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"Is a mandatory binding arbitration clause in a prefixed contract consistent with the prerequisite of voluntarily agreement? Matters of validity and award's recognition and enforcement under the N.Y. Convention."

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Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University.

The cornerstone of international arbitration is its consensual nature. Arbitration is chosen *willingly* by the contracting parties by concluding an agreement to arbitrate. At least this was the case until very recently. International commercial relationships have evolved and along with them the way that agreements are conducted, including arbitration agreements. New practices in the international commercial level with prefixed contracts are considered more efficient, speedy and low costly but at the same time they may jeopardize the consensual nature of arbitration when mandatory pre disputes arbitration agreements are included in these contracts and the latter are offered on a “take it or leave it” basis.

The present work, after considering the above, shortly refers to arbitration agreement and the validity requirements, looks at some common practices in international commerce where standard contracts are used and where arbitration clause is often included and sets the question whether there is actually consent to such an arbitration clause and how the principles of separability and competence-competence affect arbitrators and courts when jurisdiction is challenged on the ground of lack of consent. A special reference is done to the provisions of the New York Convention (1958) that could offer a ground on which a party could or could not challenge the arbitration agreement’s validity due to lack of consent. At the end it results that it would be probably superficial to ask for the absolute invalidity of any arbitration clause in any prefixed contract, except in some areas, and that the final scrutiny of such an agreement will always be in a judge’s hands.

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Keywords: Mandatory, arbitration clause, consent, New York Convention.

In my father’s memory

Konstantina Lekka
31 January 2016

Preface

This dissertation is original, unpublished, independent work by the author, Konstantina Panagioti Lekka.

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I. Introduction

One of the most significant, if not the most significant, feature of international arbitration has been its consensual nature. In a contract of cooperation two or more contracted parties also include an arbitration agreement showing their *mutual consent* to submit any existing or future dispute, arising out of, or in connection, to the contract, to a process of dispute resolution other than courts, the arbitration. For many decades this has been the traditional way to agree on the mechanism of a dispute resolution that has been very popular, especially in the area of international commercial transactions, between business-to-business since “it allows businesses to avoid feared biases from each other’s courts, and to obtain a result that is more enforceable in another country than a court decree would often be.”¹ Until recently, corporations and agencies did not require consumers, employees, franchisees or other parties who were contracting with them to resolve disputes through private arbitration rather than in court.² But commerce and business affairs have evolved and along with them arbitration has evolved as well in many aspects.

Nowadays there are many modern international transactions which take place in areas such as e-commerce, banking agreements, financial contracts, reinsurance, securities and employment contracts where consumers and employees are often called to accept a prefixed contract with predetermined terms, either in the very same contract or as reference or in adhesion, in order for consumers and clients to enjoy the services or the products provided by, usually, big international firms and for employees to get the job they are interested in. In these terms there is quite often a mandatory arbitration clause which, as the most of the rest of the terms, is not negotiable. It is quite a “take it or leave it” offer since consumers, employees and other “weak”, contracted with them, parties usually do not have bargaining power; if they want to accept what the big enterprises offer they have to undertake to submit to arbitration the *disputes that may arise* within the created legal relationship. The main arguments pro the existence of an arbitration clause in the standard contracts were quite simple: on the one hand the legal system had become too expensive, too slow, and too inefficient to deal with the special disputes that arise in the international field while on the other hand arbitration presents significant advantages to that issues in compare to courts.

Quite recently, the Oberlandesgericht München (OLG-the Munich Court of Appeal) rendered a decision in the matter opposing German speed skater Claudia Pechstein to the International Skating Union (ISU)³. The Munich Court decision held that arbitration agreements that are included into agreements entered into by athletes in order to enter into a competition are *invalid, because athletes have not voluntarily accepted arbitration as a means of dispute resolution*. In addition, the Court considered that there was a

¹ Born, Gary B., INTERNATIONAL COMMERCIAL ARBITRATION 7-11 (2d ed. 2001). Arbitration agreements are typically more enforceable in foreign countries than are court decrees because over one hundred countries have adopted the New York Convention requiring them to enforce arbitral awards issued by other signatory countries. *Id.* at 8. In contrast, fewer countries are signatory to conventions requiring them to enforce each others' court decisions.

² Sternlight, Jean R., "Creeping Mandatory Arbitration: Is It Just?" (2005). *Scholarly Works*. Paper 280. <http://scholars.law.unlv.edu/facpub/280>, page 1636

³ (Judgment of the Munich Court of Appeal of January 15, 2015, U 1110/14 Kart; currently an appeal is pending before the Supreme Court)

structural imbalance between athletes and the sports unions because the latter held a monopolistic position. This decision was the incentive to reconsider in how many other areas of business activities individuals and small companies have involuntarily accepted arbitration clauses.

Do consumers, clients, employees, franchisees and many more actually consent to the arbitration clause that is most commonly included in various standard contracts used in the international commerce? The fact that individuals do not read or they do not understand the drafted terms and conditions of a standard form contract and even if they do understand they do not have the bargaining power to negotiate can provide ground to challenge the validity of such an arbitration clause? How tribunals and courts interpret the relevant provisions of the most important legal instrument in International Commercial Arbitration, the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (hereinafter, the New York Convention), when the validity of the arbitration clause is challenged due to lack of consent either before an arbitration award is delivered and/or at the stage when enforcement of the arbitral award is sought? Is lack of consent to arbitration clause so significant to be considered as a “public policy” matter? After all the above, is it always the counterparty the weak party in such a situation or when it is experienced it can be a secret legal weapon in its sleeve?

These are some of the questions that the present work tries to answer in brief. This was tried to be done by firstly realizing that the consensual nature of arbitration has evolved and that arbitration undoubtedly offers to international commercial relationships more expertise and sufficient solutions. But on the other hand none financial or other kind of profit of the commercial entities can be used as grounds of justification of the restriction of fundamental rights.

II. THE “CONSENT” IN INTERNATIONAL COMMERCIAL ARBITRATION⁴

Arbitration has been from ancient years a popular method of settling disputes; a person neutral and usually respectable in the society was called by the parties involved in a dispute to decide how it should be settled. This was probably the first and very simple form of arbitration in a local level of a society. Nowadays societies and economies have enormously developed and almost all the transactions have or can be globalized. Arbitration which was common in local societies and mainly between traders has evolved within the 20th century in order to be able to deal with the temporary and complicated issues of the international transactions and investments. International trade and intellectual property organizations⁵ have set specific rules on arbitration and institutions⁶ have been created to shield the arbitration procedures by determining the terms under they will be pursued upon the parties choice. As it is pointed out⁷, in 1990s arbitration was increasingly used to resolve disputes in new fields such as labour and consumer disputes, banking transactions, franchise, sports and quite recently in e-business. But the existence and the evolution of arbitration is due to the existence of the will and the consent of the contracted parties to resolve their dispute out of the courts and to the relevant valid arbitration agreement.

A. Agreement to arbitrate

While studying on arbitration one realize that there is not a specific definition which legislation on arbitration or legal authors share⁸. A definition can be inferred from the provisions regarding the arbitration agreement found in the various legislations or offered by authors⁹. Without fundamental divergences between the various definitions there is definitely one main convergent feature in all of them; *arbitration it is based on an agreement between the parties*¹⁰. For an international arbitration to begin there has

⁴ As the footnote to Art. 1 of UNCITRAL Model Law explains “The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, *but are not limited to*, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road”. On the meaning of “commercial” see also BORN, Gary B., Chapter 2: Legal Framework for International Arbitration Agreements, pp. 298-301. For the succinct of this dissertation the term “international” will not be always explicitly referred regarding the terms arbitration, arbitration agreement and arbitration clause.

⁵ i.e. World Trade Organization (WTO), International Chamber of Commerce (ICC), United Nation Commission on International Trade Law (UNCITRAL), World Intellectual Property Organization (WIPO)

⁶ i.e. American Arbitration Association (AAA), ICC International Court of Arbitration (ICC), German Institution of Arbitration (DIS), London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC)

⁷ Steingruber, Andrea Marco, “Consent in International Arbitration”, *Oxford University Press 2012*, page 21, 2.38

⁸ Poudret, Jean-François, BESSON, Sébastien, *Comparative Law of International Arbitration*, Sweet & Maxwell, 2007, p.p.1-3

⁹ Ibid

¹⁰ There is also arbitration imposed by a state in certain fields which is not within the scope of this thesis.

to be an arbitration agreement between the contracted parties, physical or legal entities coming from or based in different countries, which gives to the arbitrator or the tribunal the power to resolve a dispute between them and to render “an award which becomes *res judicata* in the same way as a judgment”¹¹ but can be enforced in a far greater number of countries than a court judgement. There cannot be arbitration without the consent of the parties to arbitrate their disputes; this consent is reflected in the arbitration agreement.

There are two types of arbitration agreement¹²: a) the *arbitration clause (clause compromissoire)* which is an agreement to submit *future disputes* to arbitration and usually is included as a term in the principal agreement/contract between the parties and b) the *arbitration submission agreement (compromis)* which is an agreement between the parties to submit already *existing disputes* to arbitration. The arbitration agreement under which the parties agree to submit a dispute that has already arisen does not present any particular issues regarding the consent of the parties. The matter of consent can be mainly questioned in case of an arbitration clause¹³.

1. ARBITRATION AGREEMENT REQUIREMENTS

For a valid international arbitration procedure there has to be a valid international arbitration agreement. An arbitrator can acquire jurisdiction only when it is provided by an arbitration agreement which fulfils the form requirements and it is substantively valid under the law which governs it¹⁴. Most legislation in the developed jurisdictions have formulated “pro-arbitration” rules of presumptive substantive and formal validity for international arbitration agreements following or implementing the New York Convention, which sets the stricter requirements and will be discussed in greater detail in Chapter IV, and other international conventions¹⁵ without providing though a specific definition¹⁶. From the relevant provisions¹⁷ it follows that for a valid arbitration agreement the main minimum requirements are a) an agreement between the contracted parties b) in writing¹⁸ c) to submit and resolve by arbitration d) an existing or future dispute c) that has arisen or might arise within a defined legal relationship. As it is pointed out¹⁹ two are the main justifications for having a written form requirement for arbitration agreement and both are related to consent. The first is to

¹¹ Bucher (as cited in POUURET, Jean-François, BESSON, Sébastien, *Comparative Law of International Arbitration*, Sweet & Maxwell, 2007, p.2)

¹² art. 7 (1) of UNCITRAL Model Law: “[...] An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement”; art. II (2) New York Convention (1958): “The term “agreement in writing” shall include and arbitral clause in a contract or an arbitration agreement ...”

¹³ From now on whenever “arbitration agreement” is mentioned in the text of this thesis is referring to a pre-dispute agreement in an arbitration clause

¹⁴ For the determination of the *lex arbitri* see STEINGRUBER, Andrea M., *Consent in International Arbitration*, pp. 100-105

¹⁵ Born, Gary B., Chapter 2: Legal Framework for International Arbitration Agreements in *Gary B. Born , International Commercial Arbitration (Second Edition)*, 2nd edition (© Kluwer Law International; Kluwer Law International 2014) pp. 232 - 233

¹⁶ *Ibid* p. 241

¹⁷ Art. II(1) of the New York Convention and Art. 7(1) of UNCITRAL Model Law.

¹⁸ “France –for international arbitration- and Sweden do not have requirements of form, and thus oral agreement are sufficient” see STEINGRUBER, Andrea M., *Consent in International Arbitration*, p. 107, 6.32

¹⁹ Steingruber, Andrea M., *Consent in International Arbitration*, p. 105, 6.24

prove that consent has been reached and the second is to prove the terms of the reached consent. But is there always consent in a pre-dispute arbitration agreement (arbitration clause) even if it is in a writing form?

B. "CONSENT": THE CORNERSTONE OF ARBITRATION

From legal literature and most national arbitration legislation, arbitration is defined as a process by which parties *consensually* submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard²⁰. Similarly, national courts uniformly hold that arbitration "is a matter of consent, not coercion²¹", that "it owes its existence to the will of the parties alone"²² that "[a]rbitration is strictly a matter of consent and thus is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration,"²³ and that, "unlike court proceedings, arbitration proceedings are consensual."²⁴ It is pointed out that "there is no contrary authority from either national courts or elsewhere".²⁵

As a legal term "consent" could be defined as "a concurrence of wills"²⁶ or "voluntary acquiescence to the proposal of another; the act or result of reaching an accord; actual willingness that an act or an infringement of an interest shall occur"²⁷. Therefore, consent may have the meaning of the mutual reach of consent or the meaning of the unilateral expression of consent. Consent may be provided either explicitly and directly, orally or in writing, or tacitly as long as, in the latter case, the consent is clear and unambiguous.

In an ideal commercial world "consent" would also be the main factor for its functioning and evolution; the interested in contracting parties, after the in between them negotiations, mutually agree on the terms of a contract and they confirm their agreement by signing the contract. But as I already said this is the ideal situation. Quite often the mere fact that a contract has been agreed and signed does not suffice to establish a valid mutual consent. "Consent must also have been free and enlightened, in other words, it must not have been vitiated".²⁸ It has been stated that there are three

²⁰ Born, Gary B., Chapter 2: Legal Framework for International Arbitration Agreements in *Gary B. Born, International Commercial Arbitration (Second Edition)*, p. 240

²¹ *Volt Info. Scis. v. Bd. of Trs.*, 468, 479 (1989) and *Stolt-Nielsen S. A. v. Animal Feeds Int'l Corp.*, 559, 662, 697-98 of the Supreme Court USA as cited in Nelson, William Alan II, *Take It or Leave It: Unconscionability of Mandatory Pre-Dispute Arbitration Agreements in the Securities Industry*, p.25.

²² *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, ¶151 (Canadian S.Ct.).

²³ *Granite Rock Co. v. Int'l Bhd of Teamsters*, 130 S.Ct. 2847, 2857 (U.S. S.Ct. 2010). See *Judgment of 8 July 2003*, DFT 129 III 675, 679 (Swiss Federal Tribunal) as cited in BORN, Gary B., Chapter 2: Legal Framework for International Arbitration, p. 250.

²⁴ *Altain Khuder LLC v. IMC Mining Inc.*, XXXVI Y.B. Comm. Arb, 251, ¶295 (Victoria S.Ct.) (2011) as cited in Born, Gary B., Chapter 2: Legal Framework for International Arbitration Agreements p. 250.

²⁵ *Ibid* Born, Gary B., Chapter 2: Legal Framework for International Arbitration Agreements, p. 250 with an extensive reference of relevant judicial decision in the footnote no 124.

²⁶ <http://thelawdictionary.org>

²⁷ <http://legal-dictionary.thefreedictionary.com>

²⁸ Fabre-Magnan, Muriel, Defects of Consent at in Contract Law, in *Hartkamp/Hesselink/Hondius, Towards a European Contract Code*, 2. Ed., The Hague 1998, at 219 et seq.

categories of defects of consent, mistake, fraud or duress which are “universal ground for avoiding the contract”,²⁹ with small differentiations.

1. THE ARBITRATION CLAUSE, A SEPARATE CONTRACT WITH SEPARATE CONSENT

According to the separability doctrine,³⁰ an international arbitration clause is treated as a separate contract of the underlying contract. One of the main consequences of the doctrine’s application is the possible validity of an arbitration agreement, notwithstanding the non-existence, invalidity, illegality, or termination of the parties’ underlying contract; and vice - versa, the possible validity of the underlying contract notwithstanding the invalidity, illegality, or termination of an associated arbitration clause.³¹ Therefore the “consent” of the parties must cover separately both the main contract and the arbitration clause; in case of lack of consent either one or both of them can be declared null and void.

It is pointed out³² that there are three ways for consent to arbitration to be expressed: by promise (offer and acceptance), by conduct or by performance.³³ In commercial arbitration consent is usually expressed with one of the two first ways. As mentioned above, as the contracts are, usually, bilateral the same is with an arbitration clause; the contracted parties *willingly and mutually consent* and they promise that they will fully respect the agreement to submit a future dispute to arbitration. There are also cases where the consent is expressed by conduct which is permitted under many national legal systems.³⁴ The oral and tacit acceptances of arbitration agreement faces multi criticism whether they comply with the requirements of Article II(2) of the New York Convention³⁵ but this is not within the present work to analyze.

In consequence, if a party objects against to the existence/and or validity of an arbitration clause it is upon to the governing the arbitration clause law to determine it; this law might be a different law than the governing of the substantive contract law. There are different options as how the applicable law to the formation, validity and the interpretation of an international arbitration clause may be defined by the competent authorities,³⁶ in case of lack of expressed choice of the parties which overrides due to the parties autonomy principle, “ranging from the law chosen by the parties to govern

²⁹ Ibid

³⁰ See Born, Gary B., Chapter 3: International Arbitration Agreements and Separability Presumption, pp348-350: ““Separability doctrine” or more accurately, the “separability presumption” [...] is one of the conceptual and practical cornerstones of international arbitration”

³¹ Ibid p. 350

³² Steingruber, Andrea M., *Consent in International Arbitration*, p.74, 5.20 et seq.

³³ Consent might be expressed by performance in investment arbitration; the host State has an open offer for arbitration in a BIT and only the foreign investor may submit a dispute to arbitration. The submission of the dispute to arbitration is the acceptance of the offer by performance.

³⁴ See Born, Gary B., Chapter 5: Formation, Validity and Legality of International Arbitration Agreements, p. 682 et seq.

³⁵ Ibid.

³⁶ See the very famous *Sulamerica v Enesa* (2012) of the English Court of Appeal where a three test – stage is established: a) First comes the express choice of the governing law of an arbitration agreement by the parties; if there is not a such b) an implied choice by the parties should be sought and c) in the absence of the first two, the applicable law is the closest and with the most real connection to the arbitration agreement. On the other hand the Singapore High Court in the *FirstLink Investments Corp Ltd v GT Payment Pte Ltd s*, (2014) held that, in the absence of a choice of the parties, the law of the seat of the arbitration would also apply as the governing law of the arbitration agreement.

their underlying contract, to the law of the arbitral seat, to the law of the judicial enforcement forum, to the law of the state with the “closest connection” or “most significant relationship.”³⁷ It becomes obvious that the various choice-of-law rules have often produced unfortunate uncertainty about the choice of the law governing international arbitration agreements. Therefore, regarding the issue of lack of “consent” of one party to an international arbitration clause, if there is not an expressed choice of law, as, unfortunately, is often the situation, the competent authority, arbitrator(s) or national court, will first determine the law applicable and then consider whether the parties have validly consented to the arbitration clause and rule upon the relevant objection.

It is justifiably held³⁸ that, over the past century “the rules governing the validity and enforceability of international arbitration agreements under national and international law have evolved from a position of relative disfavor in some jurisdictions to one of essentially universal favor and affirmative encouragement”. But can this “pro-arbitration enforcement regime for arbitration agreements” which, undeniable is “of fundamental importance to the efficacy of the international arbitral process, by ensuring that agreements to arbitrate can be enforced predictably and expeditiously in forums around the world”³⁹ covers the issue of the doubtful “consent” of a party who agreed to an arbitration clause because it had no other choice than to do so?

As noted in the next Chapter, in modern practices in international commercial relationships, *standard form contracts* are offered by one party on a “take it or leave it” basis; this prefixed contracts very often include an arbitration clause which the other party cannot negotiate, as it is with the rest of the terms. In these cases, there is a great possibility that issue of unconscionability may arise.

³⁷ Born, Gary B., Chapter 4: Choice of Law Governing International Arbitration Agreements, p. 472 et seq.

³⁸ Born, Gary B., Chapter 5: Formation, Validity and Legality of International Arbitration Agreements, p. 636

³⁹ Ibid

III. ARBITRATION CLAUSES IN CONTEMPORARY COMMERCIAL PRACTICES

Nowadays large companies are more and more activated globally. Banks, huge corporations, operating in different levels of commerce, insurance groups and securities firms are operating on the markets all over the world. Internet transactions, e-business, franchising are practices which along with friendly national legislations, international conventions and intergovernmental agreements allow and facilitate the operation of such companies world widely. The transactions and the relationships that they create with the clients, consumers, employees and franchisees, sometimes even with their associates, have become impersonal and very often they are based on prefixed contracts which the latter have to sign. These adhesion contracts⁴⁰ are an important part of the modern consumer economy, usually by greatly reducing transaction costs⁴¹ but their very essence is “that they can rarely, if ever be renegotiated by the consumers/clients;⁴² in general, quite often the contracted party is not aware of the existence of an arbitration clause or it does not understand the consequences that arise of the existence of such a clause which might include terms that not only bar judicial relief but also may allow companies to set the arbitration proceedings as they want. Pre-dispute binding arbitration agreements that exist in these contracts are generally considered valid and enforceable, according to the pro-arbitration approach of the most national jurisdictions and, of course, arbitrators but there might be circumstances under which the validity may be reasonably contested due to lack of true consent, especially where the arbitration clause seems to be more favorable to the party who has drafted the contract; in such a case the competent authority, judge or arbitrator(s) must judge upon the relevant objection with much closer scrutiny facing the fact that such an arbitration clause is more problematic than a simple one drafted according to rules of the traditional contract law regarding the mutual assent of the contracted parties. Before going on with the separate reference in different areas of commercial relationships I should define that the following cases will be discussed only regarding the existence or not of the consent of the parties and not regarding the “written” form requirement⁴³ which requires a separate analysis.

⁴⁰ The term here is used to refer to a standard form contract which is drafted by one party (usually the one with the stronger bargaining power) and the other party has to adhere to the contract, without the possibility to negotiate any of its terms. Adhere contracts are usually software licences, standard form sales or employment agreements, contracts for banking transactions, insurance and securities and similar contractual documentation which refer to terms and conditions and might be in the main text or as an annex.

⁴¹ Kaiser, Christopher M., *Take It or Leave it: Monsanto v. McFarling, Bower v. Baystate Technologies, and the Federal Circuit's Formalistic Approach to Contracts of Adhesion*, 80 Chicago-Kent Law Review, 487 (2005), p. 2

⁴² Sternlight, Jean R., *"Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration"*, Scholarly Works, (1996), Paper 265, p. 40.

⁴³ See Born, Gary B., Chapter 5: Formation, Validity and Legality of International Arbitration Agreements, p. 656, §5.02. Ibid page 738, §5.04[2]: “it is possible for applicable “written” form requirements to be satisfied [...] but for the extant documents to fail substantively to establish the existence of an arbitration agreement as a substantive matter (e.g., [...]or the parties have not in fact consented to the proposed clause)

A. The mandatory arbitration clause in various form contracts

It has been a longstanding debate⁴⁴ over the benefits of mandatory arbitration in the commercial context and whether the weak parties (e.g. clients, consumers, employees) win or lose by the fact that they are obliged to proceed into arbitration to resolve a dispute for which they have agreed, or at least it seems that they have agreed, by accepting a form contract which includes a pre-dispute arbitration agreement term. It is quite interesting though to refer to some popular fields of international commercial relationships where these contracts with prefixed terms are used and to check whether there is real consent of the counterparties to the included arbitration clause.

1. Consumer contracts

Arbitration clauses are commonly used in general consumer contracts. A customer is asked to sign a standard form contract by a telecommunication firm in order to provide him services and a device, or by a bank to obtain a credit card or by a well-known car dealer in order to buy a car; usually the consumer does not read the terms of the contract, whether in a single text or in an annex; even if he reads them, rarely has the knowledge to understand all of them, especially an included arbitration clause. After all, he has not any bargaining power; if he wants the product or the service he has to accept the contract even if he actually does not consent to all of its terms. This lack of consent might lead to invalidity of the arbitration clause when the latter is hidden among the rest of Terms and Conditions and when it results to involuntary waiver of certain Constitutional rights, as lack of due process of law and lack of judicial review.

Quite interestingly, an empirical study⁴⁵ showed that the same well-known firms and trade organizations which included in their form contracts arbitration clauses and endorsed arbitration for all its benefits for the contracted parties, they did not accept an arbitration clause in non-consumer contracts which were negotiable". So even these firms, when contracting with parties with equal bargaining power, they do not show so much faith in the fairness feature of arbitration.

In the same result one might conclude by considering the provision of the Article 3(3) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer in conjunction with the Annex according to which it is unfair a term which excludes or hinders "the consumer's right to take legal action or exercise any other legal remedy, particularly *by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.*"⁴⁶

⁴⁴ See some relevant articles in the referred at the end bibliography

⁴⁵ Eisenberg, Theodore; Miller, Geoffrey P.; and Sherwin, Emily, "*Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*" (2008), page 2.

⁴⁶ See also Commission Recommendation 98/257 of 30 March 1998 on the Principles Applicable to the Bodies Responsible, especially under VI:" Principle of liberty. The decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. The consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute". As it is noted in the recital, in accordance with Article 6 of the European Human Rights Convention "access to the courts is a fundamental right that knows no exceptions."

2. E-business

Although agreements in E-business with consumers are part of the above mentioned consumer contracts a special reference should be done due to the particularities that they present. Internet provides the opportunity on the one hand for a business to expand its operation world widely and on the other hand for consumers to extend their options, checking for the best product on the best price. In a transaction through a web page a lot of information is provided in different windows to which very rarely consumers pay attention.⁴⁷ Very often the terms and conditions of a business web page are totally separated in a small, sometimes almost hidden window, in which the consumer may access only by separately click on it which usually never does. Therefore when a consumer proceeds to a purchase it is most possible that with this action he has, at least typically, “accepted” an arbitration clause which exists somewhere in the terms and conditions of the webpage.

3. Securities and insurance

Securities and insurance industry is another field where very often, if not always, standard form contracts which include mandatory arbitration clauses are used. This practice has been mainly developed in USA⁴⁸ but nowadays with the globalization of the operation of Securities and Insurance Corporations they have expanded globally. It has been noted⁴⁹ that the language used in such a contract is interesting, “because it only speaks of a pre-dispute arbitration clause; it says nothing about the *mandatory* nature of such clause”. Moreover, it is pointed out that Investors and clients can be “forced to enter a dispute resolution system which is less transparent, with no guarantee of due process of law, and, as discussed below, infinitely more difficult to get judicial review of an erroneous decision”.⁵⁰ Once again, although brokerage and advisory contracts are usually prefixed contracts with the drafting party being in a superior bargaining position, a contained in them arbitration clause will not undoubtedly be found unconscionable⁵¹ if there are no other terms that place the weaker party at a disadvantage.

4. Sports industry

Another area where arbitration is very popular and usually, both in domestic and internationally is sports industry. When a professional athlete is entering in a contract with a club usually, if not ever, accepts a mandatory arbitration clause that all the

⁴⁷ See the Supreme Court of Canada on *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, p. 4: “This precondition [of accessibility] is a useful tool for the analysis of an electronic document. Thus, a clause that requires operations of such complexity that its text is not reasonably accessible cannot be regarded as an integral part of the contract. Likewise, a clause contained in a document on the Internet to which a contract on the Internet refers, but for which no hyperlink is provided, will be an external clause.

⁴⁸ From the relevant bibliography arises that arbitration has been widely used as an ADR method in the USA and that arbitration clauses have become extremely controversial.

⁴⁹ Nelson, William Alan II, *Take It or Leave It: Unconscionability of Mandatory Pre-Dispute Arbitration Agreements in the Securities Industry*, p. 32.

⁵⁰ Ibid with an extensive analysis on *Scherk v. Alberto-Culver Co*, *Wilko v. Swan* and *Shearson/American Express v. McMahon* cases.

⁵¹ See ibid p. 44 et seq “Unconscionability analysis” with persuasive argumentation why the pre-dispute arbitration agreements are *per se* unconscionable.

disputes that might arise within their agreement will be resolved by the competent arbitral tribunal.⁵² As it is pointed out by the Oberlandesgericht of Munich in the famous *Pechstein* case⁵³ “sound and weighty arguments speak in favor of avoiding to leave to the many potentially competent national courts the duty to deal with disputes arising between athletes and International federations in the framework of international competitions, and instead to refer them to a single sports tribunal. In particular, a uniform competence and procedure can preclude that similar cases be decided differently, and therefore safeguard the equal opportunities of athletes during the competitions”.⁵⁴ Adding in this argumentation the fact that arbitrators are usually experts in this area, that the sports law is more often in favor of athletes, that representatives by the powerful athlete’s associations usually attend to it and that usually professionals athletes have got bargaining power an allegation of lack of consent could be considered justified only if particular extreme circumstances concur.⁵⁵

B. Is there actually consent in a prefixed arbitration clause?

As it has already mentioned arbitration has evolved. This evolution has brought a “reduction in the pure consensual character of arbitration”.⁵⁶ Some decades ago we understood arbitration as consent of the parties to arbitrate after the dispute had broken down; nowadays it is very common for the parties to express such a consent before the dispute has arisen.⁵⁷ It is recognized that arbitration in its traditional form cannot accommodate with the evolution of the modern international transactions which take place in different commercial areas. In some of them, consent to arbitration is frequently expressed by conduct and in others “is perceived to have a reduced consensual character”.⁵⁸ But it is not the process of reaching consent the essential feature that characterizes the arbitration procedure as consensual; it is its substance. The substantive validity of the arbitration clause will be judged under the law that governs it.⁵⁹

⁵² For example in Greece according to the Statutes of the Hellenic Football Federation (JURISDICTION, art. 66) all disputes that arise between the Federation, the Clubs, the Players and the officials or the agents are resolved by the independent Arbitration Tribunal unless it is explicitly excluded by the Greek Law.

⁵³ OLG München (The Munich Court of Appeal), 15 January 2015 Az. U 1110/14 Kart

⁵⁴ Duval, Antoine, *The Pechstein Ruling of the OLG München (English Translation)* (February 6, 2015)

⁵⁵ In *Pechstein* case the OLG in Munich held that arbitration agreements between a dominant organizer of international sports competitions and the athlete taking part in these competitions are not *per se* invalid due to the lack of free will of the athlete. It added though that under *normal circumstances* “an arbitration clause in favour of CAS would not be agreed ..., as the one-sided designation of the potential arbitrators favours the associations (the International federations – such as the ISU – [...]) involved in disputes with athletes as regard the composition of the arbitral panel. *Athletes accept this arrangement only because they have to in order to participate in international sporting competitions*”

⁵⁶ Steingruber, Andrea M., *Consent in International Arbitration*, Chapter 15, §15.08

⁵⁷ *Ibid*

⁵⁸ *Ibid* §15.12

⁵⁹ *Ibid* §15.25, “the determination of which law governs the validity [...] is of importance because of the different solutions-traditional conflict of laws approaches, substantive rule of private international law or the French solution-adopted by national legislators ...”. Regarding the applicable law see the abovementioned under B.1.

Most national legislations are silent on the question of the validity of arbitration clauses in prefixed contracts (general conditions, adhesion, by reference).⁶⁰ In the international level, arbitration clauses are excluded from the scope of application of international conventions.⁶¹ Even the very special New York Convention (1958) does not contain specific rules but, as it is analyzed in the next Chapter, leaves it to national law to determine whether the arbitration clause is valid and binding.⁶²

As it is pointed out “courts look at multiple factors to determine whether a contract is one of adhesion, including whether there was great disparity in bargaining power, no opportunity for negotiation, or services that could not be obtained elsewhere”.⁶³ Usually in contracts of adhesion “the drafting party is in a superior bargaining position and although they will not be found unconscionable in every case” courts have held that “an adhesion contract is procedurally unconscionable and unenforceable when the terms are patently unfair to the weaker party”.⁶⁴ So, in each case, the competent authority, arbitrator or court, will judge according to the governing law by estimating its own circumstances and facts. In general, both civil and common law courts have been reluctant to accept claims of lack of consent to an arbitration clause; such a claim could be accepted only where a party could not *reasonably* have been aware of the existence of such a clause and that clause contains unusual or one-sided terms.⁶⁵ National courts are divided for cases where there is typically no signature or comparable indication of assent; some have denied effect of to arbitration provisions, mostly in cases involving customers and employees, while others have reached the opposite conclusion.⁶⁶

It is often argued that no-one is obliged to contract with a company or to accept the offer that is provided in a standard form contract; this position could be characterized as superficial and simplistic. Some decades ago the Supreme Court of New Jersey in *Henningsen v. Bloomfield Motors, Inc.* noted that “the weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all”.⁶⁷ In my view this is still the situation today in many cases. Big enterprises with strong bargaining power and position draft standardized contracts which weak parties have to accept if they want to obtain

⁶⁰ Houte, Vera Van, *Consent to arbitration through agreement to printed contracts: the continental experience*, Arbitration International, 2000, vol. 16(1), p. 8, see also *ibid*, in the first part, “how the continental European Courts who had to apply the New York Convention treated the issue of consent to arbitration in printed contracts”.

⁶¹ e.g the Rome I Regulation on the law applicable to contractual obligations (Reg. (EC) No. 593/2008, Art. 1(2), the Vienna Convention on the International Sale of Goods and the Brussels Convention on Jurisdiction and Enforcement of Arbitral Awards (1958).

⁶² Houte, Vera Van, *Consent to arbitration through agreement to printed contracts: the continental experience*, Arbitration International, 2000, vol. 16(1), p. 2.

⁶³ Nelson, William Alan II, *Take It or Leave It: Unconscionability of Mandatory Pre-Dispute Arbitration Agreements in the Securities Industry*, 17 J. Bus. L. 573 (2015), p. 27.

⁶⁴ *Ibid*.

⁶⁵ Born, Gary, , Chapter 5: Formation, Validity and Legality of International Arbitration Agreements, §5.02, pp. 815-816.

⁶⁶ *Ibid* p. 810.

⁶⁷ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (N.J. 1960) as it is referred in Alderman, Richard M., *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, p. 60.

the goods or services that are provided by them. But this is a “business world” and despite the fact that the issues arising by the arbitration clauses and the lack of consent had been identified over half a century ago, as in *Henningsen*, it seems that “only a handful of cases have found pre-dispute mandatory arbitration clauses, presented on a take-it-or-leave it basis, to be unenforceable”⁶⁸ unless there are extreme circumstances for invalidating consent.

A special reference to the transactions through web-pages should be done due to their particularities. As it is noted, the “printed contract”, under Art. II(2) of the New York Convention, containing the arbitration clause can be broadly interpreted⁶⁹ but none of these cover the way transactions are performed on-line, via internet. In these cases there are no contracts, no signatures, no separate documents none physical access to any document which at least at a first glance could provide the presumptive consent. Each web-page has each own method on how to provide the Terms and Conditions under which it operates and very often they are not easily or obligatory to find and read. Therefore, unless the web-page is professionally created, and the consumer is asked to declare that has read and understood the Terms and Conditions, which are usually in a text link, where the relevant arbitration clause exists as a separate and distinguishable term, and this declaration is affirmed by the printable confirmation receipt, the lack of consent to arbitration would be a well-founded basis to object against arbitration proceedings.

Finally I would like once more to refer to the Munich Court decision in *Pechstein* case. As mentioned above (under II.A.4.), the Court outlined the advantages of arbitration when facing disputes that arise between athletes and International federations and held that arbitration agreements between a dominant organizer of international sports competitions and the athlete taking part in these competitions are not *per se* invalid due to the lack of free will of the athlete even if the consent was necessary to exercise one’s profession.⁷⁰ Nevertheless the Court went on and held that an arbitration clause in favour of CAS (Court of Arbitration for Sport) would not be agreed under normal circumstances and that “the departure from arbitration agreements that would have been signed under normal conditions of competition strips Pechstein from her fundamental right of constitutional rank, flowing from the rule of law principles, to access to national courts and to a legally mandated judge.⁷¹ Moreover, the Court held that the procedures before the CAS did not correspond to the required minimum standards of a fair trial as the parties are not treated equally⁷² and found that Pechstein had no equal influence on the composition of the arbitration tribunal.

⁶⁸ Alderman, Richard M., *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, p. 60

⁶⁹ Houte, Vera Van, *Consent to arbitration through agreement to printed contracts: the continental experience*, Arbitration International, 2000, vol. 16(1), p. 3: “the ‘printed contract’ containing the arbitral clause can: (a) either be signed by the parties [...]; (b) be part of an exchange of letter or telegrams; (c) be a separate document to which either the signed contract or the exchanged letters or telegrams, refer; (d) be part of longstanding relationship or trade usage; (e) be part of a group of related contracts”

⁷⁰ Duval, Antoine, *The Pechstein Ruling of the OLG München (English Translation)* (February 6, 2015), §§89-92

⁷¹ *Ibid*, §115

⁷² Requejo, Marta, Claudia Pechstein and SV Wilhelmshaven: Two German Higher Regional Courts Challenge the Court of Arbitration for Sport, *CONFLICT OF LAWS.net, News and Views in Private International Law* *ibid*, §115

The Court held that arbitration agreements that are included into agreements entered into by athletes in order to enter into a competition are *invalid, because athletes have not voluntarily accepted arbitration as a means of dispute resolution*. But as I already said, this is exactly the case in many other fields on international commercial relationships and not just in sports.

C. Validity of the arbitration clause and competence-competence

In addressing the existence of consent to an arbitration clause one should also importantly consider the effect of the competence-competence doctrine.⁷³ According to this principle,⁷⁴ which is applied in conjunction with the doctrine of separability,⁷⁵ arbitrators are entitled to decide on their own jurisdiction when they are called by contracted parties to adjudicate and resolve a dispute that has arisen between them⁷⁶ by rendering a final and binding award. This principle creates a kind of contradiction; when the arbitration proceedings commence by a party based on a binding arbitration clause and the other party challenge the validity of the same arbitration clause, due to lack of consent by its side, the arbitrator or the Tribunal, if and to the extent that he/it is *prima facie* satisfied that an arbitration agreement may exist firstly *assumes* that he/it has jurisdiction in order to define whether or not there is a valid arbitration agreement and then rule on his/its competence to adjudicate and proceed to consider on the merits or not.

This “positive effect” of the principle of competence-competence which empowers the arbitrators to determine their jurisdiction has a mirroring effect; domestic courts should not rule on the same issue, of the arbitrators’ jurisdiction before the arbitrators at least at the outset of arbitral process.⁷⁷ This “negative effect” of the competence-competence does not suggest that “domestic courts relinquish their power to review the existence and validity of an arbitration agreement”.⁷⁸ It means that when a court determines that an arbitration agreement *prima facie* exists and is valid has to leave to the arbitrators to

⁷³ Born, Gary, Chapter 5: Formation, Validity and Legality of International Arbitration Agreements, §5.02, p. 742.

⁷⁴ See Sklenytc, Aiste, *International Arbitration: the Doctrine of Separability and Competence-Competence Principle*, p. 48: “the competence-competence principle is now recognized by the main international conventions on arbitration, by most modern arbitration statutes, and by the majority of institutional arbitration rules. [...] the 196 European Convention ... in art. V (3)[...]. The UNCITRAL Model Law ... in art. 16(3) [...]. The UNCITRAL Arbitration Rules”.

⁷⁵ Article II(3) of the New York Convention provides that “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed” and Article 16 of the Model Law provides that “The arbitral tribunal *may rule on its own jurisdiction*, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, *an arbitration clause* which forms part of a contract shall be treated as *an agreement independent* of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.”

⁷⁶ Disputes that have arisen out of or in connection with the contract

⁷⁷ Gaillard, Emmanuel, *Prima Facie Review of Existence, Validity of Arbitration Agreement*, INTERNATIONAL ARBITRATION LAW, *NEW YORK JOURNAL*, 1/12/2005, p.1.

⁷⁸ *Ibid.*

judge upon their own jurisdiction and takes control “to the stage of any action to enforce or to set aside the arbitral award rendered on the basis of the arbitration agreement.”⁷⁹ Therefore, the counterparty which challenges the validity of the arbitration clause due to lack of consent has three ways to do it:⁸⁰

a) Prior to the making of an arbitral award and *before the arbitrators*; the validity of the arbitration clause is challenged before the arbitrators which will adjudicate according to the competence-competence principle. If the jurisdictional objection is upheld the claimant’s claims will be dismissed and the arbitration will conclude. Conversely, if the jurisdictional objection is rejected a positive jurisdictional award will be made which can be judicially reviewed upon the party’s appeal.

b) Prior to the making of an arbitral award and *before the national court*; the validity of the arbitration clause is challenged before a national court and the party does not accept to participate in the arbitration proceedings. In that event, the domestic court, due to the “negative effect” of competence-competence, will stay on litigation and refer the parties to arbitration after considering whether the parties are bound by a valid arbitration clause by applying a *prima facie* standard, unless it finds that is obviously “null and void”.

c) After the making of an arbitral award; the party chooses not to do anything of the above mentioned and instead either seek annulment of the arbitral award or resist enforcement. In each case, the national court will be required to consider whether there is a binding valid arbitration agreement. It has to be pointed out that to arguably challenge an award the party must not have participated in arbitration or if it did it must definitely object on jurisdiction. “Participation in an arbitration without objection cures the absence of an arbitration agreement”.

At this point I should note that, as it is analyzed above, it is not easy for arbitrators or courts to determine whether there is actually consent of a party in an arbitration clause in a prefixed, standard form contract. Although there is a common reluctance in accepting claims of lack of consent in arbitration clauses, the latter may provide the basis for invalidating an arbitration clause in cases where an “unsophisticated party” is genuinely unable to appreciate the existence of an arbitration clause.⁸¹ The last stage, where someone may allege that he has been forced to accept an arbitration clause or that he was not aware that he did, is when recognition and enforcement of the issued award is seeking by the other contracted party by applying before the competent court, of the country where enforcement of the award is sought, to litigate under the New York Convention.

⁷⁹ Ibid.

⁸⁰ Born, Gary, Chapter 2: International Arbitration Agreements: Legal Framework in *Gary B. Born, Law and Practice, Volume* (© Kluwer Law International; Kluwer Law International 20120, p. 2.

⁸¹ Born, Gary, Chapter 5: Formation, Validity and Legality of International Arbitration Agreements, §5.04, p. 816.

IV. THE MANDATORY ARBITRATION CLAUSE UNDER THE NEW YORK CONVENTION

International arbitration is promoted and is not confronted with mistrust any more due to the adoption in 1958 of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). When arbitrators, tribunals and national courts apply the New York Convention it is ensured that they will give effect to the parties' agreement to arbitrate and the resulting arbitral award will be recognized and enforced in the Contracting States. Article II(1)-(2) of the New York Convention sets the requirements for an arbitration agreement to be valid and enforceable and Article V provides the *exclusive* procedural and substantive grounds for challenging the enforcement of an award.⁸²

A. ARTICLE II OF THE NEW YORK CONVENTION – ARBITRATION AGREEMENT

According to Article II(1), the New York Convention applies only to an “*agreement in writing ... to submit to arbitration ... differences which have arisen or which may arise...*”. In paragraph (2) the term “agreement in writing” is defined as “an arbitral clause in a contract” (*compromissoire*) for future disputes or “an arbitration agreement” (*compromis*) for already existing disputes. In the above provision, “*writing*” refers to the agreement's form requirement and request a separate analysis due to the fact that “national laws differ considerably as to what satisfies the requirement of a written agreement”.⁸³ For the purpose of the present work I should refer into two issues. *First*, the New York Convention was adopted in 1958 and obviously its drafters could “not foresee the revolution in telecommunication technology”⁸⁴ and that is why the definition of the “agreement in writing” is limited in Article II(2) to “an arbitration clause in a contract or an arbitration agreement, *signed* by the parties or contained in an exchange of letters or telegrams”. It is generally recognized that Article II(2) sets a ““maximum” standard that precludes Contracting States from requiring additional or more demanding formal requirements under national law.”⁸⁵ That is why with Article VII they provided the place for the *lex fori* to be applied if more liberal⁸⁶ which nowadays is often the case, while the requirement of “a signed contract” appears to have become more relaxed⁸⁷ and more liberal solutions are common. *Second*, for some laws “writing” is only for evidentiary purposes (*ad probationem*) while others make it a condition of validity (*ad validitatem*).⁸⁸ This differentiation has significant consequences since in the first option arbitration agreement can be established in more ways, even as tacit

⁸² *ibid.*

⁸³ Steingruber, Andrea M., Consent in International Arbitration, Chapter 6 THE VALID REACHING OF MUTUAL CONSENT TO ARBITRATION, p. 106.

⁸⁴ *Ibid.*

⁸⁵ ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION, A HANDBOOK FOR JUDGES, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (2011), p. 44.

⁸⁶ *Ibid.*

⁸⁷ Houtte, Vera Van, Consent to arbitration through agreement to printed contracts: the continental experience, p. 3.

⁸⁸ Steingruber, Andrea M., Consent in International Arbitration, Chapter 6 THE VALID REACHING OF MUTUAL CONSENT TO ARBITRATION, p. 107.

acceptance⁸⁹ which in principle is not sufficient for the purposes of Article II(2),⁹⁰ while on the other, form requirement fulfil important functions and if it is not fulfilled it might lead into the annulment of such an agreement.

Paragraphs (1) and (3) of the Article II enforce the negative effect of an arbitration agreement which *prima facie* is valid; an “agreement in writing” shall be recognized and the court when seized of an action in a matter in respect of such an agreement shall refer the parties to arbitration, if the action is invoked by the other party. The Convention though is silent regarding the contemporary practices where standard contracts, for example with prefixed Terms and Conditions or with reference to another document or adhesion contract, are frequently used. The solution should be case-specific and for the form requirement of Article II(2) to be fulfilled, “the test appears to be that the other party is able to check the existence of an arbitration clause”.⁹¹ As it is pointed out,⁹² “in addition to considering the status of the parties – e.g., experienced businesspersons – and the usages of the specific industry, cases where the main document explicitly refers to the arbitration clause included in standard terms and conditions would be more easily found in compliance with the formal requirements set out in the Convention’s Article II than those cases in which the main contract simply refers to the application of standard forms without any express reference to the arbitration clause”. Finally, a special reference should be made at this point on post-dispute conduct and communications between the parties that could constitute a (new) arbitration agreement that satisfies Article II(2), even if there is no valid written arbitration clause.⁹³ This can occur for example when a party submits a dispute to arbitration and the other party participates to the proceedings without raising any objection to jurisdiction or affirmatively consenting to the arbitrator’s jurisdiction.⁹⁴ After applying the *prima facie* standard to the question of the existence of an arbitration agreement, according to Article II(2), the only ground for a national court to refuse to refer the parties to arbitration, according to Article II(3), is if it finds that such an agreement is “null and void”. Article V(1)(a) states that the validity of the arbitration agreement shall be judged according to the law “... to which the parties have subjected it”; if there is not such a choice, explicit or implied,⁹⁵ the court seized of a challenge of

⁸⁹ Ibid in France –for international arbitration- and in Sweden do not have requirements and thus oral agreements are sufficient.

⁹⁰ ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION, A HANDBOOK FOR JUDGES, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (2011), p. 49 “[...] some courts have endorsed this view. However, in line with the understanding that the Convention sought to go along with international trade practices, some courts have held that tacit acceptance of an offer made in writing (i.e., through performance of contractual obligations or the application of trade usages that allow for the tacit conclusion of arbitration agreements) should be considered as sufficient for purposes of Article II(2)”.

⁹¹ van de Berg, Albert Jan, *The New York Convention of 1958: An Overview*, pp. 8-9.

⁹² ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION, A HANDBOOK FOR JUDGES, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (2011), p. 46.

⁹³ Born, Gary, *Chapter 5: Formation, Validity and Legality of International Arbitration Agreements*, §5.02, p. 691.

⁹⁴ Ibid. [...] this can occur through the medium of correspondence prior to or during the arbitral proceedings, where one party asserts a right to arbitrate and the other party either expressly or impliedly accepts the existence of that right. It can also occur in the course of the arbitration, by way of the parties’ written submissions, not raising any objection to jurisdiction or affirmatively consenting to the tribunal’s jurisdiction”.

⁹⁵ See above under footnote 36

substantive invalidity of the arbitration agreement will determine the applicable law. The most commonly adopted solutions are “the law of the country where the award was made”, (Article V(1)(a)), the *lex fori* or the law governing the contract as a whole. “In general, the driving force behind the choice of the substantive law appears to be the one more favourable to the validity of the arbitration agreement.”⁹⁶ The text of the New York Convention does not expressly address the burden of proof when the validity of an arbitration agreement is challenged at the agreement enforcement stage.⁹⁷ From the language of Article II(3) that requires the court seized of an action regarding an arbitration agreement “to refer the parties to arbitration, *unless* it finds that the said agreement is null and void” the *presumptive validity* is established and consequently it is suggested that the burden of proof in disputes over the validity of an international arbitration agreement is on the party resisting enforcement of the agreement.⁹⁸ The party which challenges the validity of the arbitration agreement must prove that the latter is “null and void” because there is lack of consent either because it was forced to such an agreement or that, under the specific circumstances, it was not even aware of the existence of an arbitration clause.⁹⁹ Once more the “pro-enforcement bias” of the New York Convention have led several courts to hold that the terminal words of Article II (3) “should be construed narrowly and the invalidity of the arbitration agreement should be accepted in manifest cases only”.¹⁰⁰ If in the stage of challenge of the arbitration agreement before the national court the latter accepts the separability principle, the invalidity of the arbitration agreement would prevent the court from referring the parties to arbitration.¹⁰¹

B. THE LUCK OF THE ARBITRATION AWARD IN CASE OF LACK OF THE CONSENT

The final stage where a party may challenge the validity of the arbitration clause due to lack of consent is when the other party is seeking for enforcement of the issued, based upon the arbitral clause, arbitral award. One way the New York Convention encourages recognition and enforcement of an international arbitral award¹⁰² is by providing in Article V the *exclusive* procedural and substantive grounds on which the party, against whom recognition and enforcement is invoked, may challenge the enforcement of the

⁹⁶ ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION, A HANDBOOK FOR JUDGES, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (2011), p. 51.

⁹⁷ Born, Gary, Chapter 5: Formation, Validity and Legality of International Arbitration Agreements, §5.04, p. 743.

⁹⁸ Born, Gary, Chapter 5: Formation, Validity and Legality of International Arbitration Agreements, §5.04, p. 744.

⁹⁹ van de Berg, Albert Jan, The New York Convention of 1958: An Overview, p. 11 “... affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence”.

¹⁰⁰ *Ibid.* For example, in *Pechstein case* the Court did not find *per se* invalid the arbitration clause but it held that the latter was not valid under the *specific circumstances* due to the fact that the ISU had abused this dominant position by imposing the arbitration clause on the athlete *and in addition*, there was an imbalance during the arbitration procedures before CAS because the list from which arbitrators were selected by the parties was drafted only by the sports federations.

¹⁰¹ ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION, A HANDBOOK FOR JUDGES, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (2011), page. 52.

¹⁰² Harris, Troy L., *The “Public Policy” Exception to Enforcement of International Arbitration Awards Under the New York Convention With Particular Reference to Construction Disputes*, Journal of International Arbitration, 24, p. 10.

award. Under Article V(1)(a) recognition and enforcement of the arbitral award may be refused if “the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”. The language of paragraph 1 of Article (V)¹⁰³ leaves no doubts that the party who refuses the enforcement of the award has the burden of proving that under the applicable law, which law is determined by ground *a* of the same Article as already mentioned, there was not consent to the arbitration clause and that, under the same applicable law, the arbitration clause is invalid due to lack of consent.¹⁰⁴ The court to judge upon a claim grounded on Article V(1)(a) re-assesses the facts of the case since it has been held¹⁰⁵ that the fact that a tribunal can determine its own jurisdiction under the competence-competence doctrine, does not preclude the enforcing court which is not at the seat of the arbitration to re-examine fully the facts and issues to determine the jurisdiction of the arbitrator or the tribunal.¹⁰⁶

But what happens if the party who claims that it did not consent to the arbitration clause did not challenge the latter’s validity and did not object to the arbitrator’s jurisdiction in the course of arbitration? The Convention does not explicitly deal with the issue. In such a case, the general principle of good faith and estoppel, which applies to procedural as well as to substantive matters and have universal application, should prevent parties from keeping points up their sleeves.¹⁰⁷ In one experienced judge’s words, a party’s “obvious policy of keeping this point up its sleeve to be pulled out only if the arbitration was lost, is not one that I find consistent with the obligation of good faith nor with any notions of justice and fair play” under the Convention.¹⁰⁸

At this point, a special reference should be done to the “public policy” exception of Article V(2)(b) which has been called “probably the most misused ground [of non-enforcement] of all”.¹⁰⁹ Article V(2)(b) permits a court to refuse enforcement of an award if the latter would be contrary to the public policy where the enforcement is sought. The general rule of interpretation is to construe narrowly the grounds for refusal of enforcement in Article V.¹¹⁰ Punctual to the “pro-enforcement bias” of the New York Convention most courts in the Contracting States interpret narrowly the “public policy” and refuse enforcement only of “those international arbitration awards that violate “the

¹⁰³ Article V(1) of the New York Convention states that “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, *only if that party* furnishes to the competent authority where the recognition and enforcement is sought, *proof that: ...*”.

¹⁰⁴ “It should be noted that matters regarding the form of the arbitration agreement are not to be determined under the law governing the arbitration agreement but under the requirements of Article II(2) (which is most often invoked under Article V(1)(a)), van de BERG, Alber Jan, *The New York Convention of 1958: An overview*, p.14.

¹⁰⁵ The English Supreme Court in *Dallah Real Estate & Tourism Holding Co v. Pakistan*

¹⁰⁶ ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION, A HANDBOOK FOR JUDGES, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (2011), page. 86-88.

¹⁰⁷ *Ibid*, page. 81.

¹⁰⁸ Born, Gary, Chapter 5: Formation, Validity and Legality of International Arbitration Agreements, §5.04, p. 690, footnote 294: *China Nanhai Oil Joint Serv. Corp. Shenzhen Branch v. Gee Tai Holdings Co.*, XX Y.B. Comm. Arb. 671, 677 (H.K. Ct. First Inst. 1994) (1995).

¹⁰⁹ Paulsson Jan, *The New York Convention in International Practice: Problems of Assimilation*, as cited in Harris, Troy L., *The “Public Policy” Exception to Enforcement of International Arbitration Awards Under the New York Convention With Particular Reference to Construction Disputes*, p. 10

¹¹⁰ van de Berg, Alber Jan, *The New York Convention of 1958: An overview*, p.18

forum state's most basic notions of morality and justice".¹¹¹ Therefore, unless there are extremely circumstances, the alleged lack of consent to the arbitration clause would not be a ground for the "public policy" exception to be applied.¹¹²

What one should keep in mind is that the courts of the country of the award's origin have the exclusive jurisdiction to set aside an arbitral award while the courts in the other Contracting, to the New York Convention, States may only decide whether or not to grant enforcement within their jurisdiction. As is pointed out¹¹³ the consequence is "that *setting aside* of an award in the country of origin has extra-territorial effect as it precludes enforcement in the other Contracting States, under Article V(1)(e) of the Convention while the *refusal* of enforcement is limited to the jurisdiction within which court refuses enforcement and courts in other Contracting States are in principle not bound by such refusal'. Once more it is proven that it is more effective to prevent, or at least to try to prevent, a situation, such as for a party to challenge the validity of an arbitration clause and therefore arbitrator's jurisdiction, due to lack of consent to the arbitration clause, before the arbitrator or, in parallel, before the competent court,¹¹⁴ than to wait for an arbitral award to be issued and then just to claim for refusal on its recognition and enforcement.

¹¹¹ Harris, Troy L., *The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention With Particular Reference to Construction Disputes*, Journal of International Arbitration, 24, p. 14 .

¹¹² In *Pechstein case* the Munich Court of Appeal applied Art. V (2) (b) of the New York Convention and refused recognition of the CAS award because it violated fundamental provisions of the German Competition Law (§ 1061 Abs. 1 Satz 1 ZPO) which are part of the "public policy" (*ordre public*) exception. In this respect, it referred once more to the lack of independence of the CAS (arbitrators' list drafted only by the sports federations) by pointing out that "recognition of the CAS award would only be possible if CAS would constitute a proper arbitral tribunal".

¹¹³ Harris, Troy L., *The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention With Particular Reference to Construction Disputes*, Journal of International Arbitration, 24, p.4.

¹¹⁴ And still, if its objection is rejected, to have the third option to claim for refusal of the award's enforcement.

IV. CONCLUSIONS

Given the *consensual nature* of arbitration no one should be obliged to arbitrate without having agreed to it. On the other hand, no matter the ethical¹¹⁵ and legal issues that arise of a pre-dispute binding arbitration agreement in a standard form contract, it has to be acknowledged that this kind of contracts facilitates the evolution of international commerce. Moreover it has to be acknowledged that national and international arbitration has been a very effective alternative resolution method with undeniable advantages¹¹⁶ mainly due to its consensual nature which must not be abandoned. That is why arbitral tribunals and regularly national courts, “tend to follow an approach which leads to an expansion of the parties’ consent to arbitrate.”¹¹⁷ This though cannot be accepted as a justification of restraining constitutional and civil rights. As discussed above, issues of potential invalidity of an arbitration clause in prefixed contracts usually emerge when the drafters of these contracts abuse their right and their significant market power not only to require arbitration but also to set their rules, by limiting procedural and/or substantive rights of the contracted with them parties in their favor. That is why is very important to pass on a next generation of arbitration clauses, more fair and precise, imposed by the law and the Arbitration Institutions. On the other hand, not all contracted parties can challenge an arbitration clause claiming that they did not consent to it; for example, contracted parties with longstanding commercial relationship between them¹¹⁸ and experienced constructors who have undersigned many employment contracts¹¹⁹ with constructing undertakings, in which both cases arbitration is customary, cannot argue that they did not consent to arbitration as would probably do an unexperienced employee who was desperate to find a job and had to sign a standard contract in order to get it.

Not arguably consumers usually do not read form agreements, especially when they purchase through webpages, and if they do they rarely comprehend all the terms and almost never ask for legal advices on what these terms are concerned. In these cases States may either prohibit the arbitration of certain consumer disputes entirely or require a specific and separate written arbitration agreement that is designed to effectively inform customers that they are about to waive recourse to state courts.¹²⁰ In this case lack of consent could not provide a ground for a consumer to challenge the validity of an arbitration clause. After all, a consumer which is mature and reasonable, at least at a mid-level, and capable to legally act has to be careful when contracting and seek for further information when a matter is unknown to it and then consider the pros-and-cons of accepting a standard contract and evaluate its importance. To this direction,

¹¹⁵ Menkel - Meadow, Carrie, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 University of Miami Law Review 949 (2002).

¹¹⁶ Such as confidentiality, neutrality, technical qualification, enforceability in many foreign countries.

¹¹⁷ Steingruber, Andrea M., *Consent in International Arbitration*, p. 5.

¹¹⁸ Houtte, Vera Van, *Consent to arbitration through agreement to printed contracts: the continental experience*, Arbitration International, 2000, vol. 16(1), p. 5

¹¹⁹ See e.g. Houtte, Vera Van, *Consent to arbitration through agreement to printed contracts: the continental experience*, Arbitration International, 2000, vol. 16(1), p. 5

¹²⁰ Otto, Dirk and Elwan, Omaia, Article V(2) in Herbert Kronke , Patricia Nacimiento , et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, (© Kluwer Law International; Kluwer Law International 2010), p. 361

as in many cases, a constantly information by the State towards its citizens regarding their rights, obligations and contemporary commerce practices would lead to more mature consumers who pay more attention to what they read and accept.

Moreover, the contradiction that exists between a *mandatory* arbitration clause and arbitration as a *voluntary* dispute resolution method could be counterbalanced by practices that reassure the full awareness of the arbitration clause by the counterparty and obtain “informed consent” providing at the same time the right to “opt-out” of the pre-dispute arbitration agreement.¹²¹ In addition, where one party insists on an arbitration clause, but is ready to negotiate the place of arbitration and the applicable rules by allowing the other party to substantively participate in the determination of the arbitration procedure could not be considered as a “take it or leave it” term, taking into account the advantages that international arbitration provides (e.g. neutrality, enforceability, confidentiality). In such a case it would be very difficult, if not impossible for a counterparty to a standard contract to invoke lack of consent to an existing arbitration clause.

There are though some more sensitive areas where education, information and “informed consent” just seem not enough. Quite often individuals are forced to accept any term included in a prefixed contract because it is of a valuable importance to them to enter in such an agreement without actually consent to all the terms. Labor and health are two areas where a party might be unable to consider which might be the consequences of an arbitration clause. One of the best solutions is the harmonization of the states to declare such disputes as non-arbitrable in order to safeguard fundamental constitutional rights of the individuals, such as to bring a case before the courts.

It is obvious that not all the cases of pre-dispute arbitration agreement can be considered in the same way regarding the lack of consent. The presumptive validity of the arbitration clause must be considered from the competent authority considering at the same time the very particular circumstances of each case. Finally, once again at the very last stage of the recognition and enforcement of an arbitral award it is the competent national court which will have the final word¹²².

¹²¹ Nelson, William Alan II, *Take It or Leave It: Unconscionability of Mandatory Pre-Dispute Arbitration Agreements in the Securities Industry* p. 52-53.

¹²² See Born, Gary B., Chapter 2: International Arbitration Agreements: Legal Framework in *Gary B. Born, Law and Practice*, Volume (© Kluwer Law International; Kluwer Law International 2012), p. 43: The party which objects that is bound by a valid agreement if does not want to attend to arbitration may commence litigation in a national court or if it chooses not to appear in the arbitral proceedings or to commence parallel litigation and instead seek annulment or resist enforcement of the arbitral award. In each case, a national court will be required to consider...

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Appendix

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