

A New Perspective on the “Consent” as an Inherent Element of International Commercial Arbitration (Original Research)

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Persian Text pp. 139-157

(DOI) : 10.22066/cilamag.2025.2056945.2715

Date Received: 1 Apr.2025

Date Accepted: 13 May.2025

Extended Abstract

The phrase that “arbitration is a creature of contract and mutual consent” is so intertwined with arbitration literature that the relationship between arbitration and the element of consent is considered the same as the relationship between a body and its shadow. The most important and fundamental outcome of considering consent as an inherent element of international commercial arbitration is the recognition of default jurisdiction in favor of courts. This means that, unless otherwise agreed, the parties must refer to the court to resolve their dispute.

The perception of consent as an inherent element of international commercial arbitration disrupts the efficiency of the arbitration process by creating significant practical deficiencies. These practical deficiencies include the impossibility of consolidated actions in multilateral arbitrations and the impossibility of intervention and joinder a third party without obtaining the consent of all parties to the dispute, which increases the risk of issuing conflicting awards. Additionally, the consensual nature of arbitration is, in many cases, abused as a tool to deny arbitration or create delays in the arbitration process. On the one hand, the consensual nature of arbitration prescribes various grounds upon which parties can annul the arbitral award and frustrate the efficiency of the arbitration process. On the other hand, one party to a dispute may, as a delaying tactic, bring a dispute that is subject to a valid arbitration agreement before the court, claiming that the arbitration agreement does not exist or is invalid. It is worth mentioning that considering the element of consent as inherent also confronts the legal system with a lack

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of coherence, because if a legal system considers consent as an inherent element of arbitration, then the element of consent must be respected narrowly and exception to it should not be allowed as a rule. This is despite the fact that today, courts and arbitration tribunals have significantly abandoned the formalist approach to the element of consent and in cases where the claimant or respondent does not consent, declare existence of jurisdiction. Considering consent as an inherent element of arbitration not only confronts the legal system with a lack of coherence but also, by creating deficiencies within the structure of the arbitration system, makes it necessary to design a legal presumption to compensate for these deficiencies. In this context, the doctrine of independence of the arbitration agreement can be mentioned. While it is often referred to as a principle or a rule, it is in fact a legal presumption intended to compensate for the shortcomings arising from the consensual nature of arbitration. More precisely, if the basis of arbitration is not the consent of the parties, the design of a legal presumption based on the independence of the arbitration agreement seems unnecessary.

Today, according to the modern perspective, in order to respond to international commercial requirements and properly and optimally administer the arbitration process, the default jurisdiction in favor of arbitration is emphasized. The recognition of the default jurisdiction of arbitration has various theoretical, economic, axiological and empirical reasons. The theoretical foundations of international commercial arbitration show that, in the field of international arbitration, proceedings through arbitration have become the principle, and proceedings through national courts have become the exception. The recognition of arbitration as the primary method for resolving international disputes is reinforced by the fact that there is no transnational judicial authority with general jurisdiction in the international scope that arbitration can replace. Consequently, the parties will be forced to choose between international arbitration and national judicial authorities. Since the parties prefer their own national court and do not want to be subject to the jurisdiction of the opposing party's national court, they will refrain from referring to state judicial authorities and will ultimately refer their dispute to arbitration, an authority that guarantees the principle of impartiality more than state judicial authorities. From an economic perspective, the default jurisdiction rule is determined based on the will and preference of the majority of society, because majority defaults minimize contractual costs. In the international commercial community, it is arbitration that is chosen by the majority of commercial actors as a majority default. The default jurisdiction rule, in addition to being the choice of the majority, should also be axiologically in line with maximizing freedom of will, which arbitration better guarantees compared to judicial proceeding. Finally, the successful experience of compulsory arbitrations shows that consent cannot be an inherent element of international commercial arbitration and from this

perspective reinforcing the default jurisdiction of arbitration.

This article, using a descriptive analytical method, seeks to explain that the fundamental and inherent authority of the element of consent in international commercial arbitration has faced decline in recent times. Accordingly, in the scope of international trade, instead of the default jurisdiction of national courts, one should speak of the primary and default jurisdiction of arbitration.

Keywords

Arbitration, Natural Method, Consent, Default Jurisdiction, Principle of Autonomy

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