New York Convention

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2. Auflage 2019
ISBN 978-3-406-71445-0
C.H.BECK

are not physically transmitted and do not authenticate the sender's identity.[326] Email, however, unlike other means of electronic communication, does not inevitably lead to a materialized document. The "in writing" requirement's purpose to provide evidence (→ paras 79 *et seq.*), however, is satisfied if the content is perpetuated regardless of where the perpetuation takes place. Therefore it cannot be decisive whether the electronically transmitted information materializes automatically or manually.[327] Moreover, requiring an automatically materializing document would create difficulties with fax devices that do not print the document but convert it to a computer file format. Since the sender will never know about the technology employed by the receiver, deeming it relevant would be irreconcilable with the protection of legal transactions. This cannot be different for email. The analogy is further supported by Article II(2)'s explicit reference to telegrams that demonstrates the Convention's openness to modern means of communication (→ para. 109).[328] This reference cannot be read as excluding means that were only invented later. Finally, Article I(2)(a) of the European Convention (→ Annex V 3) clarifies the equal standing of letters, telegrams and communication by teleprinters.[329]

In a web-based environment, Article II(2) option 2 likewise applies to so-called **click-wrap** and **browse-wrap** declarations regardless of whether they employ means of encryption or authentication.[330] Click-wrap requires the user to click a button labelled "ok," "agree" or similarly before the web application proceeds further. For browse-wrap, the user downloads a file or otherwise accesses a website under the terms displayed thereon without clicking a button. Declarations are exchanged under Article II(2) option 2 if the website operator makes an offer that the customer accepts by clicking a button (click-wrap) or downloading a file (browse-wrap) or through similar means that are reported back to the website operator.[331] No declarations are exchanged if the website operator only invites the customer to submit an offer that the website operator accepts by conduct including delivery of the goods or if, in case of browse-wrap, no message is returned to the website operator.[332] **130a**

(c) Accessibility of the Information so as to Be Useable for Subsequent Reference Under Article II(2)'s Unlisted Options. The unlisted options under Article II(2) allow for a more comprehensive coverage of electronic communications than the listed options. Option I Article 7(4) of the Model Law and, with identical wording, Article 9(2) ECC explicitly accept electronic communication as long as the information contained therein is **131**

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[326] Austria: OGH, JBl 1974, 629, 630 = I Y.B. Com. Arb. 183 (1976); US: Chloe Z Fishing Co. v. Odyssey Re (London) Ltd., 109 F. Supp. 2d 1236, 1250 (S.D. Cal. 2000) = XXVI Y.B. Com. Arb. 910, 923 para. 32 (2001); *Tautschnig,* AAYB 2015, 87, 91; see also *Alvarez,* in: van den Berg (ed.), 40 Years of NYC, pp. 67, 74. But see for a requirement to ensure that the message is attributable to the sender, *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.304. Dissenting (email much more secure than telegram) *Wei,* Rethinking the NYC, p. 73.

[327] *Hill,* (1999) 15 Arb. Int'l 199, 201 *et seq.;* see also *Haas/Kahlert,* in: Weigand/Baumann (eds), Practitioner's Handbook, para. 21.181; *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.303; *Kaufmann-Kohler,* in: Briner *et al.* (eds), Liber Amicorum Böckstiegel, pp. 355, 359 *et seq.; Reymond,* Rev. arb. 1989, 385, 397; *Schlosser,* in: Stein/Jonas (eds), ZPO, Annex to sect. 1061 para. 101; dissenting *Schlosser,* Recht der Schiedsgerichtsbarkeit, para. 373.

[328] See US: Chloe Z Fishing Co. v. Odyssey Re (London) Ltd., 109 F. Supp. 2d 1236, 1250 (S.D. Cal. 2000) = XXVI Y.B. Com. Arb. 910, 923 para. 32 (2001); *Kaufmann-Kohler,* in: Briner *et al.* (eds), Liber Amicorum Böckstiegel, pp. 355, 360 *et seq.*

[329] *Cf.* Austria: OGH, X Y.B. Com. Arb. 417 para. 1 (1985); *van den Berg,* NYC, p. 204.

[330] *Wolff,* in: Piers/Aschauer (eds), Arbitration in the Digital Age, pp. 151, 171.

[331] *Haloush,* (2008) 25 J. Int. Arb. 355, 363 *et seq.; Wei,* Rethinking the NYC, p. 76; dissenting *Alqudah,* (2011) 28(1) J. Int. Arb. 67, 71; *Lederer,* SchiedsVZ 2017, 245, 247.

[332] *Wolff,* in: Piers/Aschauer (eds), Arbitration in the Digital Age, pp. 151, 171.

accessible so as to be useable for subsequent reference (→ paras 120 *et seq.*). This also allows for the assumption of written form for the purposes of Article II(2) (→ paras 114 *et seq.*, → paras 123h *et seq.*).

132 **(3) General Terms and Conditions.** General terms and conditions containing an arbitration clause are of considerable relevance in practice. Three factual situations are mainly encountered in practice: general terms and conditions can either be embedded in the main contract or included by reference, be it on the back of a contract document or in a separate document.

133 **(a) Scope of Uniform Law.** As a **starting point,** two legal categories have to be distinguished, *i.e.* the conclusion of the arbitration agreement and its form (as a requirement for recognition, → para. 181).[333] This distinction is reflected in Option I Article 7(6) of the Model Law but similarly applies to the form requirements explicitly outlined in Article II(2) (→ paras 85 *et seq.*). Some national laws allow for general terms and conditions to **become part of the contract** only if specific requirements are met. These requirements aim to limit the imparity between the party introducing the general terms and the other party and possibly also to protect consumers. The law governing the conclusion of the arbitration agreement (→ para. 42) determines the prerequisites for general terms and conditions becoming part of the contract. In contrast, whether reference to general terms and conditions containing an arbitration agreement meets the **"in writing" requirement** is to be assessed independently and to be determined by autonomous interpretation of Article II(2).

134 A considerable number of authors, however, deems **inclusion** of general terms and conditions in the contract to be generally **governed by Article II(2)'s autonomous law.**[334] The reasons given are that Article II(2)'s unifying effect would otherwise be greatly undermined and uncertainty as to determination and contents of the applicable law would be the result.[335] According to that view, Article II(2) largely meets the concerns of the national legislatures that aim to protect the weaker party and to ensure that it has the freedom to consent.[336] Article II(2) is accordingly to be interpreted as autonomously governing the inclusion of general terms and conditions, thus superseding any more demanding requirement under national law.[337]

135 However, this view **cannot be followed** to a large extent. Said requirements are preempted by Article II(2) only if the national law postulates a more demanding **form requirement** for the inclusion of general terms and conditions in a contract (→ para. 166). This will, however, only seldom be the case; the most prominent exception is Article 1341(2) of the Italian Civil Code, which calls for a specific

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[333] *Cf.* A/CN.9/WG.II/WP.139, para. 30 (p. 18) (→ Annex IV 2); *Poudret/Besson,* Comparative Arbitration, para. 213.

[334] *Adolphsen,* in: MünchKommZPO, Annex 1 to sect. 1061, NYC, Art. II para. 17; *Baldus,* Der elektronisch geschlossene Vertrag, pp. 72 *et seq.; Epping,* Schiedsvereinbarung, pp. 140 *et seq.; Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, paras 8.267, 8.292; *Lindacher,* in: Lindacher *et al.* (eds), Festschrift Habscheid, pp. 167, 174; *Schramm/Geisinger/Pinsolle,* in: Kronke/Nacimiento/Otto/Port (eds), NYC, p. 89; *Schwab/Walter,* Schiedsgerichtsbarkeit, ch. 44 para. 9; for cumulative application of Article II(2)'s autonomous requirements and the law governing the arbitration agreement *Czernich,* Kurzkommentar, Art. II para. 47.

[335] *Epping,* Schiedsvereinbarung, p. 137; *Lindacher,* in: Lindacher *et al.* (eds), Festschrift Habscheid, pp. 167, 174; *Schramm/Geisinger/Pinsolle,* in: Kronke/Nacimiento/Otto/Port (eds), NYC, p. 89; *van den Berg,* NYC, p. 209.

[336] *Schramm/Geisinger/Pinsolle,* in: Kronke/Nacimiento/Otto/Port (eds), NYC, p. 89; *van den Berg,* NYC, p. 209.

[337] *Van den Berg,* NYC, p. 209.

acceptance by the other party in order to be effective.[338] National laws mostly protect the other party to the contract by **other means than form requirements.** While it is true that Article II(2) ousts provisions under national law which have the same purpose as Article II's "in writing" requirement (→ para. 166), the provisions on the inclusion of general terms and conditions pursue a different purpose. They indeed aim to limit the imparity between the parties (→ para. 133), but that is not the same as Article II(2)'s rationale to provide evidence (→ paras 79 *et seq.*). Article II therefore does not oust provisions on the inclusion of general terms and conditions under national law.[339] The other view would result in different rules being applied to the inclusion of an arbitration clause in general terms and conditions: the courts at the place of arbitration who operate outside the scope of the New York Convention would apply the law governing the arbitration agreement while foreign courts would apply autonomous rules under Article II.[340] This inconsistency weighs heavier than the inconvenience of determining the applicable national law (→ para. 134).

(b) Parties' Signatures or Exchange of Letters or Telegrams. General terms and conditions usually do not raise specific issues of form if they are directly contained in the main contract. Otherwise, Article II(2)'s form requirements are mostly deemed to be met if some kind of written reference to the general terms and conditions exists (→ paras 137 *et seq.*) and the other party could reasonably take note of the general terms' and conditions' content (→ paras 140 *et seq.*). **136**

(aa) Reference. If the arbitration agreement is not contained in the main contractual document (*i.e.* the document signed or the offer exchanged) but rather in a third document, the main contractual document needs to **include a reference in writing**[341] to that third document in order to comply with one of the listed options under Article II(2). This follows both from the wording of the provision and from its rationale: Article II(2) refers to an arbitral clause "in" a contract and to an agreement contained "in" an exchange of letters or telegrams. Without a reference, the arbitration agreement contained in a separate document would neither be "in" the contract nor "in" the exchanged letter or telegram.[342] And it would not correspond to the rationale of Article II(2)'s listed options to provide evidence for the conclusion of the arbitration agreement and its contents (→ paras 79 *et seq.*) if such reference were not itself made in writing. However, the reference does not need to be included above a signature[343] if only it makes the referenced document part of the contract under the law governing the arbitration **137**

[338] See *van den Berg,* NYC, pp. 211 *et seq.;* apparently dissenting (Article 1342(2) of the Italian Civil Code to be considered as a question of validity under Article II(3)) Italy: Cass., XLIII Y.B. Com. Arb. 481 para. 14 (2018).

[339] Germany: OLG Düsseldorf, IPRax 1997, 115, 117 and IPRax 1997, 118, 120 *et seq.* (for futures; with dissenting case note *Thorn,* IPRax 1997, 98 *et seq.*); *Gildeggen,* Schiedsvereinbarungen in AGB, pp. 141 *et seq.; Haas/Kahlert,* in: Weigand/Baumann (eds), Practitioner's Handbook, para. 21.214.

[340] *Wolff,* in: Piers/Aschauer (eds), Arbitration in the Digital Age, pp. 151, 165.

[341] *Adolphsen,* in: MünchKommZPO, Annex 1 to sect. 1061, NYC, Art. II para. 19; *Gildeggen,* Schiedsvereinbarungen in AGB, pp. 62 *et seq.; Haas/Kahlert,* in: Weigand/Baumann (eds), Practitioner's Handbook, para. 21.174; *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.312; *Lindacher,* in: Lindacher *et al.* (eds), Festschrift Habscheid, pp. 167, 170; *Sieg,* RIW 1998, 102, 106; *Wackenhuth,* ZZP 99 (1986), 445, 456; dissenting UK: Zambia Steel & Building Supplies Ltd. v. James Clark & Eaton Ltd., XIV Y.B. Com. Arb. 715, 722 paras 18 *et seq.* (1989); Abdullah M Fahem & Co. v. Mareb Yemen Insurance Co., XXIII Y.B. Com. Arb. 789, 791 paras 6 *et seq.* (1998).

[342] *Van den Berg,* NYC, p. 210; see also *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.312.

[343] Germany: OLG Schleswig, IPRspr. 2000, No. 185, 409, 411 = XXXI Y.B. Com. Arb. 652, 656 para. 6 (2006); *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.312.

agreement. The arbitration agreement needs to be covered by the reference;[344] "all other terms and conditions for supply" may not meet that requirement.[345]

138 There is much debate about whether the reference needs to specifically refer to the arbitration agreement contained in the general terms and conditions **("specific reference")**[346] or whether a reference to the entire document **("general reference")** suffices[347]. Since arbitration clauses can easily be hidden in general terms and conditions, it is true that a general reference does not effectively warn the other party.[348] Warning the parties, however, is not part of Article II(2)'s mission (→ paras 81 *et seq.*). It may be legitimate to protect the party that does not introduce the general terms and conditions, but this is to be achieved by the relevant national law on inclusion of general terms and conditions (→ paras 133 *et seq.*). The mere evidentiary purposes of Article II(2) are complied with by a general reference. This is in line with the fact that no party needs to be made aware of an arbitration clause contained in the body of a contract under Article II(2) (→ para. 94), even if that clause qualifies as general terms and conditions.

139 It is often proposed that the reference to general terms and conditions must, in principle, be **explicit.**[349] However, Article II(2)'s wording neither requires such express reference nor does such requirement conform with the general acceptance of implied agreements.[350] The same rationale applies here as to the documents exchanged under Article II(2) option 2, which likewise do not need to explicitly refer to each other (→ para. 99). Instead of defining the borderline between explicit and implied consent (which may be difficult in a given case), the form requirement's evidentiary purpose (→ paras 79 *et seq.*) advocates a reading according to which Article II(2) requires nothing but a sufficiently clear reference. Some assume an exception if the parties had

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[344] US: Coimex Trading (Suisse) S.A. v. Cargill Int'l S.A., 2005 U.S. Dist. LEXIS 6589, *3 *et seq.* (S.D.N.Y. 2005) = XXXI Y.B. Com. Arb. 1090, 1093 *et seq.* paras 6 *et seq.* (2006); *Schlosser,* in: Stein/Jonas (eds), ZPO, Annex to sect. 1061 para. 100; *Schramm/Geisinger/Pinsolle,* in: Kronke/Nacimiento/Otto/Port (eds), NYC, p. 93.

[345] India: Alimenta S.A. v. National Agricultural Co-Operative, [1987] INSC 6.

[346] France: Cass., Rev. arb. 1990, 134, 139 = XV Y.B. Com. Arb. 447, 448 para. 3 (1990); Italy: Cass., sez. un., I Y.B. Com. Arb. 190 (1976); Cass., XXII Y.B. Com. Arb. 734, 735 para. 2 (1997); CA Brescia, VIII Y.B. Com. Arb. 383, 384 *et seq.* para. 3 (1983); Switzerland: OG Basel-Land, XXI Y.B. Com. Arb. 685, 686 *et seq.* paras 7 *et seq.* (1996); *Czernich,* Kurzkommentar, Art. II para. 36; *Lindacher,* in: Lindacher *et al.* (eds), Festschrift Habscheid, pp. 167, 173; *van den Berg,* NYC, p. 216 (for general terms and conditions on the back of the contract); see also US: Japan Sun Oil Co. v. M/V MAASDIJK, XXII Y.B. Com. Arb. 884, 886 *et seq.* paras 5 *et seq.* (1997) (E.D. La. 1994).

[347] France: TGI Strasbourg, II Y.B. Com. Arb. 244 (1977); Germany: BGH, II Y.B. Com. Arb. 242 (1977); BayObLG, NJW-RR 1999, 644, 645; Italy: Cass., XXXVII Y.B. Com. Arb. 255 para. 8 (2012); Switzerland: BG, XV Y.B. Com. Arb. 509, 511 para. 3 (1990); OG Basel-Land, XXI Y.B. Com. Arb. 685, 687 para. 6 (1996); US: Polytek Eng'g Co. v. Jacobson Cos., XXIII Y.B. Com. Arb. 1103, 1106 para. 8 (1998) (D. Minn. 1997); Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 446 *et seq.* (3d Cir. 2003) = XXIX Y.B. Com. Arb. 978, 984 *et seq.* paras 14 *et seq.* (2004); Verolme Botlek B.V. v. Lee C. Moore Corp., XXI Y.B. Com. Arb. 824, 827 para. 7 (1996) (N.D. Okla. 1995); *Adolphsen,* in: MünchKommZPO, Annex 1 to sect. 1061, NYC, Art. II para. 19; *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.311; *Schlosser,* Recht der Schiedsgerichtsbarkeit, para. 379; *Schlosser,* in: Stein/Jonas (eds), ZPO, Annex to sect. 1061 paras 112 *et seq.; van den Berg,* NYC, p. 221 (in case of ongoing business relationship); *Wackenhuth,* ZZP 99 (1986), 445, 458 *et seq.* (with an exception for ongoing business relations).

[348] *Haas/Kahlert,* in: Weigand/Baumann (eds), Practitioner's Handbook, para. 21.176; *van den Berg,* NYC, p. 218.

[349] France: Cass., Rev. arb. 1990, 134, 138 *et seq.* = XV Y.B. Com. Arb. 447, 448 para. 3 (1990); Germany: OLG München, NJW-RR 1996, 1532; *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.312; see also France: Cass., XX Y.B. Com. Arb. 660, 661 para. 5 (1995).

[350] *Born,* International Commercial Arbitration, pp. 686 *et seq.; van den Berg,* in: Blessing (ed.), ASA Special Series No. 9, pp. 25, 41; see also US: Century Indem. Co. v. Certain Underwriters at Lloyd's, London, 584 F.3d 513, 555 (3d Cir. 2009) = XXXV Y.B. Com. Arb. 485 para. 106 (2010).

an ongoing business relation.[351] While such relation may lower the requirements for inclusion of general terms and conditions under the applicable law (→ para. 42), it cannot alleviate the form requirement: without reference the inclusion cannot be evidenced as required by Article II(2), regardless of what relationship the parties had.[352]

(bb) Reasonable Opportunity to Take Note of the General Terms' and Conditions' Content. Most courts and authors require not only a reference to the general terms and conditions including the arbitration agreement, but also that the other party had a reasonable opportunity to take note of the general terms' and conditions' content.[353] According to this position, the "in writing" requirement under Article II(2)'s two explicitly listed options is only met if the general terms and conditions have been **transmitted to the other party** at the latest at the time of the contract conclusion.[354] This will usually be done together with the offer,[355] but can also be accomplished between offer and acceptance. If the general terms and conditions have already been transmitted on the occasion of an earlier contract conclusion, they do not need to be transmitted again.[356] **140**

Exceptions are discussed if the offer contains an explicit reference to an arbitration clause in general terms and conditions which have not been transmitted (though the existence of a duty to inquire is doubtful if the arbitration clause is not fully reproduced in the reference)[357] and if terms and conditions drafted by professional associations or **141**

[351] France: Cass., XX Y.B. Com. Arb. 660, 661 para. 4 (1995); *Di Pietro,* in: Gaillard/Di Pietro (eds), NYC in Practice, pp. 355, 359 *et seq.* = (2004) 21 J. Int. Arb. 439, 442 *et seq.;* dissenting Netherlands: Hof Den Haag, X Y.B. Com. Arb. 485, 486 (1985); *Gildeggen,* Schiedsvereinbarungen in AGB, pp. 76 *et seq.; Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, paras 8.315, 8.316; *van den Berg,* NYC, p. 221; *Wackenhuth,* ZZP 99 (1986), 445, 465 *et seq.*

[352] See also *Binder,* UNCITRAL Model Law Jurisdictions, p. 134 (no defined legal relationship).

[353] *Adolphsen,* in: MünchKommZPO, Annex 1 to sect. 1061, NYC, Art. II para. 19; *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, paras 8.311, 8.313; *Lindacher,* in: Lindacher *et al.* (eds), Festschrift Habscheid, pp. 167, 170 *et seq.; van den Berg,* NYC, p. 210.

[354] France: Cass., Rev. arb. 1990, 134, 138 *et seq.* = XV Y.B. Com. Arb. 447, 448 para. 3 (1990); Germany: BGH, NJW 1984, 2763, 2764 *et seq.* = X Y.B. Com. Arb. 427, 430 para. 7 (1985); OLG München, NJW-RR 1996, 1532; US: Bothell v. Hitachi Zosen, 97 F. Supp. 2d 1048, 1053 (W.D. Wash. 2000) = XXVI Y.B. Com. Arb. 939, 944 para. 17 (2001); *Haas,* Anerkennung und Vollstreckung, p. 171; *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.313; *Lindacher,* in: Lindacher *et al.* (eds), Festschrift Habscheid, pp. 167, 171; *Schlosser,* ZEuP 1994, 685, 692 *et seq.; Schwab/Walter,* Schiedsgerichtsbarkeit, ch. 44 para. 9; *Sieg,* RIW 1998, 102, 106; *Solomon,* in: Balthasar (ed.), International Commercial Arbitration, § 2 para. 108; *van den Berg,* NYC, p. 220; *Voit,* in: Musielak/Voit (eds), ZPO, sect. 1031 para. 18; *Wackenhuth,* ZZP 99 (1986), 445, 458 *et seq.;* dissenting *Gentinetta,* Lex fori, p. 318.

[355] Germany: BGH, II Y.B. Com. Arb. 242, 243 (1977); OLG Schleswig, IPRspr. 2000, No. 185, 409, 412 = XXXI Y.B. Com. Arb. 652, 656 *et seq.* para. 8 (2006); Spain: TS, X Y.B. Com. Arb. 493, 494 para. 6 (1985); US: Ferrara S. p. A. v. United Grain Growers Ltd., 441 F. Supp. 778 (S.D.N.Y. 1977) = IV Y.B. Com. Arb. 331, 332 (1979); *Schlosser,* in: Stein/Jonas (eds), ZPO, Annex to sect. 1061 para. 113.

[356] France: Cass., Rev. arb. 1990, 134, 141 = XV Y.B. Com. Arb. 447, 448 para. 3 (1990); Germany: OLG Schleswig, IPRspr. 2000, No. 185, 409, 411 *et seq.* = XXXI Y.B. Com. Arb. 652, 656 *et seq.* para. 8 (2006); Spain: TS, XIII Y.B. Com. Arb. 512, 513 para. 2 (1988); Switzerland: BG, BGE 121 III 38, 45 *et seq.* = XXI Y.B. Com. Arb. 690, 697 para. 10 (1996); CJ, 15(4) ASA Bull. 667, 672 (1997) = XXIII Y.B. Com. Arb. 764, 768 *et seq.* para. 19 (1998); *Adolphsen,* in: MünchKommZPO, Annex 1 to sect. 1061, NYC, Art. II para. 19; *Gildeggen,* Schiedsvereinbarungen in AGB, p. 71; *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.315; *Lindacher,* in: Lindacher *et al.* (eds), Festschrift Habscheid, pp. 167, 171; *Wackenhuth,* ZZP 99 (1986), 445, 459; see also Switzerland: BG, BGE 110 II 54, 59 = XI Y.B. Com. Arb. 532, 534 para. 9 (1986).

[357] Switzerland: OG Basel-Land, XXI Y.B. Com. Arb. 685, 687 para. 6 (1996); *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, paras 8.310, 8.314; *Lindacher,* in: Lindacher *et al.* (eds), Festschrift Habscheid, pp. 167, 173; *Schlosser,* in: Stein/Jonas (eds), ZPO, Annex to sect. 1061 para. 113; *van den Berg,* NYC, pp. 220 *et seq.;* similarly Switzerland: BG, BGE 110 II 54 = XI Y.B. Com. Arb. 532, 534 paras 8 *et seq.* (1986).

similar third persons which are publicly available are included by reference.[358] Reference to self-drafted general terms and conditions which had not been transmitted is not deemed to be sufficient, even if the arbitration clause contained therein is common in the respective business.[359]

142 The reasonable opportunity to take note of the general terms' and conditions' content is also denied if the general terms and conditions are drafted neither in the **language** of the contract nor in a global language[360] or if they are not sufficiently **transparent**[361].

143 The better arguments advocate that a reasonable opportunity to take note of the general terms' and conditions' content **does not form part of Article II(2)'s form requirement.**[362] Such opportunity aims to protect the party that did not introduce the general terms and conditions. It forms part of the rules on inclusion of general terms and conditions, as can be seen from the fact that this requirement normally also applies to general terms and conditions other than arbitration agreements. The inclusion of general terms and conditions in the contract, however, is subject to the law governing the arbitration agreement rather than to the autonomous provisions of Article II(2) (→ para. 135). Article II(2) is concerned only with issues of form in order to provide evidence. This rationale requires an opportunity to take note just as little as it requires that all parties have read and understood an arbitration clause contained in a contract (→ paras 94 *et seq.*).

144 **(c) Reference in a Contract Under Option I Article 7(6) of the Model Law as Incorporated in Article II(2).** Option I Article 7(6) of the Model Law – to which recourse is to be taken for assessing Article II(2)'s unlisted options (→ paras 114 *et seq.*) – is significantly more liberal than Article II(2)'s listed options. In particular, the reference to the general terms and conditions in the contract (→ paras 137 *et seq.*) does not require written form itself (→ para. 123). The extent to which the other party needs to have the opportunity to take note of the general terms' and conditions' content is determined by the law governing the arbitration agreement rather than by Article II(2) itself (→ para. 143).

145 **(4) Referenced Documents Other than General Terms and Conditions. (a) Contract Addendum, Extension, Novation or Settlement.** Reference to documents containing arbitration agreements also occurs where no general terms and conditions are involved. One factual situation raised by the UNCITRAL Secretary-General is where the original contract contains a validly concluded arbitration clause, but there is no arbitration clause in an **addendum** to the contract, an **extension** of the contract, a

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[358] Italy: Cass., X Y.B. Com. Arb. 473, 475 para. 4 (1985); CA Venezia, VII Y.B. Com. Arb. 340, 341 para. 3 (1982); Switzerland: HG Zürich, XVIII Y.B. Com. Arb. 442, 443 paras 9 *et seq.* (1993); *Adolphsen,* in: MünchKommZPO, Annex 1 to sect. 1061, NYC, Art. II para. 19; *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.316; *Lindacher,* in: Lindacher *et al.* (eds), Festschrift Habscheid, pp. 167, 171; *Schlosser,* Recht der Schiedsgerichtsbarkeit, para. 379.

[359] France: Cass., Rev. arb. 1990, 134, 138 *et seq.* = XV Y.B. Com. Arb. 447 paras 2 *et seq.* (1990); *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.316; differently for general terms and conditions which have not been objected to later US: Copape Produtos de Pétroleo LTDA. v. Glencore Ltd., 2012 WL 398596 at *6 (S.D.N.Y. 2012).

[360] *Czernich,* Kurzkommentar, Art. II para. 38; *Gildeggen,* Schiedsvereinbarungen in AGB, pp. 81 *et seq.; Haas/Kahlert,* in: Weigand/Baumann (eds), Practitioner's Handbook, para. 21.176; *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.314; *Schlosser,* in: Stein/Jonas (eds), ZPO, Annex to sect. 1061 para. 114; for English-language terms in a German-language contract see Switzerland: HG Zürich, ZEuP 1994, 682, 684; dissenting Italy: Cass., XXII Y.B. Com. Arb. 715, 720 para. 11 (1997).

[361] *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.314; *Lindacher,* in: Lindacher *et al.* (eds), Festschrift Habscheid, pp. 167, 173.

[362] Similarly *Schlosser,* in: Stein/Jonas (eds), ZPO, Annex to sect. 1061 para. 73.

contract **novation** or a **settlement** agreement relating to the contract (such a "further" contract may have been concluded orally or in writing).[363] Another factual situation is a collective bargaining agreement containing an arbitration clause that is referenced in an employment contract.[364]

A two-tiered test is to be applied to these factual situations: first, does the second agreement **require written form** under Article II(2) at all? This depends on the relation between the first agreement's arbitration clause and the subject matter of the second agreement (→ paras 88 *et seq.*). Second, if the second agreement needs to be in writing, does it **sufficiently reference** the first agreement's arbitration clause? The same rules apply here as for including general terms and conditions, *i.e.* the reference itself needs to be in writing under Article II(2)'s explicitly listed options (→ paras 137 *et seq.*)[365] while any reference suffices under Option I Article 7(6) of the Model Law as incorporated in the unlisted options of Article II(2) (→ para. 144). **146**

(b) Bill of Lading and Charter Party. Arbitration agreements are common in the context of bills of lading. While some national arbitration laws provide for privileged inclusion of arbitration agreements in bills of lading,[366] any arbitration agreement needs to comply with Article II(2)'s **form prerequisites** in order to enjoy protection under the Convention. Recognition may, however, be facilitated by **superseding conventions.**[367] **147**

If the **bill of lading contains an arbitration clause** or incorporates by reference (→ paras 137 *et seq.*) the terms of a charter party containing an arbitration clause, Article II(2)'s form requirements need to be met. For meeting the requirements of party signatures or exchange of documents, the carrier's signature on the bill of lading does not suffice, even if tacitly accepted by the shipper.[368] The agreement will only be in writing under one of the listed options of Article II(2) if the shipper also signs the bill of lading or returns a confirmation.[369] However, Option I Article 7(6) of the Model Law as incorporated in Article II(2) (→ paras 114 *et seq.*) is already complied **148**

[363] A/CN.9/WG.II/WP.108/Add.1, para. 12 (g) (p. 4) (→ Annex IV 2).

[364] US: Alvarado Vera v. Cruise Ships Catering & Servs. Int'l, N.V., XL Y.B. Com. Arb. 528 para. 10 (2015) (11th Cir. 2014); Sierra v. Cruise Ships Catering & Servs. Int'l, N.V., XLI Y.B. Com. Arb. 636 para. 6 (2016) (11th Cir. 2015); Imam Shah v. Blue Wake Shipping, XLII Y.B. Com. Arb. 633 para. 16 (2017) (W.D. La. 2016); Pagaduan v. Carnival Corp., 709 Fed. Appx. 713, 717 (2d Cir. 2017) = XLIII Y.B. Com. Arb. 652 para. 14 (2018).

[365] Dissenting US: Eres, N.V. v. Citgo Asphalt Ref., 2010 U.S. Dist. LEXIS 47691, *28 (S.D. Tex. 2010) = XXXV Y.B. Com. Arb. 540 para. 31 (2010); for references in writing see US: Alvarado Vera v. Cruise Ships Catering & Servs. Int'l, N.V., XL Y.B. Com. Arb. 528 para. 10 (2015) (11th Cir. 2014); SBMH Group DMCC v. Noadiam USA, LLC, XLIII Y.B. Com. Arb. 646 para. 30 (2018) (S.D. Fla. 2017); Sierra v. Cruise Ships Catering & Servs. Int'l, N.V., XLI Y.B. Com. Arb. 636 para. 7 (2016) (11th Cir. 2015).

[366] Example: section 1031(4) of the German Code of Civil Procedure in its pre-2013 version.

[367] For the United Nations Convention on the Carriage of Goods by Sea of Mar. 31, 1978 (1695 U.N.T.S. 3 (1999), the "Hamburg Rules"), see *Gildeggen,* Schiedsvereinbarungen in AGB, pp. 74 *et seq.; Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, paras 8.318, 8.319; *Schlosser,* Recht der Schiedsgerichtsbarkeit, para. 384; *Schlosser,* in: Stein/Jonas (eds), ZPO, Annex to sect. 1061 para. 118.

[368] Switzerland: BG, BGE 110 II 54, 57 *et seq.* = XI Y.B. Com. Arb. 532, 533 *et seq.* paras 4 *et seq.* (1986); *Haas/Kahlert,* in: Weigand/Baumann (eds), Practitioner's Handbook, para. 21.197; *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.318; *Kessedjian,* Rev. arb. 1990, 136, 139; *Schlosser,* Recht der Schiedsgerichtsbarkeit, para. 384; *Schlosser,* in: Stein/Jonas (eds), ZPO, Annex to sect. 1061 para. 118; dissenting Greece: CA Athens, XIV Y.B. Com. Arb. 634, 635 para. 2 (1989).

[369] France: Cass., Rev. arb. 1990, 617; *Epping,* Schiedsvereinbarung, pp. 65 *et seq.; Haas/Kahlert,* in: Weigand/Baumann (eds), Practitioner's Handbook, para. 21.197; *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.318; *Kessedjian,* Rev. arb. 1990, 136, 139; *Schlosser,* Recht der Schiedsgerichtsbarkeit, para. 384; *Schlosser,* in: Stein/Jonas (eds), ZPO, Annex to sect. 1061 para. 118; see also Italy: Cass., sez. un., XXVII Y.B. Com. Arb. 506, 508 para. 4 (2002); dissenting Switzerland: BG, BGE 121 III 38, 45 = XXI Y.B. Com. Arb. 690, 696 *et seq.* paras 10 *et seq.* (1996).

with under these circumstances if the arbitration agreement has been concluded under the law governing it (→ para. 144).[370]

149 If the bill of lading is **endorsed to a subsequent holder,** the endorser's signature does not perfect the written form as required by Article II(2)'s explicitly listed options. The reason is that this second signature relates to the endorsement contract with the endorsee rather than to the arbitration clause concluded with the shipper.[371] Reference to Option I Article 7(6) of the Model Law (→ paras 114 *et seq.*) allows for recognition only if the arbitration agreement has been validly concluded and its contents are recorded (→ para. 144). However, if the bill of lading already contains an arbitration agreement in writing (→ para. 148), an endorsement valid under the national law governing it transfers the written arbitration agreement to the endorsee (→ para. 153).[372]

150 **(5) Third Parties Not Having Concluded the Arbitration Agreement. (a) Third Party Beneficiary.** Under most **national laws,** contracts can include arbitration clauses that are also valid for third party beneficiaries who have not become party to the contract. The rationale is that such a contract gives rise only to rights and not to duties of the third party. If that third party by definition only benefits from the contract, in the overall view it is not burdened if the enforcement of its rights is bound to arbitration.

151 While a contract for the benefit of a third party certainly meets the **"in writing"** requirement under Option I Article 7(3) of the Model Law as incorporated in Article II(2) (→ paras 114 *et seq.*), it is acknowledged that such a contract can also meet written form under the two listed options of Article II(2).[373] This view is supported by the fact that the third party beneficiary does not become party to the contract so that it neither needs to sign nor to exchange documents.

151a These rules likewise apply to **investment arbitration** conducted under bi- or multilateral investment treaties. Such treaties, concluded between States, give the investors of one State substantive rights that protect their investments in the other State. The treaties likewise foresee that investors claiming a violation of these rights can initiate arbitral proceedings against the State. If the arbitration agreement underlying such investment arbitrations were only to be perfected by the State's offer (to all investors in the treaty) and the investor's acceptance (by requesting arbitration),[374] Article II(2)'s listed options

[370] See India: Owners & Parties Interested in the Vessel M.V. Baltic Confidence v. State Trading Corp. of India, XXVII Y.B. Com. Arb. 478, 479 *et seq.* paras 2 *et seq.* (2002); *UNCITRAL Secretariat,* Guide, Art. II para. 21.

[371] Italy: Cass., sez. un., V Y.B. Com. Arb. 267, 268 para. 3 (1980); *Haas/Kahlert,* in: Weigand/Baumann (eds), Practitioner's Handbook, para. 21.197; an exception applies if the endorsement explicitly references the arbitration agreement (India: Owners & Parties Interested in the Vessel M.V. Baltic Confidence v. State Trading Corp. of India, XXVII Y.B. Com. Arb. 478, 480 paras 3 *et seq.* (2002); *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.319).

[372] *Hausmann,* in: Reithmann/Martiny (eds), Internationales Vertragsrecht, para. 8.319; *Schlosser,* in: Stein/Jonas (eds), ZPO, Annex to sect. 1061 para. 118.

[373] US: Borsack v. Chalk & Vermilion Fine Arts, Ltd., XXIII Y.B. Com. Arb. 1038, 1042 *et seq.* paras 13 *et seq.* (1998) (S.D.N.Y. 1997); Black & Veatch Int'l Co. v. Wartsila NSD N. Am., Inc., XXV Y.B. Com. Arb. 878, 881 para. 7 (2000) (D. Kan. 1998); see also US: Todd v. S.S. Mut. Underwriting Ass'n (Berm.), XXXVI Y.B. Com. Arb. 370 para. 64 (2011) (E.D. La. 2011); but see Germany: KG, SchiedsVZ 2013, 112, 116 = XXXVIII Y.B. Com. Arb. 384 para. 16 (2013) (employing Article VII(1)); apparently dissenting Outokumpu Stainless USA, LLC v. Converteam SAS, 902 F.3d 1316, 1327 (11th Cir. 2018) = XLIII Y.B. Com. Arb. 765 para. 42 (2018).

[374] In that sense Germany: BGH, SchiedsVZ 2019, 46, 48 para. 17; US: Republic of Ecuador v. Chevron Corp., XXXVI Y.B. Com. Arb. 451 paras 11, 13 (2011) (2d Cir. 2011) (for the Ecuador-US BIT which stipulates that an "agreement in writing" for purposes of Article II NYC is created when a foreign company gives notice in writing to a BIT signatory and submits an investment dispute to arbitration [para. 12]).