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INTRODUCTION

1.01 Consent is fundamental for international arbitration in both main fields where this dispute resolution method finds application: commercial arbitration and investment arbitration. Yet in the last few years there has been an increasing discomfort with this deep-rooted assumption. Indeed, consent is a complex phenomenon; and, in arbitration its jurisdictional side also plays an important role and has to be considered. This brief introduction provides an overview of the issues which will be discussed in the book, an indication of its scope and, finally, it outlines the structure of the book, which will be subdivided into three parts: the consensual nature of arbitration, consent in commercial arbitration, and consent in investment arbitration.

A. The Issue

1.02 This book discusses legal issues associated with 'consent in international arbitration'. Its consensual nature is considered to be the cornerstone of arbitration. However, the certainty that 'arbitration is consensual by nature' or that 'arbitration is a creature of contract' has begun to be questioned. The dogma of consent has been spoken of,[1] and it has been observed that 'the empire of consent in arbitration, believed eternal, is falling'.[2]

1.03 The difficulties in discussing 'consent in international arbitration' arise mainly because of two factors. On the one hand, the term 'consent' is not easy to define, because 'consent' is a term with multiple facets (a polymorph term). To consent can have the significance of (unilaterally) expressing consent, but also of reaching mutual consent. But the foremost difficulty is the evolution and changes the world of international arbitration has gone through. The classic field of commercial arbitration has already changed: nowadays in the field of commercial arbitration the cases are often complex multiparty cases.[3] Moreover, arbitration is used as a dispute resolution mechanism in fields other than the traditional one of commercial arbitration. In the new fields the perception of the consensual nature of arbitration is different.

1.04 The reaction to this evolution and the changed perception of the consensual nature of arbitration are different: some authors would like to abandon the dogma of consent,[4] others speak about the marginalization of consent,[5] while others again suggest referring to a modern

[1] See, eg Kaufmann-Kohler and Peter, p 186; or more recently Brekoulakis, *Third Parties*, para 1.102.
[2] Youssef, p 2.
[3] As statistics for 2009 showed, 28.5 per cent of ICC cases involved multiparty issues.
[4] See, eg Kaufmann-Kohler and Peter, p 186.
[5] Youssef, p 53.

approach to consent.[6] Besides, in the case of investment arbitration one scholar has stressed the importance of consent by suggesting that this type of arbitration is a consensual, but not a contractual, dispute resolution mechanism.[7]

1. Party autonomy, arbitration agreement

1.05 The principal characteristic of arbitration is that it is chosen by the parties[8] by concluding an agreement to arbitrate. The arbitration agreement is considered the foundation stone of international (commercial) arbitration, as it records the mutual consent of the parties to submit to arbitration—mutual consent which is indispensable to any process of dispute resolution outside national courts.[9] Such processes depend for their very existence upon the agreement of the parties. Hence, this element of mutual consent is essential, as without it there can be no valid arbitration.[10]

1.06 In the context of commercial arbitration, it is generally accepted that the capacity to take part in proceedings is exclusively determined on a contractual basis. Entering into an arbitration agreement is the indispensable requirement for a person to participate in the arbitration proceedings.[11] An important cornerstone for the 'consensual' characterization of international commercial arbitration is undoubtedly the New York Convention which, despite its title, also deals with the recognition of arbitration agreements.[12]

1.07 Conversely, in investment arbitration the contractual basis is less evident. The contractual basis has been perceived as different[13] and has sometimes even been denied.[14] Nevertheless, it was underlined that 'jurisdiction in international law depends solely upon consent'[15] and that 'arbitral tribunals constituted to hear international or transnational disputes are creatures of consent'.[16] Yet in investment arbitration there are objective jurisdictional requirements which need to be fulfilled. These requirements are often laid down in international treaties. Therefore, aspects related to public international law may become an issue, posing limits to party autonomy—at least, to the party autonomy of foreign investors.

2. The evolution of arbitration

1.08 The historical role of arbitration was that of an informal and bilateral dispute resolution process, particularly popular in linear bilateral commercial transactions, such as sales of goods and transport contracts.[17] However, with the growing acceptance of arbitration as a dispute resolution mechanism, the concept and the consensual nature of arbitration have evolved over time. The perception of arbitration and its consensual nature have changed, hand in hand with this evolution.

1.09 The acceptance of arbitration is closely related to the freedom to arbitrate. Arbitrability is the fundamental expression of this freedom to arbitrate. Nowadays there are only a few domains considered to be inarbitrable, ie domains where the parties cannot consent to arbitration.

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6 Hanotiau, *Consent,* pp 539 and 554.
7 See Diallo.
8 Lew, Mistelis, and Kröll, para 1–11.
9 Redfern, Hunter, Blackaby, and Partasides, para 3–01.
10 See also ibid, para 1–09.
11 Brekoulakis, *Third Parties*, para 1.09.
12 See Art II(1) of the New York Convention.
13 See, eg Paulsson, *Privity*; Werner, *Trade Explosion*.
14 Diallo.
15 See McLachlan, Shore, and Weiniger, para 7.168.
16 Douglas, para 125.
17 Brekoulakis, *Third Parties*, para 1.11.

The attitude of the State has, however, not only changed with regard to arbitrability. Today the involvement of States in arbitration is an important one.[18] This can best be seen in investment arbitration, where States make arbitration available as a dispute resolution mechanism to foreign investors through provisions contained in national investment laws and in investment treaties. In these provisions host States also express their consent to enter into arbitration agreements (offers to arbitrate) with foreign investors to resolve disputes related to investments. **1.10**

With regard to the determination of jurisdiction, the so-called 'competence–competence' principle and the principle of autonomy/separability have been fundamental for the evolution of arbitration . Both of them strengthen the position of arbitral tribunals, permitting the tribunals to more readily give effect to arbitration agreements, but also to—possibly—expand the parties' consent to arbitration. **1.11**

3. Commercial arbitration

In commercial arbitration, arbitrations involving complex jurisdictional issues have become commonplace.[19] While the historical role of arbitration was that of an informal and bilateral dispute resolution process, particularly popular for resolving disputes in linear bilateral commercial transactions,[20] we have entered into an era of complex jurisdictional issues.[21] **1.12**

Often the traditional role and bilateral nature of arbitration cannot accommodate modern international transactions which take place in areas such as construction contracts, banking and financial transactions, reinsurance contracts, and transactions involving multinational corporations and States operating through State agencies or other emanations of the State. Arbitration agreements, by virtue of their inherent privity and requirement of form, fall short of addressing the jurisdictional complexity of multiparty or multicontract relations. A scholar observed: **1.13**

> The inadequacy of an exclusive reliance on the arbitration agreement in certain jurisdictional settings led arbitration tribunals and courts to abandon a *formalist* approach and *sometimes even consensual analysis*. Tribunals often assert jurisdiction in cases where the claimant did not sign an arbitration agreement or the respondent did not accept expressly or implicitly the jurisdiction of the tribunal. More and more courts compel non-consenting parties to arbitrate and validate or enforce arbitral awards rendered for or against non-signatories.[22]

Yet one might ask whether in the relationship between the jurisdictional and contractual side of arbitration, instead of an abandonment of the consensual analysis there is rather a modern approach to consent emerging.[23] While in commercial arbitration—the arbitration field where, despite tendencies towards more uniformity, national particularities and different legal traditions to a certain extent still play a role—the emergence of a modern approach to consent has been pointed out,[24] this development can be seen best if one considers the field of investment arbitration.

4. Investment arbitration

Investment arbitrations involve the resolution of disputes between a host State and foreign investors. The main purpose of investment arbitration is therefore to avoid resorting to the **1.14**

[18] As statistics for 2009 showed, in 9.5 per cent of ICC cases at least one of the parties was a State or parastatal entity.
[19] Youssef, p 3.
[20] Brekoulakis, *Third Parties*, para 1.11.
[21] Youssef, p 3.
[22] Youssef, pp 3 *et seq*.
[23] Hanotiau, *Consent,* pp 539 and 554.
[24] Ibid, pp 539 *et seq*, but also Brekoulakis, *Third Parties*.

local courts. With regard to ICSID arbitration the contracting States have solemnly stated in the third preamble of the ICSID Convention that:[25]

> while such [investment] disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases.

1.15 Although investment disputes differ in several respects from ordinary commercial disputes,[26] one of the key differences between investment arbitration and commercial arbitration is the source of the tribunal's power.[27] While commercial arbitrations require an arbitration agreement between the parties, investment arbitration is possible without such an arbitration agreement in the ordinary sense.[28] Indeed, national investment legislation or investment treaties may grant investors the right to initiate arbitration proceedings against the host State.[29] There may even be no contractual relationship—in particular no main contract in the form of an investment contract—between the disputing parties (foreign investor and host State), which has led authors to speak about 'arbitration without contractual relationship'[30] or 'arbitration without privity'.[31]

1.16 Due to the fact that the foreign investor, if he wishes to have a neutral forum to resolve disputes against the host State, has no real alternative than to arbitrate, the consensual nature of arbitration with regard to investment arbitration has been questioned and it has been spoken of the dogma of consent.[32] On the other hand, it has also been suggested that investment arbitration is a consensual dispute resolution mechanism, but not a contractual one.[33] Yet between the host State and the foreign investor there is undeniably a juridical relationship, which is, however, not that of a treaty.[34] Rather it seems that arbitration agreements may have different forms.

1.17 While the relationship between the host State and the foreign investor is often explained with the juridical figure of the contract, the advantages of the contractual explanation have not always been fully explored. Two main issues in this context seem to be counterclaims and revocability/irrevocability of the host State's offer.

B. Scope of the Book

1.18 This book aims to address the topic of 'consent in international arbitration' by giving an overview of the evolution of the consensual nature of arbitration and of the issues related to consent arising in the fields of commercial arbitration and investment arbitration.

1.19 Issues related to consent have been dealt with extensively and in-depth in the field of commercial arbitration, often in relation to other aspects, as for instance complex multiparty arbitrations.[35] Scholarly writing on investment arbitration has also addressed the question

[25] Crivellaro, p 119.
[26] See for an overview of differences Lew, Mistelis, and Kröll, para 28–8.
[27] See Blackaby, *Tale*, paras 11–7 *et seq*. For further differences, see also ibid, paras 11–12 *et seq*.
[28] Lew, Mistelis, and Kröll, para 28–11.
[29] Ibid.
[30] See Werner, *Trade Explosion*, p 6.
[31] See Paulsson, *Privity*, p 234.
[32] See, eg Kaufmann-Kohler and Peter, p 186.
[33] See Diallo.
[34] Crawford, p 361.
[35] See, eg Brekoulakis, *Third Parties*; Hanotiau, *Complex Arbitrations, Bank Guarantees, Consent, Multicontract, Problems*; Hosking; Youssef.

of consent.[36] On the other hand, although aspects that relate to consent and the consensual character of arbitration are often discussed in the literature, there is no comprehensive book on this subject.

Compared to the existing literature this book will be less in-depth on some issues. The book will often make reference to this literature, permitting the reader to deepen specific aspects. Instead the objective of the book is different. The scope is to provide an all-embracing discussion on consent in international arbitration and to treat both main fields of application in an international context: commercial arbitration and investment arbitration. **1.20**

The book will discuss the enlargement that the freedom to arbitrate has experienced and the increasing involvement of the State as disputing party. In this process the consensual nature of arbitration has played a central role along with the principle of party autonomy. Moreover, it will analyze the relationship between the jurisdictional and contractual side of arbitration from a contractual—or, better, consensual—viewpoint. In doing so, it will consider that acceptance—and therefore also the acceptance of the offer to arbitrate—might not only be expressed by promise, but also in other ways, and that contracts can be of different types. **1.21**

The book will then show that arbitral tribunals, and regularly also national courts, tend to follow an approach which leads to an expansion of the parties' consent to arbitrate. In the case of arbitral tribunals this is facilitated by the so-called 'competence–competence' principle and the principle of autonomy/separability. Moreover, in investment arbitration an important role is played by most-favoured-nation (MFN) clauses and umbrella clauses, ie by specific public international law concepts. **1.22**

The view taken is that there cannot in principle be—with the exception of mandatory arbitration—arbitration without arbitration agreement, and that the arbitration agreement is a contract. **1.23**

C. Structure of the Book

The work is divided into three Parts. Part I is concerned with 'the consensual nature of arbitration', Part II with 'consent in commercial arbitration' and Part III with 'consent in investment arbitration'. **1.24**

Following the introduction, Part I discusses the consensual nature of arbitration. The consensual nature is considered to be the cornerstone of arbitration. However, the perception of this characteristic of arbitration has changed over time. This is primarily due to the fact that the acceptance of arbitration as a mechanism to resolve international disputes has grown—indeed the parties' freedom to consent to arbitration has steadily enlarged—and that modern disputes are more complex. **1.25**

Part I consists of four chapters: **1.26**

- Chapter 2 looks at the evolution of arbitration and its consensual nature. The chapter describes the classical characterization of arbitration, then illustrates the historical evolution of the concept and the consensual nature of arbitration, and finally gives an overview of the framework of instruments where nowadays acceptance of the use of arbitration as a dispute resolution mechanism is embedded.
- Chapter 3 discusses the capacity to consent to arbitration and the enlargement of the parties' freedom to consent to arbitration. On the one hand the restrictions on the States'/States

[36] See, eg Ben Hamida, *Thesis*; Diallo; Douglas; Schreuer, *Commentary*; Schreuer, Malintoppi, Reinisch, and Sinclair; Stern, *Consentement* and *Marginalisation*.

agencies' entitlement to consent to arbitration have decreased and on the other hand the domains which are considered to be arbitrable have expanded. The two sides of arbitrability will therefore be analyzed, ie subjective and objective arbitrability.

- Chapter 4 examines the juridical nature of arbitration with particular regard to its consensual nature. It starts with the theories which reflect the contraposition between State sphere and private sphere, then the chapter turns to the theories which reflect the growing acceptance to use arbitration as a dispute resolution mechanism and finally it gives an overview on the question whether investment arbitration has to be considered a contractual dispute resolution mechanism or not. A particular focus of Chapter 4 will therefore be on how the distinctiveness of investment arbitration is explained in relation to the consensual nature of arbitration.
- Chapter 5 shows the multiple facets of consent to arbitration and discusses the determination of jurisdiction. The chapter underlines the fact that the adjective 'consensual' is a criterion of arbitration's qualification, but also that 'consent' is a polymorph term. The different meanings of the term 'consent' will therefore be explained, ie on the one hand the unilateral act of expressing consent (by promise, by conduct, by performance), and on the other hand the mutual reaching of consent. The mutual reaching of consent is reflected in the arbitration agreement. Chapter 5 then makes a proposal for a classification of types of consent and finally discusses aspects related to the determination of jurisdiction.

1.27 Part II is concerned with 'consent in commercial arbitration'. Commercial arbitration is the classical field of arbitration. Consent to arbitration does not usually raise any difficulty in the presence of two parties who have agreed in writing to arbitrate their disputes and where, when such a dispute arises, the procedure is initiated by one party against the other. With this background the consensual character in commercial arbitration was undisputed. However, things are different in complex (multiparty) arbitration situations.

1.28 Part II consists of five chapters:

- Chapter 6 examines the valid reaching of mutual consent to arbitration. It first briefly considers the law governing arbitration agreements and then discusses the form requirement for arbitration agreements in relation to consent to arbitration and the substantive elements of consent to arbitration. To have an arbitration agreement the parties must reach mutual consent at least on the essential elements of an arbitration agreement. However, further elements might also be of importance.
- Chapter 7 considers the issue of scope and interpretation of consent to arbitration. On the one hand the important question of which disputes are covered by the arbitration agreement will be discussed. Related to this question is also the issue of when set-off and counterclaims may be raised. On the other hand the chapter will treat how consent to arbitration has to be interpreted.
- Chapter 8 discusses situations where consent to arbitration is perceived to have a reduced consensual character: unilateral arbitration agreements, arbitration clauses incorporated by reference, and arbitration clauses in articles of association.
- Chapter 9 gives an overview of the issue of extension of consent to arbitration. The chapter first discusses the extension of consent to arbitration by application of general principles of contract law or corporate law and then considers extension of consent to arbitration to non-signatories, where aspects also related to consent by conduct will be treated.
- Chapter 10 examines consent to arbitration related to procedural mechanisms. The chapter analyzes the joinder and intervention of third parties in arbitration proceedings, the consolidation of different arbitration proceedings, and problems related to the enforcement of arbitral awards in multiparty arbitrations.

Part III is concerned with 'consent in investment arbitration'. Investment arbitration is distinctive in several aspects compared to commercial arbitration: **1.29**

- There is the involvement of States. States on the one hand may express their consent to arbitration in national investment laws and in international investment treaties, but on the other hand they are also one of the disputing parties in the arbitration proceedings.
- The reaching of mutual consent to arbitration is not enough. Indeed objective jurisdictional requirements also need to be fulfilled.
- Particularly in investment treaty arbitration, public international law is of relevance.
- In investment treaty arbitration, treaty provisions—in particular umbrella clauses—may lead to an enlargement of consent to arbitration.

Part III consists of four chapters: **1.30**

- Chapter 11 examines the expression and reaching of consent to investment arbitration. First the formal requirement of consent will be discussed and then the conditions prior to consent to arbitration analyzed. The main part of the chapter is devoted to the ways of expressing and reaching consent to arbitration; in particular of the reaching of mutual consent when the host State expresses its consent in national investment laws and investment treaties. Chapter 11 will then discuss consent to arbitration from a time perspective. In investment arbitration there is often dissociation in the time when the parties express their consent to arbitration. The host State expresses its consent in national investment laws and investment treaties before the breaking out of the dispute, whereas the foreign investor often expresses its consent once the dispute has arisen by instituting the proceeding. Finally the chapter will analyze the issue of irrevocability of consent.
- Chapter 12 examines the applicable law and the interpretation of consent to arbitration. A first important question concerns which law shall apply: international law or national law? Then issues regarding the inclination in interpreting and principles of interpretation will be discussed. Finally, important questions of interpretation also arise with regard to umbrella clauses, where the host State's consent to arbitration may be enlarged by elevating contractual disputes to treaty's disputes.
- Chapter 13 looks at consent and jurisdiction. While consent is the subjective side of jurisdiction, in investment arbitration objective requirements need to be fulfilled. The chapter therefore discusses consent in relation to jurisdiction *ratione materiae*, jurisdiction *ratione personae,* and jurisdiction *ratione temporis*. The chapter analyzes what influence the parties have in defining the requirements but also the tendency to expand the jurisdictional scope. Moreover, the chapter will discuss consent to investment arbitration with regard to procedural mechanisms.
- Chapter 14 examines the other aspects of the scope of consent in investment arbitration. In particular it discusses the limitations of the scope, counterclaims, and the important issue of consent and most-favoured-nation clauses. The chapter will conclude by delimitating investment arbitration from State to State arbitration provided for in investment treaties.