

BELATED JURISDICTIONAL OBJECTIONS IN ICSID ARBITRATION

Christoph SCHREUER

I. INTRODUCTION

Article 41 of the ICSID Convention provides that it is for a tribunal to determine its own competence.⁽³³²⁴⁾ It also provides that any jurisdictional objections are to be considered by the tribunal which may either deal with them as preliminary questions or together with the merits:

Article 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Arbitration Rule 41(1) offers further detail on the timing of jurisdictional objections:

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder-unless the facts on which the objection is based are unknown to the party at that time.

Therefore, Arbitration Rule 41(1) contains the following rules concerning the timing of objections to jurisdiction:

(3324) Under the ICSID Convention's terminology, jurisdiction is used in relation to «the Centre» i.e. ICSID, whereas competence is used to describe the powers of a particular tribunal.

- a) a jurisdictional objection must be made as early as possible;
- b) at the latest the objection must meet the deadline for the counter-memorial;
- c) if the objection relates to an ancillary claim the objection must meet the deadline for the rejoinder;
- d) exceptionally, if the facts forming the basis of the objection were unknown at the times indicated by rules b) and c), the objection may be made later.

Article 41(2) of the Convention only refers to a jurisdictional objection by a party. But Arbitration Rule 41(2) states that the tribunal may examine questions of jurisdiction and competence at any time on its own initiative:

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.⁽³³²⁵⁾

A tribunal's failure to take account of facts that affect its competence or the Centre's jurisdiction may lead to the award's eventual annulment. Under Article 52(1)(b) an award may be annulled for manifest excess of powers. A decision on the merits by a tribunal that lacks competence is the most obvious instance of an excess of powers. Therefore, it will be unwise for a tribunal to depend entirely on jurisdictional objections by a party. To what extent a party's failure to raise a jurisdictional objection may be interpreted as a valid waiver is discussed below.

II. TIMELINESS OF OBJECTION TO JURISDICTION

1. As Early as Possible

The primary rule under Arbitration Rule 41(1) is that any objection shall be made «as early as possible». This would indicate that a respondent is under an obligation to raise the objection as soon as it is aware of the jurisdictional basis of the claim and is in a position to articulate its response thereto. This may be the case as soon as the respondent is in possession of the request for arbitration, in other words some time before the tribunal is even constituted. On the other hand, a full account of the claimant's position on jurisdiction may not be available before it has submitted a full memorial.

In actual practice, jurisdictional objections are sometimes filed before the tribunal's constitution⁽³³²⁶⁾ or soon thereafter.⁽³³²⁷⁾ In some cases jurisdictional objections were raised

(3325) During the Convention's drafting, the preponderant view was that a tribunal would not only have to deal with objections to its jurisdiction by the parties but would also have the power to deal with jurisdictional questions of its own motion. History of the Convention, Vol. II, pp. 271, 399, 407, 409, 702.

(3326) *SPP v. Egypt*, Decision on Jurisdiction I, 27 November 1985, para. 5; *Generation Ukraine v. Ukraine*, Award, 16 September 2003, paras. 4.10-4.18.

(3327) *Vacuum Salt v. Ghana*, Award, 16 February 1994, para. 12.

at the first session of the tribunal.⁽³³²⁸⁾ In many other cases objections to jurisdiction were raised only after a memorial on the merits had been submitted by the claimants.⁽³³²⁹⁾

In *Bayindir v. Pakistan*, the Respondent submitted its jurisdictional objections in accordance with the timetable agreed at the preliminary hearing. The Claimant argued that the Respondent should have waited until the memorial on the merits before raising its jurisdictional objections. The Tribunal pointed out that Rule 41 provides that jurisdictional objections shall be made as early as possible. The reason for the exchange of pleadings on jurisdiction prior to the memorial on the merits was to clear the question of jurisdiction at an early stage.⁽³³³⁰⁾

In *Desert Line v. Yemen* the Respondent waited until the last day of the time fixed for the filing of its counter-memorial. Instead of a counter-memorial it filed its objections to jurisdiction.⁽³³³¹⁾ The Tribunal found it difficult to accept that the objections could not have been made earlier. It said:

The fact that objections shall be filed with ICSID «no later» than the deadline for the Counter-Memorial does not mean that the Respondent was not bound to raise them before that date, if such objections were or ought to have been already manifest, in view of the «as early as possible» requirement in the first sentence of Article 41.⁽³³³²⁾

Despite this criticism, the Tribunal examined and disposed of the objections.

In *Helnan v. Egypt*, the Tribunal had rendered its Decision on Jurisdiction⁽³³³³⁾ when the Respondent raised a new objection to jurisdiction together with its counter-memorial on the merits. The Tribunal's criticism was mild: it found that the new objection could have been raised sooner but that Egypt's error in not doing so was understandable under the circumstances. The delay did not mean that the objection had been waived. Therefore, the Tribunal proceeded to examine the new objection.⁽³³³⁴⁾

In *Siag v. Egypt*, the Tribunal took a much stricter view. After the Tribunal had rendered its Decision on Jurisdiction,⁽³³³⁵⁾ Egypt submitted a series of further jurisdictional objections. The Claimant vigorously opposed Egypt's right to do so. The Tribunal found that an objection that was not filed «as early as possible» was out of time and would have to be disregarded

(3328) *Fedax v. Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 9; *Gruslin v. Malaysia*, Award, 27 November 2000, para. 6.5; *PSEG v. Turkey*, Decision on Jurisdiction, 4 June 2004, paras. 9-11; *Duke Energy v. Peru*, Decision on Jurisdiction, 1 February 2006, paras. 9, 10.

(3329) *Benvenuti & Bonfant v. Congo*, Award, 15 August 1980, para. 1.7; *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 3; *SOABI v. Senegal*, Decision on Jurisdiction, 1 August 1984, para. 12; *AMT v. Zaire*, Award, 21 February 1997, paras. 4.02, 4.03; *Impregilo v. Pakistan*, Decision on Jurisdiction, 22 April 2005, paras. 5-7; *Saipem v. Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 50; *Enron v. Argentina*, Award, 22 May 2007, para. 14.

(3330) *Bayindir v. Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 48, 198, 199.

(3331) *Desert Line v. Yemen*, Award, 6 February 2008, para. 90.

(3332) At para. 97.

(3333) *Helnan v. Egypt*, Decision on Jurisdiction, 17 October 2006.

(3334) *Helnan v. Egypt*, Award, 3 July 2008, paras. 111-113.

(3335) *Siag v. Egypt*, Decision on Jurisdiction, 11 April 2007.

as having been waived.⁽³³³⁶⁾ Nevertheless, the Tribunal proceeded to examine the new objections «for the sake of completeness» and found that they failed on their merits.⁽³³³⁷⁾

2. Not Later than the Deadline for the Counter-Memorial

In addition to requiring objections to jurisdiction to be filed as early as possible, Arbitration Rule 41(1) mandates that an objection to jurisdiction shall be filed «no later than the expiration of the time limit fixed for the filing of the counter-memorial». Unless bifurcation between jurisdiction and merits has taken place at an earlier stage, the counter-memorial is typically the first opportunity for the respondent to offer a full explanation of its legal position. The claimant will normally have had an opportunity to describe its position in the request for arbitration and in its memorial. By the time the respondent writes its counter-memorial it should have a full picture of all relevant issues.

Whereas the primary rule requiring jurisdictional objections to be filed «as early as possible» is still somewhat flexible, the rule referring to the deadline for the filing of the counter-memorial reads like a cut-off date. It is mitigated only by the last phrase of Arbitration Rule 41(1) which creates an exception for newly discovered facts.

In *Zhinvali v. Georgia*, the Respondent raised the issue of consent to jurisdiction not in its counter-memorial but only in its rejoinder. In addition, the jurisdictional issue of the existence of an investment clearly came into focus only just before the hearing.⁽³³³⁸⁾ Since there were no relevant facts that had been unknown at the time of the filing of the counter-memorial, the Tribunal concluded that the Respondent had «failed to meet the plainly mandatory requirements of Rule 41(1).»⁽³³³⁹⁾ The Tribunal proceeded to examine the jurisdictional issues «on its own initiative» in accordance with Arbitration Rule 41(2).⁽³³⁴⁰⁾

In *Generation Ukraine v. Ukraine* the Respondent raised a jurisdictional objection at the final hearing based on an alleged deficiency in the appointment of the Claimant's counsel. The Tribunal noted that any jurisdictional objection should have been made no later than at the expiration of the time limit fixed for the filing of the counter-memorial. Therefore, the objection had to be dismissed as having been raised late. The Tribunal added that, apart from being out of time, it would dismiss the objection as hypertechnical and unmeritorious.⁽³³⁴¹⁾

In *AIG v. Kazakhstan* the Respondent filed its objections to jurisdiction two and a half months after the time limit originally fixed for the filing of its counter-memorial. The Claimant argued that these belated objections were not filed as early as possible and should not be entertained. The Tribunal found that the requirements of Arbitration Rule 41(1) were not coercive but merely served the expeditious disposal of ICSID arbitral proceedings. Therefore it admitted the belated objections.⁽³³⁴²⁾

(3336) *Siag v. Egypt*, Award, 1 June 2009, paras. 187, 288, 290, 311, 360.

(3337) At paras. 207-218, 314-360.

(3338) *Zhinvali v. Georgia*, Award, 24 January 2003, 10 ICSID Reports 6, paras. 290, 316.

(3339) At para. 317.

(3340) At paras. 321-324.

(3341) *Generation Ukraine v. Ukraine*, Award, 16 September 2003, para. 16.1.

(3342) *AIG v. Kazakhstan*, Award, 7 October 2003, 11 ICSID Reports 7, paras. 9.1, 9.2.

3. Deadline for Jurisdictional Objections to Ancillary Claims

Under Arbitration Rule 41(1) a jurisdictional objection to an ancillary claim is due, at the latest, at the time limit fixed for the filing of the rejoinder. Ancillary claims are regulated in Article 46 of the Convention and include incidental claims, additional claims and counterclaims. An incidental claim arises as a consequence of the primary claim, such as interest or compensation for procedural costs. An additional claim is made by way of a later addendum to the original claim. A counterclaim is put forward by the respondent.

Normally, counter-claims will not be advanced before the filing of the respondent's counter-memorial. Therefore, the claimant will typically raise jurisdictional objections to the counter-claims in its reply memorial.⁽³³⁴³⁾ Additional claims are typically raised after the claimant's first pleading, especially in its reply. Arbitration Rule 41(1) gives the respondent the opportunity to raise jurisdictional objections against these until its rejoinder is due. In these cases too the primary rule is that any such objection should be made as early as possible.

In *Atlantic Triton v. Guinea*, the Government's counter-memorial contained counter-claims. Atlantic Triton implicitly raised jurisdictional objections to the counterclaims in its reply memorial. After a memorial in rejoinder from the Government, Atlantic Triton filed another memorial in rejoinder on the counterclaims in which it explicitly raised the lack of jurisdiction. The Tribunal upheld these jurisdictional objections to the counterclaims in its final award.⁽³³⁴⁴⁾

4. Subsequently Discovered Facts

Under the last phrase of Arbitration Rule 41(1) the deadlines do not apply to objections that are based on facts that were unknown at the time the objection was due. Therefore, this rule is an exception to the requirement that any jurisdictional objection must be filed by the time the counter-memorial is due. It is also an exception to the requirement that a jurisdictional objection relating to an ancillary claim must be filed by the time the rejoinder is due. But this provision is, of course, not an exception to the requirement that a jurisdictional objection must be filed as early as possible. On the contrary, the «as early as possible» requirement also applies to objections filed at a later point in the proceedings because the underlying facts were unknown earlier on.⁽³³⁴⁵⁾ For example, a State party to the proceeding may at a later stage become aware of the fact that the other party is its national. It is impossible to provide time limits for this contingency but it is clear that such objections must be raised immediately once the relevant facts come to light.

In *Tokios Tokel's v. Ukraine* the Tribunal had issued its Decision on Jurisdiction⁽³³⁴⁶⁾ when the Claimant, for the first time, disclosed certain information that was relevant to jurisdiction. This disclosure formed part of the grounds for additional objections to jurisdic-

(3343) *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports 95, para. 5.

(3344) *Atlantic Triton v. Guinea*, Award, 21 April 1986, 3 ICSID Reports 18, 39.

(3345) See Note C. to Arbitration Rule 41 of 1968, 1 ICSID Reports 102.

(3346) *Tokios Tokel's v. Ukraine*, Decision on Jurisdiction, 29 April 2004.

tion by the Respondent.⁽³³⁴⁷⁾ The Tribunal declined to rule immediately on these objections but disposed of them in its Award.⁽³³⁴⁸⁾

In *Siag v. Egypt*, there was much discussion on whether the facts underlying Egypt's late jurisdictional objections were known to it at the time the objections were originally due.⁽³³⁴⁹⁾ One set of facts concerned bankruptcy proceedings in Egyptian courts involving the claimant. The Tribunal's conclusion was as follows:

the Tribunal considers that Egypt had both actual and constructive knowledge of the 2003 re-opening of the bankruptcy proceedings involving Mr Siag. Egypt was bound by ICSID Rule 41(1) to raise its objection based on these proceedings as early as possible but did not do so. The Tribunal accordingly finds that Egypt has contravened ICSID Rule 41(1).⁽³³⁵⁰⁾

Another set of facts concerned the genuineness of a document relating to the first Claimant's nationality. The Tribunal reached the conclusion that all the evidence had been with Egypt from an early stage in the proceedings and that it should have made its enquiries during the jurisdictional stage.⁽³³⁵¹⁾

5. Objections made After a Decision on Jurisdiction

As discussed above, Arbitration Rule 41(1) offers several time limits for objections to jurisdiction, including references to the time limits fixed for the counter-memorial and the rejoinder. Curiously, there is no reference to a time limit fixed by the tribunal for the submission of objections to jurisdiction. Not infrequently, bifurcation between jurisdiction and merits takes place before the first memorial on the merits. Time limits for submissions on jurisdiction and on the merits are often agreed at the tribunal's first session.

In a number of cases respondents tried to raise jurisdictional objections after the tribunal had made a decision on jurisdiction. If the proceedings are bifurcated between jurisdiction and merits at an early stage, these additional objections may well be made before the date for the submission of the counter-memorial on the merits as provided in Arbitration Rule 41(1). But it is unlikely that they will have been made «as early as possible» unless they are based on newly discovered facts.

In *Holiday Inns v. Morocco*, the Tribunal had made a decision on jurisdiction when Morocco raised new jurisdictional objections. The only source on the case describes the Tribunal's reaction as follows:

In keeping with the tendency of many international tribunals, the Arbitral Tribunal avoided any pronouncement which might be construed as a criticism of the Government's attitudes as well as any formalistic stand based on purely procedural grounds.⁽³³⁵²⁾

(3347) *Tokios Tokel's v. Ukraine*, Award, 26 July 2007, paras. 5, 27.

(3348) At paras. 96-112.

(3349) *Siag v. Egypt*, Award, 1 June 2009, paras. 165, 174, 179, 180, 191-203.

(3350) At para. 203.

(3351) At paras. 239, 241, 251, 265.266, 292, 294-307.

(3352) LALIVE, P., The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*)—Some Legal Problems, 51 British Year Book of International Law 123, 160 (1980); 1 ICSID Reports 681.

In *CSOB v. Slovakia* the Respondent, at the Tribunal's first session, declared its intention to raise jurisdictional objections. These objections were extensively addressed by the parties in a series of written and oral pleadings.⁽³³⁵³⁾ After a Decision on Jurisdiction had rejected Slovakia's objections, the Claimant filed its Memorial on the Merits. Thereupon, within the time limit for its Counter-Memorial, the Respondent filed a Further and Partial Objection to Jurisdiction. In this further objection the Respondent argued that the Claimant's Memorial was an attempt to surreptitiously extend the scope of the arbitration.⁽³³⁵⁴⁾ The Tribunal confirmed its competence in a second jurisdictional decision, without taking issue with the timing of the Respondent's objections.⁽³³⁵⁵⁾ The Tribunal then proceeded to the merits of the case.⁽³³⁵⁶⁾ It appears from the circumstances of the case that the further objections were made «as early as possible».

In *Autopista v. Venezuela*, the Respondent submitted its objections to jurisdiction at an early stage of the proceedings leading to bifurcation before a memorial on the merits had been filed. After the Tribunal had rendered a Decision on Jurisdiction,⁽³³⁵⁷⁾ the Respondent, in its submissions on the merits, raised a further objection. In its Award, the Tribunal rejected this attempt quite categorically:

90. If and to the extent that this contention must be understood as an objection to the jurisdiction of this Tribunal, it cannot be taken into consideration. Indeed, it is belated, because it was submitted well after the Decision on Jurisdiction.⁽³³⁵⁸⁾

Interestingly, the Tribunal did not refer to the time limits in Arbitration Rule 41(1). Nor did it indicate whether the further objection had been raised before or after the counter-memorial had been due. The decisive factor for rejecting the further objection was its submission after the Decision on Jurisdiction. In terms of Arbitration Rule 41(1) it would seem that the further objection was not made «as early as possible».

In *Siemens v. Argentina*, new decisions by other tribunals had become available after the Tribunal had issued its Decision on Jurisdiction.⁽³³⁵⁹⁾ The Respondent, in its submissions on the merits, invited the Tribunal to review its finding on jurisdiction in view of these recent decisions. The Tribunal categorically rejected this suggestion. It said:

The Tribunal will not review what it has already decided; it is inappropriate at this stage of the proceedings and the Tribunal has no doubt about its findings.⁽³³⁶⁰⁾

Despite this categorical rejection of the new submission on jurisdiction, the Tribunal found it appropriate to distinguish the new cases relied upon by Argentina.⁽³³⁶¹⁾

(3353) *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 7.

(3354) *CSOB v. Slovakia*, Decision on Further and Partial Objection to Jurisdiction, 1 December 2000, at para. 8.

(3355) *CSOB v. Slovakia*, Decision on Further and Partial Objection to Jurisdiction, 1 December 2000. In *SPP v. Egypt*, the two consecutive Decisions on Jurisdiction of 27 November 1985 and 14 April 1988 are not the consequence of additional objections to jurisdiction but of a stay of proceedings ordered by the Tribunal to await the decision of a domestic court.

(3356) *CSOB v. Slovakia*, Award, 29 December 2004, paras. 3-5.

(3357) *Autopista v. Venezuela*, Decision on Jurisdiction, 27 September 2001.

(3358) *Autopista v. Venezuela*, Award, 23 September 2003, para. 90.

(3359) *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004.

(3360) *Siemens v. Argentina*, Award, 6 February 2007, para. 68.

(3361) *Loc. cit.*

In *Helnan v. Egypt*, the Tribunal was much more lenient. It noted that a jurisdictional argument raised by Egypt at the merits phase had not been part of its objections to jurisdiction, on which the Tribunal had ruled in its decision on Jurisdiction.⁽³³⁶²⁾ Although the Tribunal found that the new objection «could have been raised sooner», it agreed to examine it.⁽³³⁶³⁾

In *Siag v. Egypt*, the Respondent raised additional objections to jurisdiction months after the Tribunal's Decision on Jurisdiction.⁽³³⁶⁴⁾ The Tribunal noted that Egypt's application was made well over a year after the time limit for submissions on jurisdiction.⁽³³⁶⁵⁾ The Tribunal's finding that the additional objections were untimely rested mainly on the fact that they had not been made as early as possible.⁽³³⁶⁶⁾

III. CONSEQUENCE OF UNTIMELY OBJECTION

The examples discussed above indicate that tribunals have examined the timeliness of objections to jurisdiction with the help of a number of criteria. The most important of these were the rules that an objection must be made as early as possible, that the objection must be filed no later than the deadline for the counter-memorial and that new objections should not be admitted after a deadline for jurisdictional objections or after a decision on jurisdiction. These rules are mitigated by the possibility to rely on newly discovered facts even at a later stage.

In a number of cases tribunals found that parties had missed relevant deadlines or that objections to jurisdiction had otherwise been submitted in an untimely manner. But the consequences that tribunals have drawn from these findings have varied considerably. They range from mild rebuke to findings that the belated objections would not be considered. Two points were prominent in these discussions. One is the argument that by not putting forward its objections in a timely manner the respective parties had effectively waived them and were unable to raise them at a later point. The other argument rests on the tribunal's power under Arbitration Rule 41(2) to examine questions of jurisdiction on its own initiative at any stage of the proceeding.

1. Waiver of Jurisdictional Objections

The Arbitration Rules contain clear sanctions for parties that miss deadlines for procedural steps or fail to raise the necessary objections. Arbitration Rule 26(3) provides that, in the absence of special circumstances, procedural steps taken after the expiry of lime limits are to be disregarded:

(3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

(3362) *Helnan v. Egypt*, Decision on Jurisdiction, 17 October 2006.

(3363) *Helnan v. Egypt*, Award, 3 July 2008, paras. 87, 111-113.

(3364) *Siag v. Egypt*, Decision on Jurisdiction, 11 April 2007.

(3365) *Siag v. Egypt*, Award, 1 June 2009, para. 190. See also paras. 108, 136, 226, 305.

(3366) At paras. 187, 288, 290, 311, 360.

Rule 27 goes even further and provides that failure to object promptly to the violation of a relevant rule amounts to a waiver of the right to object:

Rule 27 — Waiver

A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed —subject to Article 45 of the Convention— to have waived its right to object.

On the basis of these provisions, claimants have argued that belated jurisdictional objections were inadmissible and should be ignored.

In *Gruslin v. Malaysia*, the Respondent had not, in the first round of pleadings on jurisdiction, raised a point that concerned its consent to jurisdiction given through the applicable BIT. When the Respondent raised the point in the second round, the Claimant objected arguing that the objection had been waived since the failure to raise the point in the first round was an implicit consent and that under the last sentence of Article 25(1) of the ICSID Convention consent once given could not be withdrawn.⁽³³⁶⁷⁾ The Tribunal rejected the argument finding that under the circumstances there was no implied consent and no waiver under Rule 27.⁽³³⁶⁸⁾ The Tribunal did not address the point whether the objection had been made «as early as possible.»

In *Zhinvali v. Georgia*, the Respondent's jurisdictional objections were clearly belated and the Tribunal found that the Respondent had failed to meet the mandatory requirements of Rule 41(1).⁽³³⁶⁹⁾ The Claimant insisted on the application of the waiver provision in Rule 27. The Tribunal examined the jurisdictional objections nevertheless. It found that Rule 41(2), providing for consideration of jurisdictional issues on its own initiative, took priority over the waiver provision of Rule 27.⁽³³⁷⁰⁾

In *Helnan v. Egypt*, the Claimant contended that an untimely objection to jurisdiction by Egypt had been waived. The Tribunal, found that Egypt's new objection to jurisdiction «could have been raised sooner». It nevertheless held that «it does not mean that the objection was waived».⁽³³⁷¹⁾

In *Siag v. Egypt*, the issue of waiver took a central role in the discussion of the untimely jurisdictional objections. The Claimants argued vigorously that Egypt's belated jurisdictional objections ought to be deemed to have been waived.⁽³³⁷²⁾ The Tribunal accepted this argument both with respect to Rules 26 and 27.⁽³³⁷³⁾ Egypt had argued that Rule 27 applied only to breaches of the ICSID Rules and Regulations as well as to procedural agreements and orders but not to a breach of the Convention itself.⁽³³⁷⁴⁾ But the Tribunal found that the operation of

(3367) «When the parties have given their consent, no party may withdraw its consent unilaterally.»

(3368) *Gruslin v. Malaysia*, Award, 27 November 2000, 5 ICSID Reports, paras. 18.1-18.4, 19.1-19.7.

(3369) *Zhinvali v. Georgia*, Award, 24 January 2003, 10 ICSID Reports 6, para. 317.

(3370) At paras. 313, 318, 320, 322, 323, 324.

(3371) *Helnan v. Egypt*, Award, 3 July 2008, paras. 111, 112.

(3372) *Siag v. Egypt*, Award, 1 June 2009, paras. 136, 176, 226, 251, 265, 291

(3373) At paras. 184, 187-189, 204, 206.

(3374) At para. 233, 287, 312.

the waiver provision in Rule 27 extended to an objection flowing from an alleged breach of Article 25 of the Convention dealing with jurisdiction.⁽³³⁷⁵⁾ The Tribunal said:

...it is not Article 25 that has potentially been waived, it is the right conveyed by ICSID Rule 41 to object to the Centre's jurisdiction (based on a breach of Article 25). Non-compliance with Article 25 can be objected to pursuant to ICSID Rule 41. Failure to state said objection to jurisdiction promptly will render the objection waived, if the party raising the objection knew or should have known of the alleged breach of Article 25 at an earlier stage. It will be apparent from the above that the Tribunal considers that ICSID Rule 27 is applicable in this case.⁽³³⁷⁶⁾

Therefore, the belated jurisdictional objections had been waived pursuant to Arbitration Rule 27 and had to be disregarded under Arbitration Rule 26.⁽³³⁷⁷⁾

Despite this clear-cut result the Tribunal did not leave matters to rest there. It almost appears that it got afraid of its own courage to dismiss the jurisdictional objections on procedural grounds alone. After having disposed of the objections so decisively the Tribunal added that «[h]owever, for the sake of completeness the Tribunal will nevertheless examine the merits of Egypt's contentions.»⁽³³⁷⁸⁾ What follows is a detailed and thorough discussion of Egypt's objections. Not surprisingly, the result is a dismissal of these objections as unmeritorious.⁽³³⁷⁹⁾

These cases indicate that the application of Arbitration Rules 26(3) and 27 to belated jurisdictional objections has varied considerably. It ranges from a categorical rejection of untimely objections to a finding that there had been no waiver.

2. Examination of Jurisdiction on the Tribunal's Initiative

Arbitration Rule 41(2) states that a tribunal may consider questions of jurisdiction at any stage of the proceedings on its own initiative.⁽³³⁸⁰⁾ Therefore, a tribunal does not depend on objections submitted by a party. Tribunals have, at times, explicitly satisfied themselves of jurisdictional requirements that had not been raised by a party.⁽³³⁸¹⁾

In contested proceedings the tribunal's power to examine its competence is permissive. Rule 41(2) states that «[t]he Tribunal *may* on its own initiative consider» questions of jurisdiction. The underlying assumption is that the parties may be expected to raise any relevant

(3375) At para. 204, 288.

(3376) At para. 312.

(3377) At paras. 206, 313.

(3378) At paras. 207, 314.

(3379) At paras. 207-218, 314-360.

(3380) The issue was discussed during the Convention's drafting. The preponderant view was that a tribunal would not only have to deal with objections to its jurisdiction by the parties but would also have the power to deal with jurisdictional questions of its own motion: History of the Convention, Vol. II, pp. 271, 399, 407, 409, 702.

(3381) See e.g., *SPP v. Egypt*, Decision on Jurisdiction I, 27 November 1985, paras. 46, 47; *AMT v. Zaire*, Award, 21 February 1997, para. 5.03; *Cable TV v. St. Kitts and Nevis*, Award, 13 January 1997, para. 5.03; *Santa Elena v. Costa Rica*, Award, 17 February 2000, para. 11; *Tanzania Electric v. IPTL*, Award, 12 July 2001, para. 13; *CDC v. Seychelles*, Award, 17 December 2003, paras. 3-6; *MTD v. Chile*, Award, 25 May 2004, paras. 90-97; *Gas Natural v. Argentina*, Decision on Jurisdiction, 17 June 2005,

issues. By contrast, in uncontested proceedings the tribunal is under a duty to examine questions of jurisdiction *proprio motu*. Arbitration Rule 42(4), dealing with default, states that «[t]he Tribunal shall examine the jurisdiction of the Centre and its own competence».⁽³³⁸²⁾

It follows that a submission by a party, even if it is out of order and hence inadmissible, may form the basis of an examination of jurisdictional issues in accordance with Rule 41(2). Tribunals have in a number of cases relied on their power to examine issues of jurisdiction *ex officio* when faced with belated jurisdictional objections.

In *Gruslin v. Malaysia*, the Tribunal denied that there had been a waiver of a jurisdictional objection under Rule 27. It added that even if this had been otherwise it would have proceeded to examine the objection on its own initiative under Rule 41(2).⁽³³⁸³⁾

In *Zhinvali v. Georgia*, the Tribunal found that through its late submission of its jurisdictional objections the Respondent had failed to meet the mandatory requirements of Rule 41(1).⁽³³⁸⁴⁾ Although the Claimant relied on the waiver provision in Rule 27, the Tribunal found that it had to examine the substance of the jurisdictional objection on its own initiative. The Tribunal said:

Despite the Respondent's failure to comply with Rule 41(1), the Tribunal, [...] found, in keeping with the dictates of Article 41 of the ICSID Convention, that it had no alternative but to follow Rule 41(2)'s invitation to the Tribunal «on its own initiative» to consider «at any stage of the proceeding, whether the dispute ... is within the jurisdiction of the Centre and within its own competence». [...] in keeping with the mandatory nature of Article 41 of the ICSID Convention, Rule 41(2) not only constituted an exception to Rule 41(1) but also took priority over the waiver provision of Rule 27. Whatever the effect of its own delay upon the rights of the Respondent, the mandate of the Tribunal remains, and that is that the Tribunal must satisfy itself of the Centre's jurisdiction and of its own competence.

324. The Tribunal notes that Article 41 uses the verb «shall» whereas Rule 41(2) uses the verb «may». Under the particular facts of this case, the Tribunal believes that it must act «on its own initiative» in spite of the Respondent's egregious delay.⁽³³⁸⁵⁾

In *AIG v. Kazakhstan* the Tribunal found that Article 41 of the ICSID Convention required the Tribunal to determine every objection to jurisdiction. In addition, the Tribunal concluded that the time limits of 41(1) merely served the expeditious disposal of proceed-

paras. 5, 6; *Saipem v. Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, paras. 71-74; *Kardassopoulos v. Georgia*, Decision on Jurisdiction, 6 July 2007, paras. 108-119. See also *Fedax v. Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 25; *Micula v. Romania*, Decision on Jurisdiction, 24 September 2008, para. 65. In some cases tribunals have looked at jurisdictional arguments made not in the form of objections but expressed in tentative terms such as «doubts» and «questions»: *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 12; *SPP v. Egypt*, Decision on Jurisdiction II, 14 April 1988, para. 54.

(3382) See *Kaiser Bauxite v. Jamaica*, Decision on Jurisdiction, 6 July 1975, para. 10; *LETCO v. Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 353. This decision is reproduced as part of the Award; *Goetz v. Burundi*, Award, 10 February 1999, paras. 78, 79.

(3383) *Gruslin v. Malaysia*, Award, 27 November 2000, 5 ICSID Reports 483, para. 19.7.

(3384) *Zhinvali v. Georgia*, Award, 24 January 2003, 10 ICSID Reports 6, paras. 317.

(3385) At paras. 321, 323, 324. The dissenting opinion to the Award reached the conclusion that the Tribunal's decision on this point was «open to question». At paras. 10-12, 21.

ings but cannot be read as coercive. Therefore, the Tribunal rejected the Claimant's contention that the Respondent's belated jurisdictional objections should not be entertained:

9.2 In the opinion of the Tribunal this plea cannot be accepted. Objections to the jurisdiction of an adjudicatory body cannot be ignored, if raised during the arbitral proceedings — delay notwithstanding. Mere tardiness in raising a point of jurisdiction cannot preclude it being considered by the Tribunal at a later stage: so long as the same is raised in the course of the arbitral proceedings.

Rule 41 of the Arbitration Rules (Objection to Jurisdiction) cannot and does not negate the mandate of Article 41 of the Convention: the latter requires a Tribunal to determine every objection to jurisdiction.

The time limits prescribed in Rule 41(1) and the requirement that every objection as to jurisdiction or competence of the Tribunal shall be made «as early as possible» is intended to alert the parties to bring forth their objections, basic to the dispute being adjudicated upon on merits, at the earliest possible point of time. It appears to be rationally and reasonably related only to the expeditious disposal of ICSID arbitral proceedings. It cannot be read as coercive. It could not for instance empower the Arbitral Tribunal to grant relief to a Claimant when there is apparently no jurisdiction of the Centre or the Tribunal to entertain and try the case. The plea of the Claimants based on Article 41 of the Arbitration Rules must therefore stand rejected.⁽³³⁸⁶⁾

In *Azurix v. Argentina*, the Respondent raised a belated objection to jurisdiction. The Claimant argued that Argentina's entitlement to raise the objection had been waived. Nevertheless the Claimant discussed and opposed the substance of the objection. The Tribunal found that the objection had to be considered at its own initiative:

68. While the Tribunal agrees that the objection has been filed out of time, it considers that the issues it raises are such that they should be considered upon at the Tribunal's own initiative under Arbitration Rule 41(2). The Tribunal is assisted in its consideration by the fact that this point has been fully argued by the parties since the Claimant responded «out of an abundance of caution.»⁽³³⁸⁷⁾

In *Helnan v. Egypt*, the Tribunal found Egypt's delay in filing an objection understandable adding that it may examine jurisdictional questions at any time.⁽³³⁸⁸⁾

By contrast, in *Siag v. Egypt*, the Tribunal rejected the belated objection to jurisdiction on the basis of waiver. It did not address Egypt's subsidiary argument that it should review its jurisdiction on its own initiative in accordance with Rule 41(2).⁽³³⁸⁹⁾

IV. THE CONFLICTING APPROACHES

The practice, as outlined above, shows widely divergent responses by tribunals to objections to jurisdiction that were filed out of time. At one end of the spectrum are decisions

(3386) *AIG v. Kazakhstan*, Award, 7 October 2003, para. 9.2.

(3387) *Azurix v. Argentina*, Decision on Jurisdiction, 8 December 2003, para. 68. Footnotes omitted.

(3388) *Helnan v. Egypt*, Award, 3 July 2008, para. 112.

(3389) *Siag v. Egypt*, Award, 1 June 2009, para. 142.

to the effect that the objections were belated but would still be considered. At the other end are decisions to the effect that the objections would be rejected since, as a consequence of the delay, they had been waived. The conflicting arguments by the parties typically centred on three provisions of the ICSID Arbitration Rules: Rule 26(1) stating that a step taken after the expiration of the applicable time limit shall be disregarded; Rule 27 providing for waiver of objections not promptly made and Rule 41(2) providing for the right of the tribunal to consider jurisdictional issues on its own initiative at any stage of the proceeding.

Some tribunals have sought an answer to this apparent dilemma in the wording of Article 41(2) of the ICSID Convention.⁽³³⁹⁰⁾ The opening phrase of that provision refers to «Any objection by a party». This may be interpreted to mean that the tribunal must consider every objection to jurisdiction —whether it meets the prescribed time limits or not.

That interpretation, taken to its extreme, would mean that time limits for objections to jurisdiction, whether contained in Arbitration Rule 41(1) or in procedural orders by the tribunal may be disregarded at will without consequence to the delinquent party. As long as the objection is made while the proceedings are pending it must be considered. Such a solution would not be in the interest of procedural efficiency and would reward dilatory behaviour of respondents who could protract proceedings through a series of successive jurisdictional objections.⁽³³⁹¹⁾

The other extreme would see a delay in filing an objection as a waiver of the jurisdictional defects underlying them with the consequence that the tribunal is no longer in a position to take account of them. This extreme too, is unworkable. Not every jurisdictional defect in a request for arbitration is subject to waiver.

V. LOSS OF PROCEDURAL OR SUBSTANTIVE RIGHTS

Arbitration Rule 26(3) states that steps taken after the expiration of a time limit shall be disregarded. It does not state that the legal position that is the basis of that step is thereby altered. Similarly, Rule 27 provides that the dilatory party shall be deemed to have waived its right to object to any noncompliance with an applicable rule. It does not state that the consequences of noncompliance with an applicable rule are thereby extinguished. The violation of the applicable rule is not legalized just because the affected party has failed to object. The sanction for tardiness is procedural leading to a loss of procedural rights. The belated steps are to be disregarded and the delinquent party has lost its right to submit an objection. But the legal situation underlying the objection is not thereby rectified. The tribunal is still in a position to take account on its own initiative of the alleged jurisdictional defects underlying the belated objection.

(3390) *Zhinvali v. Georgia*, Award, 24 January 2003, 10 ICSID Reports 6, paras. 321, 323, 324; *AIG v. Kazakhstan*, Award, 7 October 2003, para. 9.2.

(3391) Before its amendment in 2006, Arbitration Rule 41(3) provided that upon the raising of a jurisdictional objection the proceedings on the merits would have to be suspended. See also *Siag v. Egypt*, Award, 1 June 2009, paras. 362-365.

The most important procedural sanction arising in this context would be the forfeiture of the procedure under ICSID Arbitration Rule 41(3) and (4).⁽³³⁹²⁾ Under that procedure an objection to jurisdiction may lead to the suspension of the proceedings on the merits. This is followed by an interim procedure dealing only with the jurisdictional questions.⁽³³⁹³⁾

The International Court of Justice has adopted this interpretation in the *Avena* case.⁽³³⁹⁴⁾ In *Avena* the United States had presented a number of jurisdictional objections after the expiration of the time-limit laid down in Article 79(1) of the ICJ's Rules of Court. Rule 79(1), as amended in 2000,⁽³³⁹⁵⁾ provides in relevant part:

1. Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial.

The ICJ noted that Article 79 of the Rules applies only to preliminary objections. Failure to make a timely presentation of the objection would not make the objection inadmissible but would merely lead to the loss of the right to bring about a suspension of the proceedings on the merits. The Court said:

... the effect of the timely presentation of such an objection is that the proceedings on the merits are suspended (paragraph 5 of Article 79). An objection that is not presented as a preliminary objection in accordance with paragraph 1 of Article 79 does not thereby become inadmissible. There are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction (...). However, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits.⁽³³⁹⁶⁾

In a number of ICSID cases tribunals have adopted the same course of action and have dealt with belated jurisdictional objections together with the merits.⁽³³⁹⁷⁾

(3392) Arbitration Rule 41 provides in relevant part: (3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(3393) Under Arbitration Rule 41(3), as in force until April 2006, the suspension of the proceedings upon the raising of jurisdictional objections was mandatory («the proceeding on the merits shall be suspended»). The Arbitration Rules, as amended with effect of 10 April 2006, now provide for the tribunal's discretion in this respect («the Tribunal may decide to suspend»).

(3394) *Case concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, 31 March 2004, ICJ Reports 2004 p. 12.

(3395) Prior to the amendment this paragraph required objections to be made «within the time-limit fixed for delivery of the Counter-Memorial».

(3396) At para. 24.

(3397) *Zhinvali v. Georgia*, Award, 24 January 2003, 10 ICSID Reports 6, para. 321; *Tokios Tokel's v. Ukraine*, Award, 26 July 2007, paras. 5, 27, 96-112. In *Siag v. Egypt*, Award, 1 June 2009, at paras.

VI. WHAT JURISDICTIONAL REQUIREMENTS ARE SUBJECT TO WAIVER?

The fact that failure to make a timely objection leads to a loss of procedural rights does not mean that there can never be a genuine waiver of rights relating to jurisdiction. ICSID's jurisdiction depends on a number of requirements some of which are subject to the disposition of the parties while others are not. In terms of Article 25(1) of the Convention, the existence of a legal dispute arising directly out of an investment is an objective fact.⁽³³⁹⁸⁾ The absence of this requirement is not subject to waiver by the parties. Similarly, the Convention's nationality requirements are not at the parties' disposal and are hence not subject to waiver.⁽³³⁹⁹⁾ Therefore, failure of a party to raise the absence of these requirements will not remove any jurisdictional obstacles and will have to be considered on the tribunal's own initiative.

By contrast, consent to jurisdiction is subject to the parties' disposition. Therefore, given the right circumstances, the tribunal may rely on a party's failure to invoke the non-existence of its consent. Similarly, failure by a respondent to invoke limitations and conditions attached to its consent may be interpreted as a waiver of these limitations and conditions. A case involving a total absence of consent is unlikely to reach a tribunal in view of the Secretary-General's screening power under Article 36(3) of the ICSID Convention. But if the existence of a valid consent is unclear or if the precise scope of the consent is subject to doubt the issue may have to be decided by the tribunal under Article 41.

In principle, jurisdiction is determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirements must be met.⁽³⁴⁰⁰⁾ But there is no good reason why it should not be possible to expand an existing consent in the course of proceedings. The Report of the Executive Directors to the ICSID Convention states:

24. Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given.⁽³⁴⁰¹⁾

On the basis of that sentence the Tribunal in *Zhinvali v. Georgia* found that consent could not be given after the institution of proceedings.⁽³⁴⁰²⁾ But upon closer inspection it is doubtful whether this excerpt from the Executive Directors' Report really means that consent can never be given or supplemented in the course of proceedings. The reference to Article 36(3) in the above quotation would indicate that this statement simply means that without the existence of consent when the request for arbitration is filed the Secretary-General will refuse to register it. It does not mean that any problems arising with the scope of consent may not be cured by agreement or acquiescence while the proceedings are under way.

168, 206, 313, the Tribunal first joined the belated objections to jurisdiction to the merits but then found that they had been waived.

(3398) For detailed discussion see C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary* 2d ed. (2009), Art. 25, paras. 62, 63, 80, 84, 85, 122-123.

(3399) For detailed discussion see *op. cit.*, Art. 25, paras. 638, 639, 657, 710, 813 (2009).

(3400) For a more detailed discussion of this principle see C. Schreuer et al., *The ICSID Convention: A Commentary* 2d ed., Art. 25, paras. 35-40.

(3401) Report of the Executive Directors on the Convention, 18 March 1965, para. 24.

(3402) *Zhinvali v. Georgia*, Award, 24 January 2003, 10 ICSID Reports 6, para. 407.

If it were true that a defect in the consent to arbitration cannot be remedied explicitly or by implication during the proceedings but remains an objective bar to the Centre's jurisdiction, it would be possible for a party to keep it in store and raise it at a convenient time especially as a ground for annulment. The better view is that the principle of *forum prorogatum* applies also in ICSID arbitration.⁽³⁴⁰³⁾ This means that an obstacle to jurisdiction that arises from the absence or scope of consent may be cured through an affirmative agreement or through acquiescence in the course of the proceedings.

Limitations and conditions attached to consent that may be cured in this way embrace a wide array of contingencies. Consent to arbitration that relates to a particular contract may be extended to related transactions. Consent clauses in BITs that are restricted to expropriation may be extended to other standards of protection. Consent clauses in treaties that are restricted to alleged violations of the treaty itself may be extended to other claims based on legislation or contract. By the same token procedural requirements attached to consent clauses in treaties are subject to waiver. This would include fork-in-the-road clauses, waiting periods for amicable settlement, as well as the requirement to first pursue the dispute in domestic courts for a certain period of time. Similarly, conditions contained in treaties concerning the nature of the investment, such as the requirement that the investment must have been approved, may be waived. All these limitations and conditions attached to consent are subject to the parties' disposition and may hence be waived. The waiver may be expressed explicitly or implicitly through a failure to object to jurisdiction on that ground.

VII. DELAY AND WAIVER

Limitations and conditions attached to consent are subject to waiver, in principle. But this does not mean that every delay in the raising of an objection to jurisdiction on these grounds will automatically amount to a waiver. Not every technical violation of a deadline contained in Arbitration Rule 41(1) or in a procedural order can be construed as a waiver or as an implicit consent.

Whether a waiver or constructive consent through a failure to raise a timely objection can be assumed will depend on the particular circumstances of the case. Here, the requirement that any jurisdictional objection must be raised as early as possible must be treated with some flexibility. For instance, if an objection relating to the respondent's consent is raised not in the respondent's first memorial on jurisdiction but only in its second memorial but before the tribunal has made a decision on jurisdiction, waiver or acquiescence cannot be assumed.⁽³⁴⁰⁴⁾

The situation is different if jurisdiction has been fully argued in preliminary proceedings and the tribunal has issued its decision on jurisdiction. If the respondent has not raised an issue relating to its consent at the jurisdictional stage, the tribunal can legitimately assume that the point has been waived and that consent has been given by implication.

(3403) For a discussion of this principle in relation to the ICSID Convention see C. Schreuer et al., *The ICSID Convention: A Commentary* 2d ed., Art. 25, paras. 481-498.

(3404) *Gruslin v. Malaysia*, Award, 27 November 2000, 5 ICSID Reports, paras. 18.1-18.4, 19.1-19.7.

VIII. SUMMARY AND CONCLUSION

Tribunal practice on the effects of belated objections to jurisdiction shows considerable variation. Some tribunals found that the delay meant that the objections had effectively been waived. These tribunals rested their decisions mostly on two provisions in ICSID's Arbitration Rules: Rule 26(1) stating that a step taken after the expiration of the applicable time limit shall be disregarded and on Rule 27 providing for waiver of objections not promptly made.

Other tribunals found that even objections that were out of time would have to be considered. These tribunals rested their decisions mostly on the following two provisions: Article 41 of the ICSID Convention providing that any jurisdictional objection shall be considered by the tribunal and Arbitration Rule 41(2) stating that a tribunal may consider jurisdictional questions on its own initiative at any stage of the proceeding.

There is no indication in tribunal practice that meritorious objections to jurisdiction were ever rejected as untimely. Even the tribunals that found belated objections inadmissible, usually still examined their substance and rejected them on that basis as well.

The sanctions in the Arbitration Rules for the non-observance of time limits are of a procedural nature. They entail the loss of the right to object. The underlying defects are not thereby cured and any jurisdictional obstacles remain. The most important procedural consequence of a failure to make a timely objection to jurisdiction is forfeiture of the right to demand an interim procedure dealing with jurisdiction.

Some jurisdictional requirements are at the parties' disposal and hence subject to waiver while others are not. The existence of a legal dispute arising directly out of an investment is not subject to waiver by the parties. Similarly, the Convention's nationality requirements are not at the parties' disposal and are hence not subject to waiver.

By contrast, consent to jurisdiction is subject to the parties' disposition. Limitations and conditions attached to consent may be waived. The waiver may be expressed explicitly or implicitly through a failure to object.

Not every technical delay in the raising of an objection to jurisdiction based on lack of consent will automatically amount to a waiver. But a persistent failure to address an issue relating to consent at the jurisdictional stage may be interpreted as implicit consent.