3. The Principle of Presumptive Validity

As the wording of this clause is ambiguous, its true meaning has to be determined through the usual means of interpretation, taking into account all relevant circumstances and interests of the parties. In most modern jurisdictions it is generally acknowledged that the principle of presumptive validity of international arbitration agreements (‘in favorem validitatis’) must be applied to the interpretation of an international arbitration agreement. According to this principle, an arbitration agreement should be construed in good faith and in a way that upholds its validity. This means that doubts about the intended scope of an agreement to arbitrate are to be resolved in favour of arbitration. This pro-arbitration approach or ‘in favorem presumption’ to the construction of arbitration agreements serves to enforce the common intention of the parties to have their dispute decided before an international arbitral tribunal:

‘An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause. … The invalidation of such an agreement … would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts.’

The in favorem approach to the construction of arbitration agreements extends to the typical formula used in such clauses, stating that all disputes ‘arising out of’, ‘arising under’ and ‘in connection with’ the contract shall be settled through arbitration. Instead of attaching different meanings to this terminology, the English House of Lords has made it clear that:

‘… the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.’

The quote from the Fiona Trust decision of the House of Lords shows that the in favorem principle is directly linked to the very fundament of the arbitration process: the consent of the parties to arbitrate. The in favorem presumption is thus one of the most essential principles of international arbitration law. The in favorem approach is also a consequence of today’s arbitration-friendly climate which is based on the understanding that dispute settlement by international arbitral tribunals has the same value and standing as adjudication before domestic courts (No. 16-25). This means that a liberal way of construing arbitration agreements has to be pursued even in those cases where in general contract law the ambiguity could not be resolved through the application of traditional means of interpretation.
Application of this doctrine instead of the very strict literal interpretation of the clause would have saved the arbitration agreement in the decision of the Court of Appeal of Vaud, because the parties had clearly identified the ICC as one of the world's leading arbitral institutions in their arbitration agreement (No. 20-65). Typically, however, international arbitrators tend to adopt a liberal 'pro-arbitration' approach in order to make sure that the will of the parties to arbitrate their disputes is not frustrated.

‘The arbitrators have from the [arbitration] clause and the pleadings of the parties decided that both parties desire a settlement of disputes outside state jurisdiction. That wish, expressed by both parties, has essentially determined the attitude of the arbitrators vis-à-vis the clause inserted into the contract. They felt an obligation to help the parties realize such a wish.’

112 See BGH, NJW (2002), 1651, 1653 for the interpretation of conflicting standard forms in a contract that is subject to the CISG.

114 See Decision on Jurisdiction, Amco Asia Corp. et al. v. Republic of Indonesia, ILM (1984), 351, 359 et seq.: ‘…any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged’.

115 Redfern and Hunter, Law and Practice, No. 3-38; Craig, Park, Paulsson, ICC Arbitration, 43; Born, International Commercial Arbitration, 230 et seq.


117 Born, supra note 114, 1326, stating that ‘…this type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims.’


120 Paulsson, The Idea of Arbitration, 300: ‘If we take this aspiration [to fulfil the very idea of arbitration as the binding resolution of disputes] as fundamental to the way we view, nurture, and control arbitration, it also appears to have a corollary. It is a simple principle, suggested as a lodestar for other social institutions, such as courts and legislatures, in their interaction with arbitrators: consensual arrangements for the resolution of disputes should be presumed valid …’.


122 See Berger, International Economic Arbitration, 126 et seq.; see also Tennessee Imports, Inc. v. P.P. Filippi & Prix Italia, 745 F. Supp. 1314, 1326 (M.D. Tenn. 1990), stating that: ‘The ICC Arbitration Court is…, a well-recognized and highly-regarded arbitral institution specializing in the field of international commercial disputes….There is little doubt that the ICC Arbitration Court can offer Tennessee Imports an effective forum’.

123 Yugoslav Co. v. PDR Korea Co., Arbitration Court attached to the Chamber for Foreign Trade of the GDR, YCA (1983), 129, 131 (emphasis added).

Referring Principles:

XIII.1.2 - Interpretation of arbitration agreements