Kluwer Arbitration Blog

Arbitration Clauses Incorporated by Reference: An Overview of the Pragmatic Approach Developed by European Courts

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The question about whether or not an arbitration clause incorporated "by reference" must be regarded as valid and binding between the parties has been, and still is, central to an animated debate in most European jurisdictions.

The New York Convention 1958 on the recognition and enforcement of foreign arbitral award ("NYC"), which also deals with the obligation of the contracting States to recognize and enforce arbitration agreements, in Article II(3) states that:

> "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
> The 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".

However, the requirement of a written form as set out by the NYC has not been construed uniformly by European courts when they come to rule upon the validity of arbitration clauses incorporated by reference to a document other than the main contract entered into by the parties.

The issue gathers prominence also in terms of recognition and enforcement of arbitral awards rendered abroad, as Article V of the NYC decrees that recognition and enforcement may be refused by the seized court if, *inter alia*, the arbitration agreement *"is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"*; thus, as the legislatures of many contracting States (like Italy or France) require that arbitration clauses be in a written form, the risk exists that the party against which enforcement is sought challenges the validity of the arbitration agreement by incorporation on the grounds that it does not comply with the applicable law.

Traditionally, a distinction has been drawn by jurisprudence between two categories of arbitration agreements incorporated by reference, in respect of which a different approach has been taken by

courts, and namely:
(i) the main contract makes express reference to an arbitration clause contained in a separate contractual document (so called "*relatio perfecta*"); or
(ii) the main contract makes general reference to the separate document as a whole, with no specific mention of the arbitration clause contained therein (so called "*relatio imperfecta*").

An overview of European case-law shows that, so far, courts have revealed a more tolerant approach *vís-a-vís* specific reference than *vís-a-vís* global reference, as they generally tend to admit the validity of an arbitration clause which is expressly referred to by a main contract, whereas the question as to whether general words are capable of incorporating terms which include an arbitration clause is much more disputed.

In those last cases, according to the majority of authorities in Europe, the judgment of the court should be centred not so much on the form of the agreement but rather on the substance of the parties' will, the matter to be determined being whether or not the party objecting to the arbitration agreement had actual knowledge of its existence and intended to express his acceptance thereof.

French courts have long since held that when the contract globally refers to standard terms and conditions containing an arbitration clause, enforcement thereof is not prevented in itself, it rather being a matter of investigating whether or not both parties had actual knowledge of the arbitration clause in question and intended to accept it, even tacitly (*Cassation Commerciale, Dreistern Werk v. Crouzier*, 26 June 1990).

The same conclusion was confirmed by the French *Cour de Cassation* in a case (*Societé Bomar Oil N.V. v. Entreprise tunisienne d'activités pétrolières (ETAP)*, 9 November 1993), relating to a sale and purchase contract referring to *"other conditions"* of the *"standard contract"* used by the seller, which included an international Chamber of Commerce (ICC) arbitration agreement. The Court of Appeal, seized by the defendant with a claim to set aside the arbitral award given by the tribunal (on the grounds that the arbitration agreement, not included in the document signed by the parties, should be deemed non-existent), dismissed the action reasoning that Article II(3) of the NYC does not exclude that a contract formed by exchange of correspondence signed by the parties refers to another document containing an arbitration agreement and concluding that such manner of incorporation must be regarded as allowed when the consent of the parties is clear and unequivocal. The Cour de Cassation upheld the decision, finding that an arbitration agreement by reference to a document such as a general conditions form is valid, even in the absence of any mention thereto in the main contract, provided that the party challenging the arbitration agreement was aware of the content of the document at the time the contract was entered into.

Italian case law appears non-unanimous on the matter. In its decision No. 11529 dated 19 May 2009 (*Dreyfus Commodities Italia v. Cereal Mangimi*), the Italian Court of Cassation, in its United Chambers, upheld the "*relatio perfecta*" theory, ruling that the requirement of a written form set out by both Article II of the NYC and Article 808 of the Italian Code of Civil Procedure is fulfilled by an arbitration clause which is contained in a document other from the main contract, provided that the reference to the said document explicitly mentions the arbitration clause contained therein, whereas a mere generic reference to the separate document or form containing the arbitration agreement would not suffice (the rationale was that only a specific reference to the arbitration clause can guarantee that both parties had knowledge of its existence).

However, in the more recent decision No. 13231 given on 16 June 2011 (*Del Medico v.*

Iberprotein), the same Court of Cassation seemed rather more inclined to adhere to the "*relatio imperfecta*" theory, as it ruled that global reference made by an international sale and purchase agreement to a general terms and conditions form containing an arbitration clause must be regarded as valid and binding. In so finding the Court observed that, on the one hand, such an interpretation would not contrast with the New York Convention, whose definition of "*arbitration agreement*" is so much extensive to admit even incorporation by general reference; and, on the other hand, being a qualified commercial operator the defendant was supposed to know the standard rules referred to in the main contract, frequently used in that commercial practice (thus maintaining that an investigation into the actual knowledge, or at least knowableness, of the arbitration agreement in question is required on a case by case basis).

Also in the English jurisdiction a number of divergent precedents can be found on the subject of what are the requirements for an effective incorporation by reference.

In *Aughton Limited v. MF Kent Services Limited* (1991), the Court of Appeal, adopting a strict approach on the grounds that arbitration agreements are to be treated differently from the other terms of a standard form contract, concluded that an arbitration clause *"must be expressly referred to in the document which is relied on as the incorporating writing. It is not incorporated by a mere reference to the terms and conditions of contract to which the arbitration clause constitutes a collateral contract"*. The same reasoning was supported by subsequent cases like *Alfred McAlpine construction Ltd v. RMG Electrical* (1994) and *Ben Barrett and Sons (Brickwork) Ltd v. Henry Boot Management Ltd* (1995).

Such views seem to have been gradually retracted following the enactment of the Arbitration Act 1996, whose Section 6 sets out a specific provision dealing with arbitration agreements by reference, decreeing that *"The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement"*. Furthermore, Section 5(3) of the Act clarifies that *"where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing"*; thus, an oral agreement which incorporates by reference the terms of a written form containing an arbitration clause would now constitute a valid arbitration agreement.

Recent decisions have adopted a more lenient perspective, admitting that in principle even a general wording of incorporation would be sufficient, at least when the question arises in the context of dealings between experienced players on a well-known market (see *Sea Trade Maritime Corp v. Hellenic Mutual War Risks Association (Bermuda) Ltd (the Athena)*, 2006; *Habas sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL*, 2010).

To date, there has been no consistency in the way European courts have been tackling the issue of arbitration agreements incorporated by reference; from an overview of case law in different jurisdictions it emerges that in most cases such arbitration agreements would be analysed in terms of existence and extent of the parties' consent to have their disputes referred to arbitration. However, in the absence of either an univocal position expressed by jurisprudence or any international or domestic rules clarifying the requirements for a proper incorporation, it is still strongly advisable for any party which, in the context of its business, has to deal with standard forms or general commercial terms to include in the main agreement an express mention of the arbitration clause contained in the secondary document.

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