REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION

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2.10 Closely modelled[14] on the New York Convention, the 1975 Panama Convention[15] was signed by the United States and a significant number of Latin American states, and marked another step forward in the recognition of arbitration as an established method of resolving disputes in a regional context. It has somewhat fallen into disuse as the signatory states have now all ratified the New York Convention.

(d) International standards

2.11 What is important about these and other conventions on arbitration,[16] whether international or regional, is that they establish the requirements for a valid international arbitration agreement and they indicate the parameters within which such an agreement will operate.

2.12 These conventions reflect the provisions to be found in developed arbitration laws and in the practice of arbitral institutions. In turn, together with the Model Law, they have played an important part in modernising and harmonising state laws governing arbitration. An arbitration agreement that provides for international arbitration must take account of these international requirements. If it fails to do so, the arbitration agreement, and any award made under it, may not qualify for international recognition and enforcement.

2.13 In seeking to establish the 'international requirements', the starting point has to be the New York Convention. Under the Convention, each contracting state undertakes to recognise and give effect to an arbitration agreement when the following requirements are fulfilled:

- the agreement is in writing;
- it deals with existing or future disputes;
- these disputes arise in respect of a defined legal relationship, whether contractual or not; and
- they concern a subject matter capable of settlement by arbitration.

2.14 These are the four positive requirements of a valid arbitration agreement, laid down in Article II(1) of the New York Convention.[17] A further two requirements are, in effect, added by the provisions of Article V(1)(a),[18] which stipulates that recognition or enforcement of an award may be refused if the party requesting refusal is able to prove that the arbitration

[14] It too recognises the validity of an agreement that submits existing and future disputes to arbitration: Panama Convention, Art. 1.

[15] Its formal title is 'The Convention on the Settlement of Civil Law Disputes Resulting from Economic, Scientific and Technological Cooperation'. The text of the Convention appears in (1978) III YBCA 15.

[16] Such as the European Convention of 1961 and the ICSID Convention.

[17] The first three are also contained in the Model Law, Art. 7(1) and (2), and the fourth in Arts 34(2)(b) and 36(2)(b)(i). More recently, however, the UN Commission on International Trade Law (UNCITRAL) formulated and adopted a recommendation regarding the interpretation of Arts II(2) and VII(1) of the New York Convention on 7 July 2006, by which it recognised that Art. II(2), which defines the way in which the 'writing' requirement must be fulfilled, must be applied 'recognizing that the circumstances described therein are not exhaustive'. The International Council for Commercial Arbitration (ICCA)'s Guide to the Interpretation of the 1958 New York Convention (2011) acknowledges this recommendation, noting that 'an inflexible application of the Convention's writing requirement would contradict current and widespread business usages and be contrary to the pro-enforcement thrust of the Convention'. See paragraphs 2.15–2.26.

[18] They are also to be found in the Model Law, Arts 34(2)(a) and 36(1)(a)(i).

agreement was made by a person under incapacity or that the agreement was invalid under the applicable law. Expressed positively,[19] these represent additional requirements to the effect that:

- the parties to the arbitration agreement must have legal capacity under the law applicable to them;
- the arbitration agreement must be 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. (In the words used earlier in the New York Convention, in Article II(3), the agreement must not be 'null and void, inoperative or incapable of being performed'.)

Each of these requirements is now considered in turn.

B. Validity of an Arbitration Agreement

(a) Formal validity—need for writing

2.15 All the international conventions on arbitration discussed above, as well as the Model Law, require that an agreement to arbitrate shall be 'in writing'. The historical reason for imposing this requirement is not difficult to divine. A valid agreement to arbitrate excludes the jurisdiction of the national courts,[20] and means that any dispute between the parties must be resolved by a private method of dispute resolution—namely, arbitration. This was a serious step to take, albeit one that has become increasingly commonplace in today's world of international commerce. Good reasons therefore existed for ensuring that the existence of such an agreement should be clearly established. This was best done by producing evidence in writing, although, as already noted in Chapter 1, the trend in modern national legislation has moved towards the relaxation of this formal requirement.[21]

2.16 Article II(2) of the New York Convention defines 'writing' as follows: 'The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'

2.17 The requirement for signature by the parties has given rise to problems in some states,[22] but the general view today is that a signature is not necessary, provided that the arbitration agreement is in writing.[23]

[19] Although it should be noted that the burden of proof is on the party opposing recognition or enforcement, who must prove lack of capacity or invalidity.

[20] See the discussion in Chapter 1, paragraphs 1.20*ff*.

[21] In this regard, see Landau, 'The requirement of a written form for an arbitration agreement: When "written" means "oral"', Sixteenth ICCA Congress, London, 12–15 May 2002.

[22] See, e.g., the cases cited in Cohen, 'Agreements in writing: Notes in the margin of the Sixth Goff Lecture' (1997) 13 Arb Intl 273. This article was a response to the earlier Kaplan, 'Is the need for writing as expressed in the New York Convention and Model Law out of step with commercial practice?' (1996) 12 Arb Intl 27. More recently, see also *Kanematsu USA Inc. v ATS—Advanced Telecommunications Systems do Brasil Ltda*, SEC 885, 18 April 2012, in which the Brazilian Supreme Court of Justice held that a signature is required where a party seeks to incorporate into a contract an arbitration clause contained in a set of standard terms and conditions.

[23] By way of modern example, see *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd* [2016] 4 SLR 1336 (in which the Singapore High Court held that an arbitration agreement recorded only in draft, unsigned contracts was valid in the light of the parties' conduct and correspondence). See also *Sphere Drake Ins. PLC v Marine Towing*.

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2.18 There has, however, been a revolution in communications since the New York Convention was drawn up in 1958. Telegrams are today an archaic curiosity. They have been replaced by various forms of written electronic communication. These changes have been reflected in the Model Law, which goes much further than the New York Convention in its definition of 'writing' and has itself been the subject of important recommended interpretations and revisions.[24]

2.19 The 2006 version of the Model Law contains both a long and a short form option for establishing the writing requirement. Option 1 provides as follows:[25]

> [...]
>
> (3) An agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
>
> (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
>
> (5) Furthermore, an arbitration agreement is in writing if it is contained in 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.
>
> (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

2.20 Option 1 has brought the Model Law into line with modern commercial life, as reflected by national legislation and repeated court decisions in recent decades. For instance, as long ago as the 1980s an exchange of telexes between two firms of brokers in Paris containing the simple statement 'English law—arbitration, if any, London according ICC Rules' was held to be a valid arbitration agreement, providing for arbitration in London under the ICC Rules, with English law as the substantive law of the contract.[26]

Inc., 16 F.3d 666, 669–670 (5th Cir. 1994) (in which the US Court of Appeals for the Fifth Circuit held that an arbitration clause was valid even though the underlying contract was not signed).

[24] On 7 July 2006, UNCITRAL issued a recommendation that Art. II (2) of the New York Convention be applied 'recognizing that the circumstances described therein are not exhaustive'. Subsequently, on 4 December 2006, the Model Law was amended pursuant to General Assembly Resolution 61/33 to include notable changes to Art. 7 on the writing requirement.

[25] The options are contained in Art. 7 of the Model Law. By way of example, Option 1 was adopted by Singapore in its 2012 revision to the Singapore International Arbitration Act, s. 2A.

[26] *Arab African Energy Corporation Ltd v Olieprodukten Nederland BV* [1983] 2 Lloyd's Rep 419. More recently, see *AQZ v ARA* [2015] SGHC 49, in which the Singapore High Court held that an arbitration agreement was valid notwithstanding that it was recorded by one party only and was not signed by the other party at all. See also *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd* [2016] 4 SLR 1336, in which the Singapore High Court held that an arbitration agreement that was recorded only in draft, unsigned contracts was valid in the light of the parties' conduct and correspondence.

However, whilst the formal requirements may have been relaxed, there remains a minimum requirement for a permanent record ('useable for subsequent reference' in the terms of the Model Law) from which a written transcription can be made. For example, the Netherlands Arbitration Act 1986 requires that the arbitration agreement shall be proven by an instrument in writing expressly or impliedly accepted by the parties.[27] For its part, as mentioned in Chapter 1, Swiss law requires an agreement to be made in writing or by means of communication that allows it to be evidenced by a text. Section 178(1) of the Swiss Private International Law Act (as amended in January 2021) states simply: 'The arbitration agreement must be made in writing or any other means of communication allowing it to be evidenced by text.'[28] **2.21**

Thus, for the purposes of the Model Law Option 1, the requirement for writing may now be satisfied where there is a record 'in any form' of the content of the arbitration agreement. **2.22**

Moreover, where a party takes part in an arbitration without denying the existence of an arbitration agreement,[29] it will, in the normal course, be deemed to have granted implied consent. In some systems of law, an oral agreement to arbitrate will be regarded as being 'in writing' if it is made 'by reference to terms which are in writing', or if an oral agreement 'is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement'.[30] In these modern arbitration laws, there has, in effect, been a triumph of substance over form: as long as there is some written evidence of an agreement to arbitrate, the form in which that agreement is recorded is immaterial.[31] **2.23**

Option 2 of the 2006 Model Law goes a step further. It does not refer to a writing requirement at all, but rather provides that it is sufficient to show 'agreement by the parties to submit to arbitration all or certain disputes'.[32] This reflects the latest position under some systems of law that arbitration agreements are not subject to any requirements of form. For instance, Article 1507 of the French Code of Civil Procedure (as modified by Article 2 of Decree 2011-48) provides that 'an arbitration agreement shall not be subject to any requirements as to its form'.[33] **2.24**

However, a degree of caution is necessary. First, even courts in jurisdictions familiar with international arbitration still may refuse to enforce arbitration agreements that are not in **2.25**

[27] Netherlands Arbitration Act 1986, s. 1021; see the commentary on this article in Sanders and van den Berg, *The Netherlands Arbitration Act 1986: Text and Notes, English* (Kluwer, 1987), p. 12, where it is said that the Act abolishes the possibility, which existed under the old Act, that an arbitration agreement could be concluded orally, but that an arbitration agreement is deemed to be concluded if the parties appear before the arbitral tribunal without invoking the lack of an agreement prior to raising any defence.

[28] Similar wording is contained in the Indian Arbitration and Conciliation Act 1996, s. 7. See *Great Offshore Ltd v Iranian Offshore Engineering and Construction Co.* (2008) 14 SCC 240 for an analysis of the Indian law position.

[29] See Sanders, 'Arbitration', in Cappelletti (ed.) *Encyclopedia of International and Comparative Law, Vol. XVI* (Brill, 1987), ch. 12, para. 106.

[30] See, e.g., the English Arbitration Act 1996, ss. 5(43)*ff*. The 'implied consent' provisions of the Model Law are also to be found in s. 5(5). In *Heifer International Inc. v Christiansen* [2007] EWHC 3015 (TCC), the court held that an arbitration agreement was validly concluded by reference to a written arbitration clause contained in another contract.

[31] See, e.g., Liebscher, 'Interpretation of the written form requirement Art. 7(2) UNCITRAL Model Law' (2005) 8 Intl Arb L Rev 164 and the cases cited therein.

[32] In their respective arbitration laws, Belgium and Scotland have adopted the Option 2 wording. See the Code Judiciaire, Art. 1681 and the Arbitration (Scotland) Act 2010, s. 4, respectively.

[33] See also the New Zealand Arbitration Act 1996, s. 7(1), which provides that 'an arbitration agreement may be made orally or in writing'.

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a written document signed by the parties or otherwise contained in an exchange of communications between the parties.[34] Secondly, an arbitration agreement that is regarded as valid by an arbitral tribunal or court in one country may not be so regarded by the courts of the country in which the award falls to be enforced.[35] By way of example, the Norwegian Court of Appeal refused recognition of an award rendered in London because an exchange of emails did not, in its view, satisfy the writing requirement of Article II(2) of the New York Convention. Although such an electronic exchange was valid and sufficient to evidence the existence of an arbitration agreement as a matter of the law of the place of arbitration—that is, English law—the Court held that the validity of the arbitration agreement was to be separately assessed by the local enforcement authority and that 'it should not be sufficient for enforcement that the arbitral award is valid according to the law of the country in question' (in this case, England, the place of arbitration).[36] While the authors might expect the Norwegian courts today to reach a different decision on the same question, this judgment shows the risks that are run in some jurisdictions (in the place of enforcement if not in the place of arbitration) if requirements as to form are not satisfied.

2.26 Finally, there are still states in which special requirements of form *are* imposed in respect of agreements to arbitrate.[37] Accordingly, the relevant national law must be examined if there is reason to believe that the formal validity of an arbitration agreement is likely to be questioned under that law.

(b) A defined legal relationship

2.27 Almost all international arbitrations arise out of contractual relationships between the parties. However, for the purposes of both the New York Convention and the Model Law, it is sufficient that there should be a 'defined legal relationship' between the parties, whether contractual or not. Plainly, there has to be some contractual relationship (real or implied) between the parties, since there must be an agreement to arbitrate to form the basis of the arbitral proceedings.[38] Given the existence of such an agreement, the dispute

[34] See, e.g., the decision of the US Second Circuit Court of Appeals in *Kahn Lucas Lancaster Inc. v Lark International Ltd*, 186 F.3d 210 (2d Cir. 1999). This decision has been applied by a number of other US courts, which have arrived at varying interpretations (some liberal; others less so) of an 'exchange of letters and telegrams'. See, e.g., the US District Court of the Southern District of California decision in *Chloe Z Fishing Co. Inc. v Odyssey Re (London) Ltd*, 109 F.Supp.2d 1048 (SD Cal. 2000); the US District Court of the Western District of Washington decision in *Bothell v Hitachi Zosen Corporation*, 97 F.Supp.2d 1048 (WD Wash. 2000); the Third Circuit Court of Appeals decision in *Standard Bent Glass Corporation v Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003). Most recently, the District Court of the Southern District of New York has affirmed the *Kahn Lucas* approach, but found that email exchanges between the parties 'comfortably satisf[ied] the standard set by the [New York] Convention': *Glencore Ltd v Degussa Engineered Carbons LP*, 848 F.Supp.2d 410 (SDNY 2012). See also *TransAsia Lawyers v EcoNova, Inc*, Not Reported in F.Supp.3d (2014).

[35] See the discussion in Chapter 3 on the law governing the arbitration agreement.

[36] Decision of the Halogaland Court of Appeal (Norway), 16 August 1999, (2002) XXVII YBCA 519.

[37] Including, particularly, the requirement in some jurisdictions (e.g. Brazil) that an arbitration clause is not operative unless it provides for the procedure to be adopted in the arbitration: see fn. 5.

[38] For an example see *D v U (ASBL) UR*, Court of Appeal, Brussels, Case No. 2016/AR/2048, 29 August 2018. In that case the court found that the requisite defined legal relationship did not exist. The arbitration agreement in question was found in the statutes of FIFA and UEFA, to which the plaintiff had adhered through its own statutes. The arbitration clause provided broadly that all disputes between FIFA or UEFA and football clubs would be submitted to CAS arbitration, without further specification. The Belgian Court of Appeal found that this 'general clause did not contain any reference to a defined legal relationship', and that '[t]he intention of the drafters of the clause is visibly to cover any type of dispute between the parties indicated; this makes the clause a general clause,

submitted to arbitration may be governed by principles of delictual or tortious liability rather than (as is usually the case) by the law of contract.

2.28 In *Kaverit Steel Crane Ltd v Kone Corporation*,[39] Kaverit commenced court proceedings alleging that Kone had breached certain licence and distribution agreements. Kone sought a stay and a reference to arbitration pursuant to the arbitration clause in the agreements. The clause stated that all disputes 'arising out of or in connection with this contract' would be referred to arbitration. The ABQB refused the stay on the grounds that some of the claims by Kaverit contained allegations that went beyond breach of contract, for example conspiracy and inducing breach of contract. The court held that these tort-based claims fell outside the scope of the arbitration clause.

2.29 However, the Alberta Court of Appeal held that the wording of the arbitration clause was wide enough to bring within its scope any claim that relied on the existence of a contractual relationship, even if the claim itself was a claim in tort.[40] To give an example: because the claim alleging 'conspiracy by unlawful means to harm [Kaverit]' relied upon a breach of contract as the source of the 'unlawfulness', that dispute should be referred to arbitration. However, it was held that those claims that were not based on the existence of a contract should proceed to trial, not arbitration.

2.30 More recently, courts around the world have adopted wider interpretations of similar clauses. For example, the Chinese courts have held that 'all disputes arising out of or in connection with the contract' will capture tortious claims.[41] In Hong Kong, a similar test has been applied, pursuant to which a tortious claim will fall within the scope of an arbitration clause if '(1) the resolution of a contractual issue is necessary for a decision on the tortious claim; or (2) the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other'.[42] The decision of the English House of Lords (now the UK Supreme Court) in *Fiona Trust* is a notable example of this practical modern trend. Lord Hoffmann considered the prior case law concerning the construction of arbitration clauses and the precise meaning of wording such as 'arising out of' and opined that

which cannot be applied because it is not an arbitration clause recognized in Belgian law': see Stephan W. Schill (ed.) *Yearbook Commercial Arbitration 2019—Volume XLIV* (ICCA & Kluwer Law International, 2019), pp. 1–9, paras 12, 14.

[39] *Kaverit Steel Crane Ltd v Kone Corporation* (1992) 87 DLR (4th) 129, (1994) XVII YBCA 346.

[40] The Court held that a dispute 'arises out of or in connection with a contract' if the 'existence of the contract is germane either to the claim or the defence': ibid., at 295–297.

[41] See the view of the Supreme People's Court (SPC) in SPC, *The Second National Foreign-related Commercial and Maritime Trial Work Meeting Minutes* (26 December 2005), Art. 7. See also *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA* [1983] 2 Lloyd's Rep 171.

[42] See *Gossip Daily Ltd v Next Media Magazines Ltd and Others* [2018] HKCFI 1951. However, by way of contrast in *Castlemil Infant (HK) Supplies Co Ltd v Care N Love Development Ltd* [2018] HKDC 1419, the Hong Kong District Court found that a claim in tort did not fall within the scope of the parties' agreement to arbitrate 'any dispute, controversy or claim arising out of or relating to [their contract]'. Finally, see also the decision of the FCA in *Walter Rau Neusser Oel Und Fett Ag v Cross Pacific Trading Ltd* [2005] FCA 1102, holding that claims in relation to fraud and misrepresentations that took place before the contract was concluded and which allegedly induced the parties to enter into the contract, did not 'arise out of' the contract and therefore fell outside the arbitration clause in question. The *Walter* case is discussed in Morrison, 'Defining the scope of arbitrable disputes in Australia: Towards a "liberal" approach?' (2005) 22 J Intl Arb 569. These issues are discussed in greater detail in van den Berg, 'Scope of the arbitration agreement' (1996) XXI YBCA 415.

'the distinctions which they make reflect no credit upon English commercial law'. He continued that:

> [T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.[43]

(c) A subject matter capable of settlement by arbitration

2.31 In determining whether a dispute is capable of settlement by arbitration, the question is whether a dispute is 'arbitrable'. As explained in Chapter 1, arbitrability, in the sense in which it is used in this book, involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts. The application of the New York Convention and the Model Law is limited to disputes that are 'capable of settlement by arbitration'.[44]

2.32 This requirement is dealt with in more detail later in this chapter.[45] Suffice to say that, in principle, *any* dispute should be just as capable of being resolved by a private arbitral tribunal as by the judge of a national court. However, it is precisely because arbitration is a private proceeding with public consequences[46] that some types of dispute are reserved for national courts, the proceedings of which are generally in the public domain. It is in this sense that they are not 'capable of settlement by arbitration'. National laws establish the domain of arbitration as opposed to that of the local courts. Each state decides which matters may or may not be resolved by arbitration in accordance with its own political, social, and economic policy.

C. Parties to an Arbitration Agreement

(a) Capacity

2.33 Parties to a contract must have legal capacity to enter into that contract, otherwise it is invalid. The position is no different if the contract in question happens to be an arbitration agreement. The general rule is that any natural or legal person who has the capacity to enter into a valid contract has the capacity to enter into an arbitration agreement. Accordingly, the parties to such agreements include individuals, as well as partnerships, corporations, states, and state agencies.

2.34 If an arbitration agreement is entered into by a party who does not have the capacity to do so, the provisions of the New York Convention (or the Model Law, where applicable) may be

[43] *Fiona Trust and Holding Corporation v Privalov* [2007] UKHL 40, at [13].
[44] New York Convention, Arts II(1) and V(2)(a); Model Law, Arts 34(2)(b)(i) and 36(1)(b)(i).
[45] See paragraphs 2.125–2.178.
[46] For example, in the recognition and enforcement of the award.

brought into operation, either at the beginning or at the end of the arbitral process. At the beginning, the requesting party may ask the competent court to stop the arbitration on the basis that the arbitration agreement is void, inoperative, or incapable of being performed.[47] At the end of the arbitral process, the requesting party may ask the competent court to refuse recognition and enforcement of the award on the basis that one of the parties to the arbitration agreement is 'under some incapacity'[48] under the applicable law.

2.35 The rules governing capacity to contract can be found in the standard textbooks on the law of contract. They vary from state to state. In the context of an arbitration agreement, it is generally necessary to have regard to more than one system of law. Questions that may arise in relation to individuals will be addressed before we consider the position of corporate entities, and lastly the particular situation of states and state entities.

(i) Natural persons

2.36 The New York Convention and the Model Law, where applicable, require the parties to an arbitration agreement to have the capacity to enter into that agreement 'under the *law* applicable to them'.[49] More correctly, this should perhaps refer to the 'law or *laws*' applicable to them. The capacity of an individual to enter into a contract within the state of his or her place of domicile and residence will depend upon the law of that state—but, in the context of an international contract, it may become necessary to have regard also to the law of the contract. For instance, a person aged 18 may well have the capacity to enter into an agreement under the law of his or her domicile, but not under the law governing the transaction in question. If that transaction were to turn out badly, that person might rely upon the incapacity as a reason for not carrying out the contract (or any agreement to arbitrate contained within it). However, there may be an applicable rule of law that defeats such ingenuity. For instance, Article 13 of the Rome I Regulation,[50] which applies among European Union (EU) member states, provides:

> In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

(ii) Corporations

2.37 The capacity of a corporation to enter into a contract is governed primarily by its bylaws and the law of its place of incorporation. If a corporation enters into a transaction that goes beyond its power (in other words, a transaction that is *ultra vires*) and the transaction turns out badly, the corporation could contend that the agreement was invalid and thus not bound by the arbitration clause in the agreement. To guard against this possibility, it is not unusual for states to have specific rules of law or principles that restrict or abrogate the doctrine of *ultra*

[47] New York Convention, Art. II(3); Model Law, Art. 8(1).
[48] New York Convention, Art. V(1)(a); Model Law, Art. 36(1)(a).
[49] Otherwise, the agreement will be regarded as invalid and accordingly unenforceable: see the provisions of the New York Convention and the Model Law cited above.
[50] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6, 4 July 2008. The uniform rules of this Regulation do not apply to questions involving the status or legal capacity of natural persons, except as stated.

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vires, so as to protect persons dealing in good faith with corporations, particularly where the person has confirmed that he or she has full power to execute the relevant contract or has benefited from the application of the contract.[51]

2.38 Counsel acting for banks or financial institutions making loans to corporate entities will be well aware of their duty to make sure that the corporate entity concerned has the capacity to enter into the loan agreement. However if that agreement contains an arbitration clause, Counsel will also need to check for any provisions governing that corporate entity's capacity to enter into an arbitration agreement.

2.39 In addition to such issues of corporate governance, the laws of some states may restrict a corporation from initiating arbitration in certain circumstances relating to the status of the corporate entity itself. For example, a number of states within the United States have statutes that restrict a corporation that is not 'in good standing' under the laws of that state from initiating any type of legal proceeding, including arbitration. Thus the failure of a corporation to maintain its good standing could be the basis of an application (or 'motion', to borrow from the US legal lexicon) to stay or dismiss an international arbitration filed by such corporation.

(iii) States and state agencies

2.40 It is unusual to encounter a corporation that insists, in its bylaws, that any disputes should be referred to the courts, rather than to arbitration. It is more frequent, however, to find states or state agencies that are not permitted to refer disputes between themselves and a private party to arbitration. In France, for example, under Article 2060 of the Civil Code, disputes concerning public collectives and public establishments, and all matters involving public policy, may not be referred to domestic arbitration.[52] However, certain commercial public entities may be authorised by decree to enter into arbitration agreements. Moreover, disputes arising out of industrial or commercial activities of public entities may be referred to *international* arbitration.[53] In Belgium, public law entities were

[51] See, e.g., within the European Union, Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 aims to ensure the protection of shareholders and third parties through requiring legislation to ensure the public availability of the key corporate documents which establish the manner in which a corporation can operate, OJ L 258/11, 1 October 2009. Where a corporation retroactively seeks to escape a contractual obligation by alleging *ultra vires*, doctrines such as estoppel, waiver, and, in Spanish speaking countries *actos propios* and legitimate expectations, come into play.

[52] In 2007, the Labetoulle Report proposed to abolish the prohibition contained in Art. 2060 and a draft law was prepared in order to 'broaden the possibility for recourse to arbitration for public bodies and to clarify the procedural regime of arbitrations involving public law': Groupe de travail sur l'arbitrage en matière administrative, *Rapport*, 13 March 2007, available online at http://www.justice.gouv.fr/art_pix/Rapport_final.pdf (in French). At the time of writing, no amendments have yet been made to Art. 2060.

[53] See the decision of the Paris cour d'appel in *INSERM v Fondation F. Saugstad*, Paris cour d'appel, 13 November 2008. See also the decision of the Conseil d'État Libanais, *Etat Libanais v Societe FTML (Cellis) SAL*, 17 July 2001, in which the Lebanese State Council, with reference to French law, held that public entities could submit to international arbitration only those contracts that do not involve the exercise of the state's prerogatives of public power. This ruling was heavily criticised in Lebanon and resulted in a new Law No. 40 being enacted by the Lebanese Parliament establishing the validity of arbitration agreements in all contracts of the state and public entities, with the exception of administrative contracts being effective only after approval of the Council of Ministers. However, it is now generally accepted that, under French law, public entities cannot rely on provisions of French law to evade obligations contained in an international arbitration agreement that they have signed: Hanotiau and Olivier, 'Arbitrability, due process, and public policy under Article V of the New York Convention: Belgian and French perspectives' (2008) 25 J Intl Arb 721, at 724.

at one time prohibited from concluding arbitration agreements. This prohibition has now been abolished, but some restrictions remain.[54] In Brazil, the higher courts have consistently ruled that a state body is not prohibited from agreeing to resolve disputes by arbitration and is bound by any such agreement, and this principle has been enshrined in legislation and by presidential decree.[55] In some other countries, the state or state agency must obtain the approval of the relevant authorities before entering into an agreement for international commercial arbitration.[56]

2.41 Although this position is now more the exception than the rule, it is advisable to check that the persons entering into the contract on behalf of the state or state agency have the necessary authority to do so. It is also wise to check that any necessary procedures for obtaining consent to an arbitration agreement have been followed. Indeed, it would be sensible to include a statement to this effect in the contract.[57]

2.42 It is plainly unsatisfactory for a state or state agency to be entitled to rely on its own law to defeat an agreement into which it has entered freely. A praiseworthy attempt to deal with this problem was made in the European Convention of 1961. This provided that persons considered by the law applicable to them to be 'legal persons of public law' should have the right to conclude valid arbitration agreements. It also provided that if a state were to wish to limit this facility in some way, it should say so on signing, ratifying, or acceding to the Convention.[58] Although the European Convention has met with only limited success, certain countries have dealt with the problem by adopting a similar approach. Swiss law, for example, provides that:

> If a party to the arbitration agreement is a state or enterprise or organisation controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement.[59]

2.43 This is a provision that all states would do well to follow, and there is now, in any event, a growing international consensus to the effect that where a state entity has agreed to resolve disputes by international arbitration, it cannot rely on its own domestic laws in order to

[54] The arbitration agreement must relate to the settlement of disputes regarding the formation or the performance of an agreement: see the Belgium Code Judiciaire, art. 1676(3).

[55] See *Companhia Paranaense de Gas ('Compagás') v Carioca Passarelli Consortium ('Consortium')*, Appeal No. 247.646-0, Paraná Court of Appeals, 11 February 2004; *Copel v Energetica Rio Pedrinho S.A.*, Agravo de Instrumento No. 174.874-9, Paraná Court of Appeals, 11 May 2005; *Companhia Estadual de Energia Eléctrica ('CEEE') v AES*, Recurso Especial No. 612.439-RS, Paraná Superior Court of Justice, 14 September 2006; Law No. 13.129/15; Decree 10.025 of 26 September 2019.

[56] For example, in Venezuela, the Commercial Arbitration Act 1998, s. 4 provides that when one of the parties to the arbitration agreement is a state entity (or an entity in which the state holds a stake of at least 50 per cent), the arbitration agreement must be specifically approved by the relevant minister. Similar restrictions are contained in the Iranian Constitution, Art. 139 and the Saudi Arabian Law of Arbitration (Royal Decree No. M/34 of 16 April 2012), s. 10.

[57] It would also be advisable to ensure that, under the relevant state law, the subject matter of the contract is 'arbitrable' in the sense discussed later.

[58] European Convention of 1961, Art. II(1) and (2).

[59] Swiss Private International Law Act (as amended in 2021), s. 177(2). Presumably, however, the state concerned might try to rely on its own law to defeat recognition or enforcement outside Switzerland of any arbitration award against it.

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avoid submitting to the arbitral process.[60] Some writers[61] have argued that restrictions imposed by a state on its capacity to enter into an arbitration agreement should not be qualified as issues of capacity, but rather as issues of arbitrability. It is argued that the restriction is self-imposed and could be waived at any time by the state concerned and that it is not a true limitation on capacity, such as the protection of persons under mental disability. Accordingly, it is argued that this issue should be treated as a matter of 'subjective arbitrability' rather than as a matter of capacity.[62] The real point, however, is that whatever legal characterisation is given to the issue, it is something that may need to be taken into account.

2.44 In circumstances where civil conflict, a revolutionary movement, or competing political factions exist within a state, a further issue can arise: whether those who claim authority to represent and bind the state are properly empowered to do so. This issue may arise after the execution of the arbitration agreement itself. For example, a stable government may exist at the time the arbitration agreement is entered into, only later to be the subject of competing claims of authority raised by different factions or regimes within a state. In this context, the prospect of a subsequent, prevailing government disavowing the acts of a former regime, including the arbitration agreement and participation in the arbitration, is a real one.[63]

2.45 The difficulty of this situation is highlighted in the English case of *The Maduro Board of the Central Bank of Venezuela v The Guaidó Board of the Central Bank of Venezuela*.[64] Following the 2018 presidential election in Venezuela, there was a dispute as to the identity of the rightful President of Venezuela, with Nicolás Maduro claiming to be the President on the ground that he won the 2018 election, and Juan Guaidó, the President of the National Assembly of Venezuela, claiming to be the Interim President under the constitution on the ground that the 2018 presidential election was flawed. Both of them, however, sought to give instructions on behalf of the Central Bank of Venezuela to release Venezuela's gold reserves held in the Bank of England. The UK Court of Appeal found that, although the UK government recognised Mr Guaidó as the *de jure* President of Venezuela, as a matter of English law, only the *de facto* President was entitled to exercise the power of sovereignty (and it was unclear who the UK government recognised as the *de facto* President of Venezuela). The Court therefore recommended seeking clarification on this point from the UK government's Foreign and Commonwealth Office and, until then, neither Mr Maduro nor Mr Guaidó could have access to Venezuela's gold reserves held in the Bank of England. As of the time of writing, this case is pending an appeal to the UK Supreme Court.

[60] See, e.g., *Benteler v State of Belgium*, Ad Hoc Award, 18 November 1983; Award in ICC Case No. 4381, 113 J du Droit Intl 1102 (1986); *Gatoil International Inc. v National Iranian Oil Co.*, High Court of Justice, Queen's Bench Division, 21 December 1988, (1988) XVII YBCA 587; *Buques Centroamericanos SA v Refinadora Costarricense de Petroleos SA* US Dist. LEXIS 5429 (SDNY 1989). See also the 1989 Resolution of the Institut de Droit International, which provides that '[a] State, a state enterprise, or a state entity cannot invoke incapacity to arbitrate in order to resist arbitration to which it has agreed'.

[61] See, e.g., Paulsson, 'May a state invoke its internal law to repudiate consent to international commercial arbitration?' (1986) 2 Arb Intl 90.

[62] It is interesting to note in this context that the Swiss Private International Law Act, s. 177(2), refers both to 'capacity' and to 'arbitrability', so that—at the very least—the two concepts may merge.

[63] For a general discussion of the issues that may arise in these contexts, and the possible ways in which they may be addressed, see Mohtashami, 'Protecting the legitimacy of the arbitral process: Jurisdictional and procedural challenges in public-private disputes', in Kalicki and Raouf (eds) *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Series, Vol. 20 (Kluwer Law International, 2019), pp. 619–638.

[64] *The Maduro Board of the Central Bank of Venezuela v The Guaidó Board of the Central Bank of Venezuela* [2020] EWCA Civ 1249.

(b) Third parties to the arbitration agreement

2.46 Party consent is a prerequisite for international arbitration. Such consent is embodied in an agreement to arbitrate, which, as discussed earlier,[65] will generally be concluded 'in writing' and signed by the parties.[66] The requirement of a signed agreement in writing, however, does not altogether exclude the possibility that an arbitration agreement concluded in proper form between two or more parties might also bind other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways: first, by operation of the 'group of companies' doctrine, pursuant to which the benefits and duties arising from an arbitration agreement may, in certain circumstances, be extended to other members of the same group of companies; and secondly, by operation of general rules of private law—principally those governing assignment, agency, and succession. Thus, by way of example: the affiliate of a signatory to an arbitration clause may find itself a co-respondent in arbitration proceedings; an assignee of an insurance contract may be able to commence arbitration against the insurer of the original insured party; a principal may find itself bound by an arbitration agreement signed by its agent; or a merged entity may continue to prosecute arbitral proceedings commenced by one of its original constituent entities.

(i) The 'group of companies' doctrine

2.47 A number of arbitral tribunals and national courts have been called upon to consider whether an arbitration agreement concluded by a company may be binding on its group affiliates, by reason of the group being a 'single economic reality'.[67] Such attempts are often motivated by the stated aim of finding the 'true' party in interest—and, of greater practical importance, of targeting a more creditworthy member of the relevant group of companies.

2.48 Although an objection of principle may readily be made—namely, that corporate personality is created precisely in order to contain liability within a particular corporate entity—in practice much will depend on the construction of the arbitration agreement in question, as well as the circumstances surrounding the entry into, and performance of, the underlying contract.[68]

[65] See paragraph 2.15.

[66] See, however, *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd* [2018] NSWCA 81, in which the parties' agreement did not contain an express arbitration clause, but contained a clause that incorporated the standard terms for companies within the Warner Bros group. The New South Wales Court of Appeal held that, because the standard terms proffered by the companies in the Warner Bros group generally contained an arbitration clause, the arbitration clause was also incorporated into the parties' agreement. The parties were therefore required to refer their dispute to arbitration.

[67] See generally Derains, 'L'extension de la clause d'arbitrage aux non-signatories: La doctrine des groupes de sociétés' (1994) 8 ASA Special Series 241; Jarosson, 'Conventions d'arbitrage et groupes de sociétés' (1994) 8 ASA Special Series 209; Derains and Schaf, 'Clauses d'arbitrage et groupes de sociétés' [1985] RDAI 231; Fadlallah, 'Clauses d'arbitrage et groupes de sociétés' [1984–85] Travaux du Comité Français de Droit International Privé 105; Gaillard and Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), paras 500*ff*.

[68] Sandrock has argued that all of the cases usually discussed in connection with the 'group of companies' theory ought to be regarded (or to have been decided) on theories of agency, such as the theory of the undisclosed principal (or, in some legal systems, indirect representation), the reverse construction of mandat apparent, or principles of good faith and estoppel: Sandrock, 'Arbitration agreements and groups of companies', in Dominice, Patry, and Reymond (eds) *Études Pierre Lalive* (Helbing & Lichtenhahn, 1993), p. 625; Sandrock, 'The extension of arbitration agreements to non-signatories: An enigma still unresolved', in Baums, Hopt, and Horn (eds) *Corporations, Capital Markets and Business in the Law: Liber Amicorum Richard M Buxbaum* (Kluwer Law International, 2000), p. 461.

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2.49 The *Dow Chemical* case has been invoked as the leading authority on the 'group of companies' doctrine, which emerged from a particular line of cases decided by ICC tribunals and subsequently considered by the French courts. In *Dow Chemical*, a claim was successfully brought before an ICC tribunal not only by the companies that had signed the relevant agreements, but also by their parent company, a US corporation, and a French subsidiary in the same group. The Paris Court of Appeal confirmed the award.

2.50 However, some have argued that the *Dow Chemical* award and judgment have been misinterpreted, and do not in fact lend support to an independent 'group of companies' doctrine. They note that, on a close reading of the decision, the tribunal's analysis was based simply on an attempt to determine the parties' common intention, and its decision may be explained by reference to the traditional requirement for consent in international arbitration.[69]

2.51 In terms, the *Dow Chemical* tribunal found that:

> [T]he arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, *by virtue of their role in the conclusion, performance, or termination of the contracts* containing said clauses, and *in accordance with the mutual intention of all parties* to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.[70]

2.52 The tribunal did refer to the relevant group of companies in that case as 'one and the same economic reality [*une réalité économique unique*]'.[71] However, it reached its decision on the basis of 'the intention common to all companies involved', and referred only 'subsidiarily' to the notion of a 'group of companies'.[72]

2.53 Following *Dow Chemical*, another ICC tribunal ruled that 'there is no general rule in French international arbitration law that would provide that non-signatory party members of the same group of companies would be bound by an arbitration clause.'[73] Similarly, some other courts, such as those in England, have also refused to accept that a third party may be bound by an arbitration agreement merely because it has a legal or commercial connection to one of the parties.[74] In jurisdictions that have recognised the group of companies doctrine, case law confirms that where a court or tribunal is tasked to determine whether a third party

[69] Hanotiau, 'Consent to arbitration: Do we share a common vision?', 2010 Freshfields Lecture, London, 21 October 2010. See also Ferrario, 'The group of companies doctrine in international commercial arbitration: Is there any reason for this doctrine to exist?' (2009) 26 J Intl Arb 647. Indeed, subsequent French decisions such as *Société Korsnas Marma v Société Durand-Auzias* (Paris cour d'appel, 30 November 1988), *Société Ofer Brothers v The Tokyo Marine and Fire Insurance Co Ltd* (Paris cour d'appel, 14 February 1989), and *Société ABS v Amkor* (Cass. Civ., 27 March 2007) did not determine the application of an arbitration agreement to non-signatories on the basis of a single economic reality of a corporate group. Rather, these decisions considered the participation of the non-signatory in the substantive transaction, its awareness of the scope of the arbitration clause, and the need for there to be a single forum or jurisdiction to deal with all aspects of any interconnected claims.

[70] ICC Case No. 4131/1982 (Interim Award) in *Dow Chemical France v ISOVER Saint Gobain (France)* (1983) 110 J du Droit Intl 899, noted by Derains in (1984) IX YBCA 131, at 135 (emphasis added)..

[71] ICC Case No. 4131/1982 (Interim Award) in *Dow Chemical France v ISOVER Saint Gobain (France)* (1983) 110 J du Droit Intl 899, at 904. The tribunal looked carefully at the parties' intentions in concluding the relevant arbitration clauses and said that the negotiating record showed that 'neither the "Sellers" nor the "Distributors" attached the slightest importance to the choice of the company within the Dow Group that would sign the contracts.'

[72] *Société Isover-Saint-Gobain v Société Dow Chemical France*, Paris cour d'appel, 22 October 1983, [1984] Rev Arb 98, at 100–101, n. Chapelle.

[73] ICC Case No. 11405/2001.

[74] *Peterson Farms Inc. v C & M Farming Ltd* [2004] EWHC 121; *City of London v Sancheti* [2008] EWCA Civ 1283.

is bound by an arbitration agreement, it will focus on the parties' common intention.[75] It could be said that consent will often be presumed[76] on the basis of a variety of factors,[77] including: (a) whether the non-signatory actively participated in the conclusion and execution of the contract containing the arbitration agreement;[78] (b) whether the non-signatory has a clear interest in the outcome of the dispute;[79] and (c) whether the non-signatory is party to a contract that is 'intrinsically inter-twined' with the contract under which the dispute has arisen.[80]

2.54 Accordingly, the *Dow Chemical* case may perhaps be best characterised as authority for the proposition that 'conduct can be an expression of consent and that among all the factual elements [. . .] the existence of a group of companies may be relevant'.[81]

(ii) 'Piercing the corporate veil'

2.55 A court or tribunal may conclude that a third party is bound by an arbitration agreement where there is evidence that the party to the agreement is being used as 'a device or façade' in order to avoid or conceal liability.[82] In such circumstances, a party may also seek to rely on the 'alter ego' principle,[83] which permits a court or arbitral tribunal to look beyond the

[75] See, e.g., *Chloro Controls (I) P Ltd v Severn Trent Water Purification Inc. and ors*, Supreme Court of India, 28 September 2012. The Court referred repeatedly to 'the real intention of the parties' to support its conclusion that an arbitration clause contained in a shareholders' agreement should be extended to a non-signatory company. See also *Cheran Properties Ltd v Kasturi and Sons Ltd*, Supreme Court of India, 24 April 2018. In *Mahangar Telephone Nigam Ltd v Canara Bank*, Supreme Court of India, 8 August 2019, the Court clarified that the group of companies doctrine could be invoked to bind the non-signatory affiliate of a company where: there is a direct relationship between the party which is signatory to the arbitration agreement; a direct commonality of the subject matter; or the transaction between the parties is of a composite nature.

[76] See, e.g., *Orri v Sociéte des Lubrifiants Elf Aquitaine*, Paris cour d'appel, 11 January 1990.

[77] See, e.g., *Kout Food Group v Kabab-Ji Sal*, Paris cour d'appel, 26 June 2020, in which the Court ruled that an arbitration clause should be extended to the parties involved in the performance of the contract and in any disputes arising out of the contract, provided that it can be presumed that they consented to the arbitration clause based on their contractual situation and their activities. The Court focused on the participation of the parent company in the performance, termination, and renegotiation of the relevant agreements to hold that it was bound by the arbitration agreement.

[78] See, e.g., *Sponsor AB v Lestrade*, Court of Appeal of Pau, 26 November 1986, [1988] Rev Arb 153 (the Court emphasised that Sponsor AB played an important role in the conclusion and execution of the contract, and in fact was 'the soul, inspirer and, in a word, the brains of the contracting party'); ICC Case No. 5103/1988 [1988] J du Droit Intl 1206; *Société Orthopaedic Hellas v Société Amplitude*, No. 11-25.891, Cass. Civ. 1ere, 7 November 2012. See also *X et al. v Z*, no. 4P 115/2003, Swiss Federal Tribunal, 16 October 2003. However, it appears that conduct subsequent to the negotiation, performance, and termination of the contract may not, in certain circumstances, be sufficient to substantiate or presume an intention to arbitrate. See, e.g., *Reckitt Benckiser (India) Pvt. Ltd. v Reynders Label Printing India Private Limited*, Supreme Court of India, 1 July 2019.

[79] See, e.g., *Trelleborg do Brasil Ltda v Anel Empreendimentos Participações e Agropecuária Ltda*, Apelação Cível No. 267.450.4/6-00, 7th Private Chamber of São Paulo Court of Appeals, 24 May 2004.

[80] *Khatib Petroleum Services International Co. v Care Construction Co. and Care Service Co.*, Case No. 4729 of the Judicial Year 72, Egypt's Court of Cassation, June 2004; *Chaval v Liebherr*, Recurso Especial No. 653.733, Brazilian Superior Court of Justice, 3 August 2006. See also *New Europe Corporate Advisory Ltd and Epic Financial Consulting v Innova 5* CA Paris, 18 December 2018, Case No. 16/24924, in which the Paris Court of Appeal ruled that where non-signatories are directly concerned by the performance of the underlying contract, and where the facts suggest that they were familiar with the existence and scope of the arbitration clause, then they may be bound by the arbitration agreement.

[81] Hanotiau, 'Consent to arbitration: Do we share a common vision?' 2010 Annual Freshfields Lecture, London, 21 October 2010.

[82] See *Prest v Petrodel* [2013] UKSC 34, at [22] *per* Lord Sumption.

[83] See, e.g., *Wm Passalacqua Builders v Resnick Developers*, 933 F.2d 131 (2d Cir. 1991). The alter ego doctrine has also been successfully applied in respect of states and state entities: see *Bridas SAPIC, Bridas Energy International Ltd et al. v Government of Turkmenistan and Turkmennneft* 345 F.3d 347 (5th Cir. 2006), discussed in the news section of [2006] Intl Arb L Rev N3334; cf. ICC Case No. 9151, *Joint Venture Yashlar and Bridas SAPIC v Government of Turkmenistan*, Interim Award of 8 June 1999.

formalities of a corporate form where it is being abused in order to attribute liability to the individual (or corporation) hiding behind that form.[84]

(iii) Third-party beneficiaries of rights under a contract

2.56 Under some systems of law, a third party may also enforce rights conferred under the terms of a contract in certain circumstances. The English Contracts (Rights of Third Parties) Act 1999 provides that a third party ('A') may enforce a contractual term where the contract expressly provides that A may do so or purports to confer a benefit on A.[85] Where the contract contains an arbitration agreement, the third party is bound by the agreement and constrained to follow the arbitral process.[86] A similar principle exists in France. The Court of Cassation has held that where a contract conferring a benefit on a third party (*stipulation pour autrui*) contains an arbitration clause, the third party is obliged to refer any claim to arbitration. Moreover, that party is precluded from objecting to the tribunal's jurisdiction if it is joined to an action as a respondent.[87] The Italian courts have also confirmed that, in certain circumstances, once a third party decides to take the benefit of a contract, it can be bound to abide by all of the terms of the contract, including any arbitration agreement.[88] The US courts have invoked the principle of estoppel to similar effect.[89]

(iv) Beneficiaries under a trust

2.57 A deed of trust is not normally considered to be a contract. Where a deed contains a dispute resolution clause providing for arbitration, the question therefore arises whether a dispute between a trustee and a beneficiary under that deed is governed by an arbitration agreement at all.[90] To complicate matters further, a deed of trust is not typically signed by the

[84] See, e.g., *Wm Passalacqua Builders v Resnick Developers*, 933 F.2d 131 (2d Cir. 1991). The alter ego doctrine has also been successfully applied in respect of states and state entities: see *Bridas SAPIC, Bridas Energy International Ltd et al. v Government of Turkmenistan and Turkmennneft* 345 F.3d 347 (5th Cir. 2006), discussed in the news section of [2006] Intl Arb L Rev N3334; cf. ICC Case No. 9151, *Joint Venture Yashlar and Bridas SAPIC v Government of Turkmenistan*, Interim Award of 8 June 1999.

[85] Contracts (Rights of Third Parties) Act 1999, s. 1.

[86] See Contracts (Rights of Third Parties) Act 1999, s. 8. See also *Nisshin Shipping Co. Ltd v Cleaves & Co. Ltd* [2003] EWHC 2602 (Comm), in which the English High Court held that brokers seeking to enforce the terms of charterparties that conferred benefits on them (the payment of commissions) were bound by the arbitration clause therein. However, see *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367, in which the English Court of Appeal held that a third party joined as *defendant* in a contract claim in the English courts could not invoke the arbitration clause in the contract to obtain a stay of proceedings under s. 9 of the English Arbitration Act 1996.

[87] *Banque populaire Loire et Iyonnais v Société Sangar*, Cass. Civ. (1ere Ch. Civ.), 11 July 2006.

[88] See, e.g., *Assicurazioni Generali SpA v Tassinari*, Judgment No. 2384, Corte di Cassazione, 18 March 1997; *Polisuole Srl v Pietrella*, Judgment No. 13474, Corte di Cassazione, 10 October 2000; *Consorzio Cooperative Costruzioni-CCC Società Cooperativa v Punta Gradelle SCARL*, Judgment No. 2568, Tribunale di Milano, 24 April 2020.

[89] See *Cargill International SA v M/T Pavel Dybenko*, 991 F.2d 1012, 1019 (2d Cir. 1993); *American Bureau of Shipping v Société Jet Flint SA*, 170 F.3d 349, 353 (2d Cir. 1999); *Avila Group Inc. v Norma J of California* 426 F.Supp. 537, 542 (DCNY 1977) ('To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purpose underlying enactment of the Arbitration Act'); *Astra Oil Co. Inc. v Rover Navigation, Ltd*, 344 F.3d 276, 279, n. 2 (2d Cir. 2003); *Birmingham Associates Ltd v Abbott Laboratories* 547 F.Supp.2d 295 (SDNY 2008), 2008 US Dist LEXIS 30321; *GE Energy Power Conversion France SAS, Corp v Outokumpu Stainless USA, LLC*, U.S. Supreme Court Case No. 18-1048, Slip. Op. 590 U. S. (June 1, 2020), p. 6 ('The text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel [...] nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines').

[90] Strong, 'Arbitration of internal trust disputes: The next frontier for international commercial arbitration?', in Kalicki and Raouf (eds) *Evolution and Adaptation: The Future of International Arbitration* ICCA Congress Series, Vol. 20 (Kluwer Law International, 2019).

beneficiaries. It could therefore be argued in such circumstances that the beneficiaries have not consented to arbitration, and that as a consequence any dispute resolution clause in the deed that purports to compel the beneficiaries to arbitrate does not, in fact, bind them.

2.58 In order to address this problem, English law has developed the doctrine of 'deemed acquiescence', which provides that, by accepting the gifts or rights conferred to them pursuant to a trust deed, beneficiaries of a trust are deemed to have agreed to settle any dispute arising thereunder in accordance with the arbitration agreement contained in the deed.[91] The US courts have adopted a similar approach, based on what is known as the 'conditional transfer' theory: '[a] beneficiary takes only by benevolence of the testator, who may attach lawful conditions to the receipt of the gift'.[92] This concept is similarly recognised in the ICC's 'Clause for Trust Disputes'.[93]

(v) Assignment, agency, and succession

2.59 **Assignment** The effect of an assignment of a contract on an arbitration clause contained therein will be determined principally by reference to the law governing the assignment in question, as well as the law governing the arbitration agreement. If the arbitration agreement is assignable under the relevant laws, there will be a further question as to the particular form, if any, which the assignment must take. This requirement must not be confused with the writing requirement that applies to the arbitration agreement itself.

2.60 Different laws take differing positions on whether an arbitration agreement should be presumed as having been assigned along with the main contract. The law of some jurisdictions, for example German, French, English, and Greek law, makes this presumption.[94] New York law also adopts this general presumption, albeit with certain limited exceptions.[95]

[91] The alternative concept is known as 'conditional transfer'.

[92] See *American Cancer Soc., St. Louis Division v Hammerstein*, 631 S.W. 2d 858, 864 (Mo. App. 1981), cited in Strong, 'Arbitration of internal trust disputes: The next frontier for international commercial arbitration?', in Kalicki and Raouf (eds) *Evolution and Adaptation: The Future of International Arbitration* ICCA Congress Series, Vol. 20 (Kluwer Law International, 2019). As discussed in paragraphs 2.172–2.174 below in the context of the arbitrability of trust disputes, a number of states in the United States have enacted legislation that expressly recognises the enforceability of binding arbitration clauses in wills and trusts. Similarly, New Zealand's Trusts Act 2019 expressly recognises the courts' power to enforce any provision in a trust that requires an internal matter to be subject to an ADR process, including arbitration.

[93] See ICC Commission on Arbitration and ADR, *ICC Arbitration Clause for Trust Disputes, 2018*, p. 7. The Commission notes that '[t]he ICC Arbitration Clause for Trust Disputes is formulated as an agreement which is binding on the original parties to the trust by virtue of their executing the trust instrument, and on all others by virtue of their having acted under, or claimed or accepted benefits under, the trust'. The ICC further explains that '[b]eneficiaries are deemed to have agreed to the arbitration clause when they obtain benefit or otherwise derive advantage from the trust'.

[94] See Bundesgerichtshof decision (1978) 71 BGHZ 162, 164–165, and (2000) 53 NJW 2346. The French Code Civil, Art. 2061 provides that transfer of the arbitration agreement is automatic on assignment of the main contract. However, Arts 1341-1, 1337, and 1338 of the Code Civil make a distinction between perfect and imperfect assignments, of which only the former discharges the original debtor of its obligations through novation, but requires the original creditor's consent to that effect. For the English law position, see *West Tankers Inc. v RAS Riunione Adriatica di Sicurta SpA (The Front Comor)* [2005] 2 All ER (Comm) 240. For the Greek law position, see Greek Supreme Court, Case No. 176/1976 ('Under articles 471 and 472 of [the Greek] Civil Code, the person who assumes per agreement with the creditor the debt of another person is obligated vis-à-vis the creditor also as regards the ancillary obligations of the debtor, including the arbitration agreement existing between the creditor and the debtor').

[95] There was a common law principle in New York law that arbitration was an 'obligation' not assumed by an assignee of a contract: see *United States v Panhandle Eastern Corporation et al.* 672 F.Supp. 149 (D. Del. 1987); *Gruntal & Co., Inc. v Ronald Steinberg et al.* 854 F.Supp. 324 (DNJ 1994); *Lachmar v Trunkline LNG Co.*, 753 F.2d 8, 9–10 (2d Cir. 1985); cf. *Banque de Paris v Amoco Oil* 573 F.Supp. 1465, 1472 (SDNY 1983). However, according to *GMAC Commer Credit LLC v Springs Indus* 171 F.Supp.2d 209 (SDNY 2001), 2001 US Dist LEXIS 5152, 44

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