INTERPRETATION OF ARBITRATION AGREEMENTS: ASCERTAINING THE COMMON INTENTION TO ARBITRATE IN INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

International Commercial Arbitration is a private form of dispute resolution arising out of a commercial contract between parties from different jurisdictions. The principle of party autonomy is the cornerstone of International Commercial Arbitration and allows the parties to have the liberty to lay down their own procedure as well as to determine the laws that would govern their disputes. Every legislation, both international and domestic, relies on the determination of the intention of the parties for the commencement of arbitration. While arbitration agreements entered into by the parties are universally accepted as an objective manifestation of the express intention of parties to arbitrate, there are many cases where the existence or the formation of the arbitration agreement itself is in question. How then, is something as elusive as the implicit intention of the parties to arbitrate inferred? Thus, this paper attempts to examine and critically analyze the different interpretative trends used by Courts and Tribunals to infer an agreement to arbitrate and the issues associated therewith, keeping in mind the unique nature of an arbitration agreement. The objective of this paper is to examine the principles, approaches and factors relied upon by Courts and Tribunals to presume the intention of the parties where it is not unambiguously demonstrable.

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1. INTRODUCTION

The consent of the parties is imperative for the commencement of International Commercial Arbitration. It is but the manifestation of their intentions, and very often both the words consent and intention are used interchangeably to describe this mutual will of the parties to resolve their disputes through arbitration. The intent of the parties is the "fundamental element" of arbitration[1] and can be of two types – express (actual) or presumed.

The New York Convention[2] and the UNCITRAL Model Law[3] both lay down the existence of an "agreement to arbitrate" as an important prerequisite for the commencement of arbitration. This "agreement to arbitrate" reflects the undertaking of the parties to refer their disputes to arbitration, and it lays down certain objective requirements that would manifest the declared intention of the parties. However, there are many cases where the formation of an arbitration agreement is disputed on account of lack of mutual consent of the parties and where the establishment of intention becomes necessary.[4] In such cases, the intention of the parties to arbitrate is not obvious and would have to be presumed by resorting to subjective means. Thus, the Courts and Tribunals presume the probable intention of the parties by applying different principles of construction and approaches to analyze both the text as well as the context - wording as well as conduct.

The instant paper is divided into five parts. The first part makes a distinction between express and presumed intent vis-à-vis an arbitration agreement, under the UNCITRAL Model Law and New York Convention. The second part examines the interpretation of the wording of an arbitration agreement, or the "text", for ascertaining intention of the parties. The third part then analyzes the relevance of pro or anti-arbitration approaches in interpreting this text of an arbitration agreement. Moreover, the fourth part focuses on the role and prevalence of the conduct of the parties, or the "context", in determining intention. Lastly, the fifth part summarizes the observations made and proposes recommendations in light of the same.

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[1] Janet A. Rosen, 'Arbitration Under Private International Law: The Doctrines of Separability and Competence de la Competence', (1993)17 Fordham Int'l L.J. 599.

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958) 21 U.S.T. 2517, 330 U.N.T.S. 3 (New York Convention), art II.

[3] UNCITRAL Model Law on International Commercial Arbitration, 1958, art 7.

[4] Gary B. Born, *International Commercial Arbitration* (2nd edn., Kluwer Law International 2014) 742.

2. ARBITRATION AGREEMENT AND INTENTION

An arbitration agreement is essentially an agreement between the parties that they have undertaken to refer some or all of their disputes to arbitration. It displays both contractual and jurisdictional characteristics.[5] The contractual aspect is by virtue of the 'agreement' that the parties undertake and which binds them to it. The jurisdictional aspect is by virtue of conferment of jurisdiction to an arbitral entity for dispute resolution as opposed to Courts. An arbitration is also sometimes addressed to constitute of a positive and negative obligation, - the positive obligation being the reference of disputes to Tribunals and the negative obligation being the non-subjection of the same to Courts.[6]

Both the New York Convention and the UNCITRAL Model Law include provisions detailing the constitution of an 'arbitration agreement'.[7] A perusal of those provisions indicates that by referring to an 'undertaking to arbitrate' it alludes to the consensual nature of arbitration and recognizes the consent of the parties as a cornerstone for arbitration. Further, it lays down certain objective methods that can be used to manifest an express consent to arbitrate or the intention of parties to arbitrate. However, the very requirement of an 'undertaking to arbitrate' displays the subjective characteristic of an arbitration agreement as it might not always be unambiguously demonstrable through objective means alone in certain cases.

For example, a signature is used as the most common means to signify assent to arbitration agreements and lucidly demonstrates the objective or express intention of the parties to abide by the provisions they have signed.[8] It is also regarded as the customary execution of an agreement to arbitrate.[9] However, in many cases, the signed documents are such that they do not clearly signify the intention to arbitrate within the words of the document. In other words, the clauses signed by the parties, on account of their ambiguity or vagueness, fail to reflect an 'undertaking to arbitrate' and thus become subject to disputes. This is an example of the cases where the Tribunals or Courts then resolve to establishing mutual intention through subjective means.

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[5] Julian D.M., Loukas A., Stefan M. Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 5-23.

[6] Gary B. Born, *International Commercial Arbitration* (3rd edn., Kluwer Law International 2021) 1349.

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art. II; UNCITRAL Model Law on International Commercial Arbitration, art. 8.

[8] Born (n 4) 796.

[9] *Repub. of Ecuador v. ChevronTexaco Corp.*, 376 F.2d 334, 351 (S.D.N.Y. 2005).

The lack of signature on a putative arbitration agreement is also relied upon to deny consent to the agreement. Nonetheless, while signature on the agreement certainly clarifies the consent of the parties, it cannot be regarded as the only means of establishing consent. Parties may be bound by an arbitration agreement even in the absence of a signature.[10] The same is apparent in Article II and Article 7 of the New York Convention and UNCITRAL Model Law respectively, where other 'implied' means of establishing consent do exist, such as the exchange of communications between the parties or the conduct of the parties. Thus, here too the Courts and Tribunals look at the subjective intention of the parties by way of different means discussed subsequently.

Moreover, it is important to note that the presence of signature on a clear and unambiguous arbitration agreement may still not necessarily establish consent where the signature is obtained by wrongful means such as forgery or fraud and the consent given is not out of free will.[11] However, the same is more a question about the vitiation of consent as a way of invalidating the arbitration agreement after its presence has been established (and less about its the formation); thus is beyond the scope of the present paper. This paper is concerned with the invalidity related to the existence of the agreement as opposed to an agreement that might be voidable.

3. SUBJECTIVE INTENTION OF THE PARTIES – DECIPHERING THE TEXT AND CONTEXT

As discussed previously, the implied consent or presumed intention of the parties is determined in cases where the objective intention of the parties is obscure or subject to dispute. This determination or presumption of intention relies on a number of different methods, approaches and principles. Broadly these methods can be classified into two types – Firstly, by examining and interpreting the terms and wording of the putative arbitration agreement to determine the intention of the parties; Secondly, by looking at the conduct of the parties surrounding the agreement. More often than not, both of these approaches are used in tandem with each other and they consist of a mix of further sub-approaches or principles relied upon to reach a definite conclusion. Thus, a determination of intention involves perusal of both the text as well as the context.

[10] *Nat'l City Golf Fin. v. Higher Ground Country Club Mgt Co.*, LLC, 641 F.2d 196, 203 (S.D.N.Y. 2009).

[11] Born (n 6) 856.

4. INTERPRETING THE WORDS OF THE AGREEMENT – ASCERTAINING THE TEXT

This approach has the most relevance in cases where the determination of intent in a signed document is to be inferred. Interpretation of an arbitration clause is generally accepted to depend upon the wording of that clause.[12] Where the wording is vague or ambiguous in nature or is not adequate to fulfill the intentions of the parties, the same is interpreted carefully to infer the intent manifested in it. It could even be used for non-signed agreements entered into by way of written communications. These principles are actively used to interpret the agreement and presume the intent of the parties, the most common of which would be discussed herein.

4.1 ESSENCE OF THE AGREEMENT – REFUTING INTENTION ON GROUNDS OF UNCERTAINTY

A lot of times, the intention to arbitrate may be refuted by one party on grounds of uncertainty as regards other specifics or lack of mutual assent on such specifics. In such cases, by looking at the words of the agreement or the exchange of communications, Courts and Tribunals essentially attempt to identify whether the core of the agreement – that is, an undertaking to arbitrate – is manifested or not. Where the essence of the agreement is apparent, this intention to arbitrate will take precedence over the lack of other specifics. This core or essence could be generally demonstrated by the use of the word "arbitration" in the agreement, despite the absence of other terms elaborating upon the arbitration or specifying the details of the arbitration.[13] As is evidenced from the UNCITRAL Model Law and the New York Convention, the absence of specifics such as the number of arbitrators, place of arbitration, etc, are not grounds to refute formation of agreements[14] and the same has been highlighted in a number of cases, for example in the case of *M.M.T.C. Limited v. Sterlite Industries (India) Ltd.*, where the Supreme Court of India adjudicated that the validity of an arbitration agreement is not dependent upon the specification of the number of arbitrators.[15]

All that is required is the manifestation of an obligation to resolve certain disputes by way of arbitration. Thus, even where the word 'arbitration' is not explicitly mentioned within the

[12] *Manufacturer, Subsidiary v. Building Supplier*, Interim Award, ICC Case No. 7929, 1995.

[13] *Zurich Am. Ins. Co. v. Cebcor Serv. Corp*., 2003 WL 21418237, (N.D. Ill.).

[14] UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (United Nations Publication 2012) <https://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf> accessed 16 November 2020, 28.

[15] CLOUT case No. 177 [*M.M.T.C. Limited v. Sterlite Industries (India) Ltd., Supreme Court, India*, 18 November 1996].

agreement, if the words allude to a dispute resolution mechanism that exhibits characteristics that of an arbitration, it would comprise of an arbitration agreement.[16] Nonetheless, there are some cases where Courts and Tribunals have annulled the formation of an arbitration agreement on grounds of uncertainty, in view of reasons such as contradictory provisions leading to uncertainty, as carried out by the Swiss Federal Tribunal[17] or the English Court of Appeal.[18] However, these decisions have been deemed as anomalous among a general trend of reconciliation and enforcement of such cases.

The references to arbitral seats, or place of arbitration, or number of arbitrators are normally only ancillary in nature and thus do not hinder the formation of an arbitration agreement where a mutual intention is conspicuous from the words of the agreement. If the intention to arbitrate is unmistakable, then a slight error in precision does not affect the arbitration clause.[19] This is especially true in cases, where the intention of arbitration is disputed on account of pathological clauses. Therefore, if a putative arbitration agreement is displaying ambiguity in the intention of resorting to arbitration, vagueness in the form of lack of specifics is immaterial for rejecting the formation of an arbitration agreement.

So far as uncertainty of intention in communications is concerned, the inferences differ between circumstances and jurisdictions. Disputes arise where uncertainty is claimed on account of presence of differing provisions regarding arbitration in the written exchanges. In such cases, too, Courts attempt to identify the essence of the agreement as discussed above and may also rely on other factors and principles such as that of good faith, estoppel, etc, as discussed below.

4.2 PRINCIPLE OF GOOD FAITH

Good faith is the principle of 'fair and open dealing' between the parties to a contract and applies to their formation, negotiation, performance and interpretation. It presumes that the parties to a contract mean to deal with each other fairly and their intentions are presumed on the basis of the understanding reached by a reasonable person in good faith and in the same position. It has been held repetitively that a putative arbitration agreement must be construed on the principle of good faith and declarations of intent should be perceived from the

[16] *PT Tugu Pratama Indonesia v. Magma Nusantara Ltd*, (2003) 4 SLR 257 (Singapore High Ct.).

[17] Judgment of 17 January 2013, DFT 4A_244/2012 (Swiss Federal Tribunal).

[18] *Lovelock Ltd v. Exportles* (1968) 1 Lloyd's Rep. 163 (English Ct. App.).

[19] Born (n 4)775.

expectations of the parties in light of the circumstances surrounding their relationship.[20] This principle finds its place in all categories of cases where the common intent of the parties is under scrutiny, most commonly in cases where the scope of an arbitration agreement as regards the disputes it is subjected to is in question. It emphasizes on the importance of deciphering the true intention of the parties at the time of agreement by reconciling it with their declared intention.

In an arbitral case where both the scope as well as the existence of an arbitration agreement was in question as a result of a series of agreements where only one of such agreements contained an arbitration clause, reliance was placed on the principle of good faith to determine the mutual intention of the parties based on the wording of the agreement.[21] Further, domestic Courts have also actively turned to this principle in the interpretation of intention, as evident in a Swiss decision wherein it was held that the intention would be presumed in a manner harmonious to the understanding of parties in exercise of good faith.[22] In cases where the intention of the parties to arbitrate is ambiguous on account of the arbitration clause being pathological, such as in *ICC Award No. 10671*, good faith was applied to interpret the clause and infer the reasonable understanding of the parties to arbitrate.[23] Good faith has also been a source for other overlapping principles and is not only used for interpreting words but also the conduct of the parties. It acts as a behavioral standard governing the contractual relationship between the parties and corresponds to the contractual aspect of an arbitration agreement.

The application of good faith in International Commercial Arbitration, while sound, is not by itself sufficient to conclusively give effect to an arbitration agreement. It may be used in combination with other doctrines or approaches, such as the principle of effective interpretation, or the pro-arbitration approach. Since it is more of a behavioral standard, good faith is not generally applied as an express doctrine, but which nonetheless would underlie the construction of arbitration agreements in implying an intention of the parties. The basis for this emerges from the commercial nature of the agreement as well as the parties, who would be assumed to have contracted in good faith in the interest of their respective businesses.

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[20] Judgment of 21 November 2003, DFT 130 III 66 (Swiss Fed. Trib.).

[21] *Manufacturer, Subsidiary v. Building supplier*, Interim Award, ICC Case No. 7929, 1995.

[22] Judgment of 29 February 2008, 26 ASA Bull. 376, 379 (Swiss Fed. Trib.).

[23] ICC Award No. 10671, Clunet 2005, 1268 et seq.

4.3 *'UT RES MAGIS VALEAT QUAM PEREA' (PRINCIPLE OF EFFECTIVENESS) – INCONSISTENT OR INTERNALLY-CONTRADICTORY CLAUSES*

'Ut res magis valeat quam pereat' is an important contract law doctrine which states that 'it is better for a thing to have effect than be rendered void'.[24] It is also applied in international commercial arbitration where the words of the putative arbitration agreement appear inconsistent or contradictory on their literal interpretation, endangering both its formation and validity. The most common example of such inconsistencies in arbitration agreement formation is when the agreement has mentions of both Courts as well as Tribunals for dispute resolution and where the parties are in disagreement about the intended dispute resolution forum. In all of such cases, an interpretation is sought that attempts to harmonize inconsistencies and give effect to the provisions therein by presuming the true intention of the parties.

Where competing arbitration and forum selection clauses exist in an agreement, an interpretation reconciling these provisions is generally sought by giving effect to the arbitration agreement and deeming the jurisdiction of Courts to exist narrowly either in a supervisory capacity as a reviewing body or for providing any judicial assistance.[25]

For example, in an English case where two clauses of a contract were contradictory owing to one of them directing arbitration and the other denoting jurisdiction of the English Courts for dispute resolution, the Queen's Bench Division Commercial Court construed the reference to English Courts as one denoting its supervisory jurisdiction to appoint and remove arbitrators, giving effect to the arbitration agreement instead of rendering it void.[26] Similarly, Arbitral Tribunals have also applied the principle of effective interpretation to reconcile conflicting clauses as in a 1993 ICC Case No. 5488, where the clauses of a construction contract had been in contradiction.[27] The Tribunal relied on the doctrine to conclude that the arbitration agreement has the general jurisdiction over disputes after the completion of work while the Courts would have a specific jurisdiction over disputes only during the performance of work. This doctrine has been recognized by arbitrators and Courts in various jurisdictions and is

[24] ICC Award No. 1434, Clunet 1976, 978 et seq.

[25] Born (n 4) 785.

[26] *Paul Smith Ltd v. H & S Int'l Holding Inc.* (1991) 2 Lloyd's Rep. 127 (QB) (English High Ct.).

[27] Award in ICC Case No. 5488, 1993.

regarded as a 'universally recognized rule of interpretation'.[28] It attempts to salvage the true intent of the parties which might have been distorted owing to the ignorance of the parties as to the mechanics of arbitration.[29]

The application of this doctrine is sound where an arbitration agreement has the risk of being rendered invalid on account of any ancillary or minute pathologies. This would also be in line with the pro-arbitration approach displayed in many jurisdictions, where pathological arbitration clauses are generally upheld, so long as the pathology does not cause hopeless confusion or uncertainty. In that sense, this doctrine is closely connected to the concept of "essence of the agreement", as discussed previously, as it helps in preserving this essence, by ensuring that it is not invalidated for frivolous reasons and that if the parties included a putative arbitration agreement, it must be their intention to arbitrate. That being said, however, this doctrine should not be applied to write an intention into the agreement where that intention is not otherwise even remotely demonstrable and there is no possibility of salvaging the arbitration agreement. Thus, the application of this doctrine requires circumspection so as to not cross the line between imputation of intention and insertion of intention.

4.4 *LEX SPECIALIS DEROGAT LEGI GENERALI (SPECIFIC OVER GENERAL)*

'Lex specialis derogat legi generali' is a general principle of legal interpretation that states that 'the specific law prevails over the general'. The same has also been frequently applied in arbitration in relation to contractual interpretation. For example, this principle of interpretation is useful in cases where there might be multiple contradictory or conflicting clauses within a contract and thus the intention to arbitrate is not conclusively certain. In such cases, the Courts and Tribunals look at the Agreement and give effect to the more specific provisions under them as opposed to the general one to determine intent.[30] Thus, in a case where the scope of the arbitration agreement was brought into question, the agreement was interpreted to determine the intention of the parties by giving precedence to the specific terms of the contract over the general ones and consequently the object of the dispute was inferred

[28] E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 270.

[29] E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 263.

[30] *Karnette v. Wolpoff & Abramson*, LLP, 444 F.Supp.2d 640, 646 (E.D. Va. 2006).

to be within the scope of the agreement.[31] A corollary to this is the decision is Monde Petroleum where a latter settlement agreement was given precedence over the dispute resolution clause in the original agreement, as it came second in time and was entered into in light of the specific circumstances.[32]

Thus, this doctrine, although more prevalent in treaty interpretation, is nonetheless founded on good reason and may be soundly applied to international commercial arbitration. Many arbitration agreements incorporate detailed steps as to the appointment of arbitrators, pre-arbitral procedure, etc., with prescribed timelines and persons stipulated therein. In such cases, the specificity within the putative arbitration agreement would indicate that the parties did particularly spend time on drafting the particular clauses, and consequently it ought to reflect the intention of the parties. However, the weight given to this doctrine in interpreting intention is relatively lesser, as the New York Convention has replaced this doctrine with the principle of effective interpretation, which requires that the prevailing clause would be the one that favours enforcement of the arbitration agreement, as opposed to being the more specific clause.[33]

4.5 Principle of Contra Proferentem – Is it applicable in determining Intention?

'Contra proferentem' is a contract law doctrine widely used to interpret ambiguous contractual clauses. This doctrine entails that an ambiguous clause be interpreted against the drafter or supplier (*proferens*) of such a clause[34] and is based on the premise that the drafter should not be allowed to take advantage of an ambiguity that they had been responsible for. While very commonly found within contractual interpretation, there is obscurity as to the scope and relevance of the doctrine in International Commercial Arbitration. The application of this doctrine as regards arbitration agreements and their formation especially, however, is somewhat seldom and it has been pointed out that this doctrine should be used to construct arbitration agreements only as a last resort.[35] This may be attributed to the fact that the doctrine does not on its own provide for a conclusive determination of the common intention

[31] Final Award in ICC Case No. 5946, XVI Y.B. Comm. Arb. 97, 102 (1992).

[32] *Monde Petroleum SA v. Westernzagros Ltd* (2016) EWHC 1472 (Comm).

[33] UNCITRAL, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 293 (2016).

[34] UNIDROIT Principles of International Commercial Contracts, art. 4.6.

[35] Alan Scott Rau, 'Gap Filling by Arbitrators', ICCA Congress Series, Volume 18 98 (Kluwer Law International, 2015).

of the parties. It is not aimed at unearthing the true intentions of the parties to arbitrate.[36] The doctrine instead focuses on preventing a party from relying on intentional vagueness to obtain a benefit.[37] Nonetheless, it may play a supplementary role[38] in the discovery of the true intent of the parties by favouring an interpretation that does not rely on the ambiguity created in the putative arbitration clause as a cause of its invalidation. Consequently, the same has been applied by arbitral tribunals in the interpretation of unclear or pathological putative arbitration clauses.[39]

This doctrine can be considered as a concept under the general notion of good faith,[40] wherein this assumption of good faith between the parties precludes the drafter from relying on intentional ambiguities for a unilateral benefit.

While the above-discussed maxims help in inferring the intention of the parties from the wording of the agreement, Courts and Tribunals have also applied fixed standards of proof or approaches for the interpretation of putative arbitration agreements. These correspond to either a reduced standard of proof by approaching such agreements more favourably or a heightened standard by disfavouring arbitration and interpreting them restrictively. They are termed as pro-arbitration and anti-arbitration approaches respectively and mixed opinions exist on the question of which of these approaches, or if any at all, should be applied in interpreting arbitration agreements.

5. PRO V. ANTI – IN FAVOREM INTERPRETATION OR STRICT INTERPRETATION?

The standard of proof required for establishing the existence of a putative arbitration agreement has been a recurrent issue in the interpretation of such agreements, with no conclusive or universally agreed upon answer to the same.[41] The question of standard of proof is arbitration specific and corresponds with the jurisdictional character of an arbitration agreement. Both Courts and Tribunals as well as authorities differ in opinions in that regard.

[36] Alan Scott Rau, 'Gap Filling by Arbitrators', ICCA Congress Series, Volume 18 98 (Kluwer Law International, 2015).

[37] Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?', (2001) 17 3 Arbitration International 59.

[38] Sykes Andrew, 'The Contra Proferentem Rule and the Interpretation of International Commercial Arbitration Agreements – the Possible Uses and Misuses of a Tool for Solution to Ambiguities', (2004) 8 Vindobona J. Int'l Comm. Arb. 65.

[39] *SA Alfac v. Société Imac importacão*, (2002) 2 Revue de l'Arbitrage 413, 414.

[40] Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?', (2001) 17 3 Arbitration International 59, 67.

[41] Born (n 4) 751.

While some believe in the application of the pro-arbitration or *in favorem* approach to interpretation, others prefer to apply an anti-arbitration approach that entails a strict interpretation.

5.1 STRICT INTERPRETATION – UNEQUIVOCAL EXPRESSION OF INTENTION

Authorities in support of a heightened standard of proof mostly rely on notions such as that of an arbitration agreement being an exception to the principle of jurisdiction of Courts and thus subject to a restrictive interpretation.[42] One award concluded that the consent of the parties to the arbitration agreement must be unequivocal and unambiguously demonstrable.[43] A similar finding was reached by the Italian Supreme Court in the case of *Krauss v. Bristol Myers*, where the existence of a putative arbitration agreement contained in exchange of documents was denied due to the lack of an unequivocal intention to arbitrate.[44] However, there is no mention of such a requirement in Article 7 of Model Law or Article 2 of the New York Convention and recent cases display a trend away from this view.[45] Further, cases that deal with ambiguous arbitration clauses also end up being inconsistent with this view. Furthermore, Born and Galliard have also rejected this approach as being archaic and inconsistent with the unanimous prevalence of arbitration as a natural means of resolving international business disputes.[46] Truly, a strict interpretation of a putative arbitration agreement does not serve any practical purposes in a world where arbitration is emerging as a normal and equivalent alternative to litigation that simplifies jurisdictional concerns over international business disputes. Thus, a strict or anti-arbitration approach must be rejected in present times.

5.2 LIBERAL INTERPRETATION – IN FAVOREM APPROACH

The principle of *in favorem validates* or *in favorem jurisdictionis* provides that arbitration agreements should be interpreted broadly, and accounts for a reduced standard of proof in determining the valid formation of an arbitration agreement. The basis for this approach lies on the growing preference and application of International Commercial Arbitration as a form

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[42] ICC case no 4392, 110 *Clunet* 907 (1983) 908.

[43] Award in Final ICC Case No. 7453, XXII Y.B. Comm. Arb. 107, 111 (1997).

[44] Judgment of 10 March 2000, *Krauss Maffei Verfahrenstechnik GmbH v. Bristol Myers Squibb*, XXVI Y.B. Comm. Arb. 816, 819 et seq. (Italian Corte di Cassazione) (2001).

[45] *Investissement Charlevoix Inc. v. Gestion Pierre Gingras Inc.*, Court of Appeal of Quebec, Canada, 21 June 2010, (2010) QCCA 1229 (CanLII).

[46] Born (n 4) 753; E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 260.

of dispute resolution.. Authorities in support of this approach further rely on the rule of presumptive validity of arbitration agreements found in the New York Convention or UNCITRAL Model Law. Moreover, US Courts have consistently reflected this approach in their decisions.[47] A US case, giving effect to the formation of a putative arbitration agreement, held that even the most minimal indication of an intent of the parties to arbitrate must be given full effect to.[48] The landmark UK case of *Fiona Trust v. Privalov*, also utilized this approach to come up with the one-stop presumption in favour of arbitration.[49] *It can be said that the In favorem approach is the jurisdictional parallel to the effective interpretation principle.*

Born accepts the applicability of a favourable standard of proof to be in consonance with the present scenario and deems it as the suitable approach. However, Galliard disfavors the application of this approach for the determination of the existence of a putative arbitration agreement, differentiating between validity and consent. He refutes both the pro and anti-arbitration approaches and instead advocates for a neutral standard of proof in the determination of consent.[50] The same has been affirmed by other commentaries.[51] Further, domestic courts have also displayed an inclination towards this approach.[52] This author considers this view as the most logical. There is a distinction between the existence and the validity of an arbitration agreement and where the existence is in question, a mere allegation as to there being an arbitration agreement by one party does not call for a presumption in its favour, as there is an equal right for the parties to also refer to courts.

An example of the application of a neutral standard of proof is the reconciliation of contradictory forum selection and arbitration clauses, wherein Courts generally give effect to both of them by referring to the jurisdiction of Courts in a supervisory capacity in connection to the arbitral process.[53] This holistic interpretation of such contracts is neither blithely restrictive nor blithely favourable, but corresponds to a logical and reasonable inference of

[47] *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346, 3355 et seq (1985).

[48] *Repub. of Nicaragua v. Standard Fruit Co*., 937 F.2d 469, 478 (9th Cir. 1991).

[49] *Fiona Trust & Holding Corp v. Privalov*, (2007) UKHL 40.

[50] E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) 257.

[51] J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 151.

[52] *EEOC v. Waffle House, Inc*., 534 U.S. 279, 293 (U.S. S.Ct. 2002).

[53] 9 Bundesgerichtshof, Germany, VII ZR 105/06, 25 January 2007, <http://www.dis-arb.de/en/47/datenbanken/rspr/bgh-case-no-vii-zr-105-06-date-2007-01-25-id653> accessed 16 November 2020.

the parties' probable intention. Thus, for interpreting the intention to arbitrate, the standard of proof is neither inclined in favour of or in opposition of arbitration, and rather takes into consideration all the facts and circumstances of the case to logically infer the probable intention of the parties.

6. CONDUCT – ASCERTAINING THE CONTEXT

The concept of consent is multi-faceted in the sense that it covers not only express consent, but also consent by conduct.[54] This means that the intention of the parties to a putative arbitration agreement can also be impliedly inferred by examining their conduct during and subsequent to the contract.[55] The reliance on conduct to infer the intention of the parties is a common contractual principle, and an arbitration agreement, being a creature of contract, can equally be subject to it. Further, even Article 7 of the Model Law accepts the formation of an agreement to arbitration via conduct.[56] Many a times, recourse has also been taken to the substantive law governing the contract to determine the conduct of the parties as a manifestation of their consent, such as CISG. There are various situations wherein the conduct of the parties amounts to a manifestation of their intention to arbitrate.

For example, one party's performance of their obligations within the contract has been held in multiple jurisdictions to amount to a tacit acceptance of the terms of the contract, including the provision for arbitration. In the case of *Smita Conductors v. Euro Alloys*, the Supreme Court of India recognized an arbitration agreement even in the absence of signature on the written contract, on the basis of the conduct of one party in invoking certain clauses of the contract as amounting to an acceptance of its terms.[57]

Further, past dealings and industry practice have also been relied upon as evidence of parties' knowledge of the arbitration agreement on the basis that they must have reasonably known about it. This approach presumes that the parties are aware of the arbitration agreement as a matter of trade practice and hence can be inferred to have impliedly consented to it. As pointed out in a German case where the consent to an arbitration was questioned on grounds of it only being unilaterally explicit, the Court held that so long as the parties are active

[54] John Townsend, 'Non-Signatories and Arbitration', (1998) 3 ADR Currents 19 23.

[55] J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 150.

[56] UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 7(3).

[57] *Smita Conductors Ltd. v. Euro Alloys Ltd.*, Supreme Court, India, 31 August 2001, Civil Appeal No. 12930 of 1996.

businessmen in their fields, they are presumed to be aware of its typical trade practice. Since, an arbitration agreement was customarily and implicitly agreed between contracting parties on the basis of industry usage, the consent to it can be implied.[58]

The conduct of the parties can also demonstrate their intent of renewing an otherwise expired contract, even in the absence of a formal renewal. In a case where an agreement containing an arbitration clause, as per its terms, could be renewed upon mutual agreement, and where upon expiry of the same the parties' conduct nonetheless evidence a reliance on its conditions, it was held that it amounted to a renewal of the agreement including the arbitration clause.[59]

So far as the consent to an exchange of written communications containing an arbitration agreement is concerned, different jurisdictions have expressed differing opinions. The question here is whether an arbitration agreement proposed in this form can be concluded by way of tacit acceptance based on conduct. In other words, whether a party can acquiesce to an offer of arbitration, contained in written communications, through its conduct. In a case where an arbitration clause was included in the purchase confirmations sent by the buyer who contended that the performance of the seller on the basis of the confirmation amounted to consenting to the arbitration agreement, the Italian Court refuted the argument and held that conduct does not satisfy Article II of the New York Convention.[60] Swiss Courts have also emphasized on the presence of an affirmative consent to written communications.[61] In contrast, many jurisdictions have accepted the formation of an arbitration agreement over written communications based on conduct. In a case where the buyer accepted the delivery of goods and only objected to the arbitration clause in a written communication two months after such acceptance, it was held that the conduct in accepting the goods amounted acceptance of the arbitration clause.[62] This approach is consistent with the provisions of the New York Convention and Model Law, as the requirement of there being an 'express' consent of the contracting parties has not been laid out in either.

[58] Bundesgerichtshof [BGH], Germany, 3 December 1992, III ZR 30/91.

[59] Judgment of 3 May 1980, *Kabushiki Kaisha Ameroido Nihon v. Drew Chem. Corp*., VIII Y.B. Comm. Arb. 394, 397 (1983).

[60] Judgment of 28 October 1993, XX Y.B. Comm. Arb. 739 (1993).

[61] Judgment of 5 November 1985, *Tracomin SA v. Sudan Oil Seeds Co*., XII Y.B. Comm. Arb. 511, 512 (1987).

[62] Judgment of 26 June 1970, *Israel Chem. & Phosphates Ltd v. NV Algemene Oliehandel*, I Y.B. Comm. Arb. 194 (1976).

7. CONSENT BY CONDUCT OF NON-SIGNATORIES – A MODERN VIEW OF CONSENT

The emerging trend in modern arbitration also involves the inclusion of a third party as a party to an arbitration agreement between other parties. Courts and Tribunals do not restrict the arbitration agreement only to signatories, but, provided certain conditions are satisfied, also bind a non-signatory with the arbitration agreement. A strict contractual perspective may not be in favour of such inclusion as it ostensibly goes against the principle of privity of contract. From a jurisdictional perspective of an arbitration agreement also such inclusion may be contested to go against the principle of party autonomy regarded as fundamental to an arbitration agreement. Nonetheless modern case law showcases this approach. The basis for this approach lies in the presumption that the non-signatory had always intended to be bound by the arbitration agreement from the beginning, and their conduct during the lifetime of the arbitration agreement is considered to justify such an intention. The manifestation of intention or consent herein lies in the conduct as opposed to the signature of the parties. Thus, the consent of the non-signatory is implied herein. The most commonly used doctrine to bind non-signatories is the group of companies doctrine evolved in the Dow Chemical case.[63] Under this doctrine, where a non-signatory is a part of a group of companies with the signatory, and has taken part in either the negotiations, performance, or termination of the contract entered into by the signatory, the common intention of all the parties is presumed to include the non-signatory as a party to the arbitration agreement. Other principles applied for binding a third or, 'less-than-obvious' party to an arbitration agreement include apparent agency, veil-piercing, alter ego and estoppel. Most of these principles are not applied distinctly and Courts and Tribunals commonly apply a mix of overlapping elements and factors to adjudicate such cases.[64]

The practice of binding third parties to arbitration agreements has led many commentators to remark that there has been a 'marginalization' of consent. This is because, as pinpointed previously, it ostensibly goes against the concepts of party autonomy and privity of contracts. However, as highlighted by Bernard Hanotiau, there has not been a marginalization of consent but only an evolution of the concept of consent to a modern form and approach, that

[63] *The Dow Chemical Company and others v. ISOVER Saint Gobain*, ICC Case No. 4131, Y. Comm. Arb. 1984, 131 et seq.

[64] William W. Park, 'Non-Signatories And International Contracts: An Arbitrator's Dilemma', (2008) 2 Dispute Res. Int'l 84.

is practically consistent with the commercial realities of complex multiparty business transactions.[65]

The question is not of extending the arbitration agreement to third parties, but ascertaining the real parties to the agreement from the very beginning. Thus, it cannot be said that there has been a fundamental alteration of consent. Rather, it has merely been developed and adapted to complement the needs of the dynamic commercial scenario. Since conduct has invariably been widely used to determine the intention of the parties, the modern approach is no different as it essentially carries out the same process.

8. CONCLUSION

The foregoing analysis of the common principles relied upon by courts and tribunals for determining a common intention to arbitrate displays many observations. The current general approach as to the interpretation of arbitration agreements focuses on the text and the context for the determination of intention. The principles applied are general principles of contract formation tweaked to suit the specific cases before the Courts and Tribunals. However, an arbitration agreement is not a normal contract between two parties, as it involves a jurisdictional aspect insofar as it ousts the jurisdiction of courts. Thus, an arbitration agreement is unique in nature and a sole recourse to general contractual principles for its interpretation cannot be said to be sufficient. As is apparent, Courts and Tribunals struggle with many ambiguities as to the application of such principles and also tend to have differing views as to their application owing to its jurisdictional aspects. The same is also due to a lack of any uniform standard or criteria provided for the interpretation of such agreements, propelling Courts and Tribunals to deal on a case-to-case basis. This non-uniformity between jurisdictions as to the interpretation of arbitration agreements leads to problems in a globalized, integrated commercial world where international contracts are common, as there will be different conclusions reached in different jurisdictions. This also has an adverse effect on the credibility of arbitration as an alternative to litigation.

Moreover, oftentimes the differing principles relied upon by jurisdictions may be contradictory in nature, or involve many *res integra* situations. For example, where one Court may rely upon the principle of *contra proferentum* but the other may advocate the application of the *in favorem* approach for interpretation, there is an inherent conflict between the two

[65] Bernard Hanotiau, 'Consent to Arbitration: Do We Share a Common Vision?', (2011) 27 Arbitration International 539.

that causes uncertainties in situations where the drafter of a putative arbitration clause seeks to undergo arbitration. While the *in favorem* approach would support a reference to arbitration, the *contra proferentum* approach would resist the same as it applies against the drafter, thereby forming ambivalence in laws.

Since the usage of contractual principles differs in every jurisdiction and the lack of any prescribed standard provides discretion to the Courts and Tribunals, there is a need for there to be arbitration specific principles and uniformity across jurisdictions in that regard. In other words, there should be personalized provisions governing arbitration agreements that take into account its contractual and jurisdictional aspects and which are prescribed uniformly across jurisdictions. This may also settle the discourse on the acceptability of involving non-signatories as parties to an arbitration agreement to encourage a modern view of consent to enable arbitration for complex business transactions common in the present world.

Thus, the arbitration law must not remain static, rigid or obsolete, and should evolve to suit the needs of its users. A strict compliance with party autonomy must be done away with in line with the modern view proposed. This would also improve the credibility of arbitration among different parties, as there will be more certainty, convenience and flexibility. The multifaceted concept of consent in arbitration agreements should be encouraged and applied to personalize arbitration agreements and uniformize its application.