FORM OF ARBITRATION AGREEMENT IN A COMPARATIVE PERSPECTIVE

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Summary: The arbitration agreement is one of the basic pillars and conditions of arbitration, without which arbitration cannot take place. In addition to the content requirements, it must be concluded in the required form in accordance with the relevant regulations. This article deals with the form of an arbitration agreement and on the example of various legal orders it shows the possibilities that can be encountered in the issue of formal requirements on an arbitration agreement. The comparative approach is intended to underline the importance of arbitration in international context and the importance of uniform, or at least similar, regulation from the point of view of legal certainty, for example. Despite the partial differences, it can be positively stated that the legal systems strive for a balance between informality and excessive formalism, and respect (also for practice) important principles important such as *potius valeat actus quam pereat* or the autonomy of the parties.

Keywords: arbitration, arbitration agreement, form of arbitration agreement, consumers, handwritten signature, electronic signature, jurisdiction of arbitrator, written form

An arbitration agreement may be defined in accordance with Article 2(1) of the New York Convention¹ as *agreement ... under which the parties are committed 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*. The text of this provision, which is considered to be also a substantive norm together with paragraph 2,² was then taken with only minor changes into Article 7(1) of the UNCITRAL Model Law,³ which the arbitration agreement defines as

- 1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), entered into force on 7 June 1959.
- 2 The whole Article II of the New York Convention is considered to be a substantive norm, which takes precedence over conflict-of-law rules. See, for example, SCHLOSSER, Peter. *Das Recht der Internationalen privaten Schiedsgerichtsbarkeit*. 2nd edition. Tübingen: Mohr Siebeck, 1989, p. 173 et seq.; judgment of the Federal Court of Justice (Bundesgerichtshof) of 12 February 1976, Ref. No. III ZR 42/74.
- 3 UNCITRAL Model Law on International Commercial Arbitration (21 June 1985) with amendments as adopted in 2006; available at: <https://www.uncitral.org/pdf/english/texts/>

an agreement of the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. For the area of international trade relations (international commercial arbitration), the arbitration agreement is defined, for example, by the European Convention on International Commercial Arbitration.⁴ According to Article I paragraph 2(a) in conjunction with paragraph 1(a) of this convention an arbitration agreement shall mean either an arbitral clause in a contract or an arbitration agreement concluded for the purpose of settling disputes arising from international trade between physical or legal persons.

We can then meet with the arbitration agreement defined with a greater or lesser extent of concretization and more detailed adjustments at the national level as well. In the Czech legal order, section 2(1) of the Czech Arbitration Act⁵ defines an arbitration agreement as an agreement of the parties that *their property disputes, with the exception of disputes arising from contracts entered into between a consumer and a professional, disputes arising from the enforcement of decisions and incidental disputes, which would otherwise fall within the jurisdiction of the courts, or which are subject to arbitration under special laws, shall be decided by one or more arbitrators or by a permanent arbitral institution.* The German regulation contained in section 1029(1) of the German ZPO⁶ almost literally copies the wording of UNCITRAL Model Law, as it defines an arbitration agreement as *an agreement by the parties that they subject themselves to the decision passed by an arbitral tribunal on all or individual disputes that have arisen between them or may arise in future as regards a specific legal relationship that is contractual or non-contractual in nature.* Exactly the same definition as in the German ZPO can be found in the Austrian ZPO,⁷ as the regulation of arbitration in Austria was fundamentally influenced by the UNCITRAL Model Act and at the same time by German legislation and discussions that in Germany (general) on the issue of regulation of arbitration took place. The Slovak Arbitration Act⁸ defines

arbitration/ml-arb/07-86998_Ebook.pdf (accessed on 10 October 2020). UNCITRAL Model Law is one of the significant achievements of the United Nations Commission on International Trade Law in the field of arbitration, which has to a greater or lesser extent influenced numerous national regulations. For more details see, for example, SCHÜTZE, Rolf. A. *Schiedsgericht und Schiedsverfahren*. 5th edition. München: C. H. Beck, 2012, p. 8 et seq.

- 4 European Convention on International Commercial Arbitration, Geneva, 21 April 1961, (European Convention); for more details on individual countries see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=en (accessed on 10 November 2020).
- 5 Czech Act No. 216/1994 Coll. On Arbitration and Enforcement of Arbitral Awards.
- 6 German Code of Civil Procedure as promulgated on 5 December 2005 (BGBl. – Federal Law Gazette I p. 3202; 2006 I p. 431; 2007 I p. 1781), last amended by Article 1 of the Act dated 22 November 2020 (Federal Law Gazette I p. 2466).
- 7 Law of 1 August 1895 Austrian Code of Civil Procedure, RGBl. Nr. 113/1895, last amended by BGBl. I Nr. 109/2018. Specifically, it is section 581(1) of the Austrian Code of Civil Procedure.
- 8 Slovak Act. No. 244/2002 Coll. On Arbitration. In detail to the whole act, for example,

in section 3(1) the arbitration agreement as *an agreement by the contractual parties that all or certain disputes which have arisen or may arise between them in a specific contractual or other legal relationship, shall be decided in arbitration*. As an agreement by the parties concluded in existing or future arbitrable disputes arising from specific legal relationship, is an arbitration agreement defined by the Swiss ZPO.⁹ At this point, however, it should be noted that the field of international arbitration in Switzerland is optionally regulated in Chapter 12 of the Private International Law Act (Article 176 et seq.).¹⁰ However, this act does not define the arbitration agreement any further, regulated in Article 178, as such.

The definition of an arbitration agreement made by various international treaties and individual legal orders is also important in terms of the form of the arbitration agreement, as it sets not only the mandatory minimum content of the arbitration agreement, but also the material scope of the provisions on the form of the arbitration agreement (see section 2.1).

It is also quite common for legal orders that, in addition to general definition of the concept of the arbitration agreement, this concept is further divided internally into individual types. However, this division of the arbitration agreement into individual types is not only a kind of theoretical matter but has its practical implications and can also be significant in terms of the form of the arbitration agreement. In fact, individual national legal orders may submit a specific type of arbitration agreements to differently strict formal requirements.¹¹ However, legal orders do not have to distinguish (and do not distinguish) the different types of arbitration agreement according to the same criteria, they do not need to use the same terms in this context, and therefore it is always necessary to examine these issues in the context of the specific legislation. Also the existing international treaties must be taken into account, such as the European Convention, which may also divide the arbitration agreement into individual types.¹²

GYÁRFÁŠ, Juraj, ŠTEVČEK, Marek a kol. *Zákon o rozhodcovskom konaní – komentár*. Bratislava: C. H. Beck, 2016.

9 The provision of Article 61 in conjunction with Article 357(1) of the Swiss Civil Procedure Code of 19 December 2008, SR 272.

10 In accordance with the provisions of Article 176(2) of the Swiss Private International Law Act of 18 December 1987, SR 291, the parties may agree to exclude the application of Chapter 12 of the Swiss Private International Law Act and to submit to the regulation of arbitration under the Swiss ZPO.

11 See with concrete examples, for example, SCHLOSSER: *Das Recht der Internationalen privaten Schiedsgerichtsbarkeit...*, p. 262; although this is the situation as of 1988 and may no longer correspond to the real situation as a result of various amendments, it does not change anything from a theoretical-practical point of view.

12 Article I(2)(a) of the European Convention: *The term "arbitration agreement" shall mean either an arbitral clause in a contract or an arbitration agreement*. Article II(2) of the New York Convention provides that *arbitration agreement shall include an arbitral clause in a contract or an arbitration agreement*.

The Czech Arbitration Act (based primarily on time aspect) distinguishes in section 2(3)(a,b), for example, an “submission agreement” relating to an individual dispute which has already arisen and an arbitration clause covering all disputes that would arise in the future from a certain legal relationship or from a defined range of legal relationships. In the Swiss ZPO, the temporal aspect is also taken into account in section 357, where the general concept of an arbitration agreement (*Schiedsvereinbarung*) covers both an agreement concluded in a dispute that has already arisen and an agreement covering disputes that may potentially arise in the future, without, however, using any special terms for these types of arbitration agreement.¹³ The German ZPO, on the other hand, does not distinguish strictly the temporal aspect of the conclusion of an arbitration agreement, as the Czech Arbitration Act or the Swiss regulation do, but divides an arbitration agreement into a concluded one in the form of an independent agreement (agreement as to arbitration/ *Schiedsabrede*) or of a clause of an agreement (arbitration clause/*Schiedsklausel*).¹⁴ It is arbitration clause that allows in a particular case a different type of approach than agreement as to arbitration (see further in this chapter). The same division is also contained in section 581(1) of the Austrian ZPO, which, however, does not use terminologically specific concept for individual types of arbitration agreement and works with the general term “arbitration agreement”. The “Austrian-German approach” also appears in the Slovak Arbitration Act, which states in section 4(1) that *an arbitration agreement may take the form of a special agreement or an arbitration clause to the agreement*.

In order for the arbitration agreement to have the effects expected by the parties or which are at least connected with the arbitration agreement by legal regulations, it must (among other things) be concluded in the form specified or permitted by the given legal norms. And it is the issue of the form of an arbitration agreement in a comparative context this article deals with. Arbitration agreement will therefore be examined in the light of the conditions imposed by the selected legal orders on its form. In the same way that an arbitration agreement is defined in the relevant laws (but also in other norms and regulations), various international treaties, national laws, model regulations, rules of arbitration institutions, etc. typically contain provisions concerning its form.¹⁵ Given the importance of arbitration in an international context, a comparative approach is essential.¹⁶

13 See Article 4 of the Concordat on Arbitration (Konkordat über die Schiedsgerichtsbarkeit) of 27 March 1969, SR 279, repealed as from 1 January 2011 by the Swiss ZPO. Concordat on Arbitration used as a general term *Schiedsabrede* (agreement as to arbitration), which was then divided into *Schiedsvertrag* (arbitration agreement) and *Schiedsklausel* (arbitration clause).

14 See section 1029(2) of the German ZPO.

15 For the purposes of the defined topic, the author leaves aside the discussion on whether the arbitration agreement is by its nature (rather) a procedural, substantive or mixed institute.

16 For more details see as examples, RYŠAVÝ, Lukáš. *Nezávislost a nestrannost rozhodce*, Praha: C. H. Beck, 2018, p. 10 et seq.

Assuming that one of the fundamental principles on which private law is based is the principle of party autonomy, it makes logically sense that, from the point of view of the form of legal act, the manifestation of party autonomy should be informality; the parties should decide for themselves in what form they will conduct legal acts and how they will enter into various relations with each other.¹⁷ It is possible to distinguish typically between oral and written forms of legal act. However, if a legal regulation – a law – lays down special conditions regarding the form for certain legal acts, then it is usually necessary to see this as an effort to protect against certain risks associated with important and significant interests. The condition of a certain form of legal act strengthens legal certainty and serves to secure evidence for potential disputes, but at the same time protects the party from the pitfalls that may be associated with the party's autonomy in this respect. The known words of Rudolf von Jhering¹⁸ speak in a similar spirit: *The form is a sworn enemy of arbitrariness, a twin of freedom. For the form balances the seduction of freedom to unfetteredness, directs the essence of freedom to solid paths so that it does not disperse, does not get lost, strengthens it inward, protects it outwardly. Solid forms are a school of discipline and order and thus of freedom itself, and represent a protective wall against external attacks, – can only be broken, but not bent.*¹⁹

Given the global validity of the New York Convention, to which currently more than 160 States have acceded,²⁰ it must be assumed that most states still require a written arbitration agreement in order to bring their national legislation in line with this international convention.²¹ It is the New York Convention

17 Similarly, for example, LIEDER, Jan. *Die rechtsgeschäftliche Sukzession. Eine methodenpluralistische Grundlagenuntersuchung zum deutschen Zivilrecht und Zivilprozessrecht sowie zum Internationalen und Europäischen Privatrecht*. Tübingen: Mohr Siebeck, 2015, p. 328; RYŠAVÝ, Lukáš. *Volba práva a nová „římská nařízení“*. In: ROZEHNALOVÁ, Naděžda, DRLIČKOVÁ, Klára, VALDHANS, Jiří (eds.). *Dny práva 2017 – Days of Law 2017: Část IV. Aktuální otázky evropského mezinárodního práva soukromého* [online]. Brno: Masarykova univerzita, 2018, p. 92.

18 Rudolf von Jhering, or Ihering, (1818–1892), was an important German lawyer dealing primarily with Roman law and the theory of law.

19 von JHERING, Rudolf. *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*. Zweiter Theil, 2. Abtheilung, Leipzig: Breitkopf und Härtel, 1858, p. 497, or 3rd edition, 1875, p. 471: „Die Form ist die geschworene Feindin der Willkür, die Zwillingschwester der Freiheit. Denn die Form hält der Verlockung der Freiheit zur Zügellosigkeit das Gegengewicht, sie lenkt die Freiheitssubstanz in feste Bahnen, daß sie sich nicht zerstreue, verlaufe, sie kräftigt sie nach innen, schützt sie nach außen. Feste Formen sind die Schule der Zucht und Ordnung und damit der Freiheit selber und eine Schutzwehr gegen äußere Angriffe, – sie lassen sich nur brechen, nicht biegen...“

20 For more details on individual countries see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (accessed on 10 November 2020).

21 See SABATER, Anibal, REZENDE, Lúcia. Chapter 2: An Arbitrator's Obligation to Use Reasonable Efforts to Issue an Enforceable Award and Its Interaction with the New York Convention. In GÓMEZ, Katia Fach, RODRÍGUEZ, Ana Mercedes López (eds.). *60 Years*

that is one of the central law sources of arbitration in general, although it must be pointed out that the material scope of the New York Convention is primarily focused on the issue of recognition and enforcement of foreign arbitral awards. On the other hand, however, the importance and impact of this exceptional and unique legal document is much greater, and it also affects (albeit indirectly) issues going beyond the recognition and enforcement of arbitration awards.²²

While the Geneva Agreements²³ did not contain any provision on the form of an arbitration agreement, the written form of the arbitration agreement follows (indirectly) from Article II(1) of the New York Convention, which provides 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*. A definition of what is meant by a written agreement is then contained in Article II(2) of the New York Convention. As regards the relationship between business entities (commercial arbitration), the European Convention also contains provisions on the written form of an arbitration agreement. Article I(2)(a) of the European Convention provides primarily that an arbitration agreement must be signed by the parties (or contained in an exchange of letters etc.) and provides for an exception to the written form of the arbitration agreement only under certain (in practice rather exceptional) conditions (see below).

Looking at the individual national regulations, the requirement of writing is generally set out as one of the basic conditions that an arbitration agreement must satisfy in order to be considered valid.²⁴ The Czech arbitration Act does so in section 3(1), where it stipulates that *the arbitration agreement must be concluded in writing, otherwise it is invalid*. The written form as a condition for the validity of the arbitration agreement can also be found in section 4(2) of the Slovak Arbitration Act, which states that *the arbitration agreement must be in writing, otherwise it is invalid*. Thus, while the provisions of the Czech or Slovak Arbitration Act, but also, for example, the Swiss ZPO in Article 358,²⁵ speak explicitly of

of the New York Convention: Key Issues and Future Challenges. Alphen aan den Rijn: Kluwer Law International, 2019, p. 28 et seq.

22 See with other references e.g. decision of the Austrian Supreme Court (Oberster Gerichtshof) of 26 April 2006, Ref. No. 7 Ob 236/05i; decision of the German Provincial Court of Appeal in Schleswig (OLG Schleswig) of 30 March 2000, Ref. No. 16 SchH 5/99; Judgment of the German Federal Court of Justice (Bundesgerichtshof) of 25 January 2011, Ref. No. XI ZR; VAN DEN BERG, Albert Jan. *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation*, Deventer, Boston: Kluwer Law and Taxation (1981), p. 87.

23 Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

24 See e.g. LIONNET, Klaus, LIONNET, Annette. *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*. 3rd edition. Stuttgart: Richard Boorberg Verlag, 2005, p. 173.

25 Article 358 of the Swiss ZPO: „Die Schiedsvereinbarung hat schriftlich ... zu erfolgen.“

the written form of the arbitration agreement, follows the condition of a written arbitration agreement in German or Austrian regulation from a slightly different wording. Section 1031(1) of the German ZPO or § 583(1) of the Austrian ZPO speak in the same way about the arbitration agreement as the document signed by the parties.²⁶ The written form is therefore primarily expressed not by using the word “in writing” (*schriftlich*), but by setting of a signature condition, as is the case of the European Convention.

Apart from the regulation contained in the New York Convention or, for example, in the European Convention, in the case of international arbitration, the form of the arbitration agreement is governed by the law determined in accordance with the conflict-of-law rules of that State.²⁷

2.1 Scope of the provisions on the form of the arbitration agreement

With regard to the condition of the arbitration agreement in writing, which is commonly accepted in practice and in legislation, it is necessary to ask what scope the concept arbitration agreement has in this context, i.e. which provision of the arbitration agreement must meet the condition of a written form. From the wording and scheme of Article II of the New York Convention or, for example, from Article 7 of the UNCITRAL Model Law must be inferred that the provisions on the written form of an arbitration agreement apply to an arbitration agreement only to the extent as the term arbitration agreement itself is defined. Therefore, only the so-called minimum content of the arbitration agreement must meet the written form.²⁸ Those provisions first define the concept of an arbitration agreement and thus, at the same time, determine the minimum content of the arbitration agreement, and then condition of the written form is attached to that definition.

Equally Article 178 of the Swiss Private International Law Act.

26 Section 1031(1) of the German ZPO: *Die Schiedsvereinbarung muss ... in einem von den Parteien unterzeichneten Dokument ... enthalten sein.*

27 In the Czech Republic, for example, the determination of the law applicable to the form of an arbitration agreement is expressly regulated in section 117 of the Czech Private International Law Act, while in Germany it must be determined on the basis of an analogous application of Article 11 of the German Private International Law Act, which applies generally to the form of legal act; see SCHLOSSER: *Das Recht der Internationalen privaten Schiedsgerichtsbarkeit...*, p. 264; SCHWAB, Karl Heinz, WALTER, Bernard. *Schiedsgerichtsbarkeit. Kommentar*. 7th edition. München: C. H. Beck & Helbing & Lichtenhahn, 2005, p. 393. see HRNČÍŘIKOVÁ, Miluše et al.: *Mediační, prorogační a rozhodčí doložky o řešení přeshraničních sporů*. Praha: Leges, 2019, p. 186 et seq.

28 Similarly SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 389; LIONNET/LIONNET: *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit...*, p. 173; MÜNCH, Joachim. In KRÜGER, Wolfgang, RAUSCHER, Thomas (eds.). *Münchener Kommentar zur Zivilprozessordnung. Band 3. §§ 1025–1109*. 4th edition. München: C. H. Beck, 2013, p. 134. See also BERGER, Bernhard, KELLERHALS, Franz. *International and Domestic Arbitration in Switzerland*. Bern: Stämpfli Publishers, 2015, marg. 431 et seq.

Other arrangements in the arbitration agreement, such as the determination of the place of arbitration, of the application of the rules of an arbitration court etc., are not subject to the stipulated condition of written form and may therefore be agreed in other way.²⁹ The purpose of the written form of the arbitration agreement is, inter alia, to protect the party from the hasty delegation of jurisdiction from ordinary (State) courts to the (private) arbitrators, as follows from the minimum content of the arbitration agreement. The other arrangements of the arbitration agreement do not need this protectionist approach. Of course, from a practical point of view, these other arbitration arrangements may often be as important to the party, if not more important, than the negotiation of an arbitration agreement itself. For example, the parties want to conclude an arbitration agreement just and only if the application of specific rules, procedures is agreed, if the dispute is submitted to a specific arbitration institution, etc. From this (practical) perspective, the minimum content of the arbitration agreement can then be considered rather problematic.³⁰

The practical impact of such defined scope of the provisions on the form of the arbitration agreement follows, for example, from Article IV(1)(b) of the New York Convention, which provides that a party applying for recognition and enforcement of an arbitration award shall also submit an original or a duly certified copy of the arbitration agreement within the meaning of Article II of the New York Convention.³¹ Thus, the obligation to submit applies only to the minimum content of the arbitration agreement.

Also from the point of view of national regulations, it should be noted that the provisions on the form of the arbitration agreement apply only to the minimum content of the arbitration agreement as defined (more or less identically) by the individual legal orders.³² In general, however, it should be mentioned that the limitation of the condition of the written form only to the minimum content of the arbitration agreement has almost no impact on practice (with the exception mentioned above). On the contrary, it is almost a rule that a written arbitration agreement contains, in addition to the minimum content, a number of other arrangements such as the place or language of arbitration, the number of arbitrators, the applicable law, arbitration rules, etc.

29 See VOIT, Wolfgang. In MUSIELAK, Hans-Joachim. *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz*. München: Verlag Franz Vahlen, 2012, p. 2428.

30 LACHMANN, Jens-Peter. *Handbuch für die Schiedsgerichtspraxis*. 3rd edition. Köln: Verlag Dr. Otto Schmidt, 2008, p. 97.

31 The same condition was originally contained in Article 35(2) of the UNCITRAL Model Law, which, however, was amended on 7 July 2006 and the current UNCITRAL Model Law no longer provides for this condition. See also Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session, p. 28 et seq.; available at: https://unctad.org/en/docs/a61d17_en.pdf (accessed on 10 October 2020).

32 See LIONNET/LIONNET: *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit...*, p. 174.

2.2 Written form of the arbitration agreement

In general, a distinction can be made (in addition to other categories) between oral and written form of legal acts. It can be stated that where the legislator lays down any requirement for the form of legal act, this should always pursue a specific goal. A condition of a particular form may thus protect, for example, the parties themselves in terms of certainty that the contract has been concluded at all and what its content is;³³ it also serves as proof that the contract has not only been concluded but also how and for what purpose; certain stricter forms, such as the form of a notarial deed, may also be linked to the entity's duty of instruction and may minimize the risk of certain disputes; of course, the public interest or the protection of the weaker party also plays a role. The stated requirement of a written form of arbitration agreement aims (among other things) to protect the parties from the various negative effects of their actions.³⁴ An important objective is thus, for example, to protect against the hasty action already mentioned, which goes hand in hand to some extent with the protection of the legally inexperienced party against possible abuse of the basic characteristics and principles of arbitration.³⁵ However, the written form of the arbitration agreement is intended to remind the party (primarily) of the fundamental fact that its conclusion leads – albeit conditionally³⁶ – to the exclusion of general courts from hearing and deciding of the dispute.³⁷

As stated above, neither the international conventions nor the national legislation are primarily based on the informality of the arbitration agreement, but generally lay down a condition of written form. This is a mandatory provision from which exceptions can only be provided by law.³⁸

In general, a legal act can be in terms of form written or oral. In case of written form, a distinction can be made between simple and so-called strict (qualified) written form. The simple form applies to private documents and the strict form to public documents such as notarial deed. In this context, it is therefore

33 See decision of the Austrian Supreme Court (Oberster Gerichtshof) of 24 Mai 2005, Ref. No. 4 Ob 82/05w.

34 Similarly (albeit from the point of view of substantive law) e.g. ZUKLÍNOVÁ, Michaela. Forma právních jednání; available at: <https://www.pravniprostor.cz/clanky/obcanske-pravo/vyklad-pravnich-jednani-i> (accessed on 10 November 2020).

35 See SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 37; decision of the Austrian Supreme Court (Oberster Gerichtshof) of 26 April 2006, Ref. No. 7 Ob 236/05i.

36 See, for example, section 106(1) of the Czech Code of Civil Procedure (Act. No. 99/1963 Coll.), section 7 of the Slovak Code of Civil Procedure (Act. No. 160/2015 Coll.).

37 Decision of the Austrian Supreme Court (Oberster Gerichtshof) of 20 October 2005, Ref. No. 2 Ob 235/05f.

38 Similarly BAUMBACH, Adolf, LAUTERBACH, Wolfgang, ALBERS, Jan, HARTMANN, Peter. *Zivilprozessordnung mit FamFG, GVG und anderen Nebengesetzen*. 73th edition. München: C. H. Beck, 2015, p. 2687; MÜNCH, Joachim. In KRÜGER, Wolfgang, RAUSCHER, Thomas (eds.). *Münchener Kommentar zur Zivilprozessordnung. Band 3. §§ 1025–1109*. 4th edition. München: C. H. Beck, 2013, p. 134.

necessary to question what is meant under in written form, respectively in which cases the arbitration agreement will be concluded in writing and in which the condition of written form will no longer be met. The individual provisions on the form of an arbitration agreement generally allow a number of different options which, however, only under certain conditions may satisfy the condition of a written form of arbitration agreement.

2.2.1 Arbitration agreement as a document (manually) signed by the parties

As follows from the previous interpretation, one of the basic methods of concluding an arbitration agreement on which most legal regulations are based, is the form of the arbitration agreement signed (manually) by the parties. In addition to this traditional and classical way, without necessarily implying the most widely used one, the legislation of course also allows for other alternatives, which will be dealt with elsewhere. Sometimes the (manually) signed arbitration agreement is specified by law directly,³⁹ other times it is quite obvious from the requirement of a written form of the arbitration agreement and the subsequent list of other options corresponding to the written form.⁴⁰

The condition of written form will be fulfilled without any doubt if the arbitration agreement is written in text form on some “physical” material/medium. Typically, it will be paper, but the condition of the document will be met (with a certain degree of exaggeration with regard to non-practicality) by an arbitration agreement carved in stone or engraved in leather or birch bark. It is completely irrelevant whether the text will be written by hand, on a typewriter, in a computer and then printed, engraved with a stylus, etc. If it is an arbitration clause, it is usually part of the main contract and will share the text form of the main contract. An arbitration agreement concluded later than the main contract, on the other hand, must, by logic, be in a separate document.

A necessary condition for the validity of a written arbitration agreement is usually the (handwritten) signature of the person concluding the arbitration agreement,⁴¹ although it is not excluded that the arbitration agreement is signed by an authorized representative.⁴² Individual legal orders may approach the issue of (handwritten) signing differently, and therefore sometimes the written form

39 Section 1031(1) of the German ZPO, section 583(1) of the Austrian ZPO, Article I(2)(a) of the European Convention, Article II(2) of the New York Convention.

40 See section 4(2, 3) of the Slovak Arbitration Act, section 3(1) of the Czech Arbitration Act.

41 See SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 389, footnote 16; section 561(1) of the Czech Civil Code (Act No. 89/2012 Coll.); decision of the Czech Supreme Court (Nejvyšší soud) of 10 January 2001, Ref. No. 25 Cdo/1999; LIEBSCHER, Christoph, OBERHAMMER, Paul, RECHBERGER, Walter H. (eds.). *Schiedsverfahrensrecht*. Band I. Wien, New York: Springer, 2012, p. 228.

42 See decision of the Austrian Supreme Court (Oberster Gerichtshof) of 7 November 2002, Ref. No. 6 Ob 67/02z, of 20 October 2005, Ref. No. 2 Ob 235/05f; LACHMANN: *Handbuch für die Schiedsgerichtspraxis...*, p. 97.

of the arbitration agreement can be fulfilled even without the signature of the person acting.⁴³ However, a handwritten signature is the most typical expression of consent to an arbitration agreement. The replacement of the handwritten signature by other (mechanical) means, such as a stamp, depends on the particular legal order (for example according to the Czech Civil Code it can be used where it is usual).⁴⁴

A handwritten signature generally performs several functions, including the closing function (finality of the text under which the signature is attached, protecting against amendments), the preservation function (permanence of recording a and signing of the legal act and the possibility of its future verification), the identification function (binding of the signature to a specific person), the authenticity function (the signed document comes from the signatory), the verification function (question of the authenticity of the signature), the function of proof (the signed document is usable as proof that, for example, the contract was concluded and what its content is) and the warning function (warning of legal consequences and protection against hasty action).⁴⁵

As this is a contractual relationship, it is essential that the arbitration agreement is signed by both parties – this requirement also follows from the wording of the relevant provisions, which speaks in the plural about the “parties”. In this context, however, it is completely irrelevant whether the signatures of the persons will be on the same document or whether the draft arbitration agreement will be accepted on a separate one.⁴⁶ If the arbitration agreement is drawn up in several identical copies, it will be sufficient for the party to sign the documents addressed to the other party.⁴⁷ What the signature is supposed to look like and what it should contain will then depend on the individual legal orders, or on the practices established between the parties or in the particular sector.⁴⁸ However,

43 See SCHLOSSER: *Das Recht der Internationalen privaten Schiedsgerichtsbarkeit...*, p. 263; MÜLLER, Christoph, RISKE, Olivier. Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 178 [Arbitration agreement]. In ARROYO, Manuel (ed.). *Arbitration in Switzerland: The Practitioner's Guide*, 2nd edition. Alphen aan den Rijn: Kluwer Law International, 2018, p. 80.

44 Section 561(1) of the Czech Civil Code; the same conclusion applies, for example, to the Slovak regulation in section 40(3) of the Slovak Civil Code (Act No. 40/1964 Coll.). See also BĚLOHLÁVEK, Alexander. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů: Komentář*. 2nd edition. Praha: C. H. Beck 2012, p. 236 et seq.

45 Deutscher Bundestag, Drucksache 14/4987, *Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr*, 14 December 2000, p. 16; available at <http://dip21.bundestag.de/dip21/btd/14/049/1404987.pdf> (accessed on 10 October 2020). See, for example, KORBEL, František, MELZER, Filip. *Písemnost, elektronický a biometrický podpis v elektronickém právním jednání*. *Bulletin advokacie*, Nr. 12/ 2014, p. 32 et seq.

46 Similarly SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 38; see section 561(2) of the Czech Civil Code.

47 BAUMBACH/LAUTERBACH/ALBERS/HARTMANN: *Zivilprozessordnung...*, p. 2686.

48 See ZUKLÍNOVÁ, Michaela. *Forma právních jednání II.*; available at: [Published by Palacký University Olomouc, Czech Republic, 2020.](https://www.pravni-</p></div><div data-bbox=)

it can be assumed that the surname of the acting person will usually suffice, while the legibility of the signature is not a condition.⁴⁹ The admissibility of signing an empty document, on which the arbitration agreement will be written only later, is also inferred.⁵⁰ From a practical point of view, this method of concluding an arbitration agreement comes most into consideration if both parties are present at the same time and “at the same time” sign the arbitration agreement.⁵¹

2.2.2 Arbitration agreement contained in letters and electronic communication

In addition to the above-mentioned traditional way, i.e. arbitration agreements (handwritten) signed by both parties, however, all regulations also provide for other (and often more used) options. Article II (2) of the New York Convention thus allows an arbitration agreement *contained in an exchange of letters or telegrams*.⁵² From the wording of Article II (2) of the New York Convention it might appear that this provision must be interpreted only as meaning that other ways than an arbitration agreement (handwritten) signed by the parties or contained in the letters or telegrams are not possible. Such an interpretation, however, would be conformed to the time of the creation of the New York Convention (1958), but would no longer stand at present. Article 2 (2) of the New York Convention must in the light of Article 7(2) to (4) of the UNCITRAL Model Law also to be interpreted as meaning that the New York Convention is not an exhaustive list of options complying with the written form, but certainly includes and allows the conclusion of an arbitration agreement also by electronic means of communication.⁵³ This only correct conclusion in today's electronic world follows not only from the UNCITRAL Model Law itself,⁵⁴ but also from

prostor.cz/clanky/obcanske-pravo/k-vyklad-pravnich-jednani-ii (accessed on 10 November 2020).

- 49 See, for example, MELZER, Filip, KORBEL, František. In MELZER, Filip, TÉGL, Petr a kol. *Občanský zákoník – velký komentář. Svazek III – § 419–654*. Praha: Leges, 2014, p. 635 et seq.; SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 38.
- 50 CZERNICH, Dietmar. *New Yorker Schiedsübereinkommen. UN-Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche*. Wien: LexisNexis, 2008, p. 18.
- 51 KOLLER, Christian. Die Schiedsvereinbarung. In LIEBSCHER, Christoph, OBERHAMMER, Paul, RECHBERGER, Walter H. (eds.). *Schiedsverfahrensrecht*. Band I. Wien, New York: Springer, 2012, p. 228.
- 52 Regarding the equivalence of telegrams and telex see decision of the Austrian Supreme Court (Oberster Gerichtshof) of 17 November 1971, Ref. No. 8 Ob 233/71.
- 53 Similarly NAGEL, Heinrich, GOTTWALD, Peter. *Internationales Zivilprozessrecht*. 7th. Edition. Köln: Verlag Dr. Otto Schmidt, 2013, p. 850; LIONNET/LIONNET: *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit...*, p. 171; with further references and a number of specific case law see BORN, Gary B. *International Commercial Arbitration. Volume I*. Alphen aan den Rijn: Kluwer Law International, 2009, p. 597 et seq.
- 54 Article 7 (3, 4) of the UNCITRAL Model Law: 3. *An arbitration 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”*

the UNCITRAL report from the session of 19 June to 7 July 2006.⁵⁵ With Article II(2) of the New York Convention is almost identical (including the conclusions set out above) the provision contained in Article I(2)(a) of the European Convention, which, in addition to the arbitration agreement signed by the parties, admits the arbitration agreement *contained in an exchange of letters, telegrams, or in a communication by teleprinter* as well.⁵⁶

In national legislation, usually adopted or amended much later, we can find similar provisions, which, however, include modern means of communication in their explicit wording.⁵⁷ Thus, their application does not have to be inferred by interpretation and follows directly from the legal norm. According to section 3(1) of the Czech Arbitration Act the written form of the arbitration agreement is also preserved if it is concluded *by telegraph, telex or electronic means, which enable the capture of their content and the identification of the persons who concluded the arbitration agreement*. Section 4(3) of the Slovak Arbitration Act also considers a written arbitration agreement to be one that is contained *in a mutual written communication of the parties or has been concluded by electronic means that enable the capture of the content of the legal act and the person who performed the legal act*. The German ZPO in section 1031(1) as well as the Austrian ZPO in section 583(1) contain an almost identical wording, which also allows the arbitration agreement set out in *letters, telefax copies, telegrams, or other forms of transmitting messages as exchanged by the parties, and that ensure proof of the agreement by supporting documents*. Nor does the Swiss legislation contain any different provision in that regard. Whereas Article 358 of the Swiss ZPO speaks very briefly about necessity to have an arbitration agreement concluded *in writing or in any other form allowing it to be evidenced by text*, Article 178(I) of the Swiss Private International Law Act contains a somewhat more detailed provision, stating that the arbitration agreement must be concluded *in writing, by telegram, telex, fax or other form of transmission, which ensure proof of the agreement*

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.

55 Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session, UNCITRAL; available at: https://unctad.org/en/docs/a61d17_en.pdf (accessed on 10 November 2020).

56 See de la BRENA, Andrea, Article I: Scope of the Convention. In ZEILER, Gerold, SIWY, Alfred. *The European Convention on International Commercial Arbitration: A Commentary*. Alphen aan den Rijn: Kluwer Law International, 2018, p. 43 et seq.

57 See also Article 17(1) of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

by text.⁵⁸ Notwithstanding this difference, the practical implications of the two provisions are the same and are parallel norms.⁵⁹

As it follows from the stated above that, in addition to the narrowly defined concept of manually signed arbitration agreement as a separate document, the legal regulations quite correctly, and in accordance with the development of various technologies, admit an arbitration agreements that have been concluded in other ways. The choice of means of communication is typically irrelevant, and the list in the legislations is clearly declaratory, because it is primarily a matter of proving the conclusion of an arbitration agreement in writing.⁶⁰

As an equivalent alternative to the handwritten signature of an arbitration agreement is in many legal regulations also explicitly mentioned the possibility of an arbitration agreement contained in an exchange of letters.⁶¹ The exchange of unilateral statements (letters) that coincide in content is also sufficient. However, if only one party confirms in writing the orally agreed arbitration agreement or sends the text of the agreement with the arbitration clause, such situation will no longer be in accordance with the above provisions; the emphasis is here on the exchange of letters, hence the active action (and will) of both parties.⁶² Whether the exchanged letters must be (by hand) signed is questionable, and this issue is not clearly seen.⁶³

However, the condition of written form is also fulfilled if the arbitration agreement is concluded by other means – typically means of long-distance communication, which enable the capture of the content and identification of the persons who concluded the arbitration agreement, or proving that an arbitration

58 The written arbitration agreement pursuant to Article 358 of the Swiss ZPO is determined identically to the prorogation clause under Article 17 of the Swiss ZPO.

59 See decision of the Swiss Federal Tribunal (Bundesgericht) of 9 March 2016, Ref. No. 4A 618/2015.

60 LACHMANN: *Handbuch für die Schiedsgerichtspraxis...*, p. 97; MÜNCH/KRÜGER/RAUSCHER: *Münchener Kommentar zur Zivilprozessordnung...*, p. 140.

61 Article II(2) of the New York Convention, Article I(2)(a) of the European Convention, section 1031(1) of the German ZPO, section 583(1) of the Austrian ZPO, section 4(3)(a) of the Slovak Arbitration Act.

62 See, for example, decision of the Bavarian Supreme Court in Munich (Bayerisches Oberstes Landesgericht) of 12 December 2002, Ref. No. 4Z Sch 16/02; decision of the German Provincial Court of Appeal in Munich (OLG München) of 23 November 2009, Ref. No. 34 Sch 13/09.

63 For the condition of signature or the possibility of the absence of a signature, see e.g. SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 38, 389; SCHLOSSER: *Das Recht der Internationalen privaten Schiedsgerichtsbarkeit...*, p. 270 et seq.; ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. 3rd edition. Praha: Wolters Kluwer, 2013, p. 169 et seq. The additionally expressed consent will also be sufficient; see decision of the German Provincial Court of Appeal in Köln (OLG Köln) of 18 Mai 1992, Ref. No. 19 U 22/92; decision of the Swiss Federal Tribunal (Bundesgericht) of 16 January 1995, Ref. No. BGE 121 III 38; KOLLER, Christian. *Die Schiedsvereinbarung*. In LIEBSCHER/OBERHAMMER/RECHBERGER: *Schiedsverfahrensrecht...*, p. 229 et seq.

agreement has been concluded.⁶⁴ These are often somewhat outdated and now almost unused and often unusable means such as telegraph, fax or telex, which are, however, still contained in the relevant provisions.⁶⁵ In the vast majority of cases, however, in today's world of modern communications, other means of electronic or technical communication, such as e-mail, will be used. In its § 583 (1), the Austrian ZPO even, as one of the few, explicitly mentions the possibility of concluding an arbitration agreement precisely by e-mail. All these means of communication from radio waves to the virtual world are also an equivalent alternative to the handwritten signing of an arbitration agreement. In short, modern technologies had to find their way into the relevant provisions and the individual legal regulations are very similar (or the same) in this respect.⁶⁶ Without them, it would be hardly possible today to speak of arbitration as an effective alternative, and the popularity of arbitration (often damaged) would certainly suffer greatly. The result of these data communications is always a textual, ie. legible, visually accessible arbitration agreement. Here, too, the proposal and acceptance do not have to be contained in one "document", or e-mail, but confirmation in mutual communication is again a necessary condition.⁶⁷ For example, the Swiss legislation does not require for any way of concluding an arbitration agreement the exchange of documents, deeds, emails, etc.; however, any proof of consent to the arbitration agreement will be provided mainly by mutual communication.⁶⁸

As the action taken by these means is also considered to be in writing, the resulting text should of course also be signed.⁶⁹ This conclusion follows, for example, from the Czech Civil Code, which stipulates that legal acts made elec-

64 See section 3(1) of the Czech Arbitration Act, section 4(3)(b) of the Slovak Arbitration Act, section 562(1) of the Czech Civil Code.

65 For example, the Czech Post abolished the possibility of sending telegrams from April 1, 2010.

66 See section 3(1) of the Czech Arbitration Act, section 1031(1) of the German ZPO, section 583(1) of the Austrian ZPO, section 4(3)(a) of the Slovak Arbitration Act, Article 178(1) of the Swiss Private International Law Act, Article II(2) of the New York Convention in conjunction with Article 7(2) to (4) of the UNCITRAL Model Law.

67 For mutual communication as a necessary condition, see also VOIT, Wolfgang. In MUSIE-LAK: *Kommentar zur Zivilprozessordnung...*, p. 2429; decision of the Bavarian Supreme Court in Munich (Bayerisches Oberstes Landesgericht) of 12 December 2002, Ref. No. 4Z Sch 16/02.

68 For example, MÜLLER, Christoph, RISKE, Olivier. Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 178 [Arbitration agreement]. In ARROYO: *Arbitration in Switzerland...*, p. 80.

69 Cf. e.g. RIEGLER, Stefan, PETSCHKE, Alexander, FREMUTH-WOLF, Alice, LIEBSCHER, Christoph. *Arbitration Law of Austria: Practice and Procedure*. Huntington, New York: Juris Publishing, 2007, p. 146 et seq.; MÜLLER, Christoph, RISKE, Olivier. Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 178 [Arbitration agreement]. In ARROYO: *Arbitration in Switzerland...*, p. 74; decision of the Austrian Supreme Court (Oberster Gerichtshof) of 29 March 2006, Ref. No. 7 Ob 64/06x; decision of the German Provincial Court of Appeal in Munich (OLG München) of 12 October 2009, Ref. No. 34 Sch 20/08.

tronically shall be signed in accordance with special regulations.⁷⁰ However, the approach to the issue of signing electronic communications is not uniform between states, or even within a single country, and it is possible to meet both the views that require a signature and those that do not insist on it.⁷¹

Precisely for the purpose of electronic communication, the so-called electronic signature has been introduced, which is currently, for example, in the Czech Republic regulated by Act No. 297/2016 Coll., on trust services for electronic transactions.⁷² This act was adopted in connection with Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.⁷³ In accordance with Article 3 (10) of that regulation, ‘*electronic signature*’ means *data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign*. The legislations usually distinguish between several types of electronic signatures.⁷⁴ According to Czech law, particularly relevant for the purposes of concluding an arbitration agreement will be the regulation contained in the section 7 of the Czech Act No. 297/2016 Coll. This provision stipulates that the following may be used for signing with an electronic signature: *advanced electronic signature, recognized electronic signature, or other type of electronic signature, if an electronic document is signed, through which legal action in a manner other than the manner specified in section 5 or 6(1) takes place*.⁷⁵ It is this “other type of electronic signature”, ie the so-called “plain” electronic signature, or just electronic signature, that will represent the most used option, and for a defined range of relationships it is completely equal to “higher” forms of electronic signature.⁷⁶ A document – an arbitration agreement – containing such a signature will then be considered as an act made in writing, just as it

70 Section 561(2) of the Czech Civil Code; see also section 40 (4 and 5) of the Slovak Civil Code.

71 See with other references e.g. HAUSMANINGER, Christian. § 583. In FASCHING, Hans W., KONECNY, Andreas. *Kommentar zu den Zivilprozessgesetzen. 4. Band. 2. Teilband: §§ 577–618 ZPO*, 3rd edition. Wien: Manz, 2017, marg. 56; see also footnote 63.

72 In Slovakia, for example, Act No. 272/2016 Coll., on Trust Services for Electronic Transactions in the Internal Market and amendment of certain acts (Trust Services Act).

73 OJ L 257, 28. 8. 2014, p. 73–114.

74 These are a qualified electronic signature, an advanced electronic signature based on a qualified certificate for electronic signature, an advanced electronic signature, and a so-called “plain” electronic signature. For the Czech republic see the document from the Ministry of the Interior of the Czech Republic: *Metodický pokyn k elektronickým podpisům a pečetím pro veřejnoprávní původce*, 12 April 2019, available at: <http://www.mvcr.cz/soubor/metodicky-material-k-problematice-pecetni-zsvd.aspx> (accessed on 10 October 2020).

75 The Slovak Act No. 272/2016 Coll. does not contain a similar provision.

76 Article 25 (1) of the Regulation (EU) No 910/2014.

would have been signed by hand;⁷⁷ many previously taken approaches will no longer be applicable under the current regulation.⁷⁸

In view of the very general definition of „other type of electronic signature” mentioned above, this concept needs to be specified in more detail. In the doctrine, there are several possible categories that are considered to be a plain electronic signature.⁷⁹ These include, for example, writing a name in an email; displaying the sender’s name in an email address; entering a PIN number; so-called ‘click wrap method’, where consent is expressed by clicking a mouse in an electronic environment on the box I agree, etc.; adding a scanned handwritten signature to an electronic document, or handwritten signature of a printed document, its scanning and electronic sending. However, the use of such means will always depend on the approach of national courts and individual legal orders and the conditions that are imposed on the form of the arbitration agreement when concluding by the means of electronic communication (see above).⁸⁰ The purpose is to make the acting person identifiable (determinable). However, the identification of the acting persons may also be based on other factors, such as whether the main contract, which contained an arbitration clause, is/was performing/performed; whether payment was made from a specific account of the person or by card by entering a unique PIN; whether the communication was made regularly from the given email address, etc.

However, none of the discussed regulations stipulates – with the exception of arbitration agreements in consumer disputes under the German ZPO – that an electronic signature must be in a “higher” form of electronic signature, so these “plain” means will also be permissible and sufficient.⁸¹ Otherwise, the electronic form of the arbitration agreement would be severely disadvantaged compared to

77 See also the Explanatory memorandum to section 7 of the Czech Act No. 297/2016 Coll., which for private law relations states, that it is possible to use *all types of electronic signatures known to Regulation eIDAS, ie electronic signature, advanced electronic signature, advanced electronic signature based on a qualified certificate for electronic signature or a qualified electronic signature. The Act thus extends parity with a manual signature to these types of electronic signatures as well.*

78 E.g. Maštálka, Ivan. Uzavírání rozhodčí doložky/smlouvy na Internetu. In: *IT právo*, available at: <http://www.itpravo.cz/index.shtml?x=128493> (accessed on 10 October 2020); judgment of the Czech Supreme Court (Nejvyšší soud) of 29 January 2009, Ref. No. 30 Cdo 1230/2007.

79 See MASON, Stephen. Informal Debate on the Issues Relating to Terminology and Clarification of Concept in Respect of the EU e-Signature Legislation, In: *SCRIPTed* [online], 2012, č. 9/1, p. 84, available at: <http://script-ed.org/?p=327> (accessed on 15 November 2020).

80 Cf. e.g. RABAN, Přemysl. *Alternativní řešení sporů, arbitráž a rozhodčí v České a Slovenské republice a zahraničí*. Praha: C. H. Beck, 2004, p. 63.

81 Similarly HUČKOVÁ, Regina, TREŠČÁKOVÁ, Diana. *Zákon o rozhodcovskom konaní – komentár*. Bratislava: Wolters Kluwer, 2018, p. 40 et seq.

a handwritten signed arbitration agreement, since there is no verification of the signature required.⁸²

In this context and with regard to the autonomy of the parties, it is also necessary to take into account the principle regulated, for example, in section 574 of the Czech Civil Code that legal act should be considered rather valid than invalid,⁸³ and there is no reason, why this principle should not be applicable to arbitration agreements.

2.2.3 Arbitration agreement concluded by reference

While the previous options were based on a direct, active conclusion of the arbitration agreement, for example in the form of a separate document or as one of the provisions of the main contract, the legislation explicitly allows for yet another way of concluding an arbitration agreement. The arbitration agreement does not have to be concluded directly between the parties as a result of a separate process; valid may be also an arbitration agreement concluded in the form of a reference in the main written contract to another document, rules and conditions, etc., which contain a valid arbitration agreement. The arbitration agreement is thus not contained in the main agreement directly, but indirectly through the documents to which it is referred. The legal orders define differently the way in which an arbitration agreement concluded in this way becomes valid and will so correspond to the written form. However, from a practical point of view, there are no major differences between the various national regulations.

The admissibility of this method of concluding an arbitration agreement is not clearly accepted in the context of the New York Convention.⁸⁴ On the other hand, it should be noted that with regard to Article VII(1) of the New York Convention⁸⁵ and the principle of the so-called most favourable right contained

82 See Article 25(1) of the Regulation (EU) No 910/2014; BĚLOHLÁVEK: *Zákon o rozhodčím řízení...*, p. 236.

83 To the principle *potius valeat actus quam pereat* (simply also *in favorem negotii*) see, for example, decision of the Czech Constitutional Court (Ústavní soud) of 3 August 2011, Ref. No. II. ÚS 3381/10; judgment of the Czech Supreme Court (Nejvyšší soud) of 23 February 2012, Ref. No. 30 Cdo 2146/2010; JAKUBÁČ, Róbert, JAKUBÁČ, Zdenko. *Judikatura vo veciach neplatnosti právnych úkonov. 1. diel*. Bratislava: Wolters Kluwer, 2018, p. 40 et seq.

84 See Deutscher Bundestag, Drucksache 13/5274, *Gesetzentwurf: Entwurf eines Gesetzes zur Neuordnung des Schiedsverfahrensrechts (Schiedsverfahrens-Neuregelungsgesetz – Schieds-VfG)*, 12 July 1996, p. 37, available at: <http://dipbt.bundestag.de/doc/btd/13/052/1305274.pdf> (accessed on 10 October 2020); BĚLOHLÁVEK: *Zákon o rozhodčím řízení...*, p. 237 et seq.; decision of the German Federal Court of Justice (Bundesgerichtshof) of 21 September 2005, Ref. No. III ZB 18/05.

85 Article VII (1) of the New York Convention: *The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.*

therein,⁸⁶ the application of other international treaties or national law, which are more favourable to the situation, is allowed.⁸⁷ Although this provision does not explicitly mention the form of the arbitration agreement, it is commonly applied to this issue and an arbitration agreement which, although does not comply with the New York Convention, but satisfies the lighter conditions of the law applicable to the arbitration agreement must also be regarded as valid.⁸⁸ This does not necessarily have to be directly about the issue of recognition and enforcement of a foreign arbitral award, but, for example, about the objection of lack of jurisdiction of general courts.⁸⁹

However, the conclusion of an arbitration agreement by reference is, for example, fully in line with the provision of Article 7(6) of the UNCITRAL Model Law, to which most of the national regulations also correspond. For the Czech legislation, the basic criterion is the consent of the party to the content of the arbitration agreement concluded in this way. Section 3(2) of the Czech Arbitration Act provides that the arbitration clause, which *is incorporated in the terms and conditions governing the main contract to which the arbitration clause applies, the arbitration clause is also considered validly negotiated if a written offer of the main contract with the arbitration clause was accepted by the other party in any manner clearly indicating the latter party's consent with the terms of the arbitration agreement.* The German, Austrian and Slovak regulations are equally based on whether the document to which it is referred, and which contains the arbitration agreement has become part of the (main) contract. Section 4(4) of the Slovak Arbitration Act states that *a reference in a contract or the parties' written communication to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided the reference is such as to make that clause, in the intention of the parties, part of that contract.* Section 1031(3) of the German ZPO similarly states that an arbitration agreement is validly negotiated where the main agreement refers to a document containing an arbitration clause, if, based on such a reference, that clause has become part of the main agreement.⁹⁰

86 See decision of the Czech Supreme Court (Nejvyšší soud) of 16 August 2017, Ref. No. 20 Cdo 5882/2016.

87 More favourable, of course, in relation to the party seeking the recognition of the award, and not to the party wishing to oppose the award, as the aim is to simplify the movement of arbitration awards.

88 Decision of the German Federal Court of Justice (Bundesgerichtshof) of 21 September 2005, Ref. No. III ZB 18/05; judgement of the German Federal Court of Justice (Bundesgerichtshof) of 8 June 2010, Ref. No. XI ZR 349/08.

89 See judgement of the German Federal Court of Justice (Bundesgerichtshof) of 25 January 2011, Ref. No. XI ZR 350/08; SCHÜTZE: *Schiedsgericht und Schiedsverfahren...*, p. 77.

90 The provision of section 583 (2) of the Austrian ZPO is almost identical to that above-mentioned German provision; see also SCHWARZ, Franz T., KONRAD, Christian W. *The Vienna Rules: A Commentary on International Arbitration in Austria*. Alphen aan den Rijn: Kluwer Law International, 2009, p. 26 et seq.; see e.g. MALACKA, Michal. *Výbrané aspekty rozhodčího řízení při VIAC*. In: Zborník z medzinárodnej vedeckej konferencie Bratislavské právnické fórum 2015, Právne nároky zmluvných strán a ich uplatňovanie

It follows from those provisions that this method of concluding an arbitration agreement applies only to an arbitration clause, but as already mentioned, this division does not have to be understood in the same way in all legal orders.⁹¹ The Swiss legislation does not explicitly regulate this issue, but this method is in accordance with Swiss law, if it is possible to prove in text form consent also to the subject of the reference.⁹²

These terms, documents to which reference is made may be, for example, previous contracts between the given entities, arbitration rules,⁹³ or in business relations ordinary (general) commercial terms.⁹⁴ It is not necessary to refer specifically to the arbitration clause.⁹⁵ It is typical for business relations that arbitration agreements are concluded by reference to various conditions. Whether consent is given to the content of the arbitration agreement, or whether the arbitration clause has become part of the main contract, will also be assessed in the light of the parties' practices, business practices or the industry.⁹⁶ In view of the wording of those provisions, no written confirmation, or, for example, the mutuality required for the exchange of letters, etc. is necessary. The existence of apparent consent to the content of the arbitration agreement, or the fact that the arbitration agreement has become a part of the main contract may also result from the behavior of the parties by the fact that the main contract is/was performing/performed, etc.⁹⁷

It will certainly suffice if such terms are attached to the main contract or, for example, printed on the other side of the main contract.⁹⁸ A reference to terms that are not attached to the main contract or were not available to the parties at the time of signing may be problematic.⁹⁹ In such cases it will be necessary to examine other circumstances such as knowledge of the conditions from previous relationships, commonality, respectively the unsurprising nature of the arbitration clause in such documents, affiliation to the industry that normally works

v súdnom a rozhodcovskom konaní – Legal Interests of Contracting Parties and their Enforcement in Judicial and Arbitral Proceedings [online]. Bratislava: Právnická fakulta Univerzity Komenského v Bratislave, 2015, p. 1402–1408.

91 See section “I. Introduction” of this article.

92 MÜLLER, Christoph, RISKE, Olivier. Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 178 [Arbitration agreement]. In ARROYO: *Arbitration in Switzerland...*, p. 80.

93 BAUMBACH/LAUTERBACH/ALBERS/HARTMANN: *Zivilprozessordnung...*, p. 2686.

94 Judgment of the Czech Supreme Court (Nejvyšší soud) of 22 September 2009, Ref. No. 23 Cdo 1888/2007.

95 See also HAUSMANINGER, Christian. § 583. In FASCHING/KONECNY: *Kommentar zu den Zivilprozessgesetzen...*, marg. 74.

96 SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 41.

97 Similarly, for example, BĚLOHLÁVEK: *Zákon o rozhodčím řízení...*, p. 242.

98 See section 273 of the Slovak Commercial Code (Act. No. 513/1991 Coll.).

99 SCHLOSSER: *Das Recht der Internationalen privaten Schiedsgerichtsbarkeit...*, p. 271, 277; BĚLOHLÁVEK: *Zákon o rozhodčím řízení...*, p. 241; SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 390; VOIT, Wolfgang. In MUSIELAK: *Kommentar zur Zivilprozessordnung...*, p. 2430.

with this conditions, etc.¹⁰⁰ However, it is not possible to refer to the arbitration clause contained in documents that are handed over during performance of the contract, such as delivery notes, invoices, etc.¹⁰¹ It is sometimes even inferred that it does not even have to be an explicit reference to any conditions, if this is common for the entities, the relationship and the industry.¹⁰²

In addition to the above, the German legislation also allows in section 1031(2) of the German ZPO for another “mediated” conclusion of an arbitration agreement. The arbitration agreement may be contained in another document/email/letter, which is transmitted by one party to another party, or by a third party to both parties; if the content of this document becomes the main content of the contract in accordance with normal/ordinary relation without a timely objection, it is a validly concluded arbitration agreement.¹⁰³ This provision therefore allows an arbitration agreement to be concluded by the silence of a party on a document containing an arbitration agreement sent by the other party,¹⁰⁴ provided that such a procedure corresponds, for example, to industry practice.¹⁰⁵ If the recipient of this draft does not wish to be bound by such an arbitration agreement, he must express his disagreement within a reasonable time. It is apparent from the above that this method comes into consideration almost exclusively in the course of business relations. Similarly, the Slovak Arbitration Act contains a specific provision on the conclusion of an arbitration agreement by written access to a contract, that includes a valid arbitration clause, under a special law.¹⁰⁶ According to section 4(5) of the Slovak Arbitration Act, the written form of arbitration agreement is preserved even in these cases; this provision affects, for example, arbitration agreements incorporated into a deed of association, founding agreement, etc.

100 See decision of the German Provincial Court of Appeal in Schleswig (OLG Schleswig) of 30 March 2000, Ref. No. 16 SchH 5/99; MÜLLER, Christoph, RISKE, Olivier. Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 178 [Arbitration agreement]. In ARROYO: *Arbitration in Switzerland...*, p. 90 et seq.

101 LACHMANN: *Handbuch für die Schiedsgerichtspraxis...*, p. 98.

102 See MÜNCH/KRÜGER/RAUSCHER: *Münchener Kommentar zur Zivilprozessordnung...*, p. 143. However, such a possibility rejects, for example, VOIT, Wolfgang. In MUSIELAK: *Kommentar zur Zivilprozessordnung...*, p. 2430.

103 E.g. VOIT, Wolfgang. In MUSIELAK: *Kommentar zur Zivilprozessordnung...*, p. 2429.

104 This is, for example, the so-called confirmation of the trader (*kaufmännisches Bestätigungsschreiben*) under German law.

105 Deutscher Bundestag, Drucksache 13/5274, *Gesetzentwurf: Entwurf eines Gesetzes zur Neuordnung des Schiedsverfahrensrechts (Schiedsverfahrens-Neuregelungsgesetz – Schieds-VfG)*, 12 July 1996, p. 36, available at: <http://dipbt.bundestag.de/doc/btd/13/052/1305274.pdf> (accessed on 10 October 2020).

106 E.g. section 115 of The Slovak Commercial Code.

2.2.4 Arbitration agreement in the “stricter” written form

Although this will not be the most common way of concluding an arbitration agreement, as it will be contrary to the speed and simplicity of legal contact, it is possible to conclude an arbitration agreement, for example in the form of a notarial deed.¹⁰⁷ If a simple written form also meets the conditions of the form of an arbitration agreement, the same conclusion must, of course, also apply to a stricter written form. Legal orders, logically, do not usually explicitly mention this possibility. An exception in this context is the German ZPO, which does so for a slightly different reason. In section 1031(5) of the German ZPO, is explicitly mentioned recording of an arbitration agreement by a notary as an alternative enabling, within the framework of an arbitration agreement in consumer disputes, the negotiation even of other matters than those relating to arbitration.

2.2.5 Arbitration agreement with a consumer

The issue of the form of an arbitration agreement takes on a different dimension in a situation when it comes to disputes in which one of the parties acts as a consumer. The difference between a ‘consumer’ and a ‘non-consumer’ dispute lies in the fact that the arbitration agreement in consumer disputes is subject to stricter conditions.

Although the Czech legal system no longer allows consumer disputes to be resolved within arbitration, it is necessary to look at the issue of the form of arbitration agreements also from the perspective of these disputes. Other legal systems allow the resolution of consumer disputes in arbitration, and after all, even in the Czech Republic, consumer disputes were arbitrable. However, with effect from 1 December 2016, in accordance with Czech Act No. 258/2016 Coll., amending certain laws in connection with the adoption of the Consumer Credit Act, disputes arising from contracts between consumer and entrepreneur were excluded from decision-making before arbitrators.¹⁰⁸ With effect until 30 November 2016, however, the section 3 of the Czech Arbitration Act also contained paragraphs 3 to 6, which regulated the issue of arbitration agreements in consumer disputes and which, in accordance with consumer protection, imposed stricter conditions on arbitration agreements.¹⁰⁹ By tightening the conditions, the leg-

107 See decision of the Czech Supreme Court (Nejvyšší soud) of 30 August 2012, Ref. No. 33 Cdo 1302/2011; MÜNCH/KRÜGER/RAUSCHER: *Münchener Kommentar zur Zivilprozessordnung*..., p. 140.

108 See RYŠAVÝ, Lukáš: *Nezávislost a nestrannost rozhodce*. Praha: C. H. Beck, 2018, p. 68 et seq.

109 Section 3 (3 to 5) of the Czech Arbitration Act(*old version*): 3. Where an arbitration agreement is concluded for the settlement of disputes arising from consumer contracts, it must be concluded separately and not as part of the conditions governing the main contract; otherwise it is invalid.

4. In good time before the conclusion of the arbitration clause, the trader shall provide the consumer with an appropriate explanation in order to be able to assess the consequences for him of concluding the arbitration clause. An appropriate explanation means an expla-

islator reacted to the plight state of arbitration in consumer disputes.¹¹⁰ In the Czech regulation, in this context there is no longer need to examine the question of who is a consumer and who is an entrepreneur,¹¹¹ or when it is a consumer dispute and when it is not,¹¹² but at the same time consumers are prevented – even if they wanted to – from resolving their dispute before an arbitrator.

Legislations that explicitly allows arbitration in business-to-consumer relations are, for example, Germany¹¹³ or Austria¹¹⁴. In Slovakia, consumer disputes do not fall within the scope of the Arbitration Act,¹¹⁵ but consumer disputes can be resolved before arbitrators on the basis of a special Act on Consumer Arbitration.¹¹⁶ For example, the Swiss legal order does not contain any provisions (in a positive or negative sense) concerning arbitration in consumer disputes.¹¹⁷

nation of all the consequences of the arbitration clause.

5. An arbitration clause concluded in accordance with paragraph 3 must also contain true, accurate and complete information about: a) arbitrators or that the permanent arbitral tribunal will decide, b) the manner of initiating and the form of conducting the arbitration proceedings, c) the remuneration of the arbitrator and the expected types of costs that the consumer may incur in arbitration and the rules for their award, d) the place of the arbitration, e) the manner in which the arbitration award is served on the consumer; and f) that the final arbitral award is enforceable.

6. If the arbitration clause entrusts the settlement of the dispute to a permanent arbitral tribunal, the requirement referred to in paragraph 5 is also met by reference to the statutes and rules of permanent arbitral tribunals issued pursuant to section 13.

110 He did so on the basis of the amendment, that has become devoid of purpose, of the Czech Arbitration Act implemented by Act No. 19/2012 Coll., amending Act No. 216/1994 Coll., on arbitration and the enforcement of arbitration awards and other related acts.

111 See LACHMANN: *Handbuch für die Schiedsgerichtspraxis...*, p. 92 et seq.; VOIT, Wolfgang. In MUSIELAK: *Kommentar zur Zivilprozessordnung...*, p. 2431.

112 E.g. Article 2(b) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; similarly Article 2(1) of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. Cf. e.g. SCHÜTZE: *Schiedsgericht und Schiedsverfahren...*, p. 73 et seq.

113 See section 1031(5) of the German ZPO.

114 See section 617 of the Austrian ZPO.

115 Cf. section 1(4) of the Slovak Arbitration Act.

116 Slovak Consumer Arbitration Act (Act No. 335/2014 Coll., on Consumer Arbitration and the amendment and supplementing of certain acts). On the issue of arbitration agreements with consumers, see MASLÁK, Marek. *Zákon o spotřebitelskom rozhodcovskom konaní – komentár*. Bratislava: Wolters Kluwer, 2017, p. 40 et seq.

117 See as examples, BELL, Katherine. *Revision des Schweizerischen Internationalen Schiedsrechts*; available at: https://www.swlegal.ch/files/media/filer_public/f7/c6/f7c6d452-dcf3-45b3-9cfa-d46f3850487a/sw_newsletter_april_2019_german.pdf (accessed on 10 November 2020); RÜEDI, Hubert, AMBAUEN, Irma. Gerichtsstands- und Schiedsklauseln in Verträgen. *KMU-Magazin*, Nr. 6/2016, p. 68.

In general, it can be stated that in the legal systems that allow arbitration in consumer disputes, arbitration agreements are subject to stricter conditions in terms of their form. The consumer is protected in several ways.¹¹⁸ Typically, a condition of a separate agreement is required, which must be signed by both parties. It is therefore not possible for the arbitration agreement to be included, for example, in the delivery terms. The consumer is at the same time also protected against the conclusion of the arbitration agreement by reference to the (general) terms and conditions.¹¹⁹ It does not have to be a separate document, but it is necessary that the arbitration agreement be clearly separated from the main contract and separately signed.¹²⁰ In addition, some national regulations explicitly emphasize in this context that the arbitration agreement must be signed by the consumer in their own hand.¹²¹ This practically excludes the possibility of concluding an arbitration agreement other than in the presence of the consumer. In addition, the German ZPO requires the handwritten signature of both parties in this context;¹²² therefore a facsimile or initials would not be sufficient.¹²³

As consumers are now increasingly concluding various contracts over the internet, there is indeed no relevant reason why they couldn't adjust in this way also the way of resolving their disputes.¹²⁴ Nevertheless, section 1031(5) of the German ZPO at the same time also provides that, in such a case, section 126a of the German Civil Code¹²⁵ must be complied with. This provision requires, for the validity of the arbitration agreement, an advanced electronic signature, which is, however, not very often encountered in consumer matters in practice. It will therefore be difficult under German law to conclude an arbitration agreement in consumer disputes by e-mail.

118 See section 1031(5) of the German ZPO, section 617(2) of the Austrian ZPO, section 3(2) of the Slovak Consumer Arbitration Act.

119 SCHÜTZE: *Schiedsgericht und Schiedsverfahren...*, p. 73.

120 LACHMANN: *Handbuch für die Schiedsgerichtspraxis...*, p. 99. According to the German ZPO, the condition of separately signing and the prohibition of other provisions does not have to be fulfilled if the arbitration agreement is recorded by a notary. The risk of submitting to arbitration without the consumer wishing is excluded here by the notary's duty to inform. A similar conclusion must apply to court settlement. See SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 44 et seq.; SCHÜTZE: *Schiedsgericht und Schiedsverfahren...*, p. 75.

121 Section 617(2) of the Austrian ZPO.

122 Section 1031(5) of the German ZPO. The conclusion of an arbitration agreement through a representative in consumer disputes allows e.g. LACHMANN: *Handbuch für die Schiedsgerichtspraxis...*, p. 99; to be insufficient considers it, e.g. BAUMBACH/LAUTER-BACH/ALBERS/HARTMANN: *Zivilprozessordnung...*, p. 2687.

123 VOIT, Wolfgang. In MUSIELAK: *Kommentar zur Zivilprozessordnung...*, p. 2432.

124 See section 3(2) of the Slovak Consumer Arbitration Act.

125 German Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), last amended by Article 2 of the Act of 12 November 2020 (Federal Law Gazette I page 2392).

In addition, an arbitration agreement with a consumer may not contain any arrangements other than those relating to the arbitration proceedings.¹²⁶ In addition to an explicit agreement establishing the jurisdiction of arbitrators (and thus excluding the jurisdiction of the ordinary courts), it may contain arrangements such as an agreement on the place of arbitration, composition of the arbitration tribunal, etc. If it included arrangements unrelated to arbitration, such an arbitration agreement would be invalid. The purpose is that the arbitration agreement is not intentionally hidden among other arrangements. An exception in this context is the recording of the arbitration agreement by a notary according to the German ZPO (see the previous subchapter 2.2.4).

Section 617(1) of the Austrian ZPO even allows a valid arbitration agreement in consumer matters to be concluded only after a dispute has arisen.

Generally, failure to comply with the form laid down by law (or agreed upon) is traditionally associated with the invalidity of such a legal act. Therefore, if the parties want to conclude a valid contract (arbitration clause), they are forced to comply with the special conditions of the form of legal act, which, however, limits their freedom in what way, respectively in what form they wish to conclude their legal act. However, it must be emphasized that the limitation of the parties' autonomy in this matter pursues, for example, the purpose of legal certainty, protection against hasty and ill-considered acting, etc., as described above, and therefore cannot be understood as something completely negative. The invalidity of legal acts due to non-compliance with the prescribed form is known primarily from the provisions of the Civil Codes, although it is often regulated differently.¹²⁷ However, even if, depending on the nature of the arbitration agreement, we completely reject its substantive-law overlap, the same conclusion also applies on the basis of the (often explicit) regulation contained in the provisions of the laws governing arbitration. Of course, the provisions governing arbitration take precedence over those of the Civil Codes in this matter. Although the invalidity of an arbitration agreement is the most common consequence of non-compliance with the prescribed form, it is also necessary for the sake of completeness to state that not all legal orders have to approach this issue in the same way.¹²⁸

As a consequence of non-compliance with the written form, the invalidity of the arbitration agreement is explicitly provided, for example, by section 3(1) of the Czech Arbitration Act or section 4(2) of the Slovak Arbitration Act. An arbitration agreement that does not comply with the form is also invalid under

126 Section 1031(5) of the German ZPO, section 617(2) of the Austrian ZPO, section 3(2) of the Slovak Consumer Arbitration Act.

127 section 125 of the German Civil Code; section 1432 ABGB (StF: JGS Nr. 946/1811) etc. On the issue of absolute or relative invalidity, see e.g. ZUKLÍNOVÁ, Michaela. *Forma právních jednání – I.*, available at: <https://www.pravniprostor.cz/clanky/obcanske-pravo/vyklad-pravnich-jednani-i> (accessed on 10 November 2020).

128 Specific examples gives, for example, SCHLOSSER: *Das Recht der Internationalen privaten Schiedsgerichtsbarkeit...*, p. 263.

German law, although this is not explicitly stated in the German ZPO; whether the invalidity of the arbitration agreement follows alone from the provision of section 1031 of the German ZPO or only in conjunction with section 125 of the German Civil Code is viewed differently in theory, but from a practical point of view the invalidity of the arbitration agreement does not change in any way.¹²⁹ Failure to comply with the form of the arbitration agreement shall declare it invalid also under Swiss law, without any explicit provision,¹³⁰ or under the New York Convention.¹³¹ An invalid arbitration agreement may be ground for setting aside of an arbitration award.¹³²

However, as stated above, in accordance with the principle *potius valeat actus quam pereat*, it is necessary to look for the reasons why an arbitration agreement is valid rather than why an arbitration agreement is invalid. Invalidity in the matter of non-compliance with the form of legal act is according to the provisions contained in the Civil Codes considered relative invalidity,¹³³ and it will be shown that the same conclusion applies to the arbitration agreement.

If the arbitration agreement has not been validly concluded in terms of form, ie in accordance with the relevant legislation, this does not necessarily mean that the arbitration cannot take place in the context of this arbitration agreement. The principle of autonomy of the parties comes to the fore again, which can still “save” the arbitration, without the parties having to conclude a (new) arbitration agreement that corresponds to the specified form. Curing of formal defects is an institute that we encounter in practically all legislations, although it is regulated quite differently in individual legal orders.

Remedy of the lack of form of an arbitration agreement is explicitly regulated, for example, by the German and Austrian regulations.¹³⁴ The condition for remedy, which then occurs automatically, is that the defendant participates in the arbitration proceedings and acts in the case without objecting to the lack of jurisdiction of the arbitrators due to the lack of form of the arbitration agreement. It is not decisive whether the party knew that by appearing or acting in the case they establish the jurisdiction of the arbitrators, as the arbitrator has no duty to instruct in this regard.¹³⁵ The appearance or acting in the matter leads to

129 F.e. judgement of the German Federal Court of Justice (Bundesgerichtshof) of 19 Mai 2011, Ref. No. III ZR 16/11; MÜNCH/KRÜGER/RAUSCHER: *Münchener Kommentar zur Zivilprozessordnung...*, p. 133.

130 MÜLLER, Christoph, RISKE, Olivier. Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 178 [Arbitration agreement]. In ARROYO: *Arbitration in Switzerland...*, p. 80.

131 SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 389; see Article V(1) of the New York Convention.

132 Section 1059(2) Nr. 1(a) of the German ZPO; section 40(1)(a)(2) of the Slovak Arbitration Act; section 31(b) of the Czech Arbitration Act; section 611(2)(1) of the Austrian ZPO.

133 E.g. section 582 of the Czech Civil Code, section 40a et seq. of the Slovak Civil Code.

134 Section 1031(6) of the German ZPO, section 583(3) of the Austrian ZPO.

135 Decision of the German Provincial Court of Appeal in Munich (OLG München) of 1 June

a change, respectively cure the original arbitration agreement.¹³⁶ The defendant thus indicates that they agree to hearing of the dispute before the arbitrator, and at the same time expresses their consent to exclusion of the general courts from hearing and deciding the case. The complainant has already expressed their will by bringing the action before the arbitrator or arbitration tribunal. As is clear from the wording of those provisions, only the defects of the prescribed form are cured/remedied. If the invalidity of the arbitration agreement is thus objected to for other reasons, the defects will be remedied and the objection of non-compliance with the prescribed form cannot be raised later.¹³⁷ However, the remedying of defects applies only to the proceedings in question, even if the arbitration agreement potentially covers several disputes.

The remedy of the defect of form of an arbitration agreement is in the Slovak regulation divided into several provisions. In section 4(7) of the Slovak Arbitration Act, an arbitration agreement is also considered to be concluded in writing if its existence is asserted in the statement of claim and not denied by the respondent in the statement of defense. This provision not only provides for the remedying of an arbitration agreement concluded other than in writing, but also allows an agreement that originally might not exist is considered a written arbitration agreement, as its existence is actually claimed only by the complainant. At the moment when a written claim and response to a claim meet before the arbitrator, this is considered to be the conclusion of a written arbitration agreement for the subject matter of the dispute. However, according to the Slovak legislation, the defect of a written form can also be remedied by the parties declaring before the arbitrator into the protocol that they agree to the arbitration and submit to the jurisdiction of the arbitrator. Statements of the parties recorded in this way shall be considered as a valid arbitration agreement.¹³⁸ Even in the absence of such an express regulation, the remediation of the form of the arbitration agreement would still follow from the provisions of section 21(2) of the Slovak Arbitration Act, according to which it is possible to challenge the jurisdiction of the arbitral tribunal for invalidity of the arbitration agreement within the arbitral proceedings before or together with the first act in the proceedings.¹³⁹ Pursuant to Section 21(3) of this Act, it is possible to take into account a later objection if

2005, Ref. No. 34 Sch 5/05; SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 39.

136 Ibid, p. 40.

137 See decision of the German Federal Court of Justice (Bundesgerichtshof) of 29 June 2005, Ref. No. III ZB 65/04.

138 Section 4(6) of the Slovak Arbitration Act. However, this approach leads to a remedy of the defect of form of an arbitration agreement even according to German case law and literature; see with other references e.g. decision of the Bavarian Supreme Court in Munich (Bayerisches Oberstes Landesgericht) of 12 December 2002, Ref. No. 4Z Sch 16/02. For the Czech regulation, see ROZEHNALOVÁ: *Rozhodčí řízení...*, p. 175.

139 A similar provision is also included in section 1040 of the German ZPO or in section 592 of the Austrian ZPO; decision of the Slovak Supreme Court (Najvyšší súd) of 2 December 2008, Ref. No. 1 Nds 6/2008.

it is caused by a ground which the arbitral tribunal considers justified.¹⁴⁰ If the objection has not been raised or has been raised late, the defect of form will logically be cured. This approach coincides also with the Czech or Swiss regulation.

According to section 15(1) of the Czech Arbitration Act, the arbitrators themselves examine their jurisdiction based on an arbitration agreement, while the lack of jurisdiction may result from an invalid arbitration agreement. However, the invalidity of the arbitration agreement for non-compliance with the form will be examined by the arbitrators only on the defendant's objection, and the lack of jurisdiction of the arbitrators cannot, for that reason, be challenged by the party acting in the case without pleading the lack of jurisdiction. In the event of an objection, the validity of the arbitration agreement will be proved by the party who invokes its validity. In accordance with section 15(2) of the Czech Arbitration Act, a party may raise an objection to the invalidity of an arbitration agreement due to a defect of form only before or together with the first act in the proceedings concerning the merits of the case.¹⁴¹ The invalidity of an arbitration agreement for the defect of form can be objected, but not without further ado, also within the proceedings of setting aside of an arbitration award according to section 31(b) of the Czech Arbitration Act or within the recognition and enforcement of a foreign arbitral award pursuant to section 121(c) of the Czech Private International Law Act.¹⁴²

Like the Czech legislation, the Swiss one does not explicitly regulate the possibility of remedying the defect of form of an arbitration agreement. However, also under Swiss law, this possibility must be allowed, although it must be based on other (more general) provisions of the Swiss ZPO, respectively of the Swiss Private International law Act.¹⁴³ Specifically, it is Article 359 of the Swiss ZPO and Article 186 of the Swiss Private International law Act, which equally allows the plea of lack of jurisdiction of the arbitral tribunal, although under Article 359 of the Swiss ZPO, the invalidity of the arbitration agreement is one of the grounds for the lack of jurisdiction of the arbitrator, while the Swiss Private International law Act speaks only of the lack of jurisdiction of the arbitration tribunal without giving any grounds. Interestingly, the Swiss legislation refers to the raising of an objection before the hearing on the substance (*'vor der Einlassung'*).

Remediation of the defect of form of an arbitration agreement, or the impossibility of raising an objection of invalidity of the arbitration agreement for the ground after the party has acted in the matter will probably also be in accordance

140 Similarly Article V(1) of the European Convention.

141 See also section 1(3) of the Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic.

142 Decision of the Czech Supreme Court (Nejvyšší soud) of 16 April 2008, Ref. No. 32 Cdo 3186/2007; judgment of the Czech Supreme Court (Nejvyšší soud) of 27 July 2010, Ref. No. 32 Cdo 761/2009.

143 See judgement of the Swiss Federal Tribunal (Bundesgericht) of 9 March 2016, Ref. No. 4A_618/2015.

with the New York Convention. Although the New York Convention does not regulate this issue in any way, such conduct could be considered a breach of good faith (honesty), a violation of the prohibition of *venire contra factum proprium*.¹⁴⁴ The European Convention is clearer in this respect, since a party in accordance to Article V(1) may object the lack of jurisdiction of an arbitrator for the invalidity of an arbitration agreement on the grounds of defect of its form *during the arbitration proceedings, not later than the delivery of its statement of claim or defence relating to the substance of the dispute*.¹⁴⁵

However, whether the legal orders explicitly provide for the cure of a defect of form of an arbitration agreement, or whether this consequence results from other (general) provisions, it is essential, in the interests of legal certainty for the parties, that any uncertainty as to the form of the arbitration agreement is removed as soon as possible. To raise a plea of defect of form is therefore tied to a specific point in time, and the marginal moment is the hearing in the case, or first acting on the merit. The acting on the substance of the dispute must be understood as active action by which a party expresses its consent to the arbitration; this consent then results in writing from the minutes of the hearing.¹⁴⁶ In case of doubt, this consent may be recorded by the arbitrator and signed by the party.¹⁴⁷ The first acting in the case is also considered to be a respondent's written statement of defense, provided that the defendant has not pleaded failure to comply with the form of the arbitration agreement.¹⁴⁸ The exchange of documents from which it can be deduced that the parties wish the arbitration can also be regarded as acting in the case.¹⁴⁹ Mere silence or inactivity of a party cannot be considered as consent to the arbitration.¹⁵⁰ However, if a party does not agree with the arbitration, it is always appropriate to object to the invalidity of the arbitration agreement, because in the end it may happen that the arbitra-

144 SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 391; VOIT, Wolfgang. In MUSIELAK: *Kommentar zur Zivilprozessordnung...*, p. 2435; decision of the German Provincial Court of Appeal in Schleswig (OLG Schleswig) of 30 March 2000, Ref. No. 16 SchH 5/99.

145 The arbitrator may admit a later plea as to the arbitrator's jurisdiction if he if it considers the reasons for the delay to be justified; see Article V(1) of the European Convention.

146 See, for example, section 33 of the Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic.

147 E.g. section 4(6) of the Slovak Arbitration Act.

148 See VOIT, Wolfgang. In MUSIELAK: *Kommentar zur Zivilprozessordnung...*, p. 2433. Exceptions to the intention to act in a case where the party is acting purely for precautionary reasons, see section 1040(3) of the German ZPO; SCHÜTZE: *Schiedsgericht und Schiedsverfahren...*, p. 76; SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 39; judgment of the Czech Supreme Court (Nejvyšší soud) of 31 March 2009, Ref. No. 23 Cdo 2351/2007.

149 BAUMBACH/LAUTERBACH/ALBERS/HARTMANN: *Zivilprozessordnung...*, p. 2687.

150 Decision of the German Provincial Court of Appeal in Munich (OLG München) of 1 June 2005, Ref. No. 34 Sch 5/05; decision of the Bavarian Supreme Court in Munich (Bayerisches Oberstes Landesgericht) of 12 December 2002, Ref. No. 4Z Sch 16/02; decision of the Czech Supreme Court (Nejvyšší soud) of 31 August 2010, Ref. No. 20 Cdo 3284/2008; of 26 July 2011, Ref. No. 20 Cdo 1926/2011.

tion agreement is valid after all and the passivity of the party could have a major influence on the decision and the possibility of seeking annulment of the arbitration award.¹⁵¹

It has already been suggested that a fixed form of legal act, ie typically a written form, is rather a hindrance to simple and quick legal contact, since compliance with special conditions as to form presents additional difficulties for the parties.¹⁵² In view of the fact that arbitration is a typical way of resolving disputes in commercial relations,¹⁵³ and that in the case of necessary protection of other entities, such as consumers, special conditions are laid down on the form of an arbitration agreement to ensure such protection, it is not absolutely necessary to insist on the written form without further ado. However, it must be pointed out that in such a case there may be those negative consequences from which the fixed (ie written) form protects.

Thus, although the written form of an arbitration agreement is generally considered to be the most common way of establishing the jurisdiction of arbitrators, arbitration need not take place solely on the basis of a written arbitration agreement; however, this does not mean here the possibility of remedying the defect of form of an arbitration agreement (see above). International treaties and national regulations sometimes explicitly provide for the possibility that arbitration may take place, even if the arbitration agreement was concluded only orally, respectively has not been negotiated in writing.

The conclusion of an arbitration agreement other than in writing is expressly permitted, for example, by Article I(2)(a) of the European Convention, as it provides that in relations between States whose laws do not require that an arbitration agreement be made in writing, the term arbitration agreement shall mean any arbitration agreement concluded in the form authorized by these laws. Thus, according to the European Convention, an arbitration agreement can also be concluded informally – orally, implied.¹⁵⁴ Therefore, if the States do not require an arbitration agreement to be concluded in writing, an arbitration agreement that has been concluded informally will also be valid under the European Convention. However, in view of the wording of that provision, it is necessary that

151 See judgment of the Czech Supreme Court (Nejvyšší soud) of 26 September 2011, Ref. No. 23 Cdo 1873/2010.

152 Similarly LIEDER, Jan. *Die rechtsgeschäftliche Sukzession. Eine methodenpluralistische Grundlagenuntersuchung zum deutschen Zivilrecht und Zivilprozessrecht sowie zum Internationalen und Europäischen Privatrecht*. Tübingen: Mohr Siebeck, 2015, p. 329.

153 For more details with other references see e.g. RYŠÁVÝ, Lukáš: *Nezávislost a nestrannost rozhodce*. Praha: C. H. Beck, 2018, p. 10 et seq.

154 Specific examples of such legal orders (as to 1988) gives SCHLOSSER: *Das Recht der Internationalen privaten Schiedsgerichtsbarkeit...*, p. 261 et seq.; see also decision of the German Provincial Court of Appeal in Munich (OLG München) of 12 October 2009, Ref. No. 34 Sch 20/08.

given two legal systems concerned allow a more lenient form.¹⁵⁵ A milder form permitted only under the law of one of the contracting parties to the European Convention is not sufficient.¹⁵⁶ However, since, as already stated in the introduction, the vast majority of legal systems stipulate the requirement of a written form of an arbitration agreement – at least to some extent – the use of this provision is rather negligible. On the other hand, in accordance with Article X(7) of the European Convention, in conjunction with Article VII(1) of the New York Convention, the use of the so-called most favourable right must also be permitted in the scope of European Convention.¹⁵⁷ Thus, such an arbitration agreement will also be valid – and the arbitral award may be recognized – that complies with the law (including conflict of laws) of the country of enforcement.¹⁵⁸ However, for the purpose of possible later evidence, it is strongly recommended that the written form be observed in such cases as well, as the plaintiff may then find themselves in need of evidence.¹⁵⁹

Just for the sake of completeness, it should be added that it is precisely with regard to the principle of the most favourable right contained in Article VII(1) of the New York Convention, that the same approach applies within the framework of the New York Convention itself (see above).

Although this is one of the least likely options, arbitration can take place without an arbitration agreement even existing, ie. that the arbitration agreement has not been concluded in writing or orally (or implied). In such a case, it is no longer a matter of the form of the arbitration agreement, as it does not exist. In this situation, it is not even possible to consider the (direct) application of the provisions on remedying the defect of form of an arbitration agreement, as these only apply to arbitration agreements concluded by the parties, but not in the form required by the legislation.¹⁶⁰ As one of the few regulating such a situation in its legislation to a certain extent, is the Slovak Arbitration Act. In section 4(7)

155 See decision of the Bavarian Supreme Court in Munich (Bayerisches Oberstes Landesgericht) of 12 December, Ref. No. 4Z Sch 16/02.

156 Therefore, the procedure followed by the German Provincial Court of Appeal in Köln (OLG Köln) in its decision of 16 December 1992, Ref. No. 16 W 43/92, is incorrect.

157 Decision of the German Provincial Court of Appeal in Munich (OLG München) of 23 November 2009, Ref. No. 34 Sch 13/09.

158 SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 392; de la BRENA, Andrea, Article I: Scope of the Convention. In ZEILER, Gerold, SIWY, Alfred. *The European Convention on International Commercial Arbitration: A Commentary*. Alphen aan den Rijn: Kluwer Law International, 2018, p. 47.

159 See, for example, decision of the German Provincial Court of Appeal in Munich (OLG München) of 12 October 2009, Ref. No. 34 Sch 20/08; similarly NAGEL/GOTTWALD: *Internationales Zivilprozessrecht...*, p. 851.

160 VOIT, Wolfgang. In MUSIELAK: *Kommentar zur Zivilprozessordnung...*, p. 2433; BAUMBACH/LAUTER-BACH/ALBERS/HARTMANN: *Zivilprozessordnung...*, p. 2687; decision of the German Provincial Court of Appeal in Munich (OLG München) of 1 June 2005, Ref. No. 34 Sch 5/05; HAUSMANINGER, Christian. § 583. In FASCHING/KONECNY: *Kommentar zu den Zivilprozessgesetzen...*, marg. 98.

of the Slovak Arbitration Act is provided, that an arbitration agreement is also considered to be concluded in writing if its existence is asserted in the statement of claim, this may, but must not correspond to reality, and not denied by the respondent in the statement of defence delivered to the arbitral tribunal.

If the arbitration agreement has not been concluded at all, theory and literature admit the possibility that by bringing an action before an arbitrator by plaintiff and by appearing and acting in the case by defendant, a new (first) arbitration agreement is concluded¹⁶¹ or that the parties submit to the jurisdiction of the arbitrator.¹⁶² However, such conduct presupposes that the acting person is aware that they are doing a legally relevant act, which in the given case implies the will to conclude an arbitration agreement.¹⁶³ If passivity does not lead to remedy of the defect of form of the arbitration agreement (see above), it cannot, a fortiori, be regarded as consenting to arbitration in the absence of an arbitration agreement.¹⁶⁴ However, if a party actively acts in the matter but does not object to the absence of an arbitration agreement at the latest at the first acting on the merits, although it could, it cannot, as a general rule, raise this objection at a later stage.¹⁶⁵

The more appropriate solution in such a case is for the arbitrator to induce the parties to the conclusion of the arbitration agreement, as this will prevent and remove any doubts about the jurisdiction of the arbitrator in the future. In any event, account must be taken of the procedural effects relating to the bringing of the action and the time at which those effects occurred.¹⁶⁶

In conclusion, it must be stated that it is necessary to find the right balance between informality and the written form of (arbitration) agreements. Whilst the informality of arbitration agreements may jeopardize the proper functioning of arbitration as a state-recognized alternative to judicial proceedings, excessive requirements for the form of an arbitration agreement may lead to the exclusion

161 SCHWAB/WALTER: *Schiedsgerichtsbarkeit...*, p. 40; BAUMBACH/LAUTERBACH/ALBERS/HART-MANN: *Zivilprozessordnung...*, p. 2687; decision of the German Provincial Court of Appeal in Stuttgart (OLG Stuttgart) of 20 December 2001, Ref. No. 1 Sch 16/01; LISSE, Luděk. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů s komentářem*. Praha: Linde, 2012, p. 563; MÜNCH/KRÜGER/RAUSCHER: *Münchener Kommentar zur Zivilprozessordnung...*, p. 261.

162 Decision of the Czech Supreme Court (Nejvyšší soud) of 31 August 2010, Ref. No. 20 Cdo 3284/2008; of 26 July 2011, Ref. No. 20 Cdo 1926/2011.

163 See judgement of the German Federal Court of Justice (Bundesgerichtshof) of 22 Mai 1967, Ref. No. VII ZR 188/64, MÜNCH/KRÜGER/RAUSCHER: *Münchener Kommentar zur Zivilprozessordnung...*, p. 261.

164 See footnote 162.

165 Section 1040(1 and 2) of the German ZPO; decision of the German Provincial Court of Appeal in Stuttgart (OLG Stuttgart) of 20 December 2001, Ref. No. 1 Sch 16/01; section 21(2) of the Slovak Arbitration Act; section 592 of the Austrian ZPO, section 15(2) in conjunction with section 33 of the Czech Arbitration Act.

166 Although for the situation of confirmation of the arbitration agreement in the record, but in terms of conclusions correctly, see ROZEHNALOVÁ: *Rozhodčí řízení...*, p. 175.

of this alternative from the interest of parties who would otherwise like to take advantage of the advantages offered by arbitration. The way in which the legislators have dealt with this balance shows that, while primarily emphasizing the need for certainty both from the point of view of the parties and, of course, from the point of view of arbitrators and general courts, they also allow remedying of defect of form of the arbitration agreement or even that arbitration takes place without the existence of an arbitration agreement. They do not insist unnecessarily strictly on the written form of the arbitration agreement but give room for the autonomy of the parties. The defect of written form is remedied under certain conditions and arbitration can still take place properly in such cases. It can therefore be positively stated that neither the approach of the legislator nor the approach of practice is unnecessarily and excessively formalistic.¹⁶⁷

Where the law allows arbitration to take place even in consumer disputes, special conditions are then formally imposed on the arbitration agreement. However, these special conditions pursue in particular the sole objective of protecting the weaker party, the consumer. While opinions may differ on the conduct of arbitration in consumer disputes, these conditions must be regarded as correct. After all, they serve the good reputation of arbitration in non-commercial disputes and can help to repair or improve the reputation of arbitration or make it more popular.

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167 Cf. the approach set out in the decision of the Czech Constitutional Court (Ústavní soud) of 4 June 2014, Ref. No. IV. ÚS 3402/13, which stipulated that there was no valid conclusion of the arbitration clause, even if it was a formally perfect, and therefore valid legal act, if the case was assessed purely formalistically and other circumstances of a particular case were not taken into account. In the given case, the Czech Constitutional Court came to the conclusion that it was a violation of good morals, abuse of law and violation of the right to a fair (due) trial.

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