# Form and proof of arbitration agreements incorporated by reference under New York Convention

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In international trade, a general reference is sufficient to validly incorporate an arbitration clause contained in another document under Article II(2) of the New York Convention, provided that the clause is common and known to those engaged in a particular trade. The party seeking to enforce a foreign arbitral award must show that such general reference is contained in the means provided for in Article II(2) of the New York Convention, including an exchange of emails between the parties.

## Facts

In 2015 a Marshall Island company, allegedly acting as the seller, and a Greek ship management company, allegedly acting as the buyer, entered into a series of agreements for the sale and purchase of bunker oil. A dispute arose between the alleged parties and the seller initiated arbitration in New York. As the winning party, the seller sought to enforce the arbitral award in Greece under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

The claimant submitted that the arbitration agreements were evidenced in the order notifications that followed the sale and purchase agreements and were sent via email by the seller to the buyer's broker. The relevant and identical wording of the order notifications read as follows:

> "*The General Terms and Conditions of the seller (including the arbitration clause in these General Terms and Conditions), a copy of which as they appear in our website (www...) is at your disposal upon request, shall apply in this agreement.*"

The respondent disputed the formal validity of the arbitration agreements invoked by the claimant and asserted that the parties had never entered into an arbitration agreement. Instead, the respondent submitted that the party presented as its broker was in reality an in-between buyer which then sold the bunker oil to the respondent and, as a result, there was no direct relationship between the claimant and respondent.

## Decision

Applying Article II(1)-(2) of the New York Convention,(1) which sets out the requirements for the formal validity of an arbitration agreement, the Piraeus Single-Member First-Instance Court(2) observed that the writing requirement aims to enhance protection of the parties, but this should not harm the practice of international trade and international transactions. The court accepted that an exchange of letters, which fulfils the writing requirement under Article II(2) of the convention, also includes an exchange of emails, as under the applicable rules on evidence of the Civil Procedure Code,(3) an email is by its nature equated to a document such as a letter. The court went on to say that the writing requirement is fulfilled in the case of incorporation by reference of standard terms containing an arbitration clause even though the parties have not signed the standard terms

document, provided that the document containing the incorporation clause fulfils the writing requirement. The court held that in international trade, a general reference to another document is sufficient for the effective incorporation of the arbitration clause – without the need for an express and specific reference – in cases concerning a provision common and known to those engaged in the particular trade, which consider the resolution of disputes through arbitration as a stable practice and refrain from making any reservation. The court explained that this is justified because arbitration has become the habitual dispute resolution method in international transactions and the parties should show enhanced vigilance in their business activities. Nevertheless, in the particular circumstances, the court found that there was no direct exchange of emails between the parties, as the claimant could not prove that the third party, to which the emails containing the incorporation clauses were addressed, was acting in the capacity of respondent's broker. Further, there was no reply by the respondent confirming its agreement.

**Comment**

The court applied the New York Convention as the request for enforcement related to a foreign arbitral award.(4) It has been established by case law that the requirements set out by the New York Convention for the formal validity of arbitration agreements are substantive rules which prevail over any other domestic substantive or conflict of law rules.(5) It is also clear that even domestic consumer protection legislation that treats as abusive – and thus null and void – arbitration clauses contained in consumer contracts, despite the broad concept of the term 'consumer' in Greek law,(6) does not apply in respect to commercial relations that fall under the scope of the New York Convention.(7)

Article II(2) of the New York Convention is silent on whether a specific and express reference or only a general reference is needed for a formally valid incorporation of an arbitration clause. Member state case law has followed both of these solutions. Greek case law has traditionally required a specific and express reference in non-New York Convention cases – particularly in respect of bill of lading incorporation clauses.(8) Nevertheless, in New York Convention cases, Greek courts have been prepared to accept a general reference as sufficient.(9) The present judgment follows this line of case law (although the incorporation clause contained a specific reference to an arbitration clause). However, it must be stressed that this deviation in favour of a general reference is not a consequence of the application of the New York Convention regime as such, but of specific circumstances – in particular:

- the international character of the dispute (international trade and international transaction);
- the common use of arbitration in the particular trade;
- the awareness of the parties regarding this practice and its stable character; and
- the absence of any reservation by them.

Although Article II(2) of the New York Convention does not refer to electronic transmissions (eg, emails), which were unknown at the time it was drafted (1958), it is now settled that the circumstances described in Article II(2) are not exhaustive (and as a result include electronic means of transmission). This has been indicated in the recommendation regarding the interpretation of Articles II(2) and VII(1) of the New York Convention, issued by the UN Commission on International Trade Law in 2006;(10) and the present judgment is in line with this approach, although it does not expressly refer to it.(11) The court invoked certain Greek civil procedure provisions on evidence in support of its finding on the validity of the incorporation of an arbitration clause by reference through an email exchange. That said, it must be stressed that the interpretation of the convention is autonomous and does not depend on the particularities of national laws. Moreover, the applicability of the national court's rules of procedure (as provided in Article III of the convention) is confined to the procedure to be applied by the court for enforcing the arbitral award and cannot extend to the interpretation of the convention's substantive provisions (eg, Article II(2)). Lastly, while invoking a national law provision for accepting an email exchange as fulfilling the writing requirement cannot be ruled out under the most favourable right provision(12) in Article VII(1) of the convention,(13) the court has clearly not followed this path.

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**Endnotes**

(1) Article II(1)-(2) of the New York Convention provides:

> *"1. 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, concerning a subject matter capable of settlement by arbitration. 2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."*

(2) Piraeus Single-Member First-Instance Court Judgment 2150/2017 (Admiralty Division).

(3) Especially, Article 444 of the Code of Civil Procedure, which equates to documents electronic means used to record, store, produce or reproduce data.

(4) Greece ratified the New York Convention by Legislative Decree 4220/1961 and applies both the commercial and the reciprocity reservations.

(5) Supreme Court Judgment 8/1997 (in plenary).

(6) See Article 2(7)(xxxi) of Law 2251/1994 on consumer protection. Greek law adopts a more expansive (compared to the original EU law provisions) concept of 'consumer' as being the end recipient of goods and services even if intended for professional or commercial needs.

(7) Piraeus Court of Appeal Judgment 525/2014 (Admiralty Division).

(8) See Supreme Court Judgment 236/1966 (in plenary) and more recently Supreme Court Judgment 8/1996 (in plenary). Nevertheless, a general reference is accepted in charter party bills (eg, Congenbill); see Piraeus Court of Appeal Judgments 200 and 201/1997.

(9) See Athens Court of Appeal Judgment 9671/1995 and Piraeus Court of Appeal Judgment 525/2014 (Admiralty Division). Another judgment from the Athens Court of Appeal (7195/2007) was quashed by the Supreme Court (539/2013), which did not apply the New York Convention (for further details please see "Form requirements in arbitration clauses incorporated by reference").

(10) See UN Document A/61/17, Annex II (at Page 61), available at www.uncitral.org.

(11) A passing reference to the United Nations Commission on International Trade Law 2006 recommendation is found in Piraeus Court of Appeal Judgment 525/2014 (Admiralty Division).

(12) It is debated whether, for example, the existence of a more favourable national law provision allows parties to 'cherry pick' between the different regimes of the convention and national law.

(13) Article VII(1) of the New York Convention provides:

> *"1. 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."*