

**BETWEEN EAST AND WEST:
ESSAYS IN HONOUR OF
ULF FRANKE**

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Marie Öhrström
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JurisNet, LLC
71 New Street
Huntington, New York 11743
USA
www.arbitrationlaw.com

Incorporation and Passivity: Entering into Arbitration Agreements under Swedish Law

*Anders Reldén**

*Mattias Nilsson***

I. INTRODUCTION

Both the New York Convention¹ and the traditional version of UNCITRAL Model Law² acknowledge only written arbitration agreements. Under Swedish law, however, there are no formal requirements for the conclusion of an arbitration agreement—an agreement is created when the parties' intentions converge. It is also not improbable that a party may become bound to an arbitration agreement as a result of that party's own passivity.

When an arbitration clause identifies Stockholm as the place of arbitration, Swedish law is applicable on the conclusion of the agreement, unless, of course, the parties have agreed otherwise. Parties negotiating and entering into agreements identifying Sweden as the place of arbitration should be conscious of the fact that a binding arbitration agreement may arise at a much earlier stage than at the time when a written contract, duly signed by all parties, is at hand. It may be argued that a binding arbitration agreement may also arise if, for example, one party does not object to the applicability of a standard agreement to which the other party refers after the initial agreement date, and such standard agreement contains an arbitration clause.

Under Swedish law, the answer to the question when a binding agreement is made is uncertain. In order to avoid disputes on the applicability of arbitration clauses, parties and counsel should be aware of the function of the Swedish mechanisms for binding agreements. In the

* Partner, White & Case Advokat AB.

** Associate, White & Case Advokat AB.

¹ The New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, article II. The term "agreement in writing" shall be understood to include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in the exchange of letters or telegrams.

² By the adoption in 2006 article 7 in UNCITRAL Model law on International Commercial Arbitration (UN Doc. No A/40/17, Annex 1 and A761/17, annex 1) has two different versions. The first option states that the arbitration shall be in writing, just as the 1985 version. An agreement is, according to this option of the Model Law, in writing if it is recorded in any form, including electronic communication. The second option does not stipulate any formal requirements.

number of disputes which do arise, arbitrators as well as counsel may also benefit from a rundown of the Swedish rules.

This article analyzes how Swedish legal principles for establishing contracts should be applied to arbitration agreements with a primary focus on issues relating to incorporation in contracts of standard agreements and agreements by passivity.

Since an arbitration agreement is generally concluded in the same way as any other agreement, we will begin by providing a brief description of the basic principles of the Swedish Contracts Act (Section II) and also by analysing whether arbitration agreements generally require any special deliberations (Section III). Then, we will account for agreement by passivity (Section IV), incorporation of standard agreements (Section V), and the special case when an arbitration clause becomes part of the agreement *after* the contract has been entered into – normally together with other terms and conditions contained in a standard agreement (Section VI). Case law which deals specifically with such questions are scarce and we will therefore in each of the sections mentioned above make our starting point in general contractual principles and thereafter analyze how they apply to arbitration agreements. A few final remarks will be made in Section VII.

II. GENERAL PRINCIPLES REGARDING CONTRACTS

A. Entering into Agreements under the Swedish Contracts Act

Swedish contract law is based on the doctrine of intention. Formation of contracts is regulated in the Contracts Act of 1915.³ The Act describes a non-mandatory model for entering into agreements, based on the parties' exchange of written (or oral) offers and counteroffers which are binding and irrevocable during an acceptance period. An agreement is entered into when an offer is met by a corresponding acceptance.

What in fact constitutes a binding agreement under Swedish law is the mutual assent of the parties – their mutual willingness to be bound towards the other party – and usually the exchange of some kind of expression of such willingness to be bound.⁴ A party's intention and willingness to be bound may be expressed in writing, orally or by the conduct of the party (subsequent conduct or mutual action). The Swedish view on agreements is basically subjective – the most important issue is the intention and belief of the parties, not the objective content of their

³ Sweden has not adopted Part II of CISG regarding formation of contracts.

⁴ See for example, Kurt Grönfors, *Avtalslagen* (3rd ed. Norstedts Juridik, Stockholm 1995) 52, Jan Ramberg and Christina Ramberg, *Allmän avtalsrätt* (7th ed. Norstedts Juridik, Stockholm 2007) 33 and 79, and *Förslag till lag om avtal etc.*, (1914) 36-49 (preparatory work of the Swedish Contracts Act).

statements.⁵ A statement (*i.e.*, a written contract) is generally merely a way of proving the intention of the parties.

The provisions in the Contracts Act are non-compulsory. The parties may agree on when a binding contract is formed.⁶ The legal provisions in the act may also be set aside by commercial practice and other well-established customs; but the existence of such usage is hard to prove.

Even if an agreement is to be formed by corresponding offer and acceptance, an agreement may occasionally be concluded even if there is no meeting of minds. Such conclusion is usually based on the principle of trust, *i.e.*, a party's trust in (and justified expectation of) the content of an expression of the other party's intention, even if such expression for some reason deviates from the true intention.⁷ Such trust or justified expectations can also be based on the absence of a reaction or objection of the other party (passivity). This way of concluding a contract is dealt with in Sections IV and VI below.

B. A Fluctuating "Contract Threshold"

The requirements for a contract to be made cannot be answered in general terms; it differs depending on the individual contract or on the individual contractual terms. For some contractual stipulations, especially those which are seen as unexpected or as a greater burden on a party, the evidence of a meeting of minds must be higher than for other terms and conditions.

The legal scholar and Swedish Supreme Court Justice Stefan Lindskog describes the deviation regarding different contractual terms as an issue of a fluctuating contract threshold.⁸ The level of the threshold differs with, *inter alia*, the content, type, and effects of the relevant contractual stipulation.

As to the variables that are of importance under Swedish law when determining the level of the contract threshold, these are not entirely clear. The conclusion that may be drawn from case law is that unexpected terms and terms forming a heavier burden on a party do have a higher threshold.⁹ Other variables are probably also of importance.

⁵ See for example, Kurt Grönfors, *Avtalslagen* (3rd Norstedts Juridik, Stockholm 1995) 56-57.

⁶ Such agreed formal requirements may be altered by a new agreement of the parties, constituted by their mutual intention.

⁷ Bert Lehrberg, *Avtalsrättens grundelement* (2nd ed. I.B.A. Institutet för Bank- och Affärsjuridik, Stockholm 2006) 235 and 237; Axel Adlercreutz, *Avtalsrätt I* (12th ed. Juristförlaget i Lund, Lund 2002) 37.

⁸ Stefan Lindskog, *Skiljeförfarande – En kommentar* (Norstedts Juridik, Stockholm 2005) 103-104. See also Axel Adlercreutz, *Avtalsrätt II* (5th edn Juristförlaget i Lund, Lund 2001) 72-73.

⁹ See cases NJA 1978 p. 432 and NJA 1980 p. 46 (Swedish Supreme Court); also Professor Ulf Bernitz, *Standardavtalsrätt* (7th ed. Norstedts Juridik, Stockholm 2008) 63-68; and Axel Adlercreutz, *Avtalsrätt II* (5th ed. Juristförlaget i Lund, Lund 2001) 64-67.

III. ARBITRATION AGREEMENTS IN GENERAL

A. *Applicability of Swedish Substantive Law on the Arbitration Agreement*

Section 48 of the Swedish Arbitration Act states as follows:

Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place . . . The first paragraph shall not apply to the issue of whether a party was authorized to enter into an arbitration agreement or was duly represented.¹⁰

Swedish substantive law applies to all arbitration agreements regarding arbitrations which take place in Sweden, unless otherwise agreed by the parties.¹¹ This includes how an arbitration agreement is concluded (with the exception of the authority and power of the person or persons representing the party entering into the agreement) and interpreted, as well as the invalidity and adjustments of unfair arbitration agreements.

B. *Entering into Arbitration Agreements*

The Swedish Arbitration Act¹² does not stipulate any specific prerequisites for an arbitration agreement to be entered into.¹³ The general

¹⁰ According to Section 46, the Arbitration Act applies to arbitral proceedings which take place in Sweden notwithstanding that the dispute has an international connection.

¹¹ In this respect, the Swedish Arbitration Act differs from the UNCITRAL Model Law. The Model Law does not regulate what is the applicable law for the arbitration agreement (see Claes Zettermarck and Anders Reldén, "Bör lagen om skiljeförfarande internationaliseras" in Lars Göthlin and others (eds.), *Vänbok till Bertil Södermark* (Norstedts Juridik, Stockholm 2009) 84. According to the Swedish Arbitration Act sections 46 and 48, the law of different countries may be applicable to the arbitration proceedings and the arbitration agreement. Regarding the proceedings, Swedish law is applicable to all arbitrations which take place in Sweden.

¹² The Swedish Arbitration Act is strongly influenced by the UNCITRAL Model Law on International Commercial Arbitration, but it does not entirely correspond to the Model Law. See for example Jernej Sekolec and Nils Eliasson, "The UNCITRAL Model Law on Arbitration and the Swedish Arbitration Act: A comparison," in Lars Heuman and Sigvard Jarvin (eds.), *The Swedish Arbitration Act of 1999, Five Years On: A Critical Review of Strengths and Weaknesses* (JurisNet, Huntington 2006) 171-250.

¹³ The agreement must of course contain a referral to arbitration and the agreement must aim at a defined existing or future legal relationship—but these issues concern the content of the agreement not its formation.

principles regarding conclusion of agreements are applicable.¹⁴ As will be discussed below, this is a general principle which in some aspects may be modified. Below we will, regarding each issue, first discuss the general principles of Swedish contract law and thereafter analyze if there are reasons to make any modifications in respect of arbitration agreements.

Several legal scholars agree that the conditions for an arbitration agreement to be concluded are, in one way or another, rigid compared to entering into agreements in general.¹⁵ In other words, a fairly high contractual threshold is upheld when dealing with arbitration agreements.¹⁶

In general, this rigidity is not motivated by arguing arbitration clauses being unexpected, even if that occasionally might be the case.¹⁷ In some cases, an arbitration clause might be a heavy burden on a party, due to the cost of arbitration. This is mainly of relevance if the agreement is entered into between companies with very different financial and legal resources.¹⁸ Of greater relevance might be the fact that an arbitration

¹⁴ SOU 1994:81, 77 and 95 (preparatory work of the Swedish Arbitration Act); Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris Publishing, New York 2003) 32; Finn Madsen, *Commercial Arbitration in Sweden* (3rd ed. Oxford University Press, New York 2007) 63; Nils Dillén, *Bidrag till läran om skiljeavtalet* (A.B. Gustaf Larssons Bokhandels Förlag, Stockholm 1933) 138-141 (dissertation); Stefan Lindskog, *Skiljeförfarande – En kommentar* (Norstedts Juridik, Stockholm 2005) 103; and Eric M. Runesson, "The Arbitration Agreement as a matter of Swedish Contract Law," in Lars Heuman and Sigvard Jarvin (eds.), *The Swedish Arbitration Act of 1999, Five Years On: A Critical Review of Strengths and Weaknesses* (JurisNet, Huntington 2006) 5.

¹⁵ Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris Publishing, New York 2003) 33; Åke Hassler and Thorsten Cars, *Skiljeförfarande* (2nd ed. Norstedts Förlag, Stockholm 1989) 34; Stefan Lindskog, *Skiljeförfarande – En kommentar* (Norstedts Juridik, Stockholm 2005) 103-105; and Axel Adlercreutz, *Avtalsrätt II* (5th ed. Juristförlaget i Lund, Lund 2001) 67. See also RH 102:82 (Court of Appeal for Western Sweden) and RH 1989:1 (Court of Appeal for Southern Norrland).

¹⁶ Stefan Lindskog, *Skiljeförfarande – En kommentar* (Norstedts Juridik, Stockholm 2005) 104.
¹⁷ In appeal court case SvJT 1979 rf p. 1 (Svea Court of Appeal), two Swedish parties entered into a purchase agreement which referred to the conditions in a contract between the seller and the seller's supplier (a Russian entity). This contract contained an arbitration clause with Moscow as the seat of arbitration. The Svea Court of Appeal held that the arbitration clause was not binding in the agreement between the two Swedish parties and, according to the court, the arbitration clause was not a natural part of the agreement, and the seller had not in an unambiguous way made it clear to the purchaser that the arbitration clause was meant to be a part of the contract between the two Swedish parties. Arbitration in Moscow must therefore reasonably be seen as an unexpected contractual term in an agreement between two Swedish entities, and also a greater burden in comparison with arbitration in the parties' own jurisdiction.

¹⁸ Ulf Bernitz, *Standardavtalsrätt* (7th ed. Norstedts Juridik, Stockholm 2008) 64-65; and Bengt Olsson and Johan Kvart, *Lagen om skiljeförfarande – En kommentar* (1st ed. Norstedts Juridik, Stockholm 2000) 33.

clause is an important term of the contract¹⁹ and the fact that a party by entering into an arbitration agreement waives its right in general of access to the ordinary courts.²⁰

C. Concluding Arbitral Agreement in Other Ways than Writing

As stated above, an offer or acceptance does not have to be in writing or even made orally. The arbitration agreement may also be established by party usage and the parties' previous course of dealing.²¹ Such usage is usually hard to prove.

An arbitration agreement may also be concluded by subsequent conduct,²² but such conduct of the party or parties would then reasonably have to indicate a clear expression of the party's intention to be bound by the arbitration agreement.²³ Based on the doctrine of separability, if the arbitration agreement is a part of another agreement, the conduct concluding must reasonably be directed at, or at least clearly include, the arbitration agreement (not only the agreement in general).

D. Burden of Proof

Swedish procedural legislation is based on the principles of free production of evidence by the parties and free evaluation of evidence by the

¹⁹ Professor Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris Publishing, New York 2003) 32; and Axel Adlercreutz, *Avtalsrätt II* (5th edn Juristförlaget i Lund, Lund 2001) 67.

²⁰ Stefan Lindskog, *Skiljeförfarande – En kommentar* (Norstedts Juridik, Stockholm 2005) 104; and Nils Dillén, *Bidrag till läran om skiljeavtalet* (A.B. Gustaf Larssons Bokhandels Förlag, Stockholm 1933) 139 (dissertation). Compare with Åke Hassler and Thorsten Cars, *Skiljeförfarande* (2nd ed. Norstedts Förlag, Stockholm 1989) 40.

²¹ RH1989:83 (Svea Court of Appeal) and for example Eric M. Runesson, "The Arbitration Agreement as a matter of Swedish Contract Law," in Lars Heuman and Sigvard Jarvin (eds), *The Swedish Arbitration Act of 1999, Five Years On: A Critical Review of Strengths and Weaknesses* (JurisNet, Huntington 2006) 6-7; and Jan Ramberg, "The arbitration agreement," in Stockholm Arbitration Report (SAR) 1999:1, 25.

²² As an example of an arbitration agreement constituted by subsequent conduct see "Final Arbitration Award Rendered in 2000 in Case 108/1997: Majority Award One Arbitrator Dissenting in Part" including Observations by Michael S. Walker, in Stockholm Arbitration Report (SAR) 2001:1, 57-72. See also Nils Dillén, *Bidrag till läran om skiljeavtalet* (A.B. Gustaf Larssons Bokhandels Förlag, Stockholm 1933) 139 (dissertation); and Finn Madsen, *Skiljeförfarande i Sverige – En kommentar till lagen* (1999:116) om skiljeförfarande och till reglerna för Stockholms Handelskammars Skiljedomsinstitut (2nd ed. Jure Förlag, Stockholm 2009) 70, Stefan Lindskog, *Skiljeförfarande – En kommentar* (Norstedts Juridik, Stockholm 2005) 101-102.

²³ A party who takes part in arbitration without objecting to the tribunal's authority is considered to have accepted that an arbitration agreement has been concluded (even if that was not originally the case). This is a special kind of conclusion of agreements through subsequent conduct.

court.²⁴ A party alleging an arbitration agreement to have been concluded has, in general, the burden to prove the facts and circumstances from which the arbitral tribunal or the court should draw the conclusion that a valid arbitration agreement has been concluded.²⁵ The burden of proof is the same whether the matter is tried by an arbitral tribunal or a court, as a preliminary issue in an arbitration matter or after challenging an arbitral award.²⁶

There is one exception to this rule. If a party does not appoint an arbitrator, the other party may request a competent district court to appoint an arbitrator and in such a case the court may reject the request on the grounds that the arbitration is not legally permissible unless manifest. In this situation, a party which asserts that no valid agreement has been entered into bears the burden of proof.²⁷

E. The Doctrine of Separability

A general principle of arbitration law is the doctrine of separability, which is adopted in section 3 of the Swedish Arbitration Act:

Where the validity of an arbitration agreement which constitutes part of another agreement must be determined in conjunction with a determination of the jurisdiction of the arbitrators, the arbitration agreement shall be deemed to constitute a separate agreement.²⁸

²⁴ The Swedish Code of Judicial Procedure, Chapter 35, Sections 1 and 6.

²⁵ As Stefan Lindskog stresses, the prerequisite valid arbitral agreement may consist of several different matters in dispute and different parties may have the burden of proof regarding different matters. Stefan Lindskog, *Skiljeförfarande – En kommentar* (Norstedts Juridik, Stockholm 2005) 103 footnote 35.

²⁶ Stefan Lindskog, *Skiljeförfarande – En kommentar* (Norstedts Juridik, Stockholm 2005) 103, 340 and 923. Compare regarding challenging the award, Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris Publishing, New York 2003) 591-592. Further, when it comes to enforcement under the New York Convention, the party asserting that an arbitral award is based on a valid arbitration agreement bears the burden of proof. This burden can often be fulfilled by referring to the tribunal's ruling in the award, unless the opposite party makes specific remarks and objections. See NJA 2003 p 379 (Supreme Court Case).

²⁷ Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris Publishing, New York 2003) 219.

²⁸ Section 2 states that the tribunal may rule on its own jurisdiction. Swedish legislation can be compared to the UNCITRAL Model Law, article 16(1):

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall entail *ipso jure* the invalidity of the arbitration clause.

The scope and the content of the doctrine of separability under Swedish law are very uncertain. The views of different legal scholars differ noticeably and the case law is very limited.²⁹

IV. PASSIVITY

A. General Principles of Contract Law

In general, a party has no obligation to reply to offers made by other parties and a party will therefore not be bound by its own passivity. There are, however, three situations dealt with in the Contracts Act when a party will be bound if it does not inform or object to the other party without unreasonable delay:

- where the offeree assumes that an acceptance has been received in due time and this fact must have been realized by the offeror (section 4);
- where the offeree believes an acceptance to correspond to the offer—but the acceptance by reason of any addition, restriction, or reservation does not—and where this fact must have been realized by the offeror (section 6); and
- where a party gives an invitation to tender an offer (a statement which would otherwise be deemed to constitute an offer but where the statement includes the words “not binding,” “without obligation,” or some similar expression), and such an offer is forthcoming within a reasonable period of time thereafter from a party thus invited, and where the recipient must realize that the offer has been occasioned by his invitation (section 9).

The three statutory rules referred to above, especially sections 6 and 9 of the Contracts Act,³⁰ are to some extent considered to be an

²⁹ See especially Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris Publishing, New York 2003) 43-51; and Stefan Lindskog, *Skiljeförfarande – En kommentar* (Norstedts Juridik, Stockholm 2005) 324-326. Lars Heuman emphasizes the intention of the average party (a hypothetical intention of the parties) to justify why a tribunal should rule on its jurisdiction regardless of whether a party raises objections to the validity of a contract including an arbitration clause. He argues that a tribunal's ruling regarding its jurisdiction cannot be overruled by a court after challenging the award, since such overruling would mean that a court were to review an award on the merits of the case. Stefan Lindskog rejects any hypothetical will of the parties as a basis for the analysis and argues that the meaning of the doctrine is nothing more than the fact that deficiency in a contract must be tried separately for the arbitration clause and the rest of the agreement. According to Lindskog, a court always has jurisdiction to try if a dispute is within the scope of an arbitration agreement and if the arbitration agreement is valid. We agree with the position taken by Lindskog.

expression of a general principle of law even if differing opinions are expressed by legal scholars.³¹ One way of formulating such a principle is that a party who must realize that the other party believes or assumes that a binding agreement has been concluded, has an obligation to inform the other party that no such agreement has been formed. A party that fails to give such notice without unreasonable delay is bound by the agreement.

In Supreme Court case NJA 1962 p. 276³² a party was bound by analogy of section 9, and to a certain extent also section 6, of the Contracts Act:

The owner of a place of entertainment contacted an artist agency by phone in order to book a dance orchestra for Midsummer's Eve. The agency (which did not have the power of attorney to bind the orchestra at the time of the phone call) suggested an identified orchestra, and the owner decided that the suggested orchestra would be fine. They agreed that the agency would send the owner a contract. The agency sent the contract, signed by the orchestra, to the owner in mid February. The owner did not sign the contract, but in late May he notified the agency that he could not engage the orchestra. The Supreme Court held that the contract sent by the agency was to be seen as an offer to the owner. The offer had been occasioned by the owner as a result of the preliminary agreement by the phone, and the owner must have realized that the orchestra assumed that the owner agreed to the preliminary agreement unless he, within a reasonable time period, notified his counterparty to the contrary. In such a situation, the owner was bound to a contract in accordance with the contract sent to him.

In other situations, the legal consequence of a party's passivity might not be that the party is bound by his own passivity but that he will bear

³⁰ See also section 3 of the Commission Act of 2009 and section 5 of the Commission Act of 1914.

³¹ See for example, Torgny Håstad, “Om underlåtenhet av Yngve Skarin och Bertil Bengtsson att ta ställning till översänt kontrakt respektive inlämnad seminarieuppsats. En civil- och processrättslig kommentar till NJA 1962 s. 276” in Anders Agell et al, *Festskrift till Bertil Bengtsson* (Nerenius & Santérus Förlag, Stockholm 1993) 221-245; Supreme Court Justice Torgny Håstad's additional opinion in NJA 2006 s. 638 (Swedish Supreme Court); Hjalmar Karlgren, *Passivitet – en köprättslig och allmänt avtalsrättslig studie* (P.A. Norstedts & Söners Förlag, Stockholm 1965) 187-240; Axel Adlercreutz, *Avtalsrätt 1* (12th ed. Juristförlaget i Lund, New York 2002) 77-85; Bert Lehrberg, *Avtalsrättens grundelement* (2nd ed. I.B.A. Institutet för Bank- och Affärsjuridik, Stockholm 2006) 90. Compare with Jan Ramberg and Christina Ramberg, *Allmän avtalsrätt* (7th ed. Norstedts Juridik, Stockholm 2007) 113-114.

³² The majority consisting of three out of five judges.

the burden of proof that no agreement has been concluded. This principle of law is based on section 21 in the Commercial Agents Act:

Where a third party which is an undertaking negotiates with the agent and thereafter receives notice from the principal that the latter ratifies the contract or accepts an offer which was forwarded by the agent, the third party, where he considers that no contract has been concluded or that no offer has been made, or that the contract or the offer have been incorrectly represented in the notification, shall inform the principal thereof without unreasonable delay. Should the third party fail to do so, and where he cannot show that the notification was incorrect, the third party shall be deemed to have concluded a contract on the terms indicated in the notification of the principal.

In Supreme Court case NJA 2006 p. 638, two commercial parties had for a long time been negotiating a settlement agreement:

After a further meeting and after e-mail correspondence between the parties' counsel, one of the counsel sent to the other party's counsel a written settlement agreement, which according to a cover letter was to be understood as confirmation of an oral agreement entered into at a meeting between the parties. When the other party did not respond without unreasonable delay, an agreement had been concluded in accordance with the contract sent to the other party unless that other party could prove that no such agreement had been entered into.

In those rare cases where a party is bound by his own passivity, the party is not bound as a result of his intention or willingness to conclude an agreement. The legal consequence, the conclusion of the agreement without a meeting of minds, serves two purposes. The original purpose mentioned in the preparatory works of the legislation, is to avoid one party speculating on the other party's risk by remaining passive.³³ The other purpose is good manners in commercial situations and the doctrine of loyalty, an obligation to undeceive the other party if that other party is under the illusion that a contract has been concluded. If a party is aware of the other party's illusion but neglects to notify the other party, the first party will be bound by his passivity.

³³ NJA II 1915 (preparatory works) 170 and 173.

B. Concluding Arbitration Agreements by Passivity

One may, in certain circumstances, argue that the silence of one party may be an expression of intention, a silent consent. Should a party's passivity be an expression of such silent consent, this would, in theory, create a binding agreement.³⁴ However, for a party to prove that the other party has given its consent by silence is not easy.

In general contract law, passivity may also bind based on one party having good reason to assume that silence is acceptance such as being an exception from the basic doctrine of intention. Legal scholars stress that it is not certain that the purposes behind conclusion of agreements due to passivity is enough for an arbitration agreement to be concluded. Professor Lars Heuman is of the opinion that an arbitration agreement might not be concluded by passivity by analogy with section 6 of the Swedish Contracts Act. He states:

It is conceivable that the general binding mechanisms of contract law cannot always be used in arbitration law, e.g. when parties can enter into a contract without requiring express common intentions. It should be observed, however, that there are numerous examples of parties having been bound by an arbitration agreement on the basis of the same principles as apply to other contracts, and that, apart from one specific situation, there is no express support in case law or doctrine for stricter requirements applying in order to bind parties to an arbitration agreement.³⁵

And further:

As an exception to basic contract law, a party can be bound by passivity after having received an offer. Those principles cannot be automatically extended to apply to arbitration clauses.³⁶

Nils Dillén, one of the early Swedish arbitration scholars, stated in his 1933 dissertation that it can be questioned if a neglected complaint could be equated with an agreement based on the intention that a dispute be tried by an arbitral tribunal. Dillén especially stresses that arbitration clauses are an encroachment on the basic right to protection through the State and the courts, and asks whether it is possible to be bound unless it is

³⁴ Nils Dillén, *Bidrag till läran om skiljeavtalet* (A.B. Gustaf Larssons Bokhandels Förlag, Stockholm 1933) 136-137 (dissertation).

³⁵ Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris Publishing, New York 2003) 33.

³⁶ Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris Publishing, New York 2003) 39.

clear from the circumstances at hand that the party has chosen to waive this right. Despite this, Dillén argues that the courts, under the influence of the commercial sphere, accept that arbitration agreements are made even in cases where it is not possible to show any real expression of intention by the parties.³⁷

In an unpublished modern case, the Svea Court of Appeal seems, in principle, to accept the conclusion of an arbitration agreement through passivity:³⁸

At a meeting the representatives of several parties agreed in principle to conclude a contract, and all the parties except two signed a contract. The contract was thereafter sent to persons authorized to sign for the two other parties. Later on the contract was signed by one further party and thereafter sent to the last party. This party never signed the contract. Svea Court of Appeal held that it could be argued that the party not signing the contract had an obligation to inform the other party when it decided not to sign the contract. The party did, however, inform the other party (approximately three months after receiving the contract). Therefore the party had not been bound by its passivity, according to the court.

The contract threshold is high in respect of arbitration agreements. However, in very rare situations it should be possible for a party to conclude an arbitration agreement by remaining passive, although passivity should only be of relevance when a party realizes that the other party relies on the first party being bound to the arbitration agreement, and the passive party neglects to clarify his opinion to the contrary.

Applying the doctrine of separability to the situation further complicates the analysis. For passivity to be of relevance, the passive party must realize that the other party believes or assumes (and hence relies on) an agreement having been concluded. The doctrine of separability could mean that passivity has specifically to concern the arbitration agreement. Even if the party was to realize that the other party relies on a contract having been formed, he might not be aware of an arbitration clause in the contract and is therefore not able to realize anything about such an arbitration clause. For a party to be bound by an arbitration clause through passivity, he might have to realize that the other party relies on an *arbitration agreement* being concluded—not the entire agreement or contract—as the arbitration agreement is to be treated as a separate agreement.

³⁷ Nils Dillén, *Bidrag till läran om skiljeavtalet* (A.B. Gustaf Larssons Bokhandels Förlag, Stockholm 1933) 139 (dissertation).

³⁸ Case T 3108-06 judgment dated December 17, 2007 (Svea Court of Appeal).

C. In Summary

It is not impossible to imagine passivity as the basis for conclusion of an arbitration agreement provided that one party must realize that the other party assumes that an arbitration agreement has been concluded, and despite this realization fails to disillusion the other party. However, such requirements are, by analogy with sections 6 and 9 of the Contracts Act, rarely fulfilled.

It may, on the other hand, be possible for the burden of proof as to whether or not a binding arbitration agreement has been concluded to be shifted to the party denying the existence of an arbitration agreement in accordance with the 2006 Supreme Court case. If one party, after concluded negotiations, sends confirmation of an allegedly concluded agreement and the other party does not revert without undue delay, the silent party might bear the burden of proof that no arbitration agreement was concluded.

V. INCORPORATION OF STANDARD TERMS

A. General Principles of Contract Law

Standard terms are incorporated into the individual contract if they form part of the individual contract or if they are attached to the contract as an attachment or an appendix. Usually a reference clause, a provision in the individual contract indicating that certain standard terms apply (or an oral reference if the agreement is entered into orally), would be sufficient for the terms to be incorporated. However, one condition is that the standard terms are easily accessible.³⁹

The above mentioned fluctuating contract threshold is of special relevance when it comes to the incorporation of standard terms. There is a difference between terms and conditions in general, and this applies to such terms and conditions that are to be seen as unexpected or impose a greater burden on a party. The result is, at least in theory, that some terms and conditions contained in a standard contract might be incorporated but other parts of the same standard contract might not become part of the individual contract.⁴⁰ This is of course not a very practical result.

³⁹ Ulf Bernitz stresses that the standard agreement must be kept available in such a way that the opposite party can without difficulty go through them before the agreement is concluded. Ulf Bernitz, *Standardavtalsrätt* (7th ed. Norstedts Juridik, Stockholm 2008) 60. According to Jan and Christina Ramberg, standard terms are easily accessible if they are available on a company's homepage or at its business premises—if the agreement is concluded there. Jan Ramberg and Christina Ramberg, *Allmän avtalsrätt* (7th ed. Norstedts Juridik, Stockholm 2007) 142-143.

⁴⁰ According to Stefan Lindskog, a court or tribunal should first consider if the standard terms are applicable, and thereafter ask if a clause in the standard terms for some reasons would not be binding. Stefan Lindskog, *Skiljeförfarande—En kommentar* (Norstedts

B. Incorporation of Arbitration Clauses

Incorporation of arbitration clauses in standard contracts is accepted internationally, both in the UNCITRAL Model Law and in the New York Convention.⁴¹

In ancient Swedish case law, the Supreme Court indicated that a higher threshold was required for an arbitration clause to be incorporated into an individual agreement than is now applied by the Swedish courts. In 1980 case law became modified:

NJA 1949 p. 609. A seller stamped an acceptance with a wording that certain standard terms were to be applied to the contract. The standard terms included an arbitration clause. The seller had not sent a copy of the standard terms to the purchaser, the arbitration clause had not been discussed between the parties and it could not be assumed that the purchaser knew about the arbitration clause. Irrespective of the material content of the agreement, the purchaser was not bound by the arbitration clause by not objecting to the confirmation.

In NJA 1969 p. 285 a Swedish seller and a Yugoslavian purchaser negotiated a contract. In the seller's offer, which was followed by telegrams, the seller referred to the printed text: *For all offers and orders Sveriges Mekanismföretags general terms of delivery are valid*. The standard terms included an arbitration clause, which was not discussed between the parties. The seller had not sent the purchaser a copy of the standard terms, and it could not be assumed that the Yugoslavian party realized that the seller assumed the arbitration clause to be applicable. The Supreme Court also expressly stated that it had no reason to try what material conditions were applicable.

NJA 1980 p. 46. Two Swedish entities had entered into a construction agreement. According to one of the parties the agreement was concluded orally at a meeting. In a letter the next day, referring to the negotiations, the other party presented the terms and conditions for work to be performed, including a reference clause to the agreed document and to the widely used

Juridik, Stockholm 2005) 106 footnote 42. See also NJA 1980 p. 46 (Swedish Supreme Court); and Axel Adlercreutz, *Avtalsrätt II* (5th ed. Juristförlaget i Lund, Lund 2001) 67 and 72-73.

⁴¹ According to Article 7(6) of the Model Law (option I), the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract. The New York Convention (Article II.2) considers an arbitral clause in a contract as an arbitration agreement in writing.

standard term AB 72. The first party did not object to the letter and started performing its work. The Supreme Court held that if the first party was of the opinion that a final agreement had been concluded orally before the letter, the party receiving the letter must have understood that the other party considered itself bound only when sending the letter and on the conditions stipulated in the letter. As the first party did not object but started to perform its work, it was bound as long as no further conditions were needed to be upheld for an arbitration clause to be valid. The Supreme Court, modifying the case law, referred to the fact that one party in NJA 1969 p. 285 was foreign and to the development of standard terms in commercial practice since 1969. It was not crucial for a copy of the standard terms to be sent to the other party and the reference clause was not hidden. Moreover, the first party had every reason to acquaint itself with the content of the terms to which the clause referred. For this reasons the party was bound by the arbitration clause.⁴²

It is clear that an arbitration agreement can be concluded through a reference clause⁴³ provided that the standard agreement is easily accessible to the parties. However, situations in which a reference clause in itself is not sufficient to conclude an arbitration agreement and the standard terms must be attached or the condition needs to be specifically emphasized, are more difficult to clearly identify.

One exception could be the situation where the arbitration clause is unexpected or particularly burdensome for one of the parties. This ought not generally to be deemed the case, but in exceptional circumstances an arbitration clause that identifies the place of arbitration as an unexpected location could fall into this category.⁴⁴ A further case which might fall within the exception is when an arbitration clause is "hidden" in the standard terms.⁴⁵

⁴² See also the Supreme court case NJA 1936 p. 521 and appeal court cases RH 1982:102 (the Court of Appeal for Western Sweden), RH 1990:7 (the Court of Appeal for Western Sweden), RH 1989:1 (the Court of Appeal for Southern Norrland).

⁴³ See for example Bengt Olsson and Johan Kvart, *Lagen om skiljeförfarande – En kommentar* (1st ed. Norstedts Juridik, Stockholm 2000) 33; and Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris Publishing, New York 2003) 33-34.

⁴⁴ An example might be case SvJT 1979 rf p. 1 (Svea Court of Appeal) (n 18). See also RH 1989:1 (the Court of Appeal for Southern Norrland) where the party was a person (not a company) with a small business with no experience of arbitration clauses. The Appeal court also stressed that the standard condition was not deemed appropriate under the circumstances at hand. The arbitration clause was not found to be incorporated.

⁴⁵ Ulf Bernitz, *Standardavtalsrätt* (7th ed. Norstedts Juridik, Stockholm 2008) 66; and Axel Adlercreutz, *Avtalsrätt II* (5th edn Juristförlaget i Lund, Lund 2001) 65-67.

The Supreme Court case discussed above concerns "agreed documents," *i.e.*, such standard agreements which had been agreed upon jointly by the parties or their trade associations. The Supreme Court noted that the matter concerned general terms and conditions drafted with due care and considering both parties' interests. Agreed documents may be deemed more well-balanced than the one-sidedly drafted standard terms of one party and are generally also more easily accessible than other standard terms. The contract threshold for incorporation of one-sidedly drafted standard terms and conditions should therefore be higher than that for agreed documents.⁴⁶

One-sidedly drafted standard terms should, under normal circumstances, be attached to the contract or sent to the other party, either in connection with the main contract or at another appropriate instance in order to be considered binding. One may also consider the possibility whereby the party introducing the standard terms indicates that the standard terms are easily accessible on the web site of the party relying on the standard terms.

An additional circumstance, directly mentioned in the 1980 case as relating to the 1969 case, is when one or all parties are foreign.⁴⁷ A prerequisite for incorporation should normally be that the standard terms containing the arbitral clause are in a language comprehensible to the party or in a language with a connection to the language in which the parties have communicated during negotiations and used for drafting the individual contract. In addition thereto, slightly higher demands ought to be put on the agreement being made accessible if it is not sent directly to the other party.

C. In Summary

Under normal circumstances, parties are bound by an arbitration clause contained in standard terms and conditions if such terms are attached to the main contract, or if there is a reference clause referring to the standard terms that have to be easily accessible. When it comes to reference clauses, certain limitations in the contract constraints may exist if the arbitration clause is unexpected, hidden, or unusually burdensome. The contract threshold is also higher for standard agreements that have been drafted by only one of the parties, or when the parties involved are foreign parties.

⁴⁶ Compare to Kurt Grönfors, *Avtalslagen* (3rd ed. Norstedts Juridik, Stockholm 1995) 67-68; Ulf Bernitz, *Standardavtalsrätt* (7th ed. Norstedts Juridik, Stockholm 2008) 18; and Axel Adlercreutz, *Avtalsrätt II* (5th ed. Juristförlaget i Lund, Lund 2001) 64.

⁴⁷ Lars Heuman, *Current Issues in Swedish Arbitration* (Kluwer Juristförlaget, Stockholm 1990) 24; and Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris Publishing, New York 2003) 37: "When foreign parties are involved, it is possible that an ordinary reference clause will not always have the intended effect."

VI. INCORPORATION OF AN ARBITRATION CLAUSE AFTER AN AGREEMENT HAS BEEN CONCLUDED

A. General Principles of Contract Law

Another issue is if standard terms can become incorporated into an individual contract after the contract has been entered into. To some extent, the answer is clear—the parties are always free to modify their agreement if they have reached consensus. But what happens if one party, after the agreement has been entered into, refers to standard terms which include an arbitration clause and the other party neither accepts nor objects to the standard terms referred to by the first party?

The Supreme Court has addressed the issue regarding standard terms in general, but legal doctrine is not unanimous and different opinions on how to interpret the case law exist:

In NJA 1970 p. 478 a Swedish seller and a Finnish purchaser negotiated an agreement on the phone and by telegram. On the phone they discussed the content of the agreement and the fact that the purchaser on the same day would enter into an agreement with a customer regarding the goods. The purchaser asked for, and received, a confirmation by telegram. The telegram included a statement that a final confirmation would be sent. The final confirmation was sent by letter a few days later, and included two disclaimers—one printed and one typed. No such disclaimer had been discussed by the parties at an earlier stage. The purchaser did not object to the disclaimers in the letter. The Supreme Court (the majority) held that the parties had entered into the agreement by the phone call and telegram, the reference to a final confirmation was only seen as routine information and that a written confirmation would also be sent. The Supreme Court further held that the letter was unclear as it contained two different disclaimers. As the purchaser had reason to believe that the parties had entered into the agreement a few days earlier without any disclaimer, the purchaser had no reason to believe that the seller intended to make the printed disclaimer a part of the agreement. The Supreme Court held that the purchaser omitting to object to the content of the printed disclaimer did not bind the purchaser to the disclaimer.

In NJA 2008 p. 962 a consumer engaged a surveyor to examine a house they intended to purchase. The agreement was made on the phone, and the surveyor sent a short confirmation by facsimile, which was signed and returned by the consumer. After

the survey, the surveyor sent the consumer a protocol. The protocol stated a period of limitation of two years. The consumer did not object to the period of limitation stated in the protocol. Approximately four years later the consumer claimed damage due to alleged negligence by the surveyor. The issue of law was whether the condition stipulating the period of limitation was part of the individual agreement. The Supreme Court held that the condition was not evidently unexpected or a great burden on a consumer engaging a surveyor. When the agreement was concluded by phone, the consumer could expect that the surveyor might define the terms and conditions for his services soon after the phone call and before the survey was made. If that had not been the case, the consumer would have had to object to the terms and conditions in order not to be bound by them. The confirmation did not contain any such terms and conditions and the fact that the protocol did include a period of limitation and that the consumer did not object at that point in time, did not mean he was bound by the condition. The Supreme Court held that the period of limitation was not a condition in the agreement between the parties.

According to Professor Ulf Bernitz,⁴⁸ standard terms must be known to the parties at the point in time when they conclude the agreement in order to become a part of the agreement. It is a general principle that the content of the agreement is fixed at the time when the agreement is concluded and the principle is, according to Ulf Bernitz, expressed in NJA 2008 p. 962. After this point in time a party cannot make a one-sided adjustment or amendment to the agreement by sending the other party a copy of or making reference to standard terms.

Professor Christina Ramberg takes a different view.⁴⁹ According to her opinion, the Supreme Court indirectly states that the time when the agreement is concluded is not crucial when judging the content of the agreement. Instead, Christina Ramberg emphasizes that what is crucial is the points in time when a contract is signed and when the parties perform their obligations under the contract. In the phase where the conditions are specified (before and after the point in time when the parties are bound) a party's passivity can be relevant if he does not clarify possible misunderstandings. But when the parties have signed a written contract, one can hardly ask a party to object to an attempt by the other party to change the content of the agreement. Regarding the question as to what would happen if a party objected to the other party's amended standard

⁴⁸ Ulf Bernitz, *Standardavtalsrätt* (7th ed. Norstedts Juridik, Stockholm 2008) 75-76.

⁴⁹ Christina Ramberg, "Inkorporering av standardavtal" (2008) *Juridisk Tidskrift* 717-723 which is a commentary to NJA 2008 p. 962 (Swedish Supreme Court).

terms after the point in time when the parties are bound but before the parties perform under the contract, Christina Ramberg argues that an alternative might be that no agreement has then been concluded.

However, NJA 2008 p. 962 can be interpreted differently as there is a distinction between stipulating the content of an agreement and interpreting that content.⁵⁰ The Supreme Court states that, irrespective of whether the parties agreed over the phone on the surveyor sending a confirmation, the consumer had reason to believe that the conditions of the agreement would be defined shortly. The confirmation, which might have determined certain terms and conditions, was either an express or an implied condition to the agreement.⁵¹ The agreement made by phone can be considered as a preliminary agreement, subject to confirmation from both parties. If the confirmation had stated other terms and conditions, these would have been incorporated into the individual agreement when the confirmation was signed by the consumer. The consumer would in such a case not have been bound by his passivity but by signing and returning the confirmation. The Supreme Court holds that passivity, regarding objections to terms and conditions after the point in time when the service is performed, does not adjust the content of the agreement.

Traditionally, the Swedish view has been that not even commercial entities have an obligation to object to any and all messages from the other party which are found to differ from their own opinion.⁵² A party is only bound to an amendment or adjustment if he must realize that the other party relies on the fact that the adjustment or amendment forms part of the agreement. There is no obligation—based on the doctrine of loyalty, or a duty to clarify mistakes, or to undeceive the other party if that other party is not under any delusion—to object to messages from the other party apart from what follows directly or by analogy from sections 4, 6, and 9 of the Contracts Act.

B. Arbitration Agreements

Regarding arbitration clauses, a party ought not to be considered bound by an arbitration clause which appears after the formation of the contract simply by not objecting to it. However, it cannot be ruled out that circumstances that motivate a different conclusion, an exception, may be at hand in individual cases. As stated above in section IV, passivity should only be of relevance if a party realizes that the other party relies on the

⁵⁰ Kurt Grönfors, *Avtalslagen* (3rd ed. Norstedts Juridik, Stockholm 1995) 52.

⁵¹ The Supreme Court refers to the facts that hiring the surveyor was made on the phone without any previous discussion, and that the service ordered was not uncomplicated.

⁵² Another thing is that both consumers and commercial entities are advised to react to such messages, not to be put in a difficult situation and that the party's silence is seen as evidence of the party's consent.

arbitration clause being part of the agreement, and the passive party neglects to clarify his opposite opinion.

Lars Heuman states:

It has been argued that prorogation clauses in letters of confirmation and such similar documents transmitted to a party after an agreement has been concluded can not be considered operative, since the recipient party's attention may have been concentrated mostly on other questions. This pronouncement also has a bearing on arbitration clauses, but the importance of the party's incomplete awareness of the clause diminishes if the agreement was concluded between parties with great experience of commercial law.⁵³

Thorsen Cars uses the example when a confirmation order, or a similar document, has been stamped to show that certain general terms and conditions apply to the delivery in question. In determining whether a party becomes bound by an arbitration clause that a party has referred to in this manner, case law has shown constraint in attributing any legal consequence to the other party's passivity. If the arbitration clause has been discussed during the negotiations of a contract, or if standard terms have been attached, the clause should be considered binding, according to Cars.⁵⁴

Eric M. Runesson argues, regarding arbitration clauses in standard conditions referred to in a confirmation order, that an objective method should be preferred for deciding if the receiving party is bound by the modification of the initial agreement. He also states:

If the arbitration agreement due to the circumstances seems to be an unexpected effect of the reference to a set or standard condition, it will normally be hard to find that the receiver of the confirmation "must have understood" that the other party intended to create an arbitration agreement. Hence, there is no agreement.⁵⁵

In an older appeals court case, a buyer was considered to have entered into an arbitration agreement by not objecting to an arbitration

⁵³ Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris Publishing, New York 2003) 39.

⁵⁴ Thorsten Cars, *Lagen om skiljeförfarande – En kommentar* (Faktas digitala bibliotek, Stockholm 1999) 26-27.

⁵⁵ Eric M. Runesson, "The Arbitration Agreement as a matter of Swedish Contract Law," in Lars Heuman and Sigvard Jarvin (eds.), *The Swedish Arbitration Act of 1999, Five years On: A Critical Review of Strengths and Weaknesses* (JurisNet, Huntington 2006) 9 (pp 8-10).

clause introduced on a contract note (Sw. *slutsedel*) which was sent as confirmation of an agreement made over the telephone.⁵⁶

The district court held, and the Svea Court of Appeal upheld, that the company had indeed not expressly committed to having the dispute tried by an arbitral tribunal. By not objecting to the arbitral clause on the contract note, the buyer was to be considered to have approved the arbitral clause.

In that particular case, the arbitration clause seems to have been reasonably obvious from the contract note. Nils Dillén states that the case corresponds well to the general legal opinion of the time and concludes, as mentioned above, that arbitration agreements may, *de lege lata*, arise through passivity.⁵⁷

The separability doctrine means that the arbitral clause is to be seen as a separate agreement. Provided that the arbitral clause has not been a topic of conversation between the parties during contract negotiations, an after-the-fact addition in the form of standard terms (containing an arbitral clause) ought hardly to conclude an arbitration agreement through passivity. When it comes to the main contract, it is a matter of adding new or adjusted terms to an already concluded agreement. One can imagine a situation whereby a passive party may become bound because it does not object to the terms and conditions added by the other party. With respect to the arbitral clause, however, there is no concluded agreement at hand to adjust, but instead communication of the standard terms is considered nothing but a regular offer applicable to the arbitral clause. Should the other party in such a case become bound, this would be a question of negative agreement formation, something which is not accepted under Swedish law.

Passivity expressed by not objecting to the arbitral clause (or to the standard terms as a whole) should not, in itself, lead to the other party being bound.⁵⁸ It would be a different matter if the offeree somehow expressed a willingness to be bound by the arbitral clause—expressly or through conduct. A further reason for this is that the party neglecting to acquaint itself with the standard terms may not even know of the offer concerning the arbitral clause. For a party to be bound, through passivity, by something of which it may not even have knowledge, but of which it perhaps should have had knowledge by having acquainted itself with the

⁵⁶ SvJT 1917 rf 6 p. 41-43 (Svea Court of Appeal).

⁵⁷ Nils Dillén, *Bidrag till läran om skiljeavtalet* (A.B. Gustaf Larssons Bokhandels Förlag, Stockholm 1933) 140-141 (dissertation).

⁵⁸ Any such reasoning, based on the separability doctrine, was, however, never presented by the Supreme Court in case NJA 1980 s 46, something which may perhaps be explained by the way in which the parties argued the case.

standard terms, would not be in line with the provisions in the Contracts Act that govern passivity.

C. In Summary

In our opinion, active assent is required in order for a party to become bound by an arbitration clause that has been added to the agreement at a date later than conclusion of the agreement. This is partly because of the higher agreement threshold for arbitral clauses, partly as a consequence of the separability doctrine. Since the arbitration agreement is a separate agreement, the relevant facts at issue—the intentions of the parties, and the passivity—must be dealt with from the point of view of the arbitration agreement and not from that of the main agreement.

VII. FINAL REMARKS

There are strong reasons to believe that passivity may lead to a binding agreement, even when it is an arbitration agreement. However, relatively strict requirements need to be fulfilled for passivity to lead to conclusion of an arbitration agreement. If the arbitration agreement cannot be said to be based on mutual assent, it needs to be supported by good faith. One party should have good reason to believe that a binding arbitration agreement has been made, while the other party acts disloyally and does not take disillusion his counterparty by clarifying that, in its opinion, no arbitration agreement has been concluded.

The separability doctrine should reasonably also mean that the trust and the passivity on which the agreement needs to be based must be aimed at or at least encompass the arbitration agreement itself.