
Kluwer Arbitration Blog

New White Paper Now Available – Checking the Boxes: Formal Validity of an Arbitration Agreement

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As experienced negotiators know, the process of contract negotiation can give rise to fruitful and long-lasting business relationships. The parties may meet several times to develop the precise terms of their agreements, through videoconferences, in conference rooms, or over dinner and drinks. But for many contracts, the parties’ representatives never meet, limiting their negotiations to exchanges of standard forms, marked-up drafts, emails, chains of SMS messages, and even an emoji or two to ensure that the agreement reached reflects their intent.

While the basic principles of offer and acceptance are well-established in legal systems around the world, evolving styles for communication, negotiation, and contract drafting continue to test their application. In one recent headline-grabbing case, *South West Terminal Ltd. v. Achter Land*, 2023 SKKB 116, a Canadian trial judge determined that the use of a thumbs-up emoji in a text message constituted not only acceptance of an offer, but also a “note or memorandum in writing and signed by the party” sufficient to satisfy the writing requirement in Saskatchewan’s Sale of Goods Act. As negotiators and businesses continue to grapple with how best to adapt their communication and negotiation styles for today’s highly digital and virtual environment, this case presents a useful lesson on the possible binding effect of informal communications.

For the arbitration community, decisions like this one may have implications for the satisfaction of writing requirements for arbitration agreements. The formal validity of an arbitration agreement is a foundational issue expressly addressed by Articles II and V of the New York Convention, Article 7 of the UNCITRAL Model Law on International Commercial Arbitration, and most national arbitration laws.

The question of formal validity may arise at various points during the lifecycle of an arbitration: before an arbitration in an application for stay or dismissal of court proceedings, during an arbitration in the context of a challenge to the tribunal’s jurisdiction, and after an arbitration in set-aside (annulment) or enforcement proceedings. A threshold issue is the law that governs validity; where multiple approaches may apply, practitioners may need to engage with conflict of law rules to determine which formal requirements govern in a particular case. These challenges are magnified in an increasingly digital and virtual world where styles of communication, negotiation, and contract drafting may run the gamut from a simple thumbs-up emoji to the most extensively drafted agreement signed in writing.

The new white paper, *Checking the Boxes: Formal Validity of an Arbitration Agreement*, edited by [Kiran Nasir Gore](#) and [Joshua Karton](#), flags key considerations for practitioners on the minimum requirements for formal validity of an arbitration agreement and highlights the approaches adopted by several key jurisdictions and arbitral institutions.

The white paper draws on modules in Kluwer Arbitration's [Practical Insights by Topic tool](#) written by [Giuditta Cordero-Moss](#) (Professor in the Department for Private Law, University of Oslo) and [Niek Peters](#) (Partner at Legaltree (Amsterdam) and Professor of International Commercial Arbitration at the University of Groningen). They identify the minimum requirements of formal validity of an arbitration agreement under the New York Convention and the approaches adopted by various national laws and arbitral institutions' rules.

The white paper further provides views from local experts on the approaches adopted by key jurisdictions, including [Alexis Foucard](#) (Counsel at Clifford Chance LLP, Paris); [Stefan Kröll](#) (Professor for International Dispute Resolution at Bucerius Law School; Chairman of the German Arbitration Institute); and [Robert Price](#) (Partner at Latham & Watkins LLP, London).

Assessing the formal validity of an arbitration agreement requires a complex and multi-step analysis. As the white paper demonstrates, the approaches adopted by various jurisdictions and arbitral institutions are far from static. In the decades since the New York Convention was ratified, standards have evolved to account for more modern means of conducting negotiations and doing business, including telefaxes and emails. And as the business world continues toward increased digital communication and informality to facilitate negotiations and contract drafting, further evolution in formal requirements for arbitration agreements is likely on the horizon.

Fill in the form to [download the white paper](#) and gain access to the full range of insights.

The white paper draws on content available in Kluwer Arbitration's [Practical Insights by Topic tool](#). Practical Insights provides guidance on the practical challenges and choices faced by practitioners and provides concrete insights on the approaches adopted by different national laws and arbitral institutions. The white paper provides only a glimpse into the content available in Practical Insights. As of today, Practical Insights consists of over 40 topics that you can explore. Other practical tools are also available in Kluwer Arbitration to provide guidance on the most important decision points in international arbitration, including arbitrator selection and conflict checking.

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This entry was posted on Thursday, September 7th, 2023 at 8:20 am and is filed under [Arbitration Agreement](#), [Arbitration Agreements](#), [New York Convention](#), [New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#), [UNCITRAL Model Law](#), [Validity](#). You can follow any responses to this entry through the [Comments \(RSS\) feed](#). You can leave a response, or [trackback](#) from your own site.