146 contracting parties; see <http://treaties.un.org> (chap. XXII doc. 1). Art. I thereof sets forth the principle of recognition and enforcement of arbitration agreements satisfying minimum requirements. The 1923 Geneva Protocol on Arbitration Clauses, ceased to have effect between Contracting States on their becoming bound and to the extent that they become bound, by the New York Convention (New York Convention Art. VII(2)). Hence in practice, the Geneva Protocol would be applicable only in relation to Iraq, the only contracting State thereunder having not ratified the New York Convention.

³ The law of the place where a judicial proceeding is filed notwithstanding the arbitration clause could also be of relevance, assuming jurisdiction be given, to determine whether a disputed agreement to arbitrate is null and void, inoperative or incapable of being performed; New York Convention Art. II(3).

⁴ The Swiss Supreme Court recently recalled along that line that the consent to arbitrate must at least express « [...] *die Absicht der Parteien, ihren Rechtsstreit einem Schiedsgericht zur verbindlichen Entscheidung zu unterbreiten, und andererseits die Bestimmung des Streitgegenstands, der den Schiedsrichtern unterbreitet werden soll.*»; decision in the matter 4A_246/2011, November 7, 2011, ground 2.1.

- the identification or reasonable possibility to identify the dispute (which must be arbitrable) to be submitted to the arbitral tribunal⁵;
- the identification or reasonable possibility to identify the parties giving such consent.

Conversely, no consent is required on other non essential elements of arbitration, such as:

- type of arbitration;
- the place of arbitration;
- the language of arbitration;
- the number of arbitrator(s) and composition of the arbitration tribunal;
- the applicable procedural rules.

The lack of parties' converging agreement on any of these secondary issues would not affect the validity of the parties' consent to arbitrate (although it might, in certain circumstances, cause difficulties –even impossibility– to implement it), unless of course it can be demonstrated that the parties' agreement on any such issue was, to either or both parties, a necessary prerequisite to their consent to arbitrate⁶. In practice, such issues are resolved by the relevant arbitration law and arbitration rules and, ultimately, the state court in ancillary proceedings, or the arbitration tribunal upon its appointment.

⁵ The Arbitration Rules as revised in 2010, Art. 1(1) requires the parties' agreement on «*the disputes between them in respect of a defined legal relationship, whether contractual or not*»; along the same wording, the 1985/2006 UNCITRAL Model Law, Art. 7 requests the parties' agreement to submit to arbitration «*[...] all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*». The New York Convention Art. II(1) refers to the parties' undertaking 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*». The 1923 Geneva Protocol on Arbitration Clauses, Art. 1(1) refers more generally to the parties' agreement «*[...] whether relating to existing or future differences between parties [...] by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration [...]*».

⁶ *Loc.cit. supra* n. 4.

Furthermore, it is also usually requested that the parties' intent to waive any judicial challenge against the arbitration award be also expressed unambiguously, in the arbitration clause, the submission agreement, or any subsequent agreement⁷. The parties' failure to express such intent would only affect the validity of the waiver itself, and not the validity of the parties' consent to arbitrate.

As to its form, the consent to arbitrate between the original parties must imperatively be given in writing, in a text or exchange of texts, or must result from a text⁸. In other words and as a rule, the arbitration clause will only be binding on the parties whose consent, whether given directly or through a duly authorised representative, is proven in a text⁹. The written requirement is purported to ensure «*[t]hat a party is aware that he is agreeing to arbitration.*»¹⁰. As a matter of principle, the standard arbitration clauses in general terms of conditions which are integral part of the main agreement meet the minimum written requirement, and so are arbitration clauses inserted in written statutory provisions and regulations of a given organization¹¹, subject of course to the parties expressing the consent thereto hence being knowledgeable of such clause. In the particular context of sport arbitration, it is assumed that athletes are knowledgeable of the federation's regulations and give their consent to the standard arbitration clause included therein when registering for or applying for an authorization to take part in a given competition¹². Such knowledge and consent would, however, be limited to a given event or competition and would not be

⁷ For a strict interpretation of this requirement under Swiss law, see Supreme Court's decisions in the matter 4A_486/2010, March 21, 2011, ground 4 and 4A_514/2010, March 1, 2011, ground 4, and references.

⁸ See for instance in Swiss International Arbitration Law, Private International Law Act (PILA) Art. 178; ATF 129 III 727 ground 5.3.1. See further Tschanz, in Bucher (ed.), *Commentaire Romand : LDIP et Convention de Lugano*, 2011, PILA Art. 178 n° 24 et seq.

⁹ See e.g. 4C.40/2003, May 19, 2003, ground 4.1 («*[...] die sich vertraglich auf ein Schiedsverfahren geeinigt haben, sei es direkt oder mittelbar durch ihre Vertreter.*»).

¹⁰ Van den Berg, *The New York Arbitration Convention of 1958*, 1981, p. 171.

¹¹ See e.g. 4A_460/2008, January 9, 2009, ground 6.2; 4P.253/2003, March 25, 2004, ground 5.4, and references.

¹² See e.g. 4A_548/2009, January 20, 2010, ground 4.1 ; 4P.230/2000, February 7, 2001, ground 2a.

considered as a blanket consent to arbitrate all and any future disputes arising with the federation¹³.

Signature of the text expressing the original consent to arbitrate is not required; however, it would significantly undermine any subsequent attempt to refute consent. On that particular issue, the New York Convention might sound more restrictive than most national laws, stipulating that «[t]he 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»¹⁴. However, the UNCITRAL issued a recommendation in 2006, advising that the above referred provision does not provide a self-sufficient and exhaustive definition of the in-writing requirement and should not be considered as providing for an exhaustive list of ways to comply with the requirement of the written form¹⁵. The prevailing view nowadays tends to be that the New York Convention Art. II(2) should be construed in line with more recent instruments reflecting the evolution of commercial practice and containing no reference to signature, such as the 1985 UNCITRAL Model law 1985/2006 UNCITRAL Model Law on International Commercial Arbitration Art. 7(4)¹⁶. The same discussion was held in the context of the recent revision of the UNCITRAL Rules, and it was considered opportune to delete the in-writing requirement and to leave it to the applicable national laws to determine the required form of arbitration agreement¹⁷.

¹³ See e.g. 4A_358/2009, November 6, 2009, ground 3.2 and numerous references.

¹⁴ Art. II(2); for a restrictive reading at the time: Van den Berg, *supra* n. 10, p. 192 *et seq.* The author advocated a more open view to modern technologies in a subsequent contribution: «[...] it is submitted that an arbitration agreement concluded by E-mail can be brought under Art. II(2) provided that there is are signatures that are electronically reliable or it is contained in an exchange of E-mail (or other form of electronic contracting) that is sufficiently recorded or can be proven to have existed in writing by other means. »; XXVIII YBCA (2003) 588.

¹⁵ GAOR, 61th Session, Suppl. No. 17 (A/61/17, Annex II).

¹⁶ Schramm, Geisinger, Pinsolle, in Kronke, Nacimiento, Otto (eds), *Recognition and enforcement of foreign awards, a global commentary on the New York Convention*, 2010, Art. II, p. 75-79; Laudau, Moollan, “Article II and the Requirement of Form”, in Gaillard, Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards, The New York Convention in Practice*, 2008, Chap. 7, p. 247; *contra*, Otto, in Kronke, Nacimiento, Otto (eds), *op.cit.*, Art. IV p. 161 («[...] a signature under the letter accepting an offer [to arbitrate] is vital (except in case of a telex)»).

¹⁷ A/CN.9/619 par. 28.

Along that line, it tends to be considered, albeit admittedly not in all jurisdictions¹⁸, that the consent to arbitrate given through **electronic means** complies with the requirement of the written form, as would, arguably, most other **modern telecommunication technologies**¹⁹, always subject, of course, to the availability of written records of the parties' primary consent to arbitrate²⁰ and subject to the particular circumstances of the case. This is, in particular, the view that would appear to have been taken in the 2005

¹⁸ Whilst arbitration tribunals tend to acknowledge the validity of arbitration clauses concluded through modern communication means, certain jurisdictions still request, for award recognition purposes, the original copy of the arbitration agreement following a strict reading of the New York Convention Art. IV(1)(b) hence would not admit as "an original" or "duly certified" copy of the arbitration clause an email or sms print out, regardless of the arbitral tribunal's finding on that matter; see e.g. Otto *op.cit. supra* n. 16, p. 162, referring to the decision of Halogaland Court of Appeal (Sweden), August 16, 1999, published Stockholm Arbitration Report (1999, no. 2) 12, 6, with note G. Nerdrum, excerpts in XXVII YBCA (2002) 519: the arbitral tribunal had acknowledged its jurisdiction based on a "draft copy" of a charterparty, unsigned, and eleven E-mail transcripts that had been exchanged between the brokers. Recognition of the final award was denied: «*In this case there is no express arbitral clause signed by the two parties. The Court of Appeal expresses doubt regarding the issue as to whether the existing E-mail transcripts can be held to fall within the definition in Art. II(2), but under no circumstances can it be asserted that these transcripts contain an agreed arbitration clause. The contents of the E-mails appear obscure and incomplete and reflect just fragments of an agreement. There is no written power of attorney from the presumed principals either. The basic requirements of legal protection set up by the Convention Art. II in conjunction with Art. IV(1)(b), for recognition and enforcement are hereby not satisfied.*».

¹⁹ For an enlightening analysis of consent to arbitrate given via an internet platform and the requirement of an hyperlink access thereto, see the famous Dell Computer case, Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34 (CanLII) p. 5 (13 July 2007).

²⁰ Schramm, Geisinger, Pinsolle, *loc.cit. supra* n. 16; more sceptical from the perspective of Art. IV(1)(b), Otto *op.cit. supra* n. 16, p. 162. For an express endorsement of modern technologies as a means to express consent, see for instance 2012 CIETAC Arbitration Rules, Art. 5.3 «*[...] An arbitration agreement is in writing if it is contained in the tangible form of a document such as a contract, letter, telegram, telex, facsimile, EDI, or Email. [...]*», on which see Chang, Cao, 'Towards a higher degree of party autonomy and transparency: the CIETAC introduces its 2005 New Rules', 8/4 Int'l Arb. Law Rev. (2005) 117, at 118: «*[...] The question is whether this list is exhaustive. A reasonable analysis would lead to a negative answer, as the group may be enlarged with the advancement of technology.*»

Convention on Choice of Court Agreements, which requests that exclusive choice of court agreement, traditionally subject to more stringent requirement than arbitration clause, be concluded or documented «[...] i) *in writing; or) by any other means of communication which renders information accessible so as to be usable for subsequent reference*»²¹. Such tendency would also reflect by en large the compromise reached in the 2005 Convention on the Use of Electronic Communications in International Contracts, in particular Art. 9 and 10²²

The question may arise whether other persons than the original parties to the arbitration agreement may rely on it. In Switzerland, such an extension would require a degree of intrusion by the third party into the original contractual relationship covered by the arbitration clause, either alongside or instead of the original party, whether formally (e.g., as the result of taking over of a debt²³ or a contract²⁴, performance guarantee²⁵, or a third party beneficiary contract subject to the third party's consent²⁶), or informally based on good-faith considerations (application of the principle of piercing of the corporate veil (*Durchgriff*)²⁷, continuous involvement in the execution and performance

²¹ Art. 3(c); as of January 5, 2012, this Convention is not in force failing sufficient ratifications.

²² As of January 5, 2012, this Convention is not in force failing sufficient ratifications; see UNCITRAL, United Nations Convention on the Use of Electronic Communications in International Contracts, New York 2007, p. 5.

²³ Taking over a debt or contract would usually imply the transfer of all accessory rights and obligations, including an arbitration clause contained in the original contract, except where the parties specified to the contrary. This would apply in the case of substitution of debtors and addition of a debtor alongside the original debtor; e.g. 4P 126/2001, December 18, 2001, ground 2e/bb. However, unless expressly agreed otherwise, no such transfer is admitted in the other forms of security or warranty where the secured debt is not taken over by the guarantor and where the obligations of the latter remain distinct from those of the main debtor. This is the case, for example, for joint and several guarantees and for independent guarantees; e.g. 4A_128/2008, August 19, 2008, ground 3.

²⁴ See e.g. ATF 128 III 50, ground 2b/aa.

²⁵ See e.g. 4A_128/2008, ground 3.

²⁶ See e.g. 4A_44/2011, April 19, 2011, ground 2.

²⁷ See e.g. 4A_160/2009, August 25, 2009, ground 4 ; 4P198/2005 of October 31, 2005, ground 2.1.

of the contract²⁸, failure to raise an objection to the arbitral jurisdiction (*vorbehaltlose Einlassung*)²⁹.

The question may also arise as to which contract(s) an arbitration agreement relates to. In particular, the question may be whether an arbitration agreement included in a written contract may extend to a connected contract. This question must be resolved by way of interpretation. In this respect, the arbitrators must ascertain the parties' effective intent in relation to such an extension³⁰. If the parties' effective intent cannot be established, then the arbitrators will have to establish what would have been the understanding of a person placed in the same circumstances as the parties³¹. For instance, in a specific case, an extension was denied in a case of two contracts, although closely connected, with two different dispute resolution clauses³².

Neither of these issues is resolved with some sort of «*presumption in favor of the jurisdiction of arbitrators*»³³.

III. Concluding Remarks

Consent lies at the heart of arbitration: it lies exclusively with parties to entrust a third party with the task of resolving their legal dispute in a binding decision. No matter how complex the disputes referred to arbitration have become, with a growing tendency to multiple parties transactions and disputes, and composite contractual schemes, and no matter how standards arbitration clauses tend to be, more particularly in sport and corporate structures, the requirement of consent must be applied strictly, and the lack of it resolutely sanctioned.

Swiss international arbitration law, which is particularly favorable to arbitration, endeavors to balance a strict requirement of written initial consent to arbitrate with a more liberal extension of the scope of such initial consent.

²⁸ See *e.g.* 4P.115/2003, October 16 2003, ground 5.

²⁹ See *e.g.* ATF 120 II 155 ground 3b/bb.

³⁰ See *e.g.* 4A_103/2011, September 20, 2011, ground 3.1.1.

³¹ See *e.g.* 4A_452/2007, February 29, 2008, ground 2.3.

³² See *e.g.* 4A_452/2007, ground 2; 4A_103/2011, ground 3.2.1.

³³ See *e.g.* 4A_103/2011, ground. 3.2.1.

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