CHAPTER 3

THE ARBITRATION AGREEMENT

3.1 DEFINITION AND ESSENTIAL ELEMENTS

Bibliography:

General Works: de Boisséson, pp.15–26 paras 1–21, pp.475–477 and pp.480–482 paras 562–574; Craig, Park and Paulsson, pp.37–42 § 4.01–05 and pp.107–166 § 6.01–9.08; Fouchard, Gaillard and Goldman, paras 385–387; Huys and Keutgen, pp.41–42 para.34, pp.81–82 paras 82–83, pp.113–134 paras 129–146 and pp.451–455 paras 644–649; Jolidon, pp.107–130 paras 1–5 *ad* Art.4 CIA; KSP-Ehrat, p.1437 paras 2–4 and pp.1449–1455 paras 28–48 *ad* Art.178; Lalive, Poudret and Reymond, pp.45–50 paras 1–3 *ad* Art.4 CIA and pp.314–315 paras 1–3 *ad* Art.178 PILS; Merkin, pp.30–34 *ad* Section 6; Poudret, FJS 464, p.7–8 para.4; Redfern and Hunter, pp.131–134 paras 3–01 to 06 and pp.152–168 paras 3–37 to 72; Rutherford and Sims, pp.53–54 paras 6.1–6.4; Schlosser, pp.193–207 paras 257–284; Schwab and Walter, pp.19–28 Ch.3 paras 1–24; Tschanz, *La convention d'arbitrage, in: Le nouveau droit suisse de l'arbitrage international, op. cit. ad* Ch.1.4.1.1.8, pp.749–759.

See also the *Handbook* for all the countries considered, Ch.II.1 and for the UNCITRAL Model Law, *ad* Art.7.

Specific Studies: P. Bernardini, The Arbitration Clause of an International Contract, Jnl. Int. Arb. 1992/2 pp.45–60 (cited: Arbitration Clauses); *id.*, Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause, *in:* ICCA Congress Series para.9, 1999, pp.197–203 (cited: ICCA); Pt.-A. Gélinas, Arbitration Clauses: Achieving Effectiveness, *in:* ICCA Congress Series para.9, 1999, pp.47–66; W. Wenger, *Schiedsvereinbarung und schiedsgerichtliche Zuständigkeit, in: Schiedsgerichtsbarkeit*, pp.223–247, especially 229–237; R. Wyler, *La convention d'arbitrage en droit du sport,* RDS 1997, pp.45–62; M. Pedrazzini, *Essentialia e accidentalia della clausola compromissoria, in: Travaux Suisses*, pp.71–83.

3.1.1 Definition

149 As mentioned in Ch.1.1, the majority of statutes and international conventions considered here give a definition of the arbitration agreement, even though they do not define arbitration as such. The arbitration agreement is the foundation on which rest both the arbitrators' jurisdiction and the validity of their award. However, this does not imply that the will expressed by such agreement is sufficient to govern arbitral proceedings without reference to a legal system.

These definitions overlap to a large extent, which limits the interest of a comparison.

150 To begin with, we will examine the definition given by Art.7 of the UNCITRAL Model Law, which served as a model to s.6 of the Arbitration Act and to ZPO, § 1029, because this provision is one of the most comprehensive. It

defines the arbitration agreement as "an agreement by the parties 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. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement". The first element, which is to be found in all the definitions (NYC, Art.II(1); ZPO, § 1029(1); Arbitration Act, s.6(1); NCPC, Art.1442; ICCP, Art.808; WBR, Art.1020(1) and (2); SU, Art.1), is the parties' undertaking to submit their disputes to arbitration, i.e. to the binding decision of one or more arbitrators. While this also results implicitly from Art.1676(1) of the CJB, it is absent in NCPC, Arts 1493 and PILS, 178, which do not strictly speaking define the arbitration agreement. However, there is no doubt that this element is inherent to the very definition of arbitration.

The definition makes it clear that the disputes submitted to the arbitrators must result from a defined legal relationship, whether contractual or not. The parties cannot, without waiving their freedom, undertake to submit to arbitration any dispute which might arise between them in the future. This is expressly mentioned in ZPO, § 1029, but not in Arbitration Act, s.6. It is implicitly contained in Arts 1442 and 1448 of the NCPC for domestic arbitration, and in ICCP, Art.808bis, as well as in WBR, Art.1020(1) and SU, 1(2), although the last two mentioned statutes extend the ambit of arbitration, as we have seen above, to findings of fact or the filling of gaps and the supplementing of a contract. Article II(1) of the New York Convention similarly envisages "all or any differences which have arisen or which may arise between them [i.e. the parties] in respect of a defined legal relationship, whether contractual or not . . . ", while Art.I(3) allows the Contracting States to limit the application of the Convention to legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration.

Thirdly, the UNCITRAL Model Law, like the New York Convention, ZPO, § 1029(1), Arbitration Act, s.6, CJB, Art.1676(1), and WBR, Art.1020, applies to "disputes which have arisen or which may arise", that is to say present or future. Art.178(3) *in fine* PILS limits itself to confirming the validity of an arbitration agreement concerning a "dispute which has not yet arisen", that is to say an arbitration clause, while Arts 1447 and 1442 of the NCPC, for domestic arbitration, as well as Arts 807 and 808 of the ICCP, distinguish between a submission agreement or "*compromis*" (for a dispute which has already arisen) and an arbitration clause or "*clause compromissoire*" (for a dispute which has not yet arisen). We shall see however that this traditional distinction which originates from French law is no longer of importance in international arbitration. We will only note here that Art.I(2)(a) of the 1961 European Convention replaced such distinction with the one between an "arbitral clause in a contract" and an "arbitration agreement" ("*compromis*"), which can have the meaning of an arbitration agreement concluded by separate act, and not only concluded after the dispute has arisen. This new terminology probably explains the alternative given by the aforementioned Art.7 of the UNCITRAL Model Law between "an arbitration clause in a contract" and a "separate agreement", a distinction which

ZPO, § 1029(2) also adopts (*Schiedsklausel* and *Schiedsabrede*), but not s.6 of the Arbitration Act. To avoid terminological confusion, we will respect the traditional meaning of submission agreement ("*compromis*") and arbitration clause ("*clause compromissoire*"), and we will use the generic term of arbitration agreement, which can refer to both present and future disputes.

151 We also point out, following Redfern and Hunter,[1] that even if the submission agreement ("*compromis*") and the arbitration clause ("*clause compromissoire*") follow the same legal regime under the aforementioned laws, the problems faced when drafting them are different. In the first case, it is important to precisely determine the existing dispute that is to be submitted to arbitration. In the second case, it is important to foresee all the hypotheses which might arise in the future; this might result in a broad but concise clause. Furthermore, while the parties generally agree on the choice of the arbitrators in submission agreements, they usually do not in an arbitration clause; at the most they will provide for a mechanism to appoint them when the time comes. Finally, other clarifications might be added if the dispute to be settled is already known.[2]

We have seen above that French domestic law still distinguishes between the submission agreement ("*compromis*") and the arbitration clause ("*clause arbitrale*") although both are arbitration agreements. This distinction is the result of a historical evolution dating back to the Code of Civil Procedure of 1806, Art.1006 which required that the submission agreement mention both the subject matter of the dispute and the names of the arbitrators, failing which it was null and void. For some time the *Cour de cassation* inferred from these requirements that an arbitration clause was invalid. While the arbitration clause has been admissible in commercial matters since 1925, Art.2061 of the Civil Code, in the version that entered into force in 1972 and was applied until being amended in 2001, provided that such clauses were null and void in non-commercial matters unless the law stated otherwise. The rule was thus nullity in principle, but admissible in commercial matters, particularly in the cases listed in Art.631 of the Commercial Code.[3] Since they were bound to respect these statutory provisions, the authors of the decree of May 14, 1980[4] have henceforth distinguished between these two types of arbitration agreement in NCPC, Arts 1442 and 1447 respectively. However, we have seen that some 75 years ago the courts discarded the prohibition resulting from CPC, Art.1006 in international arbitration.[5] This liberal conception was implicitly endorsed by the decree of May 12, 1981, since Art.1493 of the NCPC, which refers to international arbitration, no longer distinguishes between the submission agreement and the arbitration clause. Therefore, this distinction no longer plays any role in international arbitration.

[1] Redfern and Hunter, p.139 para.3–06 and pp.161–162 paras 3–57 to 59.
[2] de Boisséson, p.15 para.2.
[3] de Boisséson, pp.21–26 para.4–21; Schlosser, p.198 paras 265 and 266.
[4] Rev. arb. 1980, p.725 ss., Arts 2 and 7.
[5] Ch.1.3.1, para.23, particularly the judgments *Mardelé* of 1930 and *Dambricourt* of 1931, cited *ibidem* in fn 117.

For the reasons indicated above,[6] we shall also not distinguish between 152
contractual arbitration clauses, testamentary arbitration and clauses contained in articles of association. Here we only consider contractual clauses, which does not mean that the subject matter of the dispute is necessarily a contractual relation (but see Art.808a of the ICCP 2006).

3.1.2 The essential elements of the arbitration agreement

Since arbitration clauses are sometimes drafted in haste, at a point when the 153
contract is almost complete (midnight clause), or by persons with little experience of international arbitration, many commentators have provided lists of provisions to include.[7] Commentators of ICC arbitration distinguish between indispensable elements, which primarily include in their view, the submission to the rules of this institution, elements which are recommended and finally those which might prove useful in a specific case.[8] We shall refrain from adding a list of our own for a number of reasons. First of all, our aim is not to provide recipes to arbitration practitioners, but to point out similarities and differences between the norms governing this institution. Secondly, we feel that an essential distinction must be made between institutional and *ad hoc* arbitration, since an institution, once identified, can remedy most gaps in an arbitration agreement.[9] Finally, we consider that the arbitration agreement should be tailored to take into account the particular circumstances of the case, so that it would be both vain and dangerous to establish abstract lists.

Furthermore, several of the elements which commentators generally propose to insert in the arbitration agreement should, in our opinion, belong to either the terms of reference or a preparatory order, drawn up in full awareness of the facts by the arbitrators. It is not helpful to agree on provisions which in any event will have to be reviewed, modified or even abandoned. We already note here that non-essential clauses, such as those concerning the procedure, are not subject to the formal requirements of the arbitration agreement.[10]

Consequently, we shall stick to the essentials, that is the elements which must be contained in an arbitration agreement in order to ensure that it validly binds the parties. In doing so, we shall adopt the definition given above. We shall see further on, by distinguishing between form and content, which law governs the question of validity.

First, the arbitration agreement must, like any contract, be concluded between 154
two or more parties who are determined or determinable. This primary requirement causes problems where there are more than two parties (multi-party

[6] See Ch.1.1.1, paras 4 and 6.
[7] Notably Bernardini, *op. cit.* (Arbitration Clauses); Gelinas, *op. cit.*, pp.53–65; R.H. Kreindler, Practical Issues in Drafting International Arbitration Clauses, Arbitration 1997, pp.47–55; Pedrazzini, *op. cit.*; Ch. Spragge and N. Aitken, Drafting the Arbitration Agreement, [1998] Int. A.L.R., 145–149.
[8] Craig, Park and Paulsson, pp.85–135, Chs 6–8.
[9] See Redfern and Hunter, pp.157–158 para.3–48 and p.165 para.3–65.
[10] Except under English law (s.5(1) of the Arbitration Act 1996).

arbitration) or where the arbitration agreement is held to include persons or companies who have not signed it (extension). Furthermore, it is necessary that such persons have capacity to arbitrate and, if they act through an agent, that the latter be duly empowered. Given the complexity of these problems, we shall deal with them in a special chapter devoted to the parties (Ch.3.4). For the moment, we merely emphasise that the authors of an arbitration agreement must ensure that the parties thereto are clearly identified and validly represented.

155 Secondly, the arbitration agreement must clearly express the parties' intention to submit their dispute to arbitration, i.e. to the binding decision of one or more arbitrators appointed according to their agreement.[10a] In particular, all ambiguity between arbitration in the strict sense, mediation, expert determination, and other modes of dispute resolution outlined above in Ch.1.2 must be avoided.[10b] 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.

156 Thirdly, the arbitration agreement must specify the object of the dispute submitted to the arbitrators. Where the dispute has already arisen, it should be precisely described. Experience in drafting terms of reference shows that the parties often have difficulties in defining their differences; each tries to present them from his own point of view. By contrast, where the arbitration agreement concerns future disputes, these should be described as broadly as possible; here authors generally recommend to extend the arbitration to all disputes in connection with a determined legal relationship. The latter can be contractual or non-contractual, as several laws expressly state. The UNCITRAL Model Law merely envisages commercial arbitration but in the broadest sense, as seen above.[11] Furthermore, the object of the dispute must be arbitrable, a question which we will deal with in Ch.3.7 below.

While the international conventions and the afore-mentioned laws speak of disputes or differences (the latter term being used in Arts I and II of the New York Convention), Bruno Oppetit has cast doubt, in a work mentioned above,[12] on whether arbitration (like court proceedings) needs to be contentious. He points out that neither arbitrators nor courts are necessarily called upon to decide

[10a] The recent case law of the Swiss Federal Tribunal is very favourable to the validity of the arbitration agreement ATF 130 III 66, JdT 2004 I 83; see also ASA Bul. 2005, 128, 135–137, holding that the clause "Any dispute relating to this Agreement or its termination *may* be referred by either party to FIFA whose decision shall be final and binding on both parties" (emphasis added) is a valid arbitration agreement to submit the disputes to the arbitral procedures defined in the statutes and internal rules of FIFA (and not to FIFA itself). In the present case, the Swiss Federal Tribunal however upheld the decision of the CAS to decline its jurisdiction because the reference to CAS was not yet properly implemented in the statutes of FIFA when the arbitration was inititated.

[10b] In *Flight Training International Inc. v IFTE* [2004] 2 All E.R. (Comm) 568, a "*Settlement of Disputes*" clause referring to an institution (ACAS London, providing conciliation, mediation and arbitration services) mentioned that "*legal fees and costs shall be paid by either party which does not prevail at mediation.*" The court held that this was no valid arbitration agreement; see on this case, Ch. Debattista, Arb. Int. 2005/2, pp.236–238.

[11] Ch.1.1.5, para.10.

[12] Arbitrage institutionnel et arbitrage contractuel, Rev. arb. 1977, pp.315–326.

disputes in the strict sense, but also to regulate relationships between the parties, notably by adapting a contract or filling gaps therein. Such cases cannot in our opinion be qualified as voluntary jurisdiction ("*juridiction gracieuse*"), but are contentious, in that they determine a legal relationship with *res iudicata* effect. Besides, it is difficult to imagine parties invoking arbitration unless they have a disagreement, even if this is only in regard to the interpretation of a contractual clause or to the filling of a gap.

In this respect, English law deserves mention for two reasons. While under the former law the courts limited a stay of court proceedings or assistance in appointing arbitrators to cases where there was a dispute between the parties,[13] this prerequisite was not included in s.9 of the 1996 Arbitration Act.[14] Secondly, the definition of arbitration agreement in s.32 of the 1950 Arbitration Act used the English term "differences", also to be found in Arts I and II of the New York Convention, and the courts held that this term was wider than "dispute".[15] By using the latter in s.6 of the Arbitration Act 1996, the English legislature took care to clarify in s.82 that the word "dispute" embraces all types of differences, so that it must be understood in the broadest sense.

A fourth element, ignored or considered of secondary importance by numerous **157** authors, is that 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. As we have seen in Ch.2.2, the direct connection consists in designating a seat. Thus, a clause stating that the arbitration shall take place in Geneva is sufficient for Ch.12 of the PILS to be applicable and enables the parties to apply to the Geneva courts for assistance in constituting the arbitral tribunal pursuant to Art.179(2) of the PILS. The situation is similar in the other countries considered here, notably in France where Art.1493(2) of the NCPC empowers the President of the *Tribunal de grande instance* in Paris to resolve difficulties relating to the constitution of the arbitral tribunal in all arbitrations taking place in France. However, this Article also provides for an indirect connection that allows the intervention of this magistrate where the parties have agreed that French procedural law shall apply, irrespective of the seat. We have emphasised that this additional connection, a feature particular to French law, can result in unfortunate conflicts of jurisdiction when the seat of the arbitration is not in France.[16] In such cases, the Paris judge and the court of the seat will both have jurisdiction for appointing or removing arbitrators, which can lead to conflicting decisions.

Another form of connection consists in the submission to the rules of an arbitral institution. Such institution is generally competent, as we shall see,[17] to

[13] See notably Mustill and Boyd, pp.122–129, and (2001), pp.139–140; Samuel, pp.148–151.

[14] See *Halki Shipping v Sopex Oils* [1998] 1 Lloyd's Rep. 465, CA; Merkin, pp.35–36 *ad* s.7 and 41–42 *ad* s.9.

[15] *Sykes (Wessex) v Fine Fare* [1967] 1 Lloyd's Rep. 53, CA, especially 60; see Merkin, p.30 *ad* Section 6.

[16] Ch.2.5, para.141.

[17] Ch.4.2.1.2, para.396.

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.[18] To take the example of ICC arbitration, these powers of the ICC Court of Arbitration result from Arts 8.3, 8.4 and 14.1 of the Rules. While the ICC Court determined the seat in almost 30 per cent of all cases in the eighties, this percentage sank to 17 per cent between 1989 and 1999, which shows that the parties are conscious of the importance of this choice, even if they do not always appreciate all the consequences thereof.[19]

Finally, an indirect connection can consist in the submission to rules containing a procedure for appointing arbitrators who can then determine the seat in the absence of an agreement of the parties. Article 7.2 of the UNCITRAL Rules is an example. It provides a cascading system in the absence of an appointing authority or where such authority refuses to act; in this case a party can request the Secretary General of the Permanent Court of Arbitration in The Hague to designate such appointing authority, which will appoint either the arbitrator for the party in default or the chairman of the arbitral tribunal.[20] Article 16 then empowers the arbitral tribunal to determine the seat of the arbitration and thus to ensure a connection with a legal system. A similar mechanism can be found in Art.IV(3) to (7) of the 1961 European Convention, which enables the parties to have recourse to the president of the Chamber of Commerce at the seat of the arbitration or in the absence of such a designated seat at the domicile of the respondent or to a special Committee constituted pursuant to the Convention. However, this procedure is in principle not applicable in relations between the countries considered here: England, Switzerland and the Netherlands have not ratified the 1961 European Convention; the other Western European states, in particular Germany, Belgium, France and Italy waived the procedure in the relations between physical or legal persons whose habitual residence or seat is in those states by virtue of the Paris Arrangement of 17 December 1962,[21] which replaced that procedure by the jurisdiction of the competent judicial authority of each country. In the absence of a seat it might be difficult to identify such authority, so that this simplification can in certain cases result in a deadlock. In such a case of deadlock, we submit that the Paris Arrangement is inoperative and that the mechanism of the 1961 European Convention can be used by the claimant (para.136).

As already mentioned, a number of national laws, namely those of Germany, the Netherlands and Sweden, provide for a subsidiary connecting factor based on the domicile of one of the parties where no seat has been fixed.[22] Italian and English law also contain subsidiary connecting factors designed to avoid the

[18] Ch.2.6, para.143.
[19] Craig, Park and Paulsson, p.94 § 7.02 and App I.7.
[20] See Redfern and Hunter, pp.192–197 paras 4–35 to 38.
[21] Published by Fouchard, Gaillard and Goldman, pp.1074–1076 (French) and pp.1058–1060 (English); see Ch.1.4.1.2.4, para.79.
[22] Ch.2.5, paras 137 and 138.

invalidity of the arbitration agreement when the seat has not been indicated.[22a] However, in order to ensure the effectiveness of the arbitration the conditions of such a subsidiary connection must be met. Furthermore, we have seen that the PILS and the UNCITRAL Model Law contain no subsidiary connecting factors. In other words, 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 authors submit.[23] The effectiveness of the agreement may depend on it in cases of obstruction.

Having identified above the four essential elements upon which the validity or effectiveness of the arbitration agreement depend, we shall now briefly review the elements which are not essential although they are deemed important and often recommended to practitioners.[24] The determination of the number and qualification of arbitrators is not necessary if the agreement refers to an arbitral institution or an institutional mechanism. In such a case, the institution will determine the number of arbitrators or will even appoint them. In the contrary case, the supporting court will generally have the same powers. It can also be useful to empower the arbitrators to render partial awards or provisional measures, although the majority of recent laws already confer such powers on the arbitrators. The language of the arbitration and the rules governing the conduct of the procedure can be determined by the arbitrators if the parties have failed to do and if these issues are not dealt with in the set of rules adopted by the parties. It may be premature to determine the procedure to be followed before the exact nature of the dispute is known and it is advisable to allow the arbitrators the freedom to tailor make the procedural rules. On the other hand it is prudent, if not necessary, to empower the arbitrators to adapt contracts or fill contractual gaps, as WBR, Arts 1020(4) and SU, 1(2) provide for, or to make a subsequent agreement to this effect, which is subject to the same formal requirements.[25]

By contrast, if all our laws authorise the parties to choose the law applicable to the substance of their dispute, this choice need not necessarily be included in the arbitration agreement nor fulfil the same formal requirements.[26] The power to decide as *amiable compositeur* or *ex aequo et bono* can also be laid down in a subsequent separate agreement.[27] Furthermore, it is not always wise to confer such powers on the arbitrators without knowing the exact nature of the dispute submitted to them. The same can be said with regard to an advance waiver of the

[22a] Ch.2.5, paras 137 and 138; for Italy, see *Corte di Cassazione*, YCA 2002, p.500.
[23] Notably Bernardini, *op. cit.*, p.51 no.1; Craig, Park and Paulsson, p.93 § 7.02; Gelinas, *op. cit.*, p.57: "the most important complementary component"; Pedrazzini, *op. cit.*, p.78 no.3.
[24] See in particular Craig, Park and Paulsson, pp.91–126 § 7.01–8.14; and Gelinas, *op. cit.*, pp.57–65.
[25] See Ch.1.2.6, para.19.
[26] For Switzerland see Lalive, Poudret and Reymond, pp.389–390 para.4 *ad* PILS, Art.187; see also Ch.7.2.1, paras 682 and 683.
[27] See ZPO, § 1051(3); s.46(1)(b) of the Arbitration Act; CJB, Art.1700; NCPC, Art.1497 (see Fouchard, Gaillard and Goldman, para.1501 who add that this clause is not subject to any requirements of form); ICCP, Art.822; WBR, Art.1054(3); PILS, Art.187(2) (see Lalive, Poudret and Reymond, p.402 para.22 *ad* PILS, Art.187); UNCITRAL Model Law, Art.28(3); Art.7(2) of the European Convention 1961. See also Ch.7.5.1, para.713.

right to challenge the award, in as far as such waiver is admitted which is not the case in all laws considered here.[28]

While these various points can sometimes usefully be dealt with in the arbitration agreement, they are not crucial to its validity. However, this validity supposes that the essential elements are defined without ambiguity or contradiction. Otherwise, the clause is defective and it might prove invalid or ineffective, as we shall see below.

3.1.3 Defective arbitration clauses

Bibliography:

Among or in addition to the works already cited in Ch.3.1, see in particular de Boisséson, pp.480–482 para.574; Craig, Park and Paulsson, pp.127–135 § 9.01–08; Devolvé, Rouche and Pointon, pp.65–68 paras 115–121; F. Eisemann, *La clause d'arbitrage pathologique, in: Arbitrage commercial*, Essais Eugenio Minoli, Turin 1974, pp.129–161; Fouchard, Gaillard and Goldman, paras 484–486; Mustill and Boyd, pp.106–107; Redfern and Hunter, pp.165–168 paras 3–67 to 72; H. Scalbert and L. Marville, *Les clauses compromissoires pathologiques*, Rev. arb 1988, pp.117–135; Shackleton I, pp.59–62; van den Berg, pp.158–161, no. II–1.3.4.3 and 4.

159 Whether caused by haste, clumsiness or ignorance of the drafter, defective or "pathological" arbitration clauses have stimulated the imagination of courts and arbitrators and aroused the curiosity of legal authors. As Eisemann pointed out, they are not necessarily null and void or ineffective. Some of them, which we shall deal with first, can give rise to difficulties in the initiation of the arbitration, but will not prevent the conduct of the procedure because case law and arbitration practice try to salvage such clauses to the largest extent possible by way of interpretation.[29]

One of the most widespread errors concerns the designation of the arbitral institution.[29a] This is not fatal where it is possible to identify what the parties really meant or where the applicable arbitration law contains provision for the appointment of the arbitrators without involving the institution.[30] Thus, the parties often designate incorrectly the International Chamber of Commerce, but

[28] s.69(1), Arbitration Act; Art.1717(4), CJB; Art.192(1), PILS; Art.51, SU; see Ch.9.7, paras 838–842.

[29] Fouchard, Gaillard and Goldman, para.485.

[29a] For recent examples under the Swiss Rules, see Kellerhals and Berger, *op. cit. ad.* Ch.1.4.3.4a, pp.161–162; In Germany, the Bavarian Highest Regional Court held that an arbitration referring to the "chamber of handicrafts" ("*Handwerkskammer*"), without specifying which of the two potentially competent chambers was chosen, was ambiguous and void for uncertainty, Kröll, [2002] Int. A.L.R., N–41.

[30] Paris, Rev. arb. 1987, p.325, with a note by Level: *"Tribunal de la Chambre de commerce de Paris" = "Chambre arbitrale de Paris"*; Rev. arb. 1990, p.521; official chamber of commerce in Paris = ICC; see the other cases cited by de Boisséson, p.481 para.24, and Fouchard, Gaillard and Goldman, para.485, n.112–113. By contrast, the German central chamber of commerce has been identified as the DIS and not the ICC (ASA Bul. 2000, p.367).

the latter can usually be identified with sufficient certainty. Clauses referring expressly to the International Chamber of Commerce but adding a place other than Paris are very frequent, e.g. "Arbitration of the International Chamber of Commerce of Geneva". In this case, it is the constant practice of the ICC Court of Arbitration, followed by court practice, to interpret such clauses as meaning that the parties agreed to ICC arbitration with its seat at the place named by the parties.[31] More audacious was the interpretation given by the Geneva Court of Justice to an agreement providing that all disputes would be "settled by arbitration of the Geneva Commercial Court" and that this court would also appoint the third arbitrator. There is no Commercial Court in Geneva. Nonetheless, the Court of Justice held that the agreement sufficiently showed the will of the parties to arbitrate in Geneva so that the competent Geneva court had jurisdiction to constitute the arbitral tribunal.[32] Although the choice of a person or a magistrate as appointing authority should not be confused with the choice of the seat of the arbitration,[33] this judgment must be approved since it renders the agreement effective without violating the parties' will.

Difficulties may also arise due to defects affecting the procedure for appointing arbitrators, particularly where unfortunate derogations are made to institutional rules. The Swiss Federal Tribunal has held that the International Court of Arbitration of the ICC validly replaced the appointing body designated in the agreement (the Director of the World Health Organization, WHO), given that the parties had also referred to the ICC Rules.[34] The president of the *Tribunal de grande instance* in Paris even went so far as to ensure the effectiveness of a clause by replacing the privilege of one of the parties to appoint alone the arbitrator with a mechanism of joint appointment.[35] The ZPO, § 1034(2) provides that in cases where one party has a preponderant role in the constitution of the arbitral tribunal the other can request that the arbitrator or arbitrators be appointed by the court. The case law of the Swiss Federal Tribunal also ensured the effectiveness of the arbitration in a case where the contract contained conflicting provisions on the mechanism of selection of the arbitrators. The arbitration agreement referred to the rules of conciliation and arbitration of the Zürich Chamber of Commerce, to the UNCITRAL arbitration rules and—for the

[31] See for instance the ICC decisions JDI 1978, p.980; JDI 1981, p.839; JDI 1984, pp.946 and 950, with a note by Jarvin; JDI 1998, p.80; Collection I, pp.316, 524 and 528; ASA Bul. 1993, p.507, and 2001, p.276; JDI 2005, p.1268, 1275 para. 34; Paris, Rev. arb. 1998, p.399, with a note by Leurent; ASA Bul. 2003, p.754 (award); ATF 129 III 675, ASA Bul. 2004, p.353, JdT 2004 I 66, the clause providing that the disputes will be "arbitrated before the Tribunal of commerce of Zurich" refers to arbitration under the auspices of the Zurich Chamber of Commerce; Procedural Order, ASA Bul. 2006, p.61 ("Arbitration Court in Geneva" refers to arbitration before the Geneva Chamber of Commerce and Industry); for other examples see Craig, Park and Paulsson, p.132; Fouchard, Gaillard and Goldman, para.485 n.113 and 114; Eisemann, *op. cit.*, p.134 n.4; Scalbert and Marville, *op. cit.*, p.119.

[32] ASA Bul. 1991, p.155 = 269; see KSP-Ehrat, p.1417 para.20 *ad* Art.176.

[33] Lalive, Poudret and Reymond, p.295 para.6 *ad* PILS, Art.176.

[34] ATF 110 Ia 59 c 3 and 4 = Rev. arb. 1986, p.596, with a note by Budin; *contra*, Cas., Bul. 1983 II, 127; see Eisemann, *op. cit.*, pp.132–138.

[35] Rev. arb. 1987, p.184, with a note by Fouchard; see Rev. arb. 1980, p.73, with a note by Fouchard; here too, this magistrate departed from the contractually agreed mechanism.

appointment of the arbitrators—to the ICC rules! The Swiss Federal Tribunal held that the arbitration agreement was partly impossible, that it was nevertheless valid and that the reference to the ICC rules was simply to be disregarded.[35a]

Uncertainty as to which type of arbitration the parties intended can result from a reference to institutional arbitration rules with no submission to the institution itself or from a successive reference first to *ad hoc* arbitration and then to institutional arbitration.[36] More embarrassing are contradictory references to arbitration and court jurisdiction. The courts usually find that the parties are nevertheless bound by an arbitration agreement.[37] By contrast, where a clause provides alternatively for court jurisdiction or arbitration, the Court of Arbitration of the Bulgarian Chamber of Commerce and Industry logically held that the choice lay with the claimant.[38] This solution has also been adopted by English[39] and Italian courts.[40] In Germany, it was decided that an arbitration clause granting the claimant the choice between arbitration or court proceedings was not uncertain and was valid.[40a] It was also decided that if the parties have concluded two separate and conflicting arbitration agreements regarding the same contractual relationship, and in the absence of a specific provision governing the order of precedence, the claimant can choose under which arbitration agreement the proceedings are to be conducted.[40b] This choice is binding once it has been communicated to the other party. Similarly, contradictions are found in the designation of the applicable law.[41]

160 This leads us to so-called "white clauses" which express the will of the parties to arbitrate without determining the manner of constitution of the arbitral tribunal or referring to an institution capable of assisting therewith. In addition, if such clause contains no indications as to the place or the country where the arbitration shall take place, it will be ineffective in the absence of any of the subsidiary connecting factors discussed above in Ch.2.5 paras 137 and 138. If it does

[35a] ATF 130 III 66, ASA Bul. 2004, p.144, JDT 2004 I 83, c.3.3.3; the arbitration agreement read as follows, in pertinent part: "The parties agree that any dispute or difference which may arise out of this agreement or the execution or interpretation of any of the clauses hereof shall be settled amicably. If such dispute or difference cannot be settled in the aforementioned manner they shall be finally settled under the rules of conciliation and arbitration of the Zurich Chamber of Commerce, Zrich/ Switzerland, in accordance with the UNCITRAL arbitration rules. The number of arbitrators shall be three (3). ICC shall be the appointing authority acting in accordance with the rules adopted by ICC for that purpose.

[36] Eisemann, *op. cit.*, pp.136–141, gives various examples; Rev. arb. 2002, p.1019, award combining the appointment by the Arbitration Court of Budapest and the application of the ICC Rules.

[37] QB, BLR 2000, p.65 = ASA Bul. 2000, p.421; *Sonatrach Petroleum Co. (BVI) v Ferrell International Ltd*, [2001] All E.R. (D) 40; Paris, Rev. arb. 2001, p.575 (first case), with a note by Legros.

[38] JDI 1998, p.767, with a note by Gueorguiev; Stein, Jonas and Schlosser, p.392 para.15 *ad.* § 1029. For the validity of the inverse clause, leaving the choice to the respondent, see CA, *The Star Texas*, YCA 1997, p.815, UK 412.

[39] QB, BLR 2000, p.65 = ASA Bul. 2000, p.421.

[40] CA Milan, Riv. dell'arb. 2000, p.753, with a note by Muroni; *contra* Cas., Riv. dell'arb. 2003, p.75, rightly criticized by Luiso.

[40a] *Hanseatisches Oberlandesgericht Hamburg*, YCA 2003, p.265.

[40b] OLG Hamm Schieds VZ 2003/2, p.79.

[41] Craig, Park and Paulsson, pp.132–133 § 9.04, and Eisemann, *op. cit.*, pp.145–149.

contain an indication as to the seat of the arbitration, this will ordinarily suffice to implement the arbitration. This is for instance the case in France, where Art.1493(2) of the NCPC provides that the President of the *Tribunal de grande instance* in Paris can intervene and constitute the tribunal if the arbitration takes place in France. This means that a clause providing for "arbitration in Paris" or even "in France" is not inoperative since an application to a court having jurisdiction to constitute the arbitral tribunal can be made. This interpretation was confirmed by the courts[42] and is unanimously supported by authors.[43] By contrast, the clause indicating "arbitration in Switzerland" may be seen as incomplete to determine, in the absence of an indication of the Canton, which courts would have supportive jurisdiction.[44] The difference is due to the decentralisation of jurisdiction in Switzerland and its distribution between the Cantons. Article 2(2) of the CIA partially fills the gap by providing that if neither the parties nor an institution have chosen the seat of the arbitration, such seat shall be at the place of the court which would have jurisdiction to decide on the merits of the case, had the matter not been submitted to arbitration. To the extent that Swiss private international law allows, this provision could be applied by analogy where there is a forum in Switzerland.[45] Furthermore, we have also proposed to base the validity of a clause providing for "arbitration in Switzerland" on the principle of good faith (prohibition of an abuse of right, see Ch.2.5, para.139).

We now turn to other defects which can render a clause null and void, 161
inoperative or inapplicable (to use the terminology of Art.II(3) of the New York Convention).[46] Whether they are null and void *ab initio*, inoperative as a result of a subsequent event (such as, under certain laws, the death of an arbitrator appointed by the parties or the non-compliance with the time limit for rendering the award), or whether they prove inapplicable, the effect is the same: the arbitration can not be implemented and, save for the unlikely event that a new arbitration agreement is made, the claimant will have to turn to the courts. This is particularly the case where the arbitral institution chosen can either not be identified or does not exist despite the parties having made it an essential element of their agreement.[47] It is also the case where they have reserved the choice of such institution and are unable to reach agreement on this point.[48] Fortunately

[42] Rev. arb. 1987, p.182 (second case), with a note by Fouchard.

[43] de Boisséson, p.481 para.574 § 2; Cohen, Rev. arb. 1991, p.201; Fouchard, Gaillard and Goldman, para.486; Scalbert and Marville, *op. cit.*, p.127.

[44] Lalive, Poudret and Reymond, p.297 para.9 *ad* Art.176 PILS.

[45] Lalive, Poudret and Reymond, p.38 para.3 *ad* Art.2 Concordat.

[46] See van den Berg, pp.154–161 para.II.13.4.

[47] *Président du Tribunal de grande instance de Paris*, Rev. arb. 1983, p.485 (4th case), with a note by Moreau; Versailles, Rev. arb. 1992, p.654, with a note by Bureau: "London arbitral chamber", which does not exist; Craig, Park and Paulsson, p.134 § 9.05 n.17; Eisemann, *op. cit.*, pp.151–153 and 157–158.

[48] Craig, Park and Paulsson, p.134 § 9.06; Eisemann, *op. cit.*, pp.150–151.

these examples are rare, and the arbitral institution and the supporting jurisdictions can usually establish sufficiently the intention of the parties to set the arbitration in motion.

3.2 THE SEPARABILITY OF THE ARBITRATION CLAUSE

Bibliography:

General Works: Berger, pp.119–121; Blanchin, pp.7–38; de Boisséson, pp.484–494 paras 576–580; Craig, Park and Paulsson, pp.48–52 § 5.04; Fouchard, Gaillard and Goldman, paras 388–451; Huys and Keutgen, pp.148–150 paras 159–163; Jolidon, pp.137–139 para.81 *ad* Art.4 Concordat; KSP-Wenger, pp.1467–1468 paras 76–79 *ad* Art.178; Lalive, Poudret and Reymond, p.49 para.3 *ad* Art.4 Concordat and p.315 para.4 *ad* Art.178 PILS; Linsmeau, pp.81–83 paras 120–125; Merkin, pp.34–37 *ad* Section 7; Redfern and Hunter, pp.162–165 paras 3–60 to 64; Russell, pp.32–35 paras 2.008 to 011; Rutherford and Sims, pp.55–57 *ad* Section 7; Schlosser, pp.291–294 paras 392–393; Schwab and Walter, pp.35–37 Ch.4 paras 16–19.

Specific Studies: J.-P. Ancel, *L'actualité de l'autonomie de la clause compromissoire, Travaux du Comité français de DIP* 1991–1992, pp.75–119; S. Bollée, *La clause compromissoire et le droit commun des conventions*, Rev. arb. 2005, pp.917–929; A. Dimolitsa, *Autonomie et "Kompetenz-Kompetenz"*, Rev. arb. 1998, pp.305–357, ou ICCA, Congress Series para.9, 1999, pp.217–256 (English version); P. Mayer, *Les limites de la séparabilité de la clause compromissoire,* Rev. Arb. 1998, pp.358–368, or ICCA, Congress Series para.9, pp.261–267 (English version); F. Rigaux, *L'autonomie de la clause compromissoire en droit belge,* Ann. de droit et de science politique, Louvain 1961, p.231; A. Samuel, Separability in English law—Should an Arbitration Clause Be Regarded as an Agreement Separate and Collateral to a Contract in Which It Is Contained?, Jnl. Int. Arb. 1986/3, pp.95–109; P. Sanders, *L'autonomie de la clause compromissoire, in:* Hommage à Frédéric Eisemann, Paris 1978, pp.31–43; P. Schlosser, *Der Grad der Unabhängigkeit einer Schiedsvereinbarung vom Hauptvertrag, in: Liber Amicorum* Karl-Heinz Böckstiegel, pp.697–713; C. Svernlov, The Current Status of the Doctrine of Separabiliy, Jnl. Int. Arb. 1991/4, pp.37–49 (cited: Current Status), and The Evolution of the Doctrine of Separability in England: Now Virtually Complete?, Jnl. Int. Arb. 1992/3, pp.115–121 (cited: *Evolution); Congrès international de l'arbitrage,* Paris 1961, with a report by F.E. Klein, *Du caractère autonome et procédural de la clause compromissoire,* Rev. arb. 1961, pp.48–74.

162 The separability ("*autonomie*") of the arbitration clause is an ambiguous expression. Its several possible meanings can be illustrated, as we shall see, by the evolution of case law in France. This evolution, described very well in Ancel's report mentioned above, is marked by four landmark decisions, namely Gosset (1963), Hecht (1972), Menicucci (1975) and Dalico (1993). This case law led French authors to distinguish between material separability ("*autonomie matérielle*"), i.e. from the principal contract, and legal separability ("*autonomie juridique ou de rattachement*"), i.e. from the law of the contract or even, according to the last two mentioned judgments, from all legal systems.[49] We shall also use this threefold distinction in the following pages.

[49] In particular, Ancel, *op. cit.*, pp.81–83; Blanchin, pp.13–15; Fouchard, Gaillard and Goldman, para.388.

3.2.1 Independence of the validity of the arbitration agreement from the validity of the contract

In the first and most widely used sense, separability (or *severability*) means **163** that the validity of the arbitration clause must be assessed separately from that of the main contract—or the legal relationship—of which it forms a part. As a consequence, the arbitrator has the authority not only to determine his own jurisdiction, but also the validity or existence of the contract. We shall now examine these two elements.

When the parties conclude a contract containing an arbitration clause, they are **164** considered, according to Schwebel's formula, as concluding not one, but two agreements, so that the destiny of each contract does not depend on that of the other.[50] This distinction, which results from differences in both the nature and the object of the two agreements, applies irrespective of whether there is one document (with an incorporated clause) or two separate ones. The arbitration clause may survive the nullity, termination, repudiation or novation of the main contract,[51] although two reservations should be made. First, as Pierre Mayer has pointed out,[52] the arbitration clause is part of a main contract. It even has an accessory nature, which implies that it will be transferred along with the principal contract in case of an assignment of the latter. This does not however exclude that the arbitration clause remains valid, like a jurisdiction agreement, if the contract is null or void or has been terminated, for in such cases it will be the function of the arbitration clause to enable a decision to be made on the fate of the main contract and its consequences. This depends of course on the will of the parties, but it can be presumed that this is what they intended.

Of course—and this is the second reservation—there might exist a defect common to the contract and to the arbitration clause which renders them both null and void. This might be the case, to take the examples given by Pierre Mayer, in the event of lack of a power of attorney or defects in consent; but these defects might also only affect the one and not the other.[53] Article 1697(2) of the CJB, like Art.22(1) of the Spanish law, emphasises this aspect by providing that a decision by the arbitrators that the contract is null and void shall not entail by itself the invalidity of the arbitration agreement. The principle of separability requires that these questions be addressed separately and, as we shall see below, successively.

[50] Schwebel, p.5.

[51] Fouchard, Gaillard and Goldman, para.410 and the case law cited, notably Cas., Minoteries Lochoises, Rev. arb. 1969, p.59: the clause survived the termination of the contract due to the failure of the seller to fulfill his obligations; Sonatrach, ATF 116 Ia 56 = JdT 1990 I 563, c.3b = Rev. arb. 1990, p.921, with a note by Tschanz: the arbitration agreement survived the settlement which put an end to the dispute, because the parties are presumed to have intended to submit any disputes relating to the liquidation of the initial contract to arbitration; on this question see Ch.3.6.2.2, para.315.

[52] Mayer, *op. cit.*, pp.261–264, and Paris, Rev. arb. 1990, p.675, with a note on the Ducler judgment; followed by Schlosser, *op. cit.*, p.703.

[53] Notably Mayer, *op. cit.*, p.265; Redfern and Hunter, p.164 para.3–63.

165 While the foregoing is not really disputed, it is much rarer to find an answer to the opposite question of whether the nullity of the arbitration clause can lead to the nullity of the principal contract, i.e. if the first can be considered to be an essential element of the second. In domestic arbitration, NCPC, Art.1446 gives a negative answer since an arbitration clause which is null and void is deemed to never have been written, so it cannot affect the contract. However, this is only a presumption,[54] and the parties are free to link the fate of the contract to that of the arbitration clause,[55] particularly in international matters, where the guarantee of arbitration as the agreed form of dispute resolution can legitimately be considered an essential part of their agreement.

166 The ambit of the principle of separability can only be fully comprehended in relation with that of the so-called competence/competence, i.e. the power of the arbitrators to rule on their own jurisdiction.[56] As Sanders emphasises, if the fates of the arbitration clause and the contract were not distinct, an arbitrator who considered the contract null and void would have to decline his own jurisdiction and would therefore be unable to examine the merits and decide on the validity of the contract in the holding of the award. An impasse would result, and the only solution would be an action before a court.[57] In other words, separability means that if the arbitrator finds the main contract invalid, he does not forfeit his jurisdiction.[58] The arbitrator's competence/competence is thus the procedural instrument of the principle of separability, allowing him to decide himself on the validity of the main agreement. Inversely, Art.16 of the UNCITRAL Model Law only lays down separability to fully ensure ("for that purpose") the arbitrator's competence/competence.

While, as Fouchard, Gaillard and Goldman emphasised,[59] these two principles are separate and each has its own scope, there is a logical connection between them. Both are based on the presumed will of the parties to submit all disputes to the arbitrator, starting intention the issue of jurisdiction, and thus to have a single procedure.[60] As Sanders pointed out, this presumption is strengthened by the clause, common in international arbitration, referring to all disputes "in relation to" the contract, including those concerning its existence and validity. We shall see that numerous sets of rules and arbitration laws point in the same direction.

167 Should this rule be extended to the case where the very existence of the contract is in dispute? Some authors have declined to do so, invoking the adage *nihil ex nihilo*. In his aforementioned Article, Sanders submitted that the principle of separability could not justify the arbitrator's jurisdiction where the

[54] See de Boisséson, pp.75–76 para.78.
[55] Paris, Rev. arb. 1975, p.312, with a note by Mezger; Cas., Rev. arb. 2002, p.777, recognising that the principle of separability applies in domestic arbitration, unless the parties agree otherwise.
[56] See Ch.5.1.1, para.457.
[57] Sanders, *op. cit.*, p.33.
[58] Handbook IV, UNCITRAL-Broches, para.6 *ad* Art.16.
[59] Fouchard, Gaillard and Goldman, para.416.
[60] Notably Russell, p.34 para.2–011; Sanders, *op. cit.*, p.33, and KSP-Wenger, p.1468 para.78 *ad* Art.178 PIL S; see also the Swiss case law cited in n.73 and 74; criticical Samuel, pp.157–158.

contract is inexistent and, therefore, the arbitration clause deprived of an object. Broches agrees with him, which can probably be explained by the fact that Art.16(1) of the UNCITRAL Model Law, third sentence, only mentions the nullity and not the inexistence of the contract. Broches goes even further, submitting that the principle of separability is also inapplicable where the contract is null and void *ab initio*.[61] Several authors have disagreed, in our opinion rightly. In a detailed note on the *Navimpex* judgment,[62] Berthold Goldman has shown that nullity *ab initio* or the question whether the contract entered into force do not necessarily lead to the nullity of the arbitration clause. Indeed, the arbitration can deal with the existence of the contract, or the consequences of its inexistence or invalidity, and in particular any liability thereby incurred. In his opinion "the arbitral tribunal should be recognised as having jurisdiction in all cases where the existence of the main agreement or of the arbitration clause is disputed. It shall in such cases first have to determine whether the argument based on the inexistence is founded and, in the affirmative, whether this affects the arbitration clause (. . .). If it finds the arbitration clause is non-existent, it must of course refrain from adjudicating the merits, but otherwise it has jurisdiction to do so . . . ".

This opinion is shared by several other authors.[63] It has also been followed by the French courts since the afore-mentioned *Navimpex* judgment, even if the latter concerned the case of a contract which had not yet entered into force, and which was not, strictly speaking, inexistent. The *Cour de cassation* only recognised in its judgment that the principle of separability allows a party to invoke the arbitration clause even though the parties' main agreement has not yet entered into force providing the dispute relates to the conclusion of the agreement. In its judgment in the *Ducler* case[64] the Paris Court of Appeal went a step further and held that "the arbitration clause is completely separable from . . . the main agreement, the inexistence or the nullity of which have no affect on it . . . ". However, soon afterwards, in its *Cassia* judgment which we shall examine below,[65] the *Cour de cassation* seemed to cast doubt on this case law, refusing to treat as separable an arbitration clause in a contract which had been initialled, but not signed. More recently, the *Cour de cassation* dispelled any doubt and held that the validity of the arbitration agreement is not affected by the nullity or inexistence of the main contract.[65a] This case law is based on the "principle of validity" and separability of the arbitration agreement. We would add that the principle of separability is expressly laid down, even in the event of

[61] Handbook IV, UNCITRAL-Broches, paras 15–16 *ad* Art.16.
[62] Cas., Rev. arb. 1989, p.641, especially 645–650; also Fouchard, Gaillard and Goldman, para.411.
[63] Notably van den Berg, van Delden and Snijders, pp.85–86 para.7.6; Redfern and Hunter, p.163 para.3–61; Schlosser, *op. cit.*, pp.704–712, who distinguishes between manifest lack of consent and other cases of nullity *ab initio*; Svernlov, *op. cit.* (Current Status), pp.45–46; see also ICC No. 10274, YCA 2004, p.94.
[64] Rev. arb. 1990, p.675, with a note by Mayer; Rev. arb. 2002, p.792: *idem.*
[65] Paris and Cas., Rev. arb. 1990, p.851 and 857, with a note by Moitry and Vergne; see para.177 below.
[65a] Cas., *Omenex v Hugon*, Rev. arb. 2006, p.103, with a note by Racine.

inexistence of the main agreement, by the principal arbitration rules[66] as well as in several of the laws examined below. Therefore, we can conclude, in the absence of an explicit reservation, that this is the extent of the principle of material separability of the arbitration clause in international arbitration.

168 Understood in this manner, the principle of separability is today widely recognised, although it had difficulty in establishing itself in domestic arbitration, particularly in England[67] and France. It is now provided for by a number of arbitration laws[68] and, in the United States of America, by case law since the *Prima Paint* judgment in 1967.[69] In *Buckeye Check Cashing Inc. v Cardegna*, 126 S. Ct. 1204 (2006), the US Supreme Court held that the *Prima Paint* rule applies in state courts and contains no exception for contracts deemed void under state law. It further made it clear that the validity of the contact is to be examined by the arbitrators first. It is also widely recognised by decisions of arbitral tribunals.[70] Hence, Antonias Dimolitsa can characterise separability as a general principle of international arbitration,[71] while French authors do not hesitate to speak of "a genuinely transnational rule of international commercial arbitration".[72] Confining ourselves to Western Europe, we note that the principle is also recognised in Arts 21(2) of the Portuguese law of 1986 and 22(1) of the Spanish law of 2003, as well as in the conventions and laws analysed in more detail below.

169 In Switzerland, the principle of separability has been recognised even before the entry into force of the Concordat of 1969,[73] and subsequently in cases decided under this statute.[74] In a judgment of 1990,[75] rendered in a matter which

[66] Art. 21.1 UNCITRAL Rules; 15.2 AAA Rules; 6.4 ICC Rules; 23.1 LCIA Rules; 21.2 Swiss Rules; 36(b) WIPO Rules; Fouchard, Gaillard and Goldman, paras 393–397.

[67] Samuel, *op. cit.*, who is critical of the evolution of English law; Svernlov, *op. cit.* (Current Status), pp.44–45.

[68] See Dimolitsa, *op. cit.*, pp.222–223 n.20 and 24–27; Fouchard, Gaillard and Goldman, paras 401–403.

[69] 388 US 395; other cases are cited by Samuel, pp.166–167 and Fouchard, Gaillard and Goldman, para.402, n.31; Handbook IV, USA-Holtzmann/Donovan, Ch.II.4.; see also Art.15.2 AAA Rules. More recently, a decision of the US Court of Appeals for the 2nd Circuit distinguished between separability of arbitral clause in a void and in a voidable contract (YCA 2002, p.700).

[70] Sanders, *op. cit.*, pp.38–42, and Fouchard, Gaillard and Goldman, paras 406–407.

[71] Dimolitsa, *op. cit.*, p.223; see Sanders, *op. cit.*, p.42.

[72] Fouchard, Gaillard and Goldman, para.398.

[73] Notably ATF 71 II 116 = JdT 1945 I 278 c.2: even where it is contained in a contract and appears as one of the contractual stipulations forming a whole, the arbitration clause constitutes an independent agreement having its own object and governed by Cantonal procedural law; ATF 88 I 100 = JdT 1963 I 158, c.2: if the cause of nullity only affects the main agreement, and not the arbitration clause, the parties are presumed to have intended to submit the question of the validity of the main agreement to arbitration. For further references see Lalive, Poudret and Reymond, p.49 para.3 *ad* Art.4 Concordat.

[74] CA BS, ASA Bul. 1985, p.19 no. 2: in case of doubt, it must be presumed that the parties intended to confer on the arbitrator jurisdiction to decide on the validity of the contract, the defects of which do not necessarily affect the arbitration clause; CJ GE, ASA Bul. 1986, p.218 no.6: in the lack of indications to the contrary, the nullity or termination of the main agreement does not affect the validity of the arbitration clause; Jolidon, pp.137–139 para.81 *ad* Art.4; Lalive, Poudret and Reymond, p.49 para.3 *ad* Concordat, Art.4.

[75] ATF 116 Ia 56, cited in n.51

was governed by the procedural law of the Canton of Zurich, the Swiss Federal Tribunal applied this principle and recognised the validity of an arbitration clause contained in a contract which had subsequently been revoked by both parties. It is therefore not surprising that the Federal legislature made it clear in PILS, Art.178(3) that "the validity of an arbitration agreement cannot be contested on the ground that the main agreement may not be valid . . . ".[76] It should be noted that this text refers only to the invalidity, and not the inexistence of the main agreement. Nonetheless, for the reasons given above, we submit that the solution should be the same in this case too, unless there are indications that the parties agreed otherwise.

The authors of the 1961 European Convention only had in mind the procedural **170** aspect of the principle when they provided at Art.5(3) that the arbitrator has the power to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms a part. Therefore it cannot be said that this Article recognises the principle of separability.[77] The fact remains that its wording clearly distinguishes between decisions on the existence or validity of the arbitration agreement on the one hand, and decisions on the contract on the other.

We now turn to Art.1697(2) of the CJB, mirroring Art.18 of the Strasbourg **171** Convention. As in France, Belgian case law was initially hostile to the principle of separability. It did not recognise separability in international arbitration until 1969. The text now in force rightly provides, as we have seen, that the nullity of the main agreement does not automatically ("*de plein droit*") lead to the nullity of the arbitration agreement but envisages defects which might affect both. We should add that Belgian law is peculiar because there is no immediate challenge against the award if the arbitrator admits jurisdiction.[78] We shall return to this question later.

In 1986, Art.1053 of the WBR laid down both aspects of the principle of **172** separability. First, the arbitration agreement is considered to be "a separate agreement". Secondly, the arbitral tribunal has the power to decide on the validity of the main agreement without this affecting its jurisdiction.[79] Commentators are however divided as to whether this rule also applies where the existence of the contract itself is disputed.[80] For the reasons given above, we consider that this case is also covered by the principle of separability.

[76] See IPRG-Volken, p.1981 paras 62 and 63 *ad* Art.178; KSP-Wenger, *loc. cit.* in the bibliography *ad* Ch.3.2; Lalive, Poudret and Reymond, p.315 para.4 *ad* PILS, Art.178.

[77] Hascher, YCA 1995, pp.1024–1025 para.45 and 46 *ad* Art.5; as to the applicable law see Ch.3.5.2 para.294.

[78] Huys and Keutgen, p.149 para.163; Linsmeau, p.83 para.123.

[79] See Sanders and van den Berg, para.65 *ad* Art.1053 WBR and van den Berg (Handbook III, The Netherlands, Ch.II.4), who adds that a decision on the validity of the main agreement does not concern jurisdiction and thus cannot be challenged. The case where the Respondent contested the arbitrator's jurisdiction and where his arguments were dismissed should probably be reserved, for in such a case an application to set aside can be filed against the final award (WBR, Art.1052(4)).

[80] *Pro*: Snijders, *in*: van den Berg, van Delden and Snijders, pp.85–86 para.7.6; *contra*: van den Berg, *loc. cit.* in n.79.

173 Article 16(1) of the UNCITRAL Model Law confirms the arbitral tribunal's jurisdiction to decide on "any objections with respect to the existence or validity of the arbitration agreement" and makes it clear that the arbitration clause "shall be treated as an agreement independent of the other terms of the contract", adding that "a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause". Mirroring the Strasbourg Convention and incorporated into Art.1697(2) of the CJB, this last sentence appears to contradict the two previous ones because it only mentions the nullity and not the inexistence of the contract. As we have seen,[81] Broches in his commentary of the Model Law acknowledges two exceptions to the principle of separability: the inexistence and the nullity *ab ovo* of the main contract. If the inexistence of the contract deprived the arbitrator *ipso iure* of his jurisdiction, we do not see how he could decide on an objection related to this question, whereas the first sentence allows him to do. We are therefore inclined to interpret Art.16 as meaning that an arbitrator has jurisdiction even to decide whether the main contract exists or not.

174 In Germany the principle of separability had already been applied by the courts prior to the entry into force of the law of 1997.[82] § 1040(1) of ZPO only adopted the first two sentences of Art.16 of the Model Law, thereby avoiding the apparent contradiction discussed above and enabling to conclude that neither invalidity *ab initio* nor even the inexistence of the main contract has an impact on the arbitrator's jurisdiction.[83]

175 In Italy, Art.808(3) of the ICCP, introduced in 1994, limits itself to providing that "the validity of the arbitration clause is assessed independently of the main contract", thereby setting out the principle of separability which had since long been recognised by the courts and Italian authors.[84] The same applies to Art.3 of the Swedish law, which contains a rule developed notably in two judgments of 1936 and 1976.[85] Contrary to the Italian *Corte di Cassazione*,[86] the aforementioned Swedish case law recognises that the validity of the arbitration clause is not affected by the fact that the main contract has not come into force. Thus it appears unlikely that the new Swedish law of 1999 has restricted the scope of the principle.

176 The reluctance of the English courts with regard to the principle of separability has been very clearly analysed by Adam Samuel who approves this prudent approach.[87] Given however that such reluctance is no longer compatible with the

[81] para.167.
[82] Notably BGHZ 53 (1970), p.315: in case of doubt, the arbitrator has jurisdiction to decide on the validity of the main contract and on the consequences of its invalidity; confirmed in BGHZ 69 (1978), p.260; see Schwab and Walter, pp.35–36 Ch.4 para.16; Schlosser, p.292 para.392.
[83] Already under the former law, BGHZ 53 (1970), p.315 para.52, and Schlosser, p.293 para.393.
[84] Bernardini (Rev. arb. 1994), p.486 no.2.
[85] Cited by Svernlov, *op. cit.* (Current Status), p.48, and Samuel, *op. cit.*, p.98; J. Ramberg, Stockholm Arbitration Report 1999/1, p.28 para.12.
[86] Cas., Riv. dell'arb. 1995, p.689.
[87] Samuel, *op. cit.*, pp.100–109; see also Fouchard, Gaillard and Goldman, para.404; Merkin, p.34 *ad* Section 7; Redfern and Hunter, pp.162–163 para.3–60; Russell, pp.32–33 paras 2.010 and 011; Svernlov, *op. cit.* (Current Status), pp.48–49, and (Evolution).

law since the entry into force of the Arbitration Act 1996, we shall not dwell on it. We shall merely recall that in 1942 the House of Lords held that an arbitration clause could survive the end of the main contract, especially if it was terminated or not performed, but would be inoperative in the event of invalidity *ab initio* of the main contract.[88] While accepting this case law, Steyn J. pointed out the paradox of denying the arbitrator's jurisdiction to decide on the nullity *ab initio* of a contract containing an arbitration clause, while a separate clause would confer such jurisdiction on him. He concluded that by 1991 the evolution towards the principle of separability had almost been completed.[89] Indeed, two years later, the Court of Appeal took a new step towards complete separability and held that an arbitrator has jurisdiction to decide on the invalidity *ab initio* of a contract caused by grounds which do not affect the validity of the arbitration clause, in this case the unlawful nature of a reinsurance contract because of the absence of a licence.[90]

The last step was taken by s.7 of the Arbitration Act 1996, which establishes the principle of separability in its broadest sense. While it rightly reserves an agreement to the contrary by the parties, this section confirms that "an arbitration agreement which forms or was intended to form part of another agreement (. . .) shall not be regarded as invalid, non-existent or ineffective because the other agreement is invalid or did not come to existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement". As Merkin emphasises,[91] this 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 it is usually the case. On the other hand, contrary to the last mentioned case, the text of the new law no longer makes a distinction between various grounds of invalidity of the main contract. It is always for the arbitrator to decide thereon,[92] provided that he first accepts his jurisdiction or that his jurisdiction is not contested.[93]

177 For a long time, French law was distrustful of the arbitration clause, and even more reluctant than English law to recognise its separability. However, once this principle had been recognised in its traditional meaning, the French courts extended its scope to extreme limits, hitherto unknown to other laws. This is the reason why we deal with it last. Forcefully advocated at the international

[88] *Heyman v Darwins* [1942] AC 356, HL.
[89] *Paul Smith v L.H. & S. International Holding* [1991] 2 Lloyd's Rep. 127, QB = YCA 1994, UK 35, p.725.
[90] *Harbour Assurance v Kansa* [1993] 3 All ER 897, CA = YCA 1995, p.771, UK 39; see Dimolitsa, *op. cit.*, p.220, and Mustill and Boyd (2001), pp.266–267 *ad* s.7.
[91] Merkin, p.35 *ad* Section 7. He is of a different opinion for disputes "arising under" a contract, which he considers a more restrictive term.
[92] Nonetheless, in the case *Azov Shipping v Baltic Shipping* [1999] 2 Lloyd's Rep 159, J. Colman seems to have inferred from the lack of initial existence of the main contract that Azov was also not bound by the arbitration clause, an approach which Shackleton (II, pp.128–129) considers incompatible with the principle of separability.
[93] See *Halki Shipping v Sopex Oils* [1998] 1 Lloyd's Rep 465, CA.

arbitration Congress in Paris in 1961,[94] the material separability of the arbitration clause was recognised, for international arbitration only, by the *Cour de cassation* in 1963 in the *Gosset* case already mentioned above.[95] An application had been brought before the French courts to recognise and enforce an award made in Italy ordering the French company Gosset to pay the price of goods blocked by customs for lack of the required authorisation. The company argued that the contract was invalid due to this very fact, and that this entailed the invalidity of the arbitration. The *Cour de cassation* ruled in favour of the Italian company, admitting the principle of separability in its classical meaning: "in international arbitration, the arbitration agreement, be it concluded separately or be it part of the contract which it concerns, is always—save in exceptional circumstances which have not been invoked in the present case—completely separate from such contract, which excludes that it can be affected by the fact that the latter might be invalid". In other words, each has an independent fate.

Henri Motulsky considered this judgment as a contribution "to the emergence of an international legal order".[96] Effectively, the rule hence established is specific to international arbitration, like the admissibility of the arbitration clause itself. Furthermore, this judgment rightly places on an equal footing an arbitration clause inserted in the contract and one concluded in a separate document. Finally, it reserves exceptional circumstances which might justify a joint fate. In the absence of examples in case law, we can imagine that this would be the case of a clause expressly linked to the fate of the main contract or *vice versa* (see para.165).

This leading judgment has since been confirmed by numerous others and is beyond discussion in international and domestic arbitration.[96a] Its consequence is to shield the question of the validity of the arbitration clause from defects of the contract to which it refers, notably invalidity, rescission or termination.[97] We have seen above that, in its *Navimpex* judgment of 1988,[98] the *Cour de cassation* extended this separability to the case where the main contract had not yet entered into force, because the seller had not provided a letter of guarantee.

However, in their judgments rendered in 1988 and 1990 in the *Cassia* case,[99] the Paris Court of Appeal and then the *Cour de cassation* seemed to reconsider the previous case law. The parties had initialled but not signed, and subsequently

[94] See Rev. arb. 1961, pp.48–74: based on the report by F.E. Klein, the congress passed two resolutions, one in favour of the separability of the arbitration clause, the other in favour of the arbitrator's jurisdiction to decide on his own jurisdiction (competence-competence).
[95] Rev. arb. 1963, p.60 = JDI 1964, p.82, with a note by Bredin; see the analysis by Ancel, *op. cit.*, pp.76–77, and Fouchard, Gaillard and Goldman, para.391.
[96] Cited by Ancel, *op. cit.*, p.77.
[96a] The same principle applies in domestic arbitration, Cas. *Parisot v Marie*, *Les Cahiers de l'Arbitrage* No. 2003/2/2, Gaz. Pal. 7–8.11.2003, p.41.
[97] See the examples of case law given by Blanchin, p.25 para.61, and by Fouchard, Gaillard and Goldman, para.391, n.10 and 11; Paris, Rev. arb. 2002, p.971: the illegality of the main contract does not affect the validity of the arbitration agreement.
[98] Rev. arb. 1989, p.641, with a note by Goldman; see para.167.
[99] *Pia Investments v. Cassia*, Rev. arb. 1990, p.851 and 857, with a note by Moitry and Vergne, cited in para.167.

ceased performing an architect contract containing an arbitration clause. Nonetheless the arbitral tribunal had found that the parties had consented to arbitration and consequently held that it had jurisdiction. While recalling the principle of separability, the Paris Court of Appeal took the opposite stance, holding that "in cases where the nonexistence of the [arbitration] agreement is alleged because of a defect in the formation of the contract, as in this case", the validity of the arbitration clause should be determined under the law applicable according to the conflict-of-law rules, i.e. in the case at hand the law of Pakistan, pursuant to which the parties were not bound. This was confirmed by the *Cour de cassation*, which held that "the separability of the arbitration clause has its limits in the formal existence of the main contract which contains the clause invoked" and "that such existence must necessarily be determined under the law which, pursuant to the principles of private international law, govern the form of the contract".

This limit to the principle of separability was confirmed in subsequent judgments[100] but has been abandoned by more recent case law (see para.167 n.65a). The restriction of the former case law had been justly criticised since, as we have seen, the principle of separability implies that it is for the arbitrator to rule first on his jurisdiction and then on the existence of the main contract. As Fouchard, Gaillard and Goldman rightly submitted,[101] the principle of separability does not mean that the arbitration agreement *"can never be held to be void or non-existent; the arbitration agreement will be non-existent or void if directly affected, but not simply as a function of the existence or validity of the main contract. In the Cassia case, the correct approach would have been to establish whether the arbitration agreement had actually been signed, and whether it was subject to any particular conditions of form. If, in the light of rules which remained to be determined, the arbitration agreement had not been signed, the decision could have been set aside on the basis of Art.1502 1° of the New Code of Civil Procedure. Conversely, if the court were to establish that the arbitration agreement did exist and was valid as to its form, the arbitrators would then be responsible for examining the existence and formal validity of the main contract, subject to review by the courts confined to the issue of compliance with international public policy"*. This is a clear summary of the consequences of the principle of separability in its first meaning. However, we shall now see that in France it is not limited to this.

3.2.2 Submission of the contract and of the arbitration agreement to different laws

The principle of separability not only entails that the validity of the contract and of the arbitration agreement must be determined separately, but also that they

[100] Paris, Rev. arb. 1996, p.66, with a note by Jarrosson, and Rev. arb. 1997, p.251, with a note by Gaillard.
[101] Fouchard, Gaillard and Goldman, para.595.

can—and often are—governed by different laws. This is a result both of their different natures and of the freedom generally conferred on the parties to choose the applicable law. We have already emphasised the importance of the seat of the arbitration as far as the law applicable to the arbitration is concerned in the preceding Chapter,[102] and we shall see below which connecting factors apply to the formal and material validity of the arbitration agreement.[103] While the parties may certainly submit both the contract and the arbitration agreement to the same law, they usually only determine the law applicable to the former. In this case, several authors[104] and courts[105] presume that the parties also intended to submit the arbitration agreement to the law chosen for the contract. This is only a presumption and not an absolute rule, with the result that the law applicable to the substance of the dispute and the law governing the arbitration agreement are not always identical. In addition, as we shall see, in the absence of a choice of law, the rules of law applicable to the substance of the dispute are usually different from those governing the arbitration agreement. Thus Art.V(1)(a) of the New York Convention refers in such a situation to the law of the seat of the arbitration, which is generally distinct from the law applicable to the substance of the case. In short, there is no doubt that, whatever the connecting factors involved, the arbitration agreement and the contract can be and often are governed by rules of a different nature and origin.[106]

Although it has been questioned,[107] this diversity of the applicable rules implicitly results from Art.V(1)(a) of the New York Convention, which submits the arbitration agreement to its proper law, be it that chosen by the parties or, in the absence of such choice, that of the seat of the arbitration.[108] This is confirmed by the majority of the laws considered here; they clearly distinguish between the requirements for the validity of the arbitration agreement and the law applicable to the substance. This is an additional reason justifying the material separability with which we have just dealt.

179 In France, the second aspect of separability was underlined by the judgments of the Paris Court of Appeal[109] and of the *Cour de cassation*[110] in the case *Hecht v Buisman's*, in 1970 and 1972 respectively. The Dutch company Buisman had

[102] Ch.2.2 paras 115–119.
[103] Ch.3.3.1.1 and 3.5.3.
[104] See Dimolitsa, *op. cit.*, p.219; Mayer, *op. cit.*, p.267, who submits that the parties would never avail themselves of this possibility of subjecting the contract and the arbitration agreement to different laws, a solution which he deems inappropriate; Mustill and Boyd, pp.62–63, who consider that the proper law of the arbitration agreement generally corresponds to that of the contract; *id.* (2001), pp.122–123, pointing out that under the Arbitration Act 1996 the arbitration is governed by the law of the seat (curial law); see also Ch.3.5.3.1 para.297.
[105] See Ch.3.5.3.2. para.300.
[106] Fouchard, Gaillard and Goldman, paras 412–414.
[107] Fouchard, Gaillard and Goldman, para.399.
[108] Blanchin, p.16.
[109] Rev. arb. 1972, p.67, with a note by Fouchard = JDI 1971, p.833, with a note by Oppetit.
[110] Rev. arb. 1974, p.89, with an article by Ph. Francescakis, pp.67–87; JDI 1972, p.843, with a note by Oppetit.

granted the claimant Hecht exclusive sales rights in France, a non-commercial activity, and since the contract referred to French law, the question before the French courts was whether the prohibition of Art.1006 of the Code of Civil Procedure applied to the arbitration clause. The Court of Appeal answered in the negative, recalling the freedom of the parties, in an international contract, "to provide for the contractual provisions of their choice and to refer, with regard to what they do not determine expressly, to a law which they can freely choose", under the sole reservation of public policy. It concluded from this proposition that in the case at hand the parties were entitled to exclude the application of French law and to enter into an arbitration clause, which enjoyed in international arbitration a "complete legal autonomy". The *Cour de cassation* upheld the judgment for the sole reason that "in international arbitration, the arbitration agreement is completely autonomous". A number of commentators felt that it could be inferred from these judgments that the arbitration agreement was independent of any national law, as was subsequently held in the 1975 *Menicucci* judgment. In our opinion, such interpretation would not only go beyond the text of the *Hecht* decision, but also beyond what was necessary to confirm the validity of the arbitration clause. The judgment of the Paris Court of Appeal limited itself to holding that in agreeing on arbitration, the parties had excluded the application of French law which prohibited it, but without thereby excluding the applicability of all national laws or establishing a principle of material validity. In his note on the Paris judgment, Philippe Fouchard seems to be more cautious than other authors: he rightly considers that the basis of the judgment is the freedom to enter into contracts, he perceives "a new rule favourable to international arbitration which allows it to escape a provision of domestic law which is, in some respects, too rigid", but considers it "difficult to state" that the court had established an absolute principle of validity of an arbitration clause contained in an international contract.

Regardless of what the exact significance of these judgments may be, they ensure the validity of arbitration clauses contained in an international contract, even in non-commercial matters, and exclude any rules to the contrary, in particular Art.1006 of the French Code of Civil Procedure and Art.2061 of the Code Civil.[111] Consequently, France was able in 1989 to withdraw the reservation of commerciality which it had made under the New York Convention.[112]

While to our knowledge all European laws allow the application of different legal provisions to the arbitration agreement and the contract to which it refers, the French courts have given to the principle of separability a third, much more audacious scope, which would have the effect of liberating the arbitration agreement from all legal systems. It is to this third meaning that we now turn.

[111] Notably Blanchin, pp.22–23; Fouchard, Gaillard and Goldman, para.418. Note that Art.2061 of the Civil Code, relaxed by the law of 15 May 2001, still applies in domestic law.
[112] Blanchin, p.23; Fouchard, Gaillard and Goldman, para.262.

3.2.3 Validity of the arbitration agreement independently of any national law

180 It was again in connection with the validity of an arbitration clause contained in a mixed contract (partly commercial and partly non-commercial) that the Paris Court of Appeal in its *Menicucci* judgment of 1975[113] had the opportunity of complementing, or at least explaining the significance of the *Hecht* judgment. Recalling that it was not prohibited to insert an arbitration clause into an international contract, even partly non-commercial, and that in such cases the clause was completely autonomous, it inferred from this principle of autonomy "that, without it being necessary in the case at hand to determine the law applicable to the substance of the contract ... or to the arbitration and the award, to admit the objection based on the lack of jurisdiction [of the *Tribunal de commerce*] it is sufficient to hold that, given the separability of an arbitration clause contained in an international contract, such clause is valid independently of a reference to any national law".

According to Jean-Pierre Ancel,[114] "thus was confirmed 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. This is the ultimate pinnacle of autonomy". Is it not rather, as Fouchard, Gaillard and Goldman noted,[115] the result of "a skid of terminology" ("*glissement porté par la terminologie*")? For it is only the first two aspects, i.e. indifference to the fate of the main contract and the possibility of being submitted to a separate law, that flow logically from the principle of separability.[116] The latter by no means implies that the arbitration agreement is independent of any national law. The real justification of this regime lies elsewhere: as Philippe Fouchard emphasises in his note on the *Menicucci* judgment, the aim is to remove the obstacles which certain laws, including French law, bring to the development of international arbitration. Although the judgment does not say so, this new conception of separability implies abandoning the conflict of laws approach in favour of material rules, which are in reality part of French law and not of any international or transnational system. We shall see this point with the *Dalico* judgment.

The case law initiated by the *Menicucci* judgment was followed not only by the Paris Court of Appeal, but also by other courts[117] until being confirmed and clarified by the *Cour de cassation* in the *Dalico* judgment of December 20, 1993.[118] The appeal against the judgment of the court below challenged the latter

[113] Rev. arb. 1977, p.147, with a note by Fouchard = JDI 1977, p.106, with a note by Loquin.
[114] *Op. cit.*, p.77.
[115] Fouchard, Gaillard and Goldman, para.419.
[116] Fouchard, Gaillard and Goldman, para.409.
[117] See notably the judgments cited by Blanchin, p.27 n.68 and 69; Rev. arb. 1973, p.158, with a note by Fouchard; Rev. arb. 1991, p.81, with a note by Fouchard, and p.456, with a note by Gaudemet-Tallon (Dalico); recently, Paris, Rev. arb. 2006, p.154..
[118] Rev. arb. 1994, p.116, with a note by Gaudemet-Tallon = JDI 1994, p.432, with a note by Gaillard

for not having taken Libyan law into consideration for the question of the validity of the arbitration clause. The court replied "that by virtue of a material rule of private international law of arbitration, an arbitration clause is legally independent of the main agreement in which it is contained directly or by reference, and that its existence and effectiveness are determined according to the common intention of the parties without reference to a national law, the mandatory rules of French law and of international public policy being reserved". This 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. More recent French case law and some authors held that mandatory rules of French law should only be taken into consideration where they concur with international public policy.[119] The Paris Court of Appeal went a step further and repeatedly confirmed that "an arbitration clause has its own validity and effectiveness".[120] This reasoning has rightly been criticised by authors who observe that a legal act can only be valid according to a norm and not in itself.[121] In its most recent case law (*Uni-Kod*), the *Cour de cassation* reaffirmed the rule of the *Dalico* decision and made an explicit reference to the "mandatory rules of French law" and to "international public policy".[121a]

The result of this case law is that the arbitration agreement is subjected to a 181
material rule which recognises its validity provided it does not violate international public policy. Although this has been the subject of controversy, the rule is an international rule of French law and not a transnational rule.[122] It was not explicitly restated in the Decree of 12 May 1981, but only mentioned in the Prime Minister's accompanying report. This new case law conflicted too directly with certain fundamental rules of French law, which are now limited to domestic arbitration. Nevertheless, according to certain authors,[123] this material rule results *a contrario* from the fact that Arts 1493 and 1494 of the NCPC do not submit the validity of the arbitration agreements to any requirements. In other words, they argue that this regime is based on pure consensualism, the silence of the law and an implicit reservation of international public policy.

Such a regime has the consequence of excluding a conflict of law approach 182
since the validity of the arbitration agreement does not depend on any law, French or foreign. The prevailing opinion among French authors approves this

[119] Cas., *Renault v V 2000,* Rev. arb. 1997, p.537, with a note by Gaillard, and Paris, *KFTCIC* Rev. arb. 1997, p.251, with a note by Gaillard = JDI 1997, p.151, with a note by Loquin; Paris, Rev. arb. 2002, p.792 and 971; Rev. arb. 2003, p.1252; Fouchard, Gaillard and Goldman, paras 441–442.
[120] Notably Rev. arb. 1989, p.691, with a note by Tschanz; Rev. arb. 1990, p.675, with a note by Mayer; Rev. arb. 1992, p.95, with a note by Cohen (*Orri*); Paris, Rev. arb. 2006, p.210; Blanchin, p.24 n.57; Fouchard, Gaillard and Goldman, para.436.
[121] Blanchin, p.24; Fouchard, Gaillard and Goldman, para.438 and 440; Gaudemet-Tallon, Rev. arb. 1996, p.469.
[121a] Cas., *Uni-Kod v Ouralkali*, Rev. arb. 2005, p.959 with a note by Seraglini.
[122] Blanchin, p.29, n.77 and 78; Dimolitsa, *op. cit.*, p.226 n.35; Fouchard, Gaillard and Goldman, para.441 and 442; Mayer, with a note on the *Ducler* judgment (Rev. arb. 1990, p.675).
[123] Notably Ancel, *op. cit.*, pp.79–80; Fouchard, Rev. arb. 1991, p.86, who writes that "Arts 1493 and 1494 NCPC do not say anything else in substance".

approach,[124] which is understandable since the restrictions set by French "local law" in this field are thereby overcome. Fouchard, Gaillard and Goldman[125] remarked that "as the validity of the arbitration agreement is examined solely by reference to the French conception of international public policy, it simply means that the agreement is no longer affected by the idiosyncrasies of local law", by which both the rules of the Code Civil as well as foreign laws are meant! It is thus understandable that such a conception has given rise to serious reservations, both in France and elsewhere, and that it has even sometimes been described as "juridical imperialism".[126] In her note on the *Dalico* judgment,[127] Gaudemet-Tallon observed that if a general consensus on the material rules formulated by the French *Cour de cassation* really existed, national laws would lose their *raison d'être*, and she questioned whether, in this case, it was logical to apply a French material rule to a dispute involving a Danish company and a Libyan municipality. To these objections Fouchard, Gaillard and Goldman[128] in particular responded that such material rules only apply when an application is made to a French court to enforce or set aside an award and when such court has to decide whether the arbitration agreement can be enforced in France. It would then be justifiable to ignore the particularities of national laws otherwise governing the arbitration in question.

This original conception of separability certainly allowed the French courts to free international arbitration from constraints resulting from national laws, including the constraints of French law. This 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. 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. Such lack of foreseeability is one of the most negative features of this method. Recently, Bollée and Seraglini have stressed the drawbacks of the approach of the French courts, insisting particularly on the lack of predictability of this method.[128a] To take an example often given by authors, it is difficult to determine the time-limit which international public policy sets for invoking a defect in contract formation: is it one year, as in Switzerland, ten years, or longer? In addition, this method disregards the perfectly legitimate claim of the country of the seat to provide for minimal requirements governing the validity of the arbitration agreement, by submitting it to material rules or to

[124] Notably Blanchin, pp.27–28; de Boisséson, pp.493–494 para.580; Fouchard, Gaillard and Goldman, paras 435–450.
[125] Fouchard, Gaillard and Goldman, para.441.
[126] Dimolitsa, *op. cit.*, pp.226–227; Fouchard, Gaillard and Goldman, para.438; Schlosser, p.293 para.393.
[127] Cited in n.118 above.
[128] Fouchard, Gaillard and Goldman, para.442.
[128a] Bollée, *op. cit.*, pp.928–929; and *Quelques remarques sur la pérennité (relative) de la jurisprudence Dalico et la portée de l'Article IX de la Convention européenne de Genève (A propos de l'arrêt Sté Uni-Kod c/ Sté Ouralkali)*, JDI 2006, pp.127–138, in particular 131–134; Seraglini,

conflict of law rules, as does for instance Art.178 of the PILS. Moreover, the connection with the legal system of the seat is at least as strong as that with the place where recognition and enforcement are sought. Contrary to what the *Cour de cassation* stated in its *Hilmarton* judgment,[129] an award and the arbitration agreement upon which it is based are as integrated in the legal system of the country of the seat as in the system of the country which allows its enforcement. Not only is the latter place often accidental but enforcement can be sought in several countries which, if they follow French case law, could each provide for different material rules in the name of their own perception of international public policy. Therefore it is not certain that this approach can truly lead to uniform results, which would be desirable.

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. On this specific point, the recent *Uni-Kod* decision of the *Cour de cassation* might announce an evolution of French law because it seemed to reserve the application of a law specifically chosen by the parties to govern the arbitration agreement.[129a] The approach of the French courts also contradicts the connecting factors provided for in Art.V(1)(a) of the New York Convention, which subjects the validity of the arbitration agreement in the first place to the law chosen by the parties, and, in the absence thereof, to the law of the country where the award was made. Admittedly this is not so important if the enforcement of an award is sought in France, because it can then benefit from the extreme liberalism of French law by virtue of Art.VII of the New York Convention. By contrast, where an award made in France has to be enforced elsewhere, it will not be judged through French case law, but according to the requirements of the New York Convention.

This conception of separability has remained isolated,[130] and it is hardly in a position to ensure the uniform regulation of international arbitration to which it aspires. Such a result can only be obtained by the development of international treaties.

3.3 THE FORM OF THE ARBITRATION AGREEMENT

Bibliography:

General Works: Berger, pp.133–155; Bernardini (Rev. arb. 1994), pp.485–486; Blessing (Introduction), pp.183–185 paras 481–487; de Boisséson, pp.477– 480 paras 572–573 and pp.482–484 para.575; de Bournonville, pp.96–98 paras 69–72; Bucher, pp.47–52 paras 117–128; Fouchard,

[129] Rev. arb. 1994, p.327, with a note by Jarrosson = JDI 1994, p.701, with a note by Gaillard; see Ch.10 para.927.
[129a] Cas., Rev. arb. 2005, p.959, 960, with a note by Seraglini, esp. pp.972–976; Bollée, JDI 2006, pp.134–135, stressing that a choice of law governing specifically the arbitration clause (as opposed to the contract as a whole) is rare in practice.
[130] We should however cite a Luxemburg award which applied this French case law (ICC Award No.8938 = YCA 1999, p.174).

Gaillard and Goldman, paras 590–623; Huys and Keutgen, pp.110–112 paras 127–128 and pp.473–475 paras 673–678; IPRG-Volken, pp.1973–1978 paras 17–47 *ad* Art.178; Jarvin, p.44; KSP-Wenger, pp.1438–1446 paras 6–21 and pp.1456–1458 paras 52–55 *ad* Art.178; Lalive, Poudret and Reymond, pp.315–321 paras 5–13 *ad* Art.178 PILS; Linsmeau, pp.64–65 paras 77–85; Merkin, pp.28–34 *ad* Section 5 and 6; Mustill and Boyd (2001), pp.261–265; Poudret (*Droit applicable*), pp.25–27; Redfern and Hunter, pp.134–137 paras 3.07 to 09; Rüede and Hadenfeldt, pp.63–67 § 11 VI; Schlosser, pp.261–283 paras 359–384, and (Rev. arb. 1998), pp.295–297; Schwab and Walter, pp.37–45 Ch.5 paras 1–20, and pp.388–393 Ch.44 paras 7–17; van den Berg, pp.170–232, N. II 2, and (ASA), pp.37–45 and 61–65; van den Berg, van Delden and Snijders, pp.36–37 paras 4.8.2.

In addition, for each country, Handbook, Ch.II 1.

Specific Studies: G.A. Alvarez, Art.II (2) of the New York Convention and the Courts, *in:* ICCA Congress Series para.9, 1999, pp.67–81; J.D.M. Lew, The Law Applicable to the Form and Substance of the Arbitration Clause, ibidem pp.114–145, spec. 119–120 and 129–136; N. Kaplan, Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?, Arb. Int. 1996, pp.27–45; J.-F. Poudret and G. Cottier, *Remarques sur l'application de l'Art.II de la Convention de New York*, ASA Bul. 1995, pp.383–393.

On studies specifically relating to arbitration clauses by reference, see the bibliography *ad* Ch.3.3.12.

183 The formal validity of the arbitration agreement is often fiercely disputed because the jurisdiction of the arbitrators and the conduct of the arbitral proceedings depend thereon. However, the international conventions and the law of the European countries widely concur on this point and require that the agreement must be made in writing.[131] This is notably the case in Austria (ZPO, Art.583(1)), Greece (Art.7(3) of the law of 1999), Luxemburg (CPC, Art.1005), Portugal (Art.2(1) of the law of 1986), Scotland to the extent that the UNCITRAL Model Law is applicable, and Spain (Art.9(3) of the law of 2003). This is also the case in the majority of the laws considered here, with the exception of France and Sweden which, like Denmark (see s.7 of the new Act) and Norway, do not have any formal requirements and of England, which, paradoxically, assimilates an oral agreement to a written one! These few exceptions do not detract from the general rule submitting the validity of an arbitration agreement to a document in writing. Writing is not always understood in exactly the same way, although Art.II of the New York Convention undeniably had a unifying influence.

While certain laws require writing only for evidentiary purposes *(ad probationem)*, others make it a condition of validity *(ad validitatem)*. According to Wenger[132] Dutch, French (domestic) and Italian laws belong to the former category, while the New York Convention, the Swiss PILS, the UNCITRAL Model Law and the German ZPO belong to the latter. The question has been particularly debated in Belgium, where commentators currently appear to be of the opinion that writing is only necessary for evidentiary purposes.[133] In fact, the difference between these two approaches is slim. If writing is only an evidentiary

[131] See Alvarez, *op. cit.*, p.68 n.4, and Lew, *op. cit.*, pp.129–132, who however on p.133 confuse formal and material validity under Swiss law.

[132] KSP-Wenger, pp.1438–1439 para.7 *ad* Art.178; *contra*, Fouchard, Gaillard and Goldman, para.606, who consider that the written form required by PILS, Art.178 is only *ad probationem*. We shall return to this point in Ch.3.3.4. para.193.

[133] Huys and Keutgen, p.110 para.127; Linsmeau, p.64 para.78.

requirement, the arbitration agreement can also be established by tacit acceptance. This is particularly the case where the respondent participates in the arbitral proceedings without contesting the existence of an arbitration agreement, as the UNCITRAL Model Law and the new Greek law of 1999 provide. This also applies if writing is a condition of validity since, as we shall see,[134] a party who pleads on the merits is barred from contesting the jurisdiction of the arbitrators or deemed to have thereby submitted to that jurisdiction.

Given the influence exercised by the New York Convention, we shall begin our **184** study therewith and the 1961 European Convention, and then proceed to examine the various national laws and the UNCITRAL Model Law. We shall then examine the particular situation under French law and address two particularly controversial problems, tacit acceptance and arbitration agreements by reference.

3.3.1 The New York Convention and the 1961 Geneva Convention

We do not propose here to recall in detail the voluminous writings and the abundant case law dedicated to the formal requirements of Art.II(2) of the New York Convention. In this respect we can refer to the book by A.J. van den Berg, which remains fundamental, and to the analyses given each year in the Yearbook. We consider it more important to determine the respective ambits of this provision and of those contained in national laws. As Berger[135] has pointed out, the coexistence of a uniform law and of national laws poses the highly controversial question of their respective field of application.

3.3.1.1 Field of application

We have already observed above[136] that the New York Convention only **185** applies in two cases. First, on the basis of Art.II(3) when a court is seized with a dispute on the mertis which is covered by an arbitration agreement, and secondly when seized with an application to recognise and enforce a foreign award. By contrast, the Convention does not govern the cases where the jurisdiction of the arbitrator is contested before him because the arbitration agreement is allegedly invalid, or where the arbitrator's decision as to his jurisdiction is challenged before the courts of the seat. In the last two cases, the majority of authors, in particular in Switzerland, consider that the Convention does not apply,[137] while some consider that Art.II of the New York Convention

[134] Ch.5.1.4 para.471.

[135] Berger, pp.133–135. See Ch.1.4.1.2.2 para.72.

[136] Ch.1.4.1.2.2 para.72.

[136] Ch.1.4.1.2.2. para.72.

[137] Berger, pp.133–134; Dimolitsa, *op. cit. ad* Ch.3.2, pp.247–248 and n.96; IPRG-Volken, p.1976 paras 34–36 *ad* Art.178; Lalive, Poudret and Reymond, p.285 para.3 *ad* Art.7 and pp.316–317 para.7 *ad* PILS, Art.178; Poudret (*Droit applicable*), p.25; van den Berg, p.173 para.II.2.2.2, and pp.185–190 para.II.2.2.4, where he describes these two approaches without opting clearly for either, and (ASA), pp.33–36, where he advocates a solution also defended in this book, but by a different route.

always prevails over formal requirements of national laws, with the exception of a possible reference by virtue of Art.VII to a more favourable law.[138] In his recent report,[139] Alvarez abstained from taking side in this capital debate. It is evident that if the courts at the seat apply their own law to the question of the jurisdiction of the arbitrator, the latter cannot ignore such law for risk of his award being set aside. However, this should not dissuade him from motivating his ruling on jurisdiction by also mentioning, if possible, the formal requirements of Art.II(2) of the New York Convention, to which Art.V(1)(a) refers, in order to facilitate recognition and enforcement of the award abroad.[140] Yet there is no doubt in our minds that if he cannot reconcile the two, the arbitrator should give priority to the law of the seat and thus avoid that his award be set aside, for this would compromise its recognition and enforcement in most countries.

186 Even though the *Cour de cassation* expressly excluded the application of Art.II of the Convention by courts entertaining applications for setting aside an award,[141] the French courts did the opposite in the case *Bomar Oil v Etap*. In its decision of January 20, 1987,[142] the Paris Court of Appeal confirmed "that this text sets out a material rule which must apply in all cases, regardless of whether the arbitration agreement is invoked in support of a plea of lack of jurisdiction before a court or before an arbitration tribunal with a view to having the matter referred to a court". It is on the basis of the Convention that it dismissed the first ground for nullity and confirmed the validity of the arbitration agreement, which had been made by reference. The *Cour de cassation* also relied on Art.II of the New York Convention in its decision of October 11, 1989 setting aside the decision of the Court of Appeal in order to establish whether there existed an ongoing business relationship between the parties which ensured perfect knowledge of the disputed clause.[143] In order to resolve this question, the Versailles Court of Appeal, to which the matter was remitted, made a detour via Art.VII of the New York Convention, and concluded that the Convention did not pose requirements any different to those of French law. Yet, at least according to Catherine Kessedjian, this court relied on a material rule derived from the

[138] Notably de Boisséson, p.478 para.572; Bucher, pp.47–48 paras 117–119; Walter, Bosch and Brönnimann, p.77 no.IV.1, who confine the ambit of PILS, Art.178 to agreements concluded in Switzerland for an arbitration with seat in Switzerland (while the second condition is obvious, the first is unfounded).

[139] Alvarez, *op. cit.*, p.69 n.5.

[140] See van den Berg, pp.185–190 para.II–2.2.4 and p.227: having recognised that both solutions are possible, this author concludes that the arbitrator should apply Art.II (2) in order to ensure recognition of his award, but under reservation of the more favourable law pursuant to Art.VII, which presupposes that the country in which the future award will have to be enforced is already known; see also: Should an International Arbitrator Apply the New York Convention of 1958?, *in: Liber Amicorum* Pieter Sanders, pp.39–49: we do not consider that the other arguments which he advances are decisive.

[141] Notably Cas., Rev. arb. 1985, p.415 (first judgment), with a note by Synvet; Rev. arb. 1988, p.137, *idem* = JDI 1987, p.964, with a note by Oppetit; see Fouchard, Gaillard and Goldman, para.265–267.

[142] Rev. arb. 1987, p.482, with a note by Kessedjian = JDI 1987, p.934, with a note by Loquin.

[143] Rev. arb. 1990, p.134, with a note by Kessedjian = JDI 1990, p.633, with a note by Loquin.

principle of consensualism.[144] This approach was approved by the *Cour de cassation* in its second decision of November 9, 1993. This time the Court did not rely on Art.II of the Convention which had been invoked in support of the appeal, but confined itself to confirming in international arbitration the validity of an arbitration clause made by reference where the party against whom such clause is invoked was aware thereof at the time of the conclusion of the contract.[145]

The first three *Bomar Oil* judgments were heavily criticised not only by commentators at the time, but also subsequently.[146] The legal commentators pointed out that the courts disregarded the material rule of French law dispensing an arbitration agreement from any requirements of form, a rule supposedly applicable by virtue of Art.VII of the New York Convention. Curiously, this criticism is not based on the fact that the New York Convention was simply not applicable in this case because the matter concerned an application to set aside an award made in France by an arbitral tribunal confirming its own jurisdiction.[147]

The question whether Art.VII, which reserves the application of the most **187** favourable law, can be invoked in all cases is disputed. As we have already pointed out,[148] we do not believe that this is the case, contrary to a widely held opinion[149] recently shared by the Paris Court of Appeal.[149a] There are at least two reasons for this. One is the text: Art.VII only expressly mentions treaties "concerning the recognition and enforcement of arbitral awards" and national provisions allowing any interested party the right "to avail himself of an arbitral award", and not of an arbitration agreement. This means that Art.VII does not cover the case envisaged by Art.II(3), i.e. a plea of lack of jurisdiction based on an arbitration agreement, which is easily explained because the latter was incorporated into the Convention at the last minute. The second reason relates to the unfortunate consequences which would result from the application of Art.VII to decide the validity of an arbitration agreement invoked before a foreign court. The latter might be inclined to refuse jurisdiction by applying its own particularly liberal law (for instance French law), while the arbitrator or the authority seized with an application to set aside the award on the question of jurisdiction might also decline jurisdiction based on the more restrictive law of the seat or, pursuant to an opinion refuted above, based on Art.II(2) of the New York Convention. Such negative conflict of jurisdiction would deprive the applicant of the possibility of recourse to both the court and the arbitrator. The only fully

[144] Rev. arb. 1991, p.291 (second case), with a note by Kessedjian.

[145] Rev. arb. 1994, p.108, with a note by Kessedjian = JDI 1994, p.690 (1st case), with a note by Loquin.

[146] Fouchard, Gaillard and Goldman, paras 495 and 614.

[147] In this sense the *Orri* award CCI 5730 (Collection II, p.410, especially pp.413–414).

[148] Ch.I.4.I.2.2 para.74.

[149] Notably Fouchard, Gaillard and Goldman, paras 495 and 614; van den Berg, pp.86–88 para.I-4.2.4.

[149a] Paris, *ABS v Copropriété maritime Jules Verne*, Rev. arb. 2003, p.243, holding that NYC, Art.VII applies because of the link between Art.II and Art.V(1)(a) regarding the validity of the arbitration agreement. Consequently, the material rules of French law are applicable also within the framework of a plea of lack of jurisdiction based on the arbitration agreement.

satisfactory solution would be to reserve only the more favourable law of the seat, which would allow the applicant to obtain an award. Unfortunately this is not the solution of Art.VII, unless the law of the country where the arbitration agreement is invoked refers itself to the law of the seat.

We consider it indispensable, when invoking Art.VII of the Convention, to carefully distinguish between three different situations: recognition and enforcement of an award, objection to the jurisdiction of the court on the basis of the arbitration agreement (*exceptio arbitrii*) or objection to the jurisdiction of the arbitrator. Unfortunately, commentators and courts too frequently advocate the application of Art.VII without making first such a distinction.[150]

To the extent that Art.VII is applicable, it is necessary to clarify the statement that Art.II(2) establishes a uniform rule superseding the requirements of domestic law and that this provision "*must in principle be deemed to be both a maximum and a minimum requirement*".[151] In reality, Art.II(2) only provides for a maximum formal requirement for the case of the enforcement of foreign arbitral awards. The requirement is not minimal precisely because the less restrictive conventions and laws are reserved. This is in accordance with the purpose of the New York Convention, which is to favour the recognition of foreign awards, while in the event of conflict between state jurisdiction and arbitral jurisdiction it is important to have a uniform response avoiding such conflicts.

3.3.1.2 Formal requirements under the New York Convention and the 1961 European Convention

188 We shall only briefly mention the two types of agreement recognised by Art.II(2) of the NYC, referring the reader for further details to the numerous Articles that have been written on this subject.[152] However, one preliminary remark is necessary. In its afore-mentioned judgment in the *Bomar Oil* case,[153] the Paris Court of Appeal considered that the authors of this text, "desirous to facilitate the resolution of disputes by way of arbitration in matters of international commerce (. . .) wished, in establishing the rule that the arbitration agreement must be in writing, to protect the parties from rashly entering into a commitment entailing a waiver of court jurisdiction". While some find this formula somewhat outdated, the Basle Court of Appeal confirmed it in a judgment in 1994, holding that the parties should be protected from obligations

[150] Thus Alvarez, *op. cit.*, pp.69–71, who notably cites without distinction the *Tradax* case, which concerns a plea of lack of jurisdiction raised before the court pursuant to Art.II(3), and *Bomar Oil*, which concerns the jurisdiction of the arbitrator, in which case the Convention, and not just its Art.VII, is inapplicable; see also Fouchard, Gaillard and Goldman, para.614.

[151] van den Berg, pp.178–179, para.II–2.2.3, and (ASA), p.44; Alvarez, *op. cit.*, p.71.

[152] Notably Alvarez, *op. cit.*, pp.72–80; Bucher, pp.48–51 paras 120–127; Fouchard, Gaillard and Goldman, paras 616–670; van den Berg, pp.170–228 N.II–2.

[153] See above, para.186, n.142, translated by Alvarez, *op. cit.*, p.73.

which they incur unknowingly.[154] In our opinion one should infer from this, as stated above, that the written form is not merely an evidentiary requirement, but a condition of validity.

Article II(2) allows two types of written agreement. First, an arbitration clause contained in a contract or an arbitration agreement signed by the parties.[155] While this first form requires not only a written text, but also the parties' signature,[156] this is not the case for the second. Indeed, Art.II(2) also considers an arbitration agreement contained in an exchange of letters or telegrams to be valid. The documents exchanged need not be signed, even if they are letters.[157] Furthermore, the courts did not take long to extend the exchange to other forms of communication such as telex and telefax.[158] What is essential is that the documents are identifiable and can be held to express the intention of each of the parties. The majority of authors advocate assimilating an exchange of e-mails to an exchange of telegrams and admitting the validity of an arbitration agreement concluded by this form of communication as far as Art.II(2) of the New York Convention is concerned.[159]

To summarise, as the text of the Convention clearly indicates and a judgment **189** of the Swiss Federal Tribunal confirms,[159a] the arbitration clause must either be contained in a contract or other document signed by both parties, or result "from the exchange of written declarations, which need not be signed". The necessity of such an exchange of written documents not only results from the limpid text of the Convention, but has also been convincingly demonstrated by van den Berg, who submits that this is not the case where one document is sent by one

[154] YCA 1996, p.685, Switzerland 26, cited by Alvarez, *op. cit.*, p.79. This is also the opinion of van den Berg, pp.171–173 para.II–2.2.1.

[155] The signature can be in a subsequent document ratifying the contract—unsigned—which contains the arbitration clause (TF, YCA 1990, p.509, Switzerland 18).

[156] We do not agree with the interpretation of a US court (CA, 5th Circuit, YCA 1995, p.937, US 181) and reported by M. Cohen (Arb. Int. 1997, pp.273–274), which consists in separating the "arbitral clause in a contract", whether signed or not, from the "arbitration agreement" which can be "signed by the parties or contained in an exchange of letters or telegrams". The punctuation and the plural form used in the French version ("signés") are sufficient to exclude this interpretation, as a more recent American judgment held (CA, 2nd Circuit, YCA 1999, p.900, US 287). On the exact meaning of this first form see van den Berg, pp.192–193 para.II–2.3.2, and Art.I (2) let. a of the European Convention of 1961 analysed below in para.190.

[157] AG Basel, YCA 1979, p.309, Switzerland 5; van den Berg, pp.193–195 para.II–2.3.2, and (ASA), pp.61–62 para.205 and 206.

[158] Notably CJ GE, RSJ 1968, p.56 para.19 = YCA 1976, p.199, Switzerland 1; ATF 111 Ib 253 = YCA 1987, p.511, Switzerland 14; YCA 1991, p.13 (arbitral award); AG Basle, YCA 1996, p.685, Switzerland 26; ATF 121 III 38, c.3 (45); OG Austria (1971), YCA 1976, p.183, Austria 2; Paris, Rev. arb. 1987, p.482, with a note by Kessedjian; Fouchard, Gaillard and Goldman, para.618; van den Berg, pp.204–205 para.II-2-4-1 and (ASA), p.62 para.207.

[159] Kaufmann-Kohler, *op. cit. ad* Ch.2.3.3, p.448; R. A. Horning, The use of new means of communication in aid of acceleration of international arbitration, *in: Liber Amicorum* Michel Gaudet, pp.79–87, especially 80; R. Hill, New paths for dispute resolution, *in: Liber Amicorum* Michel Gaudet, pp.57–68, especially 64–66; *id.*, *op. cit. ad* Ch.2.3.1.3, pp.200–202; *contra*, CA Halogaland, Norway 1, YCA 2002, p.519: an exchange of e-mails confirming the content of a contractual document that had not been signed by the parties does not satisfy the requirements of Arts II and IV NYC; see A.L. Ortiz, Arb. Int. 2005/3, pp.353–355.

[159a] ATF 121 III 38, c.3.

party to the other.[160] This has been confirmed by numerous judgments.[161] However, it suffices for an exchange that the addressee of an offer to arbitrate subsequently refers thereto in a written text from which it can be inferred that it accepts such offer[162] or again, as van den Berg has also written,[163] that the recipient of the unsigned document returns it signed. This is not an exchange of two documents, but the sending back and forth of one document, each time attesting in writing the intention of one and then the other party to submit to arbitration. By contrast, silence of the recipient or even tacit acts such as performance of the contract do not satisfy the requirement of acceptance in writing. We shall return to this point below when dealing with tacit acceptance.[164]

190 The definition of arbitration agreement given by Art.1(2)(a) of the 1961 European Convention is based on Art.II(2) of the New York Convention, differing on only three points. First, the text makes clear that it is the contract containing the clause or the arbitration agreement which must be signed, and not the clause itself, thus avoiding an interpretation of the text of 1958 which is open to criticism. Secondly, the text has been modernised in that the Convention of 1961 expressly mentions "communications by teleprinter", which confirms the evolutive case law referred to above. Although it is not yet a generic formula as in the UNCITRAL Model Law or in Art.178 of the PILS, we submit that its scope should be extended as methods of communication develop. Finally, the text reserves the application of more liberal laws "in relations between states whose laws do not require that an arbitration agreement be made in writing". This reservation envisages laws which allow formless arbitration agreements, such as in France and Denmark, or which submit the agreement to a less strict form. Although this is the case for England and Sweden, neither country is a party to the Convention of 1961.

This raises the question of the nature of "the relations" envisaged by this reservation, i.e. of the connecting factor which determines its application. The text is not clear and its meaning is controversial. Like Fouchard, Gaillard and

[160] On p.192 para.II-2.3.1: For instance, where the text requires an exchange of letters, there must have been a mutual transfer of documents; the mere transmission of one document by a party to the other cannot linguistically fulfill the word "exchange".

[161] CJ GE, YCA 1976, p.199, Switzerland 1 = RSJ 1968, p.56: the unilateral transmission of a letter of "confirmation" does not amount to an exchange; CA Florence, YCA 1979, p.289, Italy 29: the exchange can result from the reference on invoices to a purchase order mentioning the clause on the reverse side; Cas., Imparato, YCA 1991, p.588, Italy 106: handing over unsigned general business conditions to the other party who then signs them does constitute exchange; Cas., Robobar, YCA 1995, p.739, Italy 131: a confirmation of order containing an arbitration clause does not fulfil the requirements of Art.II (2) of the Convention; *contra*, YCA 1976, p.195, Netherlands 1, criticised by van den Berg, pp.197–198 para.II–2.3.3.

[162] See CA Florence, YCA 1979, p.289, Italy 29; van den Berg, p.201 n.231.

[163] Van den Berg, p.193 i.f.; see YCA 1991, p.588, cited in n.161.

[164] Ch.3.3.11; meanwhile we can refer to the firm opinion of van den Berg, pp.206–207 para.II-2.4.2 and 227 para.II–2.5 if., and (ASA), p.41 and 62–63 para.208; Fouchard, Gaillard and Goldman, para.620 euphemistically envisage "certain difficulties" with regard to Art.II(2) in cases of oral or tacit acceptance.

Goldman,[165] one might advocate connecting the reservation to the domicile of the parties at the time of the conclusion of the arbitration agreement, the criterion used in Art.1(1)(a) of the Convention. In other words, the escape clause would apply to all arbitration agreements or awards between parties domiciled in two countries which dispense from the written form.[166] This interpretation is not only at odds with the preparatory materials, even if these are confusing, but above all with the text of the Convention, which refers to "relations between states", and not between parties. Thus it seems to us that the Convention envisages relations between the country of the seat and that of recognition, to the extent that neither requires the written form.[167] Unlike Art.VII of the New York Convention, it is however not sufficient, if only the state where recognition is sought does not require the written form.[168] We now turn to the national laws, beginning with those which require written form.

3.3.2 Belgium

Like the provisions analysed above, Art.1677 of the CJB envisages two forms: **191**
"a written text signed by the parties or other documents which bind the parties and manifest their will to submit to arbitration". We find this wording, which does not require an exchange, particularly clear. First, it provides that only documents which are binding on the parties can be taken into consideration. These must originate from the parties or from persons authorised to act for them, which is particularly important when the documents are not signed. Secondly, these documents must manifest the intention of both parties ("their will") to submit to arbitration, which seems to exclude oral or even tacit acceptance.[169]

We saw above that the written form is here only an evidentiary requirement, and not a condition of validity. If the intention of the parties to arbitrate is contested, the existence of the arbitration agreement shall be proven by mean of documents, even if these are unsigned. The term document is used in its broadest sense[170]: invoices, order forms, general business conditions etc. It is essential that the documents be imputable to the parties and manifest their mutual will to

[165] See Fouchard, Gaillard and Goldman, para.623.

[166] See Fouchard, Gaillard and Goldman, para.623; in the same vein Fouchard, p.83 para.144; Schlosser, p.274 para.375.

[167] See Hascher, YCA 1995, p.1015 paras 22–24 *ad* Art.1.

[168] As the BGH did for the recognition of an award rendered in Denmark between a Danish and a German citizen, basing its decision only on German law, which was applied pursuant to Art. VII of the New York Convention and 1 (2) (a) of the European Convention of 1961 (YCA 1996, p.535, GER 44).

[169] Huys and Keutgen, p.112 para.128, consider that it is possible to invoke the performance of the arbitration agreement in order to establish its existence, which seems to us to be correct if the admission concerns the arbitration agreement, and not only the main contract, for instance through the appearance before the arbitrator without protesting (see Linsmeau, p.65 para.80: the minutes showing appearance are tantamount to evidence) or if the party proceeds without reservation on the merits of the case.

[170] de Bournonville, p.96 para.70; Handbook I, Belgium-Matray, Ch.II.1 b; Huys and Keutgen, p.111 para.127; Linsmeau, pp.64–65 paras 78–79 and 84; Cas., Bul. 1995, p.952 para.457: proof by telex

submit to arbitration. By contrast, an oral agreement is not valid, contrary to the situation under Belgian law prior to the reform of 1972, which did not submit arbitration agreements to any formal requirements.[171]

In conclusion, CJB, Art.1677 seems to be along the lines of Art.II(2) of the New York Convention, so that the coexistence of these two rules should not lead to any problems. In our opinion the Belgian text is to be preferred, for it emphasises the two elements which have to be fulfilled if the mutual will of the parties to submit to arbitration is based on unsigned documents.

3.3.3 The Netherlands

192 Pursuant to Art.1021 of the WBR of 1986, "proof of the arbitration agreement shall be furnished in writing". As stated above, this is an evidentiary requirement and not a condition of validity, which implies, according to the commentators, that in the absence of a written document the respondent is nevertheless bound if he recognises the existence of the agreement or proceeds without raising an objection (see WBR, Art.1052(2)).[172]

Article 1021 of the WBR further provides that for such proof, "a written document providing for arbitration or refering to general conditions providing for arbitration shall suffice, providing such document has been expressly or tacitly accepted by or on behalf of the other party". Two conditions must therefore be fulfilled: on the one hand a written document providing directly or indirectly for arbitration, and on the other hand an explicit or tacit acceptance by the other party or a person empowered to act on his behalf. The confirmation can even come from a third party, for example a broker, and refer to general conditions.[173] As in Belgium, the new statutory text repeals the former admissibility of an oral arbitration agreement.[174] It is remarkable that the aim of the legislature to tighten evidentiary requirements and to ensure greater foreseeability has prevailed over the former liberalism.

Nevertheless, the new text of 1986 is broader than that of the New York Convention because it allows a tacit acceptance and also covers arbitration agreements made by reference. We would add that by virtue of Art.1073(1) of the WBR this rule of form is applicable when the seat of the arbitration is in the Netherlands. This will be the case for determining the jurisdiction of an arbitrator sitting in that country. By contrast, if the arbitration agreement is invoked before a foreign jurisdiction or if an application to enforce an award given in the Nertherlands is filed abroad then in principle the New York Convention will apply. The less strict formal requirements of Art.1021 of the WBR might

[171] Linsmeau, p.65 para.81; A. Bernard, L'arbitrage volontaire en droit privé, Bruxelles-Paris 1937, pp.60–61 para.96 and p.107 para.179.
[172] Handbook III, The Netherlands—van den Berg, Ch.II.1; van den Berg, van Delden and Snijders, p.36 para.4.8.2.
[173] *Ibidem*.
[174] Sanders and van den Berg, para.5 *ad* Art. 1021; see also Schultsz, *op. cit. ad* Ch.1.4.1.1.6, p.210,

therefore exceptionally lead to a refusal of enforcement, as it is also the case under Swiss law.

3.3.4 Switzerland

The Federal legislature abandoned the requirement of signature as an element 193
of the written form pursuant to Art.6 of the CIA[175] and opted for a simplified written form[176] which certain authors have even assimilated to a simple evidentiary requirement.[177] Under PILS, Art.178(1), which is a material rule applicable to all arbitrations when the seat is in Switzerland (see Art.176(1) of the PILS),[178] it suffices that the arbitration agreement be "made in writing"; it does not have to be signed. It recognises as being written the telegram, telex and telefax, all of which are generally unsigned, as well as "any other means of communication which can be evidenced by a text". It is thus essential that the mode of communication used results in a text, which can be kept and if necessary produced. It may be qualified as documentary form or, in German, *Textform*.[179] Along with the means of communication in the proper sense, including e-mails,[180] all documents with an evidentiary value, such as confirmations of orders, notes, minutes, general conditions etc., fulfil the requirements of PILS, Art.178(1) and constitute a written arbitration agreement.

While the Swiss text is close to the New York Convention, as it has been interpreted recently by the courts, there is an important difference: Art.178(1) of the PILS does not require an exchange of documents, i.e. that each of the parties sends a document to the other. In its judgment of 1995 in the case *CNT v MSC*[181] the Swiss Federal Tribunal did not consider this difference and interpreted the text of the Convention of 1958 in the light of Art.178 of the Swiss law of 1987!

[175] Lalive, Poudret and Reymond, pp.56–59 para.1 *ad* Art.6 Concordat with numerous references. This rule applied to all arbitrations with their seat in a Canton which had ratified the Concordat, so that neither the parties nor the arbitrators could depart therefrom contrary to what Derains has suggested (ICC Award No. 4504, Collection II, p.279, note III, at pp.290–291). This requirement is notably omitted in an award made in Geneva, which held an unsigned telex for valid, wrongly invoking case law relating to Art.II (2) of the New York Convention, while in fact only the Concordat was applicable to the question of the jurisdiction of the arbitral tribunal (ASA Bul. 1984, p.313 ss, sp. 315–318).
[176] On the origin of this provision see IPRG-Volken, p.1975 paras 25–32, and KSP-Wenger, p.1440 para.10 *ad* Art.178.
[177] See Fouchard, Gaillard and Goldman, para.606; *contra* KSP-Wenger, *loc. cit.*, and Lalive, Poudret and Reymond, pp.318–319 para.11 *ad* Art.178 PILS.
[178] IPRG-Volken, pp.1973–1974 paras 18–20 *ad* Art.178; Lalive, FJS 946, Ch.IV para.8; Lalive, Poudret and Reymond, p.317 para.8 *ad* Art.178 PILS.
[179] Swiss Federal Tribunal, ASA Bul. 2004, p.344, 348, c.4.1; KSP-Wenger, pp.1440–1441 paras 10–12 *ad* Art.178; Lalive, Poudret and Reymond, pp.318 paras 9 and 10 *ad* Art.178 PILS.
[180] On this question see the Report by the Federal Ministry of Justice of 24 November 1998 on electronic signatures and private law, JAAC 63.46; O. Arter, F.S. Jörg and U.P. Gnos, PJA 2000, pp.277–297, 279 (on Art.5 PILS); M. Jaccard, *Forme, preuve et signature électronique, in: Aspects juridiques du commerce électronique*, Zurich 2001, p.115; Vischer, Huber and Oser, pp.652–653 para.1435; Kaufmann-Kohler, *op. cit. ad* Ch.2.3.3, p.448; Art. 583(1) Austrian ZPO.
[181] ATF 121 III 38 = YCA 1996, p.690, Switzerland 27.

While this is disputable, it would be even more erroneous to infer from the statutory text that a written communication from one party to the other suffices because no exchange of documents is required.[181a] It is indeed the mutual will of all parties concerned that has to be established by a text.

Although to our knowledge the Swiss Federal Tribunal has not had the opportunity to clarify this point with regard to arbitration agreements, it clearly did so in a judgment of 1993 concerning a jurisdiction agreement pursuant to PILS, Art.5, the text of which is identical to PILS, Art.178.[182] Here it held that the fact that the respondent had knowledge of the jurisdiction clause contained in the general conditions which it had received was not sufficient to bind it to such clause, since otherwise the protection afforded by this provision, i.e. the security entailed by the acceptance of an election of jurisdiction, would be thwarted. "It is necessary [the judgment says] that each party make its declaration in writing or by one of the other means of communication mentioned". We hence agree with a published award[183] confirming that the requirement of the written form extends to the will of both parties and that consequently neither a unilateral declaration by one of them nor tacit acceptance by the other is sufficient.

The slight difference which we have just noted between the conditions of formal validity pursuant to Art.II(2) of the New York Convention and Art.178(1) of the PILS (no exchange required) might lead to a refusal of recognition abroad of an award which is valid in Switzerland,[184] Art.VII of the former being not applicable in that case for the reasons explained in para.187.

As we have already pointed out, the common intention of the parties can be based on a single document, for example when the document was returned for acceptance by the second party to the sender, or even where it consists of minutes or some other text drawn up by a third party (for instance the arbitrator) confirming the consent of the two parties. However, an alleged letter of confirmation originating from a party and left unanswered by the other will not suffice, and neither will an oral agreement, for example made on the telephone, nor tacit acts, such as the performance of the main contract. The only exception is based on the doctrine of abuse of rights, although such should only be assumed in exceptional cases, since otherwise the envisaged statutory protection would be too easily undermined. Wenger has therefore rightly insisted on the reciprocal character of the requirement of form.[185] It cannot be put better and we are surprised that a number of practitioners in Switzerland have submitted otherwise, at the risk of denaturating the legal text.

[181a] *Contra*, P. Karrer, *La convention d'arbitrage en droit suisse. Forme, validité, portée, Mélanges* François Knoepfler, pp.177–189, 183–184, who appears to disregard the form requirement of Art.178 (1) PILS. We cannot share the opinion of this author.

[182] ATF 119 II 391 = JdT 1994 I 620, c.3b.

[183] ASA Bul. 1994, pp.38–45.

[184] See Poudret (Discrepancies), pp.239–240.

3.3.5 Italy

194 Article 807 of the ICCP 2006 governs the form of the submission to arbitration and of the arbitration clause (see the reference to this provision in ICCP 2006, Art.808(1)). Article 807(1) of the ICCP 2006 provides that the arbitration agreement shall be made in writing, as under the former law of 1994. Article 807(2) of the ICCP 2006 now explicitly mentions that the written formal requirement is considered complied with also when the parties' intention is expressed by electronic messages in accordance with the applicable statutes and regulations, a solution which was already defended by some authors under the former law.[186] As seen above (para.28), the new Act of 2006 does no longer distinguish between domestic and international arbitration and repealed Art.833 of the ICCP 1994, which provided that Arts 1341 and 1342 of the Civil Code—requiring a specific approval of the party for arbitration clauses contained in general conditions of contract or in contracts concluded on the basis of standard forms—were not applicable in international matters. Since the abrogation of Art.833 of the ICCP was not accompanied by precise explanations, it is doubtful whether the two above-mentioned provisions of the Civil Code, which raised many uncertainties in the past,[187] are today applicable to arbitrations taking place in Italy, even in purely international matters. This would constitute an unfortunate step back, contrary to the intention of the legislature to provide not only a uniform but also a modernised arbitration law in Italy.

3.3.6 UNCITRAL Model Law

195 Article 7(2) of the UNCITRAL Model Law subjects the arbitration agreement to the written form, adding that this requirement is fulfilled if the agreement is part of a document signed by the parties or contained in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement. This provision is simply an update of the text of the New York Convention of 1958.[187a] It adds the case of an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. As we have already seen, in particular in Dutch law, failure to raise a procedural objection constitutes an admission. Finally, the Model Law recognises the validity of a reference in a contract to a document containing an arbitration clause "provided that the contract is in writing and the reference is such as to make that clause part of the contract". We shall see that,

[186] Briguglio, Fazzalari and Marengo, pp.15–16 para.2 *ad* Art.807; Handbook II, Italy-Bernardini, Ch.II.1.b, p.7.

[187] Handbook II, Italy-Bernardini, Ch.II.1.b, p.8; A. Giardina, *op. cit. ad* Ch.1.4.1.1.5, pp.265–267 no.5. Art.1341 of the Italian Civil Code governing the written acceptance of general conditions had already been discarded where the New York Convention applies (Cas., YCA 1991, p.588, and 1993, p.427, Italy 106 and 122).

[187a] The wording appears sufficiently broad to validate an agreement contained in an exchange of e-mails, see Sanders, Arb. Int. 2004/3, p.245; Kaufmann-Kohler, *op. cit. ad* Ch.2.3.3, p.448; see also A.L. Ortiz, Arbitration and IT, Arb. Int. 2005/3, pp.343–360, 352.

on this point too, the Model Law does not add anything new to Art.II(2) of the New York Convention, as this latter provision has been interpreted.

3.3.7 Germany

196 Despite being closely inspired by the Model Law, the new German law of 1997 distances itself on a number of points, notably where the form of the arbitration agreement is concerned. § 1031(1) of the ZPO corresponds to the first two hypotheses envisaged by the Model Law, i.e. a document signed by both parties or an exchange by any other means of communication which provides a record of the agreement. Similarly, ZPO, § 1031(3) establishes, in different terms, a rule identical to Art.7(2), last sentence, of the Model Law for agreements made by reference. By contrast, ZPO, § 1031(2) and (4) introduce provisions unknown to the Model Law and designed to relax the formal requirements in a country which, hitherto, dispensed arbitration agreements between businessmen from any requirement of form whatsoever.[188]

First, § 1031(2) of the ZPO extends written form to the case where "the arbitration agreement is contained in a document which has been sent by one party to the other or by a third party to both parties and which in conformity with business usage constitutes an agreement, provided no objection is raised in good time". In other words, an exchange is not necessary and the silence of the addressee can entail acceptance to the extent that this is in conformity with business usage. German and English law share this concern regarding the respect for commercial usage and, in particular, the practice of so-called paperless contracts, although it is not expressed in exactly the same terms.

§ 1031(4) of the ZPO explicitly governs the bill of lading, an issue which has given rise to a number of disputes and abundant case law. It provides that an arbitration agreement can "be concluded by the transmission of a bill of lading making express reference to an arbitration clause contained in a charter party". In other words, explicit reference can make the clause binding on successive holders of the bill of lading, without it being necessary to establish whether such persons had effective knowledge of the charter party and the arbitration clause contained therein. This particular case of an arbitration agreement by express reference is distinguishable from Art.II(2) of the New York Convention in that an exchange is not necessary, acceptance being presumed.

By contrast, ZPO, § 1031(5) tightens the formal requirements to protect consumers, a concern resulting from the fact that the German statute also applies to domestic arbitration: only a document signed by both parties and containing only provisions relating to arbitration is valid, unless made in notarised form. Finally, § 1031(6) of the ZPO confirms that by proceeding on the merits, the defects of form are remedied. This corresponds, in broader terms, to the exchange of briefs (statements of claim and defence) envisaged by Art.7(2) of the Model Law.

[188] See Schlosser (Rev. arb. 1998), pp.295–296.

To summarise, the most original provision of the new German law compared with its model consists in the admissibility of tacit acceptance where this is in conformity with commercial usage. As Schlosser had pointed out, this rule is similar to Art.17(1) of the Brussels Convention, now Art.23 of the Council Regulation of 22 December 2000, allowing the conclusion of a jurisdiction agreement in a form which accords with practices which the parties have established between themselves or with a usage of international trade of which the parties are or ought to have been aware and which is widely known or regularly observed. If such usage or practices exist, silence of the addressee constitutes acceptance, as the European Court held in 1997.[189] As already stated in para.193 with regard to Swiss case law concerning PILS, Arts 5 and 178, we believe that it is desirable to harmonise the conditions of validity of jurisdiction agreements and arbitration agreements as far as possible. 197

3.3.8 England

198 Under the Arbitration Acts 1950 (s.32) and 1975 (s.7) the written form for arbitration agreements was already a requirement. Nevertheless, the courts had given the concept a very wide meaning. Pursuant to a judgment of the Court of Appeal of 1986[190] it sufficed that the parties had orally accepted the terms of the contract, including the written arbitration clause. On the other hand it was not usual, notably in banking and maritime practice, to sign contract documents. Thus, while maintaining the requirement of a written agreement, justified in their eyes by the significance of submission to arbitration, the authors of the Arbitration Act 1996 distanced themselves from the UNCITRAL model to give the concept of written form the widest possible meaning.[191] This explains why s.5 defines in very broad terms that there is a written form when the agreement is made in writing (regardless of whether it is signed by the parties), or by exchange of communications in writing (which encompasses any means of communication providing a record), or when the agreement can be evidenced in writing.

Adopting the case law mentioned above, s.5(3) goes even further and provides that a non-written agreement but referring to terms in writing is equivalent to a written agreement. Thus, where the parties accept orally a draft contract made in writing or written general conditions containing an arbitration clause, the arbitration agreement is deemed to be made in writing. Contrary to what the DAC Report states, it is doubtful whether such extension is compatible with Art.II(2) of the New York Convention. While this provision in its English version (unlike the French version) does not appear to be exhaustive (it says *shall*

[189] ECJ, *MSG v. Gravières Rhénanes*, ECR 1997 I, p.911 = RCDIP 1997, p.563, cited by Schlosser (Rev. arb. 1998), pp.296–297.

[190] *Zambia Steel v James Clark* [1986] 2 Lloyd's Rep. 225, CA, followed notably by QB, *Abdullah M. Fahem v Mareb Yemen Insurance and Tomen* [1997] 2 Lloyd's Rep. 738 = YCA 1998, p.789, UK 48; see other examples given in § 36 of the DAC Report.

[191] DAC Report § 31–34.

include), we have seen that it establishes a uniform rule in the field of enforcement of the arbitration agreement and of the arbitral award, under the sole reservation of Art.VII. As already emphasised above,[192] the latter provision only reserves the more favourable law of the country in which recognition is sought, and not of the country of origin of the award, except if the latter refers to the former. Consequently, an English award based on an oral agreement referring to a written document might be denied enforcement elsewhere.

Pursuant to s.5(4) of the Arbitration Act 1996, an agreement is evidenced in writing if one of the parties, or a third party with the authority of the parties to the agreement, records an agreement made otherwise than in writing. This will be the case for example for minutes drawn up by the arbitrator or any third party with the parties' consent.[193] However, it could be inferred *a contrario* that in the absence of such consent there is no arbitration agreement.[194] Finally, s.5(5) follows Art.7(2) of the Model Law in inferring an arbitration agreement from an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement other than in writing is alleged by one party and is not denied by the other party in its response. Nevertheless, by making it clear that the parties must have exchanged written submissions, English law does not content itself with an informal communication.[195]

199 An exclusively oral agreement is thus not sufficient under the Arbitration Act, although it is valid under common law, such validity being expressly reserved by s.81(1)(b).[196] In such a case the arbitration is not subject to the Arbitration Act, and cannot benefit from the facilities offered by that Act.

200 Finally, curiously positioned under the heading "definition of arbitration agreement", s.6(2) partially adopts the last sentence of Art.7(2) of the Model Law regarding the validity of an agreement made by reference. We shall return to this question below when dealing with this type of agreement.[197]

3.3.9 Sweden

201 Like the law of 1929,[198] the new Swedish law of 1999 contains no requirements of form. Accordingly, an oral agreement is sufficient for arbitration in Sweden, but this can lead to difficulties at the enforcement stage under the New York Convention.[199] Nevertheless, by virtue of SU, Art.48 the parties can

[192] In para.187.
[193] See DAC Report § 37.
[194] Merkin, p.29 *ad* Section 5.
[195] DAC Report § 39; see Merkin, p.30 *ad* Section 5.
[196] Handbook II, England-Veeder, Ch.II.1.d, p.16; Merkin, p.28 *ad* Section 5 and 163–164; Mustill and Boyd (2001), p.261 para.18 *ad* Section 5.
[197] Ch.3.3.12 para.223.
[198] Handbook III, Sweden-Holumbäck, Ch.II.1.
[199] J. Ramberg, Stockholm Arbitration Report 1999/1, p.24 no. 4; Heuman (new Act), pp.32–33. We do not understand why Jarvin (p. 44 para.5) states that such oral agreements are "now" valid under [illegible] already the case under the previous law.

subject their agreement to the law of their choice and thus to the formal requirements of such law.

3.3.10 France

French law deserves particular mention on this point, as well as on many **202** others, because of the consequences which it draws from the complete separability of the arbitration agreement, notably as regards form. As seen above,[200] by virtue of this principle of separability the arbitration agreement in international arbitration is not subject to any national law at all, but exclusively to material principles derived from the French conception of international public policy. Such international public policy allows a pure consensualism and does not entail any particular formal requirement, contrary to Arts 1443 and 1449 of the NCPC which provide, subject to invalidity, for the written form in domestic arbitration.

In reality the French courts were initially hesitant to infer this consequence from the principle of separability . Thus, in its judgment of 1988 in the *Cassia* case, already mentioned and analysed above,[201] the *Cour de cassation* applied a foreign law to the formal existence of the arbitration agreement. Although this conflict of laws approach was followed in subsequent judgments of the Paris Court of Appeal,[202] it has been abandoned by the *Cour de cassation*, leading some authors to describe the former case law as a mere "juridical hesitation".[203] In its judgment of March 3, 1992 in the *Sonetex* case,[204] the applicant raised an argument based on the fact that the Court of Appeal did not give a ruling on the law applicable to the form and on the proof of the arbitration clause in question. The *Cour de cassation* dismissed this argument in the following terms: "the Court of Appeal did not have to decide on the form and on the proof of these clauses under a law which, due to their separability in international arbitration, might have been not applicable thereto". This judgment thus applied the principle of complete separability to any law whatsoever as regards to form and proof of the arbitration agreement, two concepts which are frequently treated similarly or identically in France. In addition, as we have already pointed out, in its second judgment in the *Bomar Oil* case of November 9, 1993,[205] the *Cour de cassation* confirmed the validity of the arbitration agreement by referring to a material rule of international arbitration without basing itself on any law. Furthermore, like in its previous judgment, it considered that acceptance of the arbitration agreement is a question of fact which the Court of Appeal is free to decide. Some weeks later, in its *Dalico* judgment,[206] it responded more explicitly

[200] See Ch.3.2.3 paras 180–182.
[201] In para.177.
[202] Notably Rev. arb. 1996, p.66, with a note by Jarrosson; Rev. arb. 1997 p.434, with a note by Derains, and Rev. arb. 1998, p.564.
[203] Fouchard, Gaillard and Goldman, para.594.
[204] Rev. arb. 1993, p.273, with a note by Mayer = JDI 1993, p.140, with a note by Audit.
[205] Cited in n.145.
[206] Cited in n.118.

to the reproach levelled against the court below for not having determined the nature of the law governing the existence and the formal validity of the disputed arbitration agreement, emphasising that these issues are "determined, subject to mandatory rules of French law and international public policy, by the common will of the parties, without it being necessary to refer to the law of any country". The Paris Court of Appeal has in numerous subsequent judgments adopted this affirmation of consensualism, limited solely by public policy, and rejected the application of the formal requirements of Art.1443 of the NCPC.[207]

203 However, the statutory text raises two questions. First, Art.1499 of the NCPC provides with regard to the recognition and enforcement of the arbitral award, that the latter is "established by production of the original accompanied by the arbitration agreement". Some commentators inferred from this provision that, in order to be produced, the arbitration agreement must have been made in writing.[208] However, this is not the solution of the courts, which recognise the validity of an oral agreement provided it can be established, and of the majority of authors.[209] Secondly, pursuant to Art.1495 of the CPC, "where international arbitration is subject to French law, the provisions of Books I, II and III (. . .) do not apply except in the absence of a particular agreement". One might be tempted to infer from this provision that Arts 1443 and 1449, which are in Book I and require, subject to nullity or invalidity, the written form, apply to an international arbitration submitted by the parties to French procedural law without making an explicit deviation as to the form of the arbitration agreement. This is not however the generally recognised interpretation. Instead, authors and even courts do not hesitate to consider that by making an oral agreement the parties intended to depart from the rule of NCPC, Art.1443, so that it is not applicable.[210] Admittedly, it is difficult to imagine in practice parties entering into an oral arbitration agreement and referring (orally) to French procedural law.

Thus, by inference from the principle of complete separability of the arbitration agreement, the French courts dispense such an agreement from any requirements of form. It is sufficient that the parties' consent can be established by any possible means, this question of fact being freely determined by the Courts of Appeal and not subject to the review of the *Cour de cassation*. The result is, as eminent authors have pointed out,[211] that such agreements cannot be held to be formally invalid. However, this purest form of consensualism, which

[207] *V 2000*, Rev. arb. 1996, p.245, with a note by Jarrosson; *Centro Stoccaggio Grani*, Rev. arb. 1997, p.89; *Trafidi*, Rev. arb. 1997, p.90; Rev. arb. 2006, p.210.

[208] Notably Sanders, Rev. arb. 1981, p.520; Devolvé, Rouche and Pointon, p.58 para.96.

[209] Notably de Boisséson, pp.477–479 para.572; Fouchard, Gaillard and Goldman, para.608 and the authors cited.

[210] Notably Fouchard, Gaillard and Goldman, para.609; Handbook II, France-Derains, Ch.II.1.a; Loquin, with a note on Cas., *Bomar Oil*, JDI 1990, p.642; Paris, Rev. arb. 1990, p.657, considering that the fact that Art.1443 NCPC was not respected implied the intent to derogate it! Paris, *Bargues Agro Industries v Young Pecan Company*, Rev. arb. 2006, p.154: the absence of any requirement as to the form of the arbitration agreement is a material rule of French international arbitration law, which excludes the application of Art. 1443 NCPC (form in domestic arbitration) even where the parties submitted to French procedural law.

[211] and Ch.1.4.1.1.4, p.622

to our knowledge is not shared in Europe except in Denmark, Norway and Sweden, entails the risk that an arbitral award made in France based on an oral arbitration agreement respecting neither the written form required by Art.II(2) of the New York Convention, nor the form required under the law of the country where enforcement is sought, will be refused recognition and enforcement. We reiterate here the observation already made with regard to PILS, Art.178 (para.193), which has distanced itself to a much lesser degree than French law from the requirements of the New York Convention.

In conclusion, we have seen that all the Conventions and laws considered here 204 contain material rules governing the validity of the arbitration agreement. It is therefore questionable whether there is any justification in opposing the conflict of law approach to the material rule approach, as certain French authors have done.[212] According to these authors, the former approach "is likely to produce results which, depending on the localization of the arbitration agreement . . . will vary according to local idiosyncrasies, or according to the degree of confidence of the relevant countries in international arbitration". Does the same not apply to the material principles inferred by each country in its perception of international public policy? For the time being, only the requirements of the New York Convention and of the 1961 Geneva Convention can be considered truly transnational. As long as national laws contain requirements of form which, although converging, are not the same, it is indispensable to determine their respective fields of application and to resolve the conflicts of law resulting from their differences. Most of these laws have opted for the seat of the arbitration as the connecting factor, and their material rules apply to arbitration agreements providing for arbitration on their territory. Of course, it can be disputed whether such a connecting factor is appropriate, but it does at least have the merit of being widely recognised, thus reducing conflicts. By applying its own material rule every time one of its courts is seized, French law is allowing the *lex fori* to prevail, and this also leads to difficulties. An agreement held as being valid in France will not necessarily be held so in another country. This shows that the adoption of material rules cannot entirely solve the problem so long as they do not fully concur.

3.3.11 Oral and tacit acceptance

Although we have already alluded to this question several times in the context 205 of the various laws considered here, we now address it separately because it is one of the most controversial questions in practice. The requirement of a written agreement by the majority of Conventions and laws does not entirely correspond to the usages of international commerce and consequently some authors consider it to be excessive. The question can arise in a number of situations, in particular where one party sends the other party a document confirming an oral agreement or containing an offer to arbitrate, followed by oral acceptance by the addressee

[212] Notably Fouchard, Gaillard and Goldman, paras 599–609, 603.

or tacit acts such as the performance of the contract or, more frequently, by no reaction at all. However, it is clear that the requirement of a written agreement implies that the consent of both parties, and not just of one of them, must fulfil this form. This is reinforced by the requirement of an exchange of texts pursuant to Art.II(2) of the New York Convention, and Art.7(2) of the Model Law. It cannot seriously be disputed that, according to these provisions, the parties' consent must result from an exchange of written documents, although these need not be signed. It is therefore almost unanimously recognised that the tacit or oral consent of the addressee does not meet this requirement of form.[213] In the last two passages cited, van den Berg clearly confirms that an arbitration clause contained in a confirmation of sale or purchase does not satisfy the requirement of written form pursuant to Art.II(2) of the New York Convention unless:

(a) it is signed by both parties or
(b) a copy is returned as a sign of acceptance, signed or not, by the addressee, or
(c) the unilateral confirmation is ultimately accepted in another written communication from the addressee to the sender.

Van den Berg adds that tacit acceptance is not sufficient, even though this is no longer in line with international commercial practice. Even recent Italian and Swiss case law have decided that tacit acceptance was not sufficient.[214] In the afore-cited judgment of 1995 rendered by the Swiss Federal Tribunal in the case *CNT v MSC*,[215] where this Court gave the most liberal and "updated" interpretation of Art.II(2) of the New York Convention, it did not rely on a tacit acceptance, but on the fact that the shipper had himself filled out the bill of lading prior to forwarding it to the carrier, who signed it. Thus each party had evidenced in writing his intention to arbitrate, and it was only the question of the exchange of documents which was a problem, as we saw above.

[213] Notably Berger, pp.142–143 and 147, who recognises this with regret; Bucher, pp.50–51 para.127, for whom the convention of 1958 "clearly intended to exclude that an arbitration agreement can be accepted orally or tacitly"; Fouchard, pp.81–82 paras 140–141; Fouchard, Gaillard and Goldman, para.620; Holtzman and Neuhaus, pp.260–261; Kaplan, *op. cit.*, pp.32–33 and pp.36–39 for the Model Law; Schlosser, p.279 para.380, who confronts French law with the New York Convention on this point, p.280 para.381 and p.283 para.384 for bills of lading; van den Berg, pp.206–207 para.II–2.4.2 and (ASA), p.41 and 62; OLG Rostock, summarised in English by Kröll [2002] Int. A.L.R., N–31.

[214] Notably, in addition to the judgments cited by van den Berg, Cas. Erlanger, YCA 1991, p.591, Italy 108: exchange of letters, where the second letter did not include the arbitration clause; *Rich v Italimpianti*, YCA 1992, p.554, Italy 116: the confirmation containing an arbitration clause sent by Max Rich to Impianti could not have been accepted tacitly; *Robobare v Finncold*, YCA 1995, p.739, Italy 131: a clause contained in a unilateral confirmation of an order does not bind the other party because it is not accepted in writing. Similarly, OG Basel Land, YCA 1996, p.685, Switzerland 26; *contra* BGH, YCA 1995, p.666, Germany 42: commercial usage allows tacit acceptance, which might have been the case under the German law then in force, but not pursuant to Art.II of the New York Convention.

[215] [illegible] Switzerland 27, cited in para.193 n.181.

Unlike these Conventions and the Model Law, Art.178(1) of the PILS does not require an exchange, but subjects the validity of the arbitration agreement to the written form. The requirement of an agreement in writing implies that not only the offer to arbitrate but also the acceptance itself must result from a document. Thus we have difficulty in understanding how Knoepfler could submit in his commentary on a judgment already mentioned[216] that the statutory text is open to two interpretations: **206**

- either an agreement is made using the means of communication listed in Art.178, which would imply an exchange of two documents;
- or an agreement, even an oral one, is confirmed by a text evidencing the agreement, for example, a letter emanating from only one of the parties.

It is however clear that an oral agreement unilaterally confirmed in writing does not constitute a "written agreement". The same applies where the addressee remains silent. Although it might better conform to the "liberal philosophy" of the PILS, Knoepfler's second interpretation would be incompatible with the statutory text currently in force. Knoepfler's first interpretation seems to require, in our opinion incorrectly, that there must be an exchange of two texts. In fact, as we have already pointed out, the parties' intention to arbitrate can result from a sole document, in particular when countersigned by the adressee, or at least returned as a sign of acceptance to the sender.

Knoepfler's second proposed interpretation, which seems to us to be incompatible with the statutory text, has been adopted by Blessing, who considers that tacit acts such as the performance of the contract are sufficient to constitute acceptance,[217] and not without hesitation by Berger, who invokes the intention of the legislature to respond to the needs of international commerce.[218] However, it has been rejected by the majority of commentators, both in Switzerland and abroad.[219] **207**

The solution should not be different in Italy, given that ICCP, Art.807(2) requires that the intention of all the parties is manifested in writing and in view of the case law of the Italian courts, particularly the *Corte di Cassazione*, in application of the analogous text of Art.II(2) of the New York Convention.[220] The same is the case in Belgium, where Art.1677 of the CJB requires, as we have

[216] ASA Bul. 1994, p.38 = RSDIE 1995, p.585 para.14, with a note by Knoepfler; same opinion, P. Karrer, *op. cit.* in note 181a, pp.183–184.

[217] Blessing (Liberalism), p.30; (Introduction), p.184 para.484; *id., in:* DIS 1/II, p.39.

[218] Berger, p.143.

[219] Notably Bucher, p.51 para.127, for whom PILS, Art.178 is not different in this respect from Art.II (2) of the New York Convention; Fouchard, Gaillard and Goldman, para.620; KSP-Wenger, pp.1442–1443 paras 15 and 16 *ad* Art.178, very convincing; Lalive and Gaillard, pp.931–932 D, who point out that PILS, Art.178 is thus less liberal than French law, but that written documents are usually used at least for evidentiary purposes; Lalive, FJS 946, p.11 para.8; Poudret (Droit applicable), p.25.

[220] See the references given in n.161.

seen, "documents which bind the parties and manifest their will to submit to arbitration". This clear text seems to exclude documents expressing the intention of only one of the parties to the agreement; by contrast, case law prior to 1972 seemed to recognise the validity of such agreement in the absence, at that time, of any specific formal requirements.[221]

208 Dutch law, which prior to 1986 permitted even oral agreements, recognises the validity of a tacit acceptance. Article 1021 of the WBR only requires proof in writing and considers that a document containing an arbitration agreement "expressly or tacitly accepted by or on behalf of the other party" constitutes such. Therefore, it suffices for the agreement to be valid that a document emanating from one of the parties, for example a confirmation of an order which mentions an arbitration clause, is tacitly accepted by the addressee, for example by failing to react or by performing the contract. Thus, there is a notable difference between this very liberal text and those previously analysed.

209 Although it requires a written agreement, the English legislature did not wish to be constrained by the narrow framework of the New York Convention. It therefore added two paragraphs to s.5 of the Arbitration Act 1996 which provide that an oral, but not tacit, agreement is sufficient. First, as we saw in para.198, s.5(3) of the Arbitration Act 1996 considers an oral agreement referring to written terms to be a written agreement. Secondly, pursuant to s.5(4) Arbitration Act 1996 an agreement which is not made in writing may be evidenced in writing if it is recorded by one of the parties, or by a third party with the authority of the parties. Thus, where the parties agree to arbitrate in the presence of a third party and the latter records this by any means (see s.5(6) Arbitration Act 1996), such document will constitute sufficient written proof. These hypotheses seem to us to be different from tacit acceptance, which results from the silence of the addressee, from an alleged confirmation or from the performance of the main agreement.

210 In 1997, the German legislature also considerably relaxed the requirements of form in comparison with the Model Law which served as its inspiration. Thus ZPO, § 1031(2) 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.[221a] The reference to commercial usage was inspired not only by previous case law, which upheld the tacit conclusion of an arbitration agreement between businessmen provided it was in conformity with such usage,[222] but also—as we pointed out in para.197—by Art.17 of the Brussels Convention governing jurisdiction agreements.

[221] A. Bernard, L'arbitrage privé, Brussels 1937, pp.60–61 para.96 and p.107 para.179.

[221a] For a case where the arbitration agreement was held to be invalid because the claimant did not refer in writing to the application of its general conditions of contract, see Oberlandesgericht, *Celle*, YCA 2005, p.536, 539.

[222] BGH, YCA 1995, p.666, Germany 42; *Hanseatisches Oberlandesgericht*, Hamburg, YCA 2005, pp.509, 523, Germany 73.

Finally, oral and even tacit acceptance is sufficient in countries such as France **211**
and Sweden which do not submit the arbitration agreement to any requirement of form. In its second decision in the *Bomar Oil* case,[223] the *Cour de cassation* held that since the company was aware of the arbitration clause contained in a standard form contract, it had "accepted the incorporation of the document into the contract, even if only by remaining silent". Even if the intention of the parties to arbitrate can be established by any means, documentary evidence often plays an essential role in France.

In conclusion, we note that our sources do not show the same degree of **212**
liberalism concerning this question. While the New York Convention, the 1961 Geneva Convention, the Model Law, the Swiss and the Italian law retain the requirement of a written agreement, which to our mind excludes oral and tacit acceptance, the doctrine of abuse of rights being of course reserved, Dutch, English and German law have relaxed this requirement, while French and Swedish law contain no requirements of form at all. Depending on whether one is more concerned with predictability or, on the contrary, with accommodating commercial practice, one can express a preference for one or the other of these solutions, but the differences existing between the norms in force are not disputable.

In his very detailed study of this problem Neil Kaplan pointed out that the refusal of tacit acceptance is contrary to the practice of international trade and that it is paradoxical to submit an accessory clause to stricter formal requirements than those governing the main contract. He therefore proposes a revision of Art.II(2) of the New York Convention or, in the meantime, a less rigid application of this provision by the courts,[224] a wish which is in our opinion difficult to reconcile with the text currently in force.

3.3.12 Arbitration agreements by reference

Bibliography:

General Works: cited *ad* Ch.3.3 above.

Specific Studies: X. Boucobza, *La clause compromissoire par référence en matière d'arbitrage international*, Rev. arb. 1998, pp.495–516; V. van Houtte, Consent to Arbitration Through Agreement to Printed Contracts: The Continental Experience, Arb. Int. 2000, pp.1–18; R. Huber, Arbitration Clause "By Reference", ASA Special Serie 8, 1994, pp.78–88; B. Oppetit, *La clause arbitrale par référence*, Rev. arb. 1990, pp.551–569; J.-F. Poudret, *La clause arbitrale par référence selon la Convention de New York et l'Article 6 CIA, Mélanges* Guy Flattet, Lausanne 1985, pp.523–538; C. Reymond, *La clause arbitrale par référence, in: Travaux Suisses*, pp.85–98; A. Samuel, Arbitration Clauses Incorporated by General Reference and Formal Validity under Art.II (2) of the New York Convention, *Etudes* Jean-François Poudret, pp.505–518.

[223] Cited in para.186 n.145; see also Paris, Rev. arb. 1994, p.95 (3rd case), with a note by Paclot, and Rev. arb. 1997, p.89, with a note by Derains, who infers from this judgment that the acceptance may result from the silence of the addressee, as well as from the commencement of the performance of the contract or from a reliance on the arbitration clause.

[224] Kaplan, *op. cit.*, not. pp.29 and 44–45.

213 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 widespread in the practice of international commerce because it simplifies and accelerates transactions. Their validity or, more precisely, the requirements that these agreements must fulfil in order to be binding on the parties have nevertheless been widely debated and given rise to numerous commentaries and studies. In reality, the fate of an arbitration agreement by reference depends not only on formal questions, but also on questions of substance, two distinct questions which are too often confused. The question whether the addressee of an offer referring to a document containing an arbitration clause effectively consented to such clause is a matter of interpretation of that party's intent and of how the agreement was formed, and thus relates to substance. However, the determination as to whether such intent was expressed in the form required by the applicable law is a question of formal validity. Several authors have submitted that it is justified to deal with the latter issue preliminarily, for it is futile to dwell on consent which has not been expressed in the required form.[225] By contrast, this preliminary question does not arise in countries which, like France or Sweden, have no requirements of form and allow consent to be proven by any means. Therefore, it depends on whether the applicable law submits the arbitration agreement to formal requirements, and this leads to reserve once more a special place to French law.

214 As Bruno Oppetit has pointed out, an arbitration agreement by reference is not uncommon, at least in international commerce where arbitration has become the usual mode of dispute resolution. There is no need to provide for special requirements for this type of agreement. It is necessary and sufficient that the requirements of form, if any, and of substance are fulfilled. In order to establish whether a party has accepted arbitration in full awareness, a distinction must be made between explicit and global references. Where the parties have expressly referred in their agreement to an arbitration clause, 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. We saw above that the arbitration agreement itself can be the object of a separate document.

The situation is more delicate where the reference is implicit or global, i.e. only mentions the document referred to and not the arbitration clause contained therein. In this case, the validity of the arbitration clause will mainly depend on the circumstances, in particular on the knowledge which the parties had or should have had of the contents of the document referred to and, in consequence, of the

[225] Notably Huber, *op. cit.*, p.83, and KSP-Wenger, p.1444 para.17 *ad* Art.178.

arbitration clause. Their personal qualifications, their ongoing business relationship, and the relevant trade usages can play an important role in this regard. The validity of an arbitration agreement by reference should hence not be determined *in abstracto*, but taking the particular circumstances of the case into account.

215 Finally, there are differences depending on whether the applicable law contains or not a provision governing arbitration agreements made by reference. Neither the New York Convention nor the 1961 Geneva Convention envisages this type of agreement, but they do not exclude it. Authors and courts were initially very wary about the validity of such agreements under the New York Convention. Under Art.II(2) the arbitration agreement must be the object of a contract signed by the parties or resulting from an exchange of letters, telegrams or other means of communication. The document to which the parties refer will generally not comply with either of these forms. Thus, Schlosser has submitted that a reference to general conditions signed by only one of the parties or printed on the reverse side of a document is insufficient. These must be either joined to the contract or to the exchange of correspondence which refers to them or be the object of an explicit reference.[226] *A fortiori* a subsequent letter of "confirmation" referring to conditions hitherto not agreed upon is worthless[227] since, as we have seen, tacit acceptance is incompatible with written form, even simplified written form.

In his commentary on the New York Convention, van den Berg goes a step further and distinguishes four situations[228]: (1) if the general conditions containing the arbitration clause are mentioned in the contract or on the reverse side thereof, then a general reference is sufficient; (2) the same applies if they are attached with the contract; (3) if they are the object of a separate document which does not fulfil one of the two forms allowed by Art.II(2) of the Convention, a specific reference is necessary; (4) finally, if they had already been communicated on the occasion of a previous transaction between the parties, a general reference will suffice since the addressee already had knowledge of the conditions. We cast doubt on the fourth hypothesis in our Art.of 1985, pointing out that while it might accommodate practical needs, it is hardly compatible with the text of the Convention.[229] At that time it had also not yet been approved by the courts, as van den Berg admitted.

216 The case law applying Art.II(2) of the New York Convention analysed in detail in our Article mentioned above was still very restrictive. The Italian *Corte di Cassazione* had not recognised the validity of a general reference to a previous contract containing an arbitration clause.[230] More recently, this court has

[226] Schlosser, pp.276–277 para.379; Stein, Jonas and Schlosser, p.425 para.5 ad. § 1031; see also Schwab, cited by Poudret, *op. cit.*, p.529 n.31, and Schwab and Walter, p.390 Ch.44 para.9; Samuel, pp.86–89.

[227] Schlosser, p.278 para.380; J. Robert, with a note *ad* Rev. arb. 1984, p.363, especially p.370; P. Sanders, *Vingt années de la Convention de New York de 1958*, DPCI 1979, pp.359–386, especially pp.376–377.

[228] van den Berg, pp.215–222, para.II–2.4.3.3, and summary at p.228; this distinction is adopted notably by Walter, Bosch and Brönnimann, p.79.

[229] Poudret, *op. cit.*, p.533.

[230] YCA 1976, p.190, Italy 5; see also YCA 1977, p.249, Italy 15, and YCA 1978, p.278, Italy 17.

confirmed that a general reference is not sufficient.[231] By contrast, the *Bundesgerichtshof* has recognised the validity of general business conditions attached with the contract.[232] Specific references, i.e. those which mention the existence of the clause itself or at least mention arbitration, have generally held to be sufficient by the courts of various European countries.[233] We saw above that this was in particular the opinion of the French *Cour de cassation* in its first decision of October 11, 1989 in the *Bomar Oil* case rendered—wrongly—in application of Art.II of the New York Convention and holding that an arbitration agreement by reference is only valid if the existence of the clause is expressly mentioned or if the parties have an ongoing business relationship which ensures that they are perfectly aware of the clause.[234] This judgment, which was heavily criticised, nevertheless opened a new perspective by considering that "perfect knowledge" of the arbitration clause can replace an explicit reference, the essential point being that the two parties accepted the reference in full awareness. From the question of form we pass to that of consent, which is the only relevant issue under French law, as we shall see below.

The English courts attach greater importance to the terms used in the reference rather than to the text of the New York Convention: whereas an explicit reference in a bill of lading to the terms of the charterparty, including the arbitration clause, sufficed to incorporate the latter into the agreement, this was not the case of a global reference to terms and conditions without mentioning the arbitration clause.[235]

The restrictive or even uncertain practice of the courts led Berger, who is mindful of the usages and needs of international trade, to write, still in 1993, that a global reference presented risks with regard to the New York Convention; he advised making an explicit reference.[236]

Swiss case law rendered in application of the New York Convention has widely recognised the validity of arbitration agreements made by reference. This was the case in the landmark decision in *Tradax v Amoco* rendered by the Swiss Federal Tribunal in 1984 concerning an objection to the jurisdiction of the Swiss courts (*exceptio arbitrii*) raised by Tradax on the basis of an arbitration agreement.[237] The bills of lading in dispute contained a general reference to the

[231] YCA 1984, p.421, Italy 58; Riv. dell'arb. 1996, p.717: only a *relatio perfecta* is valid under Art.II (2) NYC; YCA 2002, p.506, Italy 160: same conclusion on the basis of the New York Convention and of Art. 833 ICCP of 1994.

[232] YCA 1977, p.242, Germany 12; see CA Milan, YCA 1993, p.415, Italy 119.

[233] TGI Strasbourg, YCA 1977, p.244, Fr. 2; LG *Zweibrücken*, YCA 1979, p.262, Germany 16: "Arbitration Rotterdam", with reference as to the dispute resolution mechanism to a standard form contract containing the clause on the back; CA Milan, YCA 1979, p.284, Italy 27; Cas., YCA 1979, p.296, Italy 33, and 1984, p.421, Italy 58; CA Brescia, YCA 1983, p.383, Italy 52; Cas., Riv. dell'arb. 1996, p.717: reference to the *Chambre arbitrale de Paris*; CA, YCA 1997, p.849, UK 44: reference on the back of the bill of lading to the clause contained in the charterpary.

[234] Rev. arb. 1990, p.134, cited in para.186 n.143.

[235] QB, *The Rena K*, YCA 1979, p.323, UK 6; CA, *The Verenna*, [1983] 3 All ER 645.

[236] Berger, pp.152 and 155.

[237] ATF 110 II 54 = YCA 1986, p.532, Switzerland 8; see Alvarez, *op. cit.*, pp.76–77.

"clauses and conditions" of a charterparty concluded between Amoco Transports and Tradax, and this charterparty provided for arbitration in New York. Amoco Texas, beneficiary of these bills of lading, did not consider itself bound by such reference, and sued the carrier Tradax before the courts of Geneva which admitted their jurisdiction. Mentioning the debate existing on the validity of global references, the Federal Tribunal held that it was necessary to decide on the basis of the circumstances of each concrete case, in particular taking into account the experience of the parties and trade usage. In the case at hand it found that both parties were engaged in the hydrocarbon trade, an area where arbitration is common, and that both the claimant and the company which had signed the charterparty were part of the Amoco group. It inferred that Tradax was entitled to assume that the claimant knew of the conditions of the charterparty and had accepted them. This line of argument, confined to the existence of consent without regard to the form in which it is expressed, dispensed the court from deciding on the validity of a global reference to a charterparty. In other words, the circumstances of the case were decisive for the holding. Besides, in its judgment a year later in *Tracomin v Sudan Oil Seeds*,[238] the Swiss Federal Tribunal left open the question whether a global reference is sufficient to make the arbitration clause binding under Art.II of the New York Convention or whether the particular circumstances of the *Tradax* case "support the submission that the arbitration clause was included in the documents signed by their parties or the representatives".

Since then, both the Swiss Federal Tribunal[240] and a number of Cantonal courts[241] have confirmed the validity of a general reference under Art.II of the New York Convention, at least when the particular circumstances of the case allow the inference that the parties did effectively accept to submit to the arbitration clause contained in the referenced document without doubt or ambiguity. This liberal approach is approved by several authors, both from

[238] ATF 111 Ib 253 c.6 = YCA 1987, p.511, Switzerland 14: on this dispute which took place in England and in Switzerland, see Poudret, *op. cit.*, pp.523–524, Reymond, *op. cit.* pp.85–86, and Samuel, *op. cit.*, pp.508–509.

[239 omitted]

[240] Rep. 1989, p.406 = YCA 1990, p.509, Switzerland 18; the general reference in an amendment to the principal contract is sufficient to make the clause contained therein binding; *contra*, ATF 128 I 354, ASA Bul. 2003, p.364, c.4: the reference is not sufficient when it refers to general conditions which were not handed over to the contracting party by the broker.

[241] CJ GE, ASA Bul. 1989, p.167 = YCA 1991, p.612, Switzerland 19: the reference to general business conditions must be completely unambiguous (see Alvarez, *op. cit. ad* Ch.3.3, p.78); AG Basel, BJM 1995, p.254 = YCA 1996, p.685, Switzerland 26: a global reference is sufficient where the addressee can gain knowledge of the general business conditions printed on the reverse side or where they are already known to him (see Alvarez, ibidem, p.79); HG ZH, ZR 1990, p.193 para.86 = YCA 1993, p.442, Switzerland 22 (see Huber, *op. cit.*, pp.85–87); ZR 1990, p.193 para.86: a reference to the GAFTA general conditions suffices since the signature to the contract does not only cover its contents but also those to which it refers; *contra*, ZR 1992, p.72 para.23: a global reference to the seller's general business conditions was deemed insufficient because the clause was unusual.

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Switzerland[242] and abroad,[243] although none of them really distinguishes between the uniform rule of the New York Convention and the provisions of the national laws, with which we shall now deal, beginning with Switzerland.

217 Neither the Concordat nor the PILS contain specific provisions governing arbitration agreements by reference. The less strict formal requirements of the PILS are not without consequences for the validity of such agreements. While pursuant to CIA, Art.6 the reference must fulfil the requirement of written form, including the signature of the parties, this is not the case under PILS, Art.178(1), which contents itself with writing *lato sensu*, for instance the delivery of a tender referring to the FIDIC conditions, followed by a written adjudication on that basis, none of these documents being signed. It is essential that the will of the parties to arbitrate results with certainty from the documents. Thus commentators are unanimous in agreeing that, depending on the individual circumstances of the case, a global reference can be sufficient with regard to PILS, Art.178.[244] Recent judgments of the Swiss Federal Tribunal confirm this interpretation.[245]

Adam Samuel[246] has suggested an ingenious solution to avoid any requirements of form in recognising the validity of arbitration agreements by reference in Switzerland. Noting that, at least in its English version, Art.II of the New York Convention does not prohibit the recognition of an arbitration agreement which does not correspond to the definition contained in its para.2, and that PILS, Art.7 compels a Swiss court to defer to the jurisdiction of the arbitrator unless the

[242] Notably Bucher, pp.49–51 para.124–125, who denies, as we have seen, that PILS, Art.178 (1) has any scope of its own; Huber, *op. cit.*, pp.85–87; Reymond, *op. cit.*, especially p.98, although favourably disposed towards arbitration agreements made by reference, does not opt for either explicit or global reference and refers to van den Berg, who is rather restrictive, as we saw above.
[243] Berger, pp.152–155, who considers that van den Berg's interpretation is too restrictive; Fouchard, Gaillard and Goldman, paras 494–495; Oppetit, *op. cit.*, pp.562–563, for whom the requirement of an explicit reference demonstrates a "resurgence of formalism which is completely unjustified".
[244] Notably Berger, p.143; Bucher, loc. cit. in n.242; Blessing (Liberalism), p.39; IPRG-Volken, pp.1976–1977 paras 37–40; KSP-Wenger, p.1444 para.17, and ASA Bul. 1992, p.24, who considers, like the courts, that it is only admissible "depending on the circumstances" of the case; Lalive, Poudret and Reymond, pp.319–321 para.13 *ad* Art.178 PILS; Rüede and Hadenfeldt, p.64 and 67 § 11 VI, who do not distinguish between the PILS and the Concordat; Walter, Bosch and Brönnimann, pp.78–79, who follow van den Berg.
[245] ASA Bul. 2001, p.523 c.2a; a global reference, here to the rules of a sport association providing the jurisdiction of the CAS, is sufficient providing it results from the documents exchanged that the party has accepted them without reserve and in awareness of the situation, in casu by filing an appeal with the CAS after receipt of such rules; ASA Bul. 2001, p.523: an express indication of the arbitration agreement is not necessary because it can be expected that a sportsman is aware of the provisions contained in the statutes of the association for which he applies; ASA Bul. 2002, p.482, c.2c: it is not necessary that the arbitration agreement be mentioned in the contractual documents exchanged between the parties; ASA Bul. 2005, p.128, 136; but see RSDIE 2005/1, p.204, c.3.1, where the Swiss Federal Tribunal held that an arbitration clause—like a jurisdiction clause—contained in business conditions is not valid, unless a specific reference was made to it in the contract or if the party proposing the business conditions could in good faith assume that the other party knew, understood and accepted the clause; in his note, Knoepfler has rightly noted that in international trade arbitration clauses are so common that a party should normally not be allowed to raise that it did not read, see or understand such a clause if it was expressed in clear terms.
[246] *Op. cit.*, pp.516–519.

agreement is null and void, without prescribing any requirement of form, Samuel suggests that solely the law of the seat of the arbitration should apply to the question of whether the agreement is valid and whether the court should decline jurisdiction. However, this approach seems to us to lose sight of the fact that PILS, Art.7 only applies when the New York Convention does not apply, i.e. when the seat of the arbitration is in Switzerland.[247] In this case PILS, Art.178(1) establishes a material rule of validity which the courts must apply. In summary, if the seat is abroad, a Swiss court must exclusively apply the New York Convention, and if the seat is in Switzerland, it must apply PILS, Art.178(1) to determine the formal validity of the arbitration agreement by reference and, consequently, its own jurisdiction.

Like the PILS, the Belgian code does not contain a specific provision 218
regarding arbitration agreements by reference. Art.1677 merely refers to written texts, even if unsigned. Therefore, the solutions should not differ from those encountered under Swiss law. Prior to 1972, Belgian law contained no formal requirements and arbitration agreements by reference were largely recognised, even more than under the law now in force. In a recent study, Véra van Houtte gave numerous examples, some prior and others subsequent to the statutory text currently in force.[248] These examples show that a reference to an arbitration clause contained in general business conditions is sufficient provided that these are clear, known to the parties, and accepted by them. This is the case when a seller sends the purchaser a standard form contract containing an arbitration clause and the parties subsequently conclude a contract on this basis,[249] or when a confirmation of an order refers to the seller's general business conditions which are perfectly known to the purchaser.[250] The Belgian courts seemed to widely consider that the silence of the addressee constitutes acceptance, which is difficult to reconciliate today with the text of Art.1677, which requires that the will of the parties results from written documents. By contrast, a reference made subsequently to the conclusion of the contract, in particular one containing an invoice, is ineffective.[251] Thus Véra van Houtte has rightly cast doubt on the holding of the Brussels Court of Appeal that the enforceability of general business conditions containing an arbitration clause is not governed by arbitration law, but only by contractual law.[252] While the latter has had some influence on the case law referred to above, Art.1677 of the CJB, which specifically governs arbitration, must nonetheless be respected. It seems to us hazardous to infer the current state of the law from court practice dating from before the entry into force of this provision.

[247] See Ch.5.4.3 para.499.
[248] *Op. cit.*, pp.10–11; see also Linsmeau, pp.50–52 paras 61– 62.
[249] Jur. Anv. 1957, p.187.
[250] JLMB 1996, p.1319.
[251] *Ibidem* and Limb. Rechtsl. 1997, p.159.
[252] JT 1992, p.60, followed by Bournonville, p.97 para.71.

219 While Art.1443(1) of the NCPC expressly confirms the validity of an arbitration agreement by reference in domestic arbitration,[253] French law makes no mention of such an agreement where it concerns international arbitration. We saw above that the NCPC was more generally silent on the form of the arbitration agreement, which allowed the courts to free the latter from any requirements of form. Therefore the only question is to interpret the parties' intention to submit to the arbitration provided for in the referenced document. Fouchard, Gaillard and Goldman stated this in the following words[254]: "Arbitration agreements incorporated by reference must therefore be analyzed in terms of the existence and extent of the parties' consent to have their disputes resolved by arbitration. The existence and extent of that consent should be interpreted using the general principles of interpretation of arbitration agreements.". This development is well illustrated by the two decisions rendered in 1989 and 1993 by the *Cour de cassation* in the case *Bomar Oil v ETAP*. In the first decision,[255] which wrongly invoked Art.II of the New York Convention, the court required that the arbitration clause be the object of an explicit reference or be based on an ongoing business relationship. In the second decision, the court did not mention the New York Convention or any other legal norm at all and formulated a material rule of interpretation in the following terms: "in international arbitration an arbitration agreement by reference to a document containing an arbitration clause, for example general business conditions or standard form contracts, is valid even if it is not mentioned in the main agreement, when the other party had knowledge of the contents of this document at the time of the conclusion of the contract, and that it accepted the incorporation of the document into the agreement, even by remaining silent". Two elements are hence sufficient for the clause contained in the referenced document to be binding on the other party: first, knowledge of such clause, secondly acceptance, even tacit.[256]

In his aforementioned study of 1990, published before the second decision in the *Bomar Oil* case, Bruno Oppetit[257] still doubted that French law contained a "material rule which allows to directly establish the validity of an arbitration agreement by reference in the field of international arbitration". He deemed it particularly "hazardous" to derive such a rule from the principle of separability and to say that its validity was a "usual rule of international commerce".

[253] On the interpretation of Art.1443 (1) NCPC see de Boisséson, pp.63–67 paras 64–68; Oppetit, *op. cit.*, pp.565–569; Robert and Moreau, pp.65–66 para.84, who plead for an explicit reference in domestic arbitration but not in international arbitration (pp.238–240 para.271); Cas. *Coisplet* (3rd case), Rev. arb. 2003, pp.1341: only the arbitration clause, as opposed to the reference to such clause, should be in writing pursuant to Art.1443 NCPC, an interpretation that assimilates the scope of this Article to s.5(3) of the Arbitration Act!

[254] Fouchard, Gaillard and Goldman, para.496.

[255] Cited in para.186 n.143.

[256] Cited in para.186 n.145; see Alvarez, *op. cit.*, p.78, who incorrectly attributes this solution to Swiss law, which does not however allow tacit acceptance (see para.206).

However, in view of the French case law rendered since[258] there can no longer be any doubt about this rule. The French courts do not refer to any specific law, and particularly not to Art.II of the New York Convention, which would have been applicable in the majority of cases. This solution might be justified in the light of Art.VII of the Convention if one considers, unlike ourselves,[259] that this provision applies not only to the recognition of arbitral awards but also to the recognition of arbitration agreements.

This material rule applies in all cases where a French court has to determine the validity of an arbitration agreement by reference in international arbitration, and they do so without taking into account any requirements of the arbitration law of the seat. In the light of the afore-mentioned case law, the rule can be summarised as follows: an arbitration clause contained in the referenced document, in particular in general business conditions to which global reference is made, is binding on the party who had knowledge of this document at the time of the conclusion of the contract or who neglected to acquire knowledge of it although he had received it and who is therefore deemed to have accepted the arbitration clause by remaining silent. These are questions of fact which the *Cour de cassation* has no power to review, as it emphasised in the afore-mentioned *Sonetex* case. Unlike Alvarez,[260] we think that this case law is more liberal than Swiss 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. 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 suffice to constitute acceptance or to make the clause applicable to a new transaction where no reference to these conditions is made.[261]

What are the exact nature and scope of the material rule so defined? Boucobza submitted that it is a material rule of French law with a universal ambit, solely applicable by French courts.[262] Therefore, it would be a rule of the *lex fori*,

[258] Notably Paris, Rev. arb. 1994, p.99: a purchaser, who due to his business relationship with the seller has knowledge of the latter's general business conditions, which contain an arbitration clause, and who does not object from the outset cannot contest the general business conditions by returning the invoices; Paris, JDI 1996, p.110: a global reference to conditions of sale is not valid unless made prior to the conclusion of the contract, and not in subsequent invoices; Paris, Rev. arb. 1997, p.90: binding nature of general business conditions of which the addressee was aware; Cas., Rev. arb. 1998, p.537: binding nature of the clause on a party who had knowledge thereof at the time of the conclusion of the contract and who accepted it by remaining silent; Paris, Rev. arb. 1998, p.564: tacit acceptance, since the contract referring thereto had not been made in writing; Cas., Rev. arb. 2001, p.559, with a note by Legros; Paris, Rev. arb. 2002, p.793 and 2003, p.427; Cas., *Prodexport*, Rev. arb. 2003, p.1341, with a note by Legros. On this case law, see notably Fouchard, Gaillard and Goldman, para.496 and the additional references given in the French edition of this book.

[259] See Ch.1.4.1. 2.2 para.74 and 3.3.1 para.187.

[260] *Op. cit.* p.78; *contra*, Derains cited in n.261 below.

[261] Cas. Verdol, Dalloz 1992, IR, p.208; see CA The Hague, YCA 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, JDI 1994, p.1059 = Collection III, pp.555, 559. Derains rightly observes that "French law of international arbitration is much more liberal [than Swiss law] since it does not require the written form for an arbitration clause".

[262] Boucobza, *op. cit.*, especially pp.499–503.