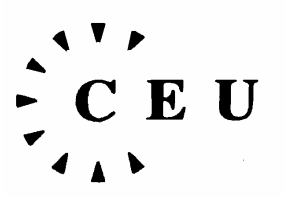

JUDICIAL APPOINTMENT OF ARBITRATORS

by Ilona Panurco

LL.M. SHORT THESIS
COURSE: INTERNATIONAL DISPUTE SETTLEMENT
PROFESSOR: TIBOR VARADY
Central European University
1051 Budapest, Nador utca 9.
Hungary

ABSTRACT

Nowadays arbitration becomes one of the most popular ways for the dispute resolution, in such a way taking over it a part of the functions that were previously considered as exclusive competence of the law court. The main issue it to establish whether it is still relevant to apply to the courts for asking support services in order to start or continue the arbitration. Is the court the last resort solution in case of discrepancies of the arbitration tribunal formation and its further work? Still, the court assistance shall be regarded as the one that is aimed to solve arbitration as it is based on the both parties intention to solve their dispute in such a way.

This work is based on the analysis of the procedure and effects of judicial appointment of arbitrators, as it is far from being the most common way of constitution of arbitral panel. Special attention is paid to national legislations, as this competence is given to courts by national laws. Main aim of the research is to emphasize the main reasons that can lead to the judicial appointment of arbitrators, problems that can appear during this procedure and consequences of its performing, as well as to emphasize the importance of judicial support in the formation of the arbitral tribunal.

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INTRODUCTION

Last decades the interest to arbitration was continuously increasing. People address more often their disputes to arbitration in order to solve them faster. Taking into consideration the tremendous development of arbitration it becomes relevant whether national courts still play an important role in the international commercial relationships and in the sphere of the dispute resolution that derive from them. Even if arbitration derives from the parties' will, it can not be completely separated from the national judicial and legislative systems. "Arbitration is a system established and regulated pursuant to law, and it necessarily bears a close relationship to a nation's courts and judicial system.[1]' There are cases when national courts have to intervene in order to solve the arbitration that can be disrupted or delayed due to the occurrence of objective circumstances or due to parties' behavior. One of the aspect were the support of the court is necessary is the phase of the arbitral tribunal formation. Nowadays "national arbitration laws contain specific provisions giving courts prerogatives with respect to measures related to the constitution of the arbitral tribunal and decisions on challenges and the replacement of arbitrators.[2]" It is commonly recognized that court intervention in the formation of arbitral tribunal, as well as in other phases of the arbitration is to support and realize the will of the parties to have their dispute solved by arbitration.

The purpose of this work is to establish the place of the courts in the arbitration, specifically at the initial stage of arbitration, when the arbitral tribunal has to formed; to find out the tendencies in arbitration concerning the intervention of the courts in the arbitration proceedings. Even if this aspect is regulated by international instruments as UNCITRAL Model Law on International

1 Ball M., "The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration", Arbitration International, Vol. 22 No. 1 (2006), pp. 74 – 93
2 Schäfer E., Verbist H., Imhoos Ch., „ICC Arbitration in Practice", (2005) p.3

Commercial Arbitration and national laws, as we shall see, in practice this aspect raises lots of questions. It is relevant to establish the source of the powers of the courts to appoint arbitrators as in each case the nature of the whole process is different. Therefore there an be situation : a) when courts are acting as appointing authority due to the parties will, and b)when courts are acting in appointing arbitrator(s) on the basis of national law provisions. In the present work it is analyzed the appointment of arbitrators by the courts that are acting on the basis of national laws.

In the first chapter are described the issues concerning general requirements to the formation of the arbitral tribunal: number of the arbitrators and manner of their appointment. The same chapter makes an introduction to the main issue of the work, by offering analysis of the functions which are generally recognized as being performed by the national courts and by specifying grounds on the basis of which the courts shall act and appoint the arbitrator(s). Second chapter offers a more practical information, mainly it discusses the importance of indication of the place of arbitration in the arbitration agreement and other factors that shall be met in order a national court to have power and jurisdiction to make the appointment or substitution of the arbitrator(s) . An interesting issue in this respect is the case when the appointment is made by the court in order to avoid denial of justice, even if there are no straight specific rules in this respect. Third Chapter emphasizes the purpose of court intervention in the appointment of arbitrator(s), shows the problematic areas by providing the procedure on appointment. It also underlines the importance of the wording of the arbitration agreement and discusses the necessity of prima facie examination of the existence of a valid arbitration agreement by the courts. Fourth Chapter deals with the issue concerning the ground on which the court might refuse the appointment and whether the decision on refusal can be appealed.

This work is aimed at outlining the role of the courts and the practical importance of the courts' function to appoint arbitrator(s) and whether the purpose of this service is to provide support to arbitration.

CHAPTER I – GENERAL NOTIONS

1.1. Varieties of Arbitrators' Appointment

Arbitration is about the parties' autonomy and parties' will. Parties are free to establish the manner in which the formation of the arbitration panel shall be done, as well as the manner in which a sole arbitrator shall be appointed, or they can expressly designate specific persons for being arbitrators. As Professor Gaillard points out, the majority of national laws on arbitration "offer more or less firmly the parties' freedom to stipulate in their agreement the procedures for constituting the arbitral tribunal, and thus also to specify the procedure for appointing an arbitrator if one party refuses to do so"[3].

1.1.1. Number of arbitrators and procedure of their appointment

One of the significant aspects in the formation of the arbitration panel is the number of arbitrators whom parties would like to decide their case. There are a few possibilities: sole arbitrator, a panel of three arbitrators, or in certain cases, might be more arbitrators in dependence of the character and complexity of the case and number of the parties.

Model Law emphasizes the general rule that parties are left to decide themselves upon the number of arbitrators by providing that "parties are free to determine the number of arbitrators"[4]. It means that parties can agree not only upon a sole arbitrator or upon three arbitrators, but on an even number of arbitrators as well.

An issue in this regard is whether it is reasonable to appoint an even number of arbitrators. The

3 Gaillard E., "Laws and Court Decisions in Civil Law Countries", p. 66
4 UNCITRAL Model Law on Inernational Commercial Arbitration, art.10 (1)

practical significance of the uneven number of arbitrators relates to the adoption of the decisions. Art. 29 of the Model Law provide that "in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members". If parties opted for an even number of arbitrators, for example a panel of two arbitrators, then it is hardly to figure out how the decision can be reached as "majority means unanimity"[5].

Some countries solved this problem by specific provisions in the national law. Even if not imposing a number of arbitrators, laws would require that the arbitration panel to be formed of an uneven number of arbitrators, or will ask the appointed arbitrators to select another one for making the number uneven. For example the Bangladesh Arbitration Act states that the arbitral tribunal shall be made up of three arbitrators but adds: 'where parties appoint an even number of arbitrators, these arbitrators shall appoint an additional arbitrator who shall act as chairman of the arbitral tribunal."[6] The same requirement can be found in the Netherlands legislation: "the arbitral tribunal shall be composed of an uneven number of arbitrators. If the parties have agreed on an even number of arbitrators, the arbitrators shall appoint an additional arbitrator who shall act as the chairman of the arbitral tribunal."[7] According to Fouchard, in France, the requirement that an arbitral tribunal comprise an uneven number of arbitrators applies to domestic arbitration, but not in international cases[8]. Still most scholars support the idea of "omitting the possibility to appoint an even number of arbitrators" [9] as "in international arbitration … they are invariably impractical and

5 Sanders P., "UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future"
6 Bangladesh Arbitration Act (2001), Ch.IV, section 11 (d)
7 Netherlands Arbitration Act, art. art. 1026 (1)and (3), same provision can be found in Austrian Code of Civil procedure, art. 586
8 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p.459
9 Sanders P., "UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future"

unsuitable for most cases"[10]. It seems that in terms of efficiency and practicability, parties shall opt for one of the commonly accepted panels: sole arbitrator or three-arbitrator panel. This is the common approach of international instruments and national laws.

In the model arbitration clause provided by the UNCITRAL Arbitration Rules, parties, additionally to other terms of arbitration clause, "may wish to consider adding [that] b) the number of arbitrators shall be… (one or three)".[11] It is emphasized once again that there shall be an uneven number of arbitrators (one or three) in art. 5 of the UNCITRAL Arbitration Rules.

Majority of the countries enacted Model Law or, even if not enacted, try to follow this model.[12] According to Model Law "The parties are free to agree on a procedure of appointing the arbitrator or arbitrators."[13] If parties do not agree upon the procedure of appointment, paragraph 3 of the same article provides a "default mechanism … when there are to be three arbitrators"[14]. According to this procedure, each party shall appoint one arbitrator and the two arbitrators nominated by the parties, shall select the third arbitrator. The sole arbitrator is selected by both parties by consensus. Scholars consider that the system of appointing three-arbitrator panel "owes its success to the fact that parties value their freedom to appoint one of the arbitrators"[15]. In this case due consideration shall be given to the importance of the trusting feature of the relationship between parties and arbitrator(s) appointed by them. Therefore the most common provision in international instruments and in national laws, as well as in practice is that arbitration panel shall be formed from an uneven

10 Lew, Julian D.M.; Mistelis A. Loukas; Krőll M. Stefan, „Comparative International Commercial Arbitration", (2003), p. 225

11 UNCITRAL Arbitration Rules (1976), art.1

12 Republic of Moldova did not enacted Model Law, but there is a new draft of the Law on commercial arbitration that is following Model Law provisions. In March 2008 the old law (from 1994) was still in force. It is expected that the new law will be adopted soon. Draft Law can be found on: www.parlament.md/download/drafts/ro/4557.2006.doc

13 UNCITRAL Model Law on Commercial Arbitration, art. 11 (2)

14 Drahozal R. Ch., „Commercial Arbitration. Cases and Problems", (2002), p.358

15 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p. 536

number of arbitrators, usually one or three.

1.1.2. Methods of appointing an arbitral tribunal

Professor Hunter considers that the most usual methods of appointing an arbitral panel are:

- agreement of the parties;
- arbitral institution;
- list system;
- appointing authority
- national court[16].

Despite the fact that parties are allowed to determine freely the number of arbitrators and the method of their appointment, it is not always the case. Sometimes parties fail to provide such information in their arbitration agreement. According to Professor Varady, in case the arbitration clause does not provide the procedure of appointing the arbitrators, there are "four possible ways to bring to perfection an agreement to arbitrate:

- arbitrators my be nominated by an arbitral institution;
- the parties themselves may complete their agreement and nominate the arbitrators directly;
- the parties may create a special appointing authority in their arbitration agreement;
- assistance may be rendered by courts.[17]"

As all these methods encompass each other at a certain point, the main difference is whether parties agreed in advance on the appointment or failed to do so.

Agreement of the parties is the most usual method for appointing arbitrators. In practice, this

16 Redfern A. & Hunter M., „Law and Practice of International Commercial Arbitration", (2003), p. 195

17 Varady T., Barcelo J., von Mehren T., "International Commercial Arbitration. A Transnational Perspective", (3rd ed.2006), p. 365

type of appointment supposes that parties did not refuse to appoint arbitrator(s), they reach an agreement in regard of the appointed arbitrators, and finally, the appointed arbitrator(s) shall accept the nomination to act as such. There are often cases when the appointed arbitrators, even if are impartial, independent and perfectly qualified for solving certain types of cases, can not proceed due to busy schedule or other reasons. From practical considerations parties shall ask written and dated confirmation of acceptance from the arbitrator(s). It seems it becomes important when it comes to the calculation of time-limits[18]. Certain legislations require that arbitrators shall accept their mandate in writing.[19] In case parties failed to provide in their arbitration agreement the issue of arbitrators' appointment, at the moment of dispute occurrence, they can themselves complete the arbitration agreement and nominate the arbitrators directly. It is the most usual and reasonable method as it is efficient and less time consuming than other possible solutions in these circumstances.

Arbitral institution themselves provide the procedure of appointing arbitrators under their own arbitration rules. In order to enable an arbitral institution to appoint arbitrators according to their rules, parties have to designate it in their arbitration agreement. It is commonly recognized, that if parties chooses an arbitral institution, they impliedly agree upon the rules of this institution[20]. The only exception is that parties would opt for other arbitration rules, but still to be performed by the designated arbitral institution. Professor Hunter points out that in such a case many arbitral institutions are offering their services as appointing authority, even where the arbitration is not to be

18 Redfern A. & Hunter M., „Law and Practice of International Commercial Arbitration", (2003), p. 195

19 Netherlands Arbitration Act, art. 1029

20 For example in ICC Rules of Arbitration (1998) it is stated (art.6(1):"
"Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration proceedings unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement".

conducted under their own rules[21].

The "list system" supposes that each party makes a list of three or four persons considered to be acceptable arbitrators and then exchange them in an attempt to reach agreement. Sometimes arbitral instituttions apply this system by sending out the „same list of names to each party and then parties decide which arbitrators to select"[22]. For example, in case of a sole arbitrator and in case of selecting the third presiding arbitrator, UNCITRAL Arbitration Rules provides that:

"In making the appointment the appointing authority shall use the ... list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case. At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names. Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference. After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties".[23]

Parties may provide in their agreement the appointing authority that shall make the appointment. As appointing authority may serve an arbitral institution, a specific person or a national court. There are cases when a party refuses to appoint an arbitrator or a party-appointed arbitrator does not agree with the other party-appointed arbitrator on a third arbitrator. This situation may be solved by providing in the arbitration agreement that an authority appointed by the

21 Redfern A. & Hunter M., „Law and Practice of International Commercial Arbitration", (2003) p. 196
22 Idem
23 UNCITRAL Arbitration Rules, art. 6

parties shall make the appointment. The distinction shall be made whether arbitral institutions are acting as administering authority (it would be an institutionalized arbitration) or as an appointing authority (it is limited just to the appointment of arbitrators). Its also important to distinguish the role of the law court in appointing arbitrators. There are two different cases, when the law court is acting as an appointing authority because parties designated it as such, or, it is acting on the basis of the national law that enables law courts to perform appointment of arbitrators in certain cases that will be further analyzed.

National court can serve as appointing authority if parties expressly designated it. The other situation that involves national court in the appointing procedure is when parties fail to form the arbitral panel under any of the above mention methods before or at the moment of dispute arising. Courts are most commonly called upon in the ad-hoc arbitrations where parties did not designate any appointing authority. In case of institutionalized arbitration provides its own solutions by applying its own arbitration rules, if parties did not agree otherwise. In order to consider that a certain national court is able to appoint the arbitrators, we have to check whether this court has jurisdiction and whether it has the power to do the appointment. According to general rule, if the court has both jurisdiction and power, the consent of both parties is not necessary. It is sufficient for the claimant to apply to the court for the appointment of a sole arbitrator, or of a presiding arbitrator, as the case may be.[24]. These aspects will be analyzed in the following chapter.

1.2. The Role of the Court in the Arbitration

The role of the Court in arbitration is significant one, even if not too broad. Each country has specific legal framework that enables national courts to offer support to arbitration by providing a certain number of functions. This framework can vary from one country to another in dependence

24 Redfern A. & Hunter M., „Law and Practice of International Commercial Arbitration", (2003) p. 201

of the regulation and case law (if it is applicable), but it is generally accepted that in the countries that enacted Model Law, the role of the courts are almost the same. Certain scholars consider that, in general, interference by the courts in arbitral proceedings should be limited to instances and functions expressly provided by the applicable rules[25]. Art.5 Model Law provides that in matters governed by the model law, no court shall intervene unless the model law so allows. Moreover, according to the explanatory note of the UNCITRAL secretariat "recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process".[26]

Professor Kroll states that even if the general trend is to minimize court intervention, "there are, however, some situations where court intervention and assistance is needed" [27], and continues "court intervention is normally possible only in two situations:

- when expressly provided for in the arbitration law, or
- where the issue is not covered by the law. Here, the court intervention may be possible as a default mechanism for the support of the arbitration proceedings".[28]

Article 6 of the Model Law provides that "the functions referred to in articles 11(3), 11(4), 13(3), 14, 16 (3) and 34 (2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions]." The majority of the countries provide that national law courts would serve for these purposes. Still

25 Kurkela S.M. & Snellman H., „Due Process in International Commercial Arbitration", (2005), p. 167

26 Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration, para. 15

27 Lew, Julian D.M.; Mistelis A. Loukas; Kr̋ll M. Stefan, „Comparative International Commercial Arbitration", (2003) , pp.355-356

28 Ibidem, p.359

there are countries that have chosen another option. For example in Russia and Ukraine the bodies entrusted with the functions provided by Model Law are Chambers of Commerce. Specifically, the function of arbitrators' appointment is performed by the president of the Chamber of Commerce and Industry of Russia, and Ukraine respectively[29].

According to the amended Model Law, national courts are fulfilling the following functions[30]:

1. appointment, challenge and termination of the mandate of an arbitrator (arts. 11, 13, 14)
2. decide upon the jurisdiction of the arbitral tribunal (art. 16)
3. decide upon setting aside of the arbitral award (art. 34).
4. offer assistance in taking evidence (art.27)
5. decide upon recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (arts. 8 and 9),
6. court-ordered interim measures (art. 17 J),
7. recognition and enforcement of interim measures (arts 17 H and 17 I)
8. recognition and enforcement and of arbitral awards (arts 35 and 36).

From the provisions of Model Law and of UNCITRAL Arbitration Rules derive eight general principal functions that courts perform in the implementation and oversight of a national arbitration regime:[31]

Enforce agreements to arbitrate. In case there is a valid arbitration agreement between the parties, but one of them applies to court, the other is in right to invoke the existence of arbitration agreement. In such case courts are required by the national laws to address parties to arbitration.

29 See Law of the Russian Federation on International Commercial Arbitration, art.6 and Law of Ukraine on Commercial Arbitration, art.6. The same approach has been taken by the Islamic Republic of Iran, Singapore, Bulgaria.

30 See also Annex 1

31 Ball M., "The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration", Arbitration International, Vol. 22 No. 1 (2006), pp. 74 – 93

This duty of the courts is also provided by art. 8(2) Model Law.

Enforce arbitration awards. The majority of the national laws require the courts to recognize and enforce the awards. Each Model Law state, as well as states with progressive arbitration framework will satisfy the request of the winning party to recognize and enforce the award. Under the Model Law, this requirement applies with respect to both domestic awards and foreign awards (art. 35(1))[32]. According to the New-York Convention, "each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon"[33].

Set aside arbitration awards made in the country where the court sits or decline to recognize or enforce foreign or domestic awards, if the awards and the proceedings that produced them fail to meet national or international legal standards[34]. Grounds for setting aside the award are provided by the Model Law in art. 36 The grounds on which the denial of recognition and enforcement of a foreign or domestic award are exhaustively provided by the art. V of New-York Convention. The court that is not in jurisdiction where the award was made has no power to set a foreign award aside. Consequently, if a court (not from the sit of arbitration) refuses to recognize or enforce an award, the party is still enabled to ask for enforcement of award in other country.

Decide challenges to the jurisdiction of arbitral tribunals. Article 16 (2) and (3) of the Model Law provides that "arbitral tribunal may rule on a plea that it does not have jurisdiction either as a preliminary question or in an award on the merits… If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court […]to decide the matter, which decision shall be subject to no appeal"

32 Idem
33 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. III
34 Ball M., "The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration", Arbitration International, Vol. 22 No. 1 (2006), pp. 74 – 93

Appoint arbitrators: As it is mentioned by scholars, a "blank" arbitration clause, which merely provides for disputes to be resolved by arbitration, will require the intervention of the courts to be effective, unless the parties agree upon the choice of arbitrators[35]. The same result will be achieved in case parties fail to constitute arbitration panel regardless the provisions of arbitration clause. It is the case when "court intervention is necessary to make the agreement to arbitrate workable".[36] .

Remove arbitrators for interest or bias. Under the Model Law, the fact that an arbitrator is not acting independently and impartially is a ground for a party to ask for challenge[37]. Article 13(1) and (2) of the Model Law provide that parties are free to agree on challenge procedures, and that, if they do not, the challenge may be made to the arbitral tribunal. If the arbitral tribunal rejects the challenge or if the agreed alternative procedure is not successful, the Model Law, Article 13(3), provides that the challenging party may present the challenge to a designated court. Most of such challenges are made at an early stage in arbitration[38].

Grant interim relief to preserve the status quo before arbitration is commenced or while arbitration is pending is a significant function as it is ensures that the award will mean something for the parties. As Markham Ball mentions in his article, "irreparable harm may have been done or assets may have been irrevocably dissipated by the time an arbitration case has been decided on the merits"[39]. Under art.9 Model Law, "it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure"[40].

35 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p. 535
36 Lew, Julian D.M.; Mistelis A. Loukas; Kr̋ll M. Stefan, „Comparative International Commercial Arbitration", (2003), p. 368
37 Model Law on International Commercial Arbitration, art. 12 (2)
38 Ball M., "The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration", Arbitration International, Vol. 22 No. 1 (2006), pp. 74 – 93
39 Idem
40 Model Law on International Commercial Arbitration, art. 9

Order parties to produce evidence or witnesses in connection with an arbitration. Model Law in art. 27 provide that "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this state assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence". The "rules of taking evidences" seems to be those provided expressly by legislation (in civil law countries that would be the Code of Civil Procedure) or statutes of the courts, rules that are generally applied in litigation. For example the English Arbitration Act, in § 43 (1) provides that "party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence"[41].

1.3. Basis for the Judicial Appointment of Arbitrators

Even if the general approach is that courts shall not interfere in the parties' right to appoint arbitrators or at least in providing a mechanism for their appointment, there are several exceptions to the rule when the courts "must act to save the process"[42].

Model Law countries, following the provisions of art. 11(4) of the Model Law, generally regulate the situations when the court intervention in appointing arbitrators is necessary, specifically when there is an appointment procedure agreed by the parties, but:

- a party fails to act as required under such procedure, or
- the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

41 English Arbitration Act, §(1)

42 Ball M., "The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration", Arbitration International, Vol. 22 No. 1 (2006), pp. 74 – 93

- a third party, including an institution, fails to perform any function entrusted to it under such procedure.

In such cases "any party may request the court or other authority specified in article 6 (i.e. national court) to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment"[43]. In addition, Article 11(3) Model Law, which deals with cases where the parties have not agreed on an appointment procedure, also provides for court appointment as a last resort.[44]

In the USA, according to the Uniform Arbitration Act and Federal Arbitration Act, a court is entitled to appoint arbitrator (s) when:

- a party to an enforceable arbitration agreement fails to appoint an arbitrator within a reasonable time;
- the method provided in the agreement to arbitrate is not followed by the parties;
- there has been mechanical breakdown in the arbitrator selection process or one of the parties refuses to comply;
- the failure to appoint a neutral third arbitrator would result in inherently unfair arbitration proceedings, though other authority holds that a court should order the selecting party to select another arbitrator if the court determines the challenged arbitrator demonstrates evident partiality[45].

Uniform Arbitration Act provides that in one of the above mentioned case, the court, on [motion] of a party to the arbitration proceeding, shall appoint the arbitrator[46]. Federal Arbitration

43 Model Law on International Commercial Arbitration, art. 11 (4)

44 Lew, Julian D.M.; Mistelis A. Loukas; Kr̋ll M. Stefan, „Comparative International Commercial Arbitration", (2003) p. 241

45 Grossman E.L., Harnad K. G., "Alternative Dispute Resolution §127", American Jurisprudence, 2nd ed., Nov. 2007

46 Uniform Arbitration Act (2000), „Appointment of Arbitrator; Service As A Neutral

Act provides similar rule[47]. Consequently, in practice, courts are usually called upon in the following circumstances:

Party refuses to appoint co-arbitrator. In cases involving a panel with three arbitrators, one party will occasionally fail to appoint a co-arbitrator, either through neglect or a desire to frustrate the arbitral process[48] In the Bancomer S.A. v Samsung case, court held that in the event of a "party's failure to appoint an arbitrator, the arbitrator shall be appointed in accordance with the provisions of art. 1427 of Commercial Code", that is consistent with art. 11(4) Model Law[49].

A third party, including an institution, fails to perform any function entrusted to it under such procedure. In this case a third party can be an individual, or an institution.

a) Individual. It is strongly not recommendable for the parties to designate an individual. However, in case parties agreed upon a specific person to serve as arbitrator and due to certain circumstances this individual can not proceed, there are two ways to solve the problem. One way is to leave parties to agree by themselves on another appointment, or, in case they can not reach a consensus, courts shall make the appointment.

b) Appointing authority (institution) refuses to act or is not existent anymore.

In the Astra Footwear[50] the clause was referring that "in case the buyer is accused, the Chamber of Commerce in New-York is competent". Due to the ambiguity on the determination of the institution (one arty was asking for the New York Chamber of Commerce, the other one was asking for the ICC that has office in New-York), court concluded that parties actually intended to address

Arbitrator"

47 Federal Arbitration Act, Chapter I, section 5

48 Born G.B., „International Commercial Arbitration", (2nd ed. 2001), p. 633

49 Bancomer S.A.. v. Samsung Telecommunications America, Inc , Mexico, Thirteenth Civil Collegiate Court of the First Circuit, DC 827/2000-13, 25 January 2001, abstract of the case in the CLOUT system

50 Astra Footwear Industry . v Harwyn International, Inc., District Court for the Southern District of New York, 1978. See also: Brandenburgisches Oberlandesgericht, 8 SchH 1/00, 26 June 2000, CLOUT Case 439: failure of appointment process due to inexistence of the institution.

their dispute to the New York Chamber of Commerce. Afterwards it appeared that New York Chamber of Commerce (NYCC) became New York Chamber of Commerce and Industry (NYCCI) and did not have anymore the function to arbitrate. "Since the NYCC no longer arbitrates and the ICC was not specified in the agreement petitioner requested the court appoint the arbitrator pursuant to §5 of the FAA. Court appointed an arbitrator and held that §5 of the FAA was drafted to provide a solution to the problem caused when the arbitrator selected by the parties can not or will not perform"[51].

Parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure In a German case, party appointed arbitrators could not agree upon the chairman. Parties previously agree that in case of a failure of agreement the chairman was to be appointed by the president of the "Landgericht" at the employer's place of business, which was not existent at the Italian employer's lace of business. When arbitrators could not reach an agreement upon the chairman, parties applied to the Brandenburghische Oberlandesgericht (Higher Regional court) for the appointment of the chairman. The Court appointed the arbitrator holding that it had jurisdiction and was competent to do so since the parties had implicitly agreed on arbitration in Germany and the initial appointment procedure had failed.

Another basis for the courts to make the appointment of arbitrators is when "parties' arbitration agreement is indefinite or internally inconsistent."[52] So called "blank clause"(*clause blanche*) is one which contains no indication, whether directly or by reference to arbitration rules or to an arbitral institution, as to how the arbitrators are to be appointed." [53] According to Born[54], in the United States, U.S. courts are generally willing to appoint arbitrators under §5 of the FAA where

51 Drahozal R. Ch., „Commercial Arbitration. Cases and Problems", (2002), p. 360.
52 Born G.B., „International Commercial Arbitration", (2nd ed. 2001), p. 635
53 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p. 266
54 Born G.B., „International Commercial Arbitration", (2nd ed. 2001), p. 635

there is a defective agreement regarding an appointing authority. In France, as well, the "blank clause" are permitted under French international arbitration law. In such cases the court may, after hearing the parties, decide on the number of arbitrators and the method of their appointment. It can also directly appoint the required arbitrator or arbitrators.[55]

55 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p. 498

CHAPTER II – JURISDICTION OF THE COURT

2.1. Conditions for the National Court to Be Able to Make the Appointment

Model Law in art.6 provide that each enacting state to specify the "court, courts or, where referred to therein, other authority competent to perform" functions attributed by the Model Law. Dore considers that the advantage of pre-designating a court is that it makes available a single, centralized institution, having a specialized function, able to act speedily when is called upon and that such pre-designation could be particularly helpful to the foreign party.[56]

Before analyzing the conditions for the national courts to have jurisdiction in appointing arbitrators, it is necessary first of all to distinguish two different situations:

- national court is acting as the court in appointing the arbitrator (s) pursuant to national law

- national court is acting as authority appointed by the parties in order to make the appointment.

This distinction is significant at the moment when we evaluate the character of the decision taken by the court. Professor Varady states that "the essential difference is actually not in the person of those who would make the appointment, but rather in the source of their power. The president of a given court may be chosen by the parties as their appointing authority, but he may also have distinct competences under his national law to act as appointing authority. His responsibilities, his powers and the nature of his decisions will not be the same in these two situations…As long as the source of their competence is the agreement of the parties; their action is not channeled by official procedure, just as their right to refuse the request is not restrained by the existence of the official

56 Dore I. I., „The UNCITRAL Framework for Arbitration in Contemporary Perspective", (1993), p.105

duties."[57]

In the present work it is analyzed the appointment of arbitrators by the courts that are acting on the basis of national laws, not the parties agreement. National arbitration laws "typically provide for proceedings that do not involve arbitration institution or "permanent" arbitral tribunals"[58].

It is commonly recognized that in order the court to make an appointment it has to have:

- firstly, jurisdiction to do so, and

- secondly, the court has to have the power under its own law to make appointment.[59]

2.1.1. Court's jurisdiction to make the appointment

The general rule is that a national court will have jurisdiction if the arbitration shall take place on its territory. We can distinguish here two possible situations.

a) arbitration agreement designates the sit of arbitration. This is the best solution as, in this case "the party wishing to proceed with the arbitration simply applies to the appropriate national court for the appointment to be made"[60].

b) arbitration agreement does not designate the sit of arbitration. In this case the jurisdictional complications are unavoidable in international arbitration. "A clause that fails to provide either for an effective method of constituting the arbitral tribunal, or for the place of arbitration, may turn out to be inoperable"[61] in most jurisdictions or it encompasses "serious risk of not having the benefit of a supporting judge"[62].

Still, in some states, the issue whether the court is empowered to offer assistance depends not

57 Varady T., Barcelo J., von Mehren T., "International Commercial Arbitration. A Transnational Perspective", (3rd ed.2006), p. 370
58 Schäfer E., Verbist H., Imhoos Ch., „ICC Arbitration in Practice", (2005), p. 6
59 Hauleatt-James M. & Gould N., „International Commercial Arbitration", (1996), p.52
60 Redfern A. & Hunter M., „Law and Practice of International Commercial Arbitration", (2003), para 4-33
61 Idem
62 Gaillard E., "Laws and Court Decisions in Civil Law Countries", p. 71

only on the place of arbitration. Other criteria can serve as basis for the court intervention, like: be "nationality of the parties, the law governing the arbitration and domicile or place of business of the parties"[63].

For example possible solution in case of non-establishing the place of arbitration, would be if one party is "resident or, in case of a legal entity, has its headquarters in Germany" [64]. According to the ZPO "If the place of arbitration […]is not in Germany, competence lies with the Higher Regional Court (*Oberlandesgericht*) where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court (*Kammergericht*) shall be competent" [65]. It would be a fortunate case if the other party is subject to the laws similar to the German one. In a case[66] German court considered itself competent even though the parties had not explicitly agreed upon the place of arbitration. "The court derived the parties' intent to arbitrate in Germany from the circumstances: (1) the parties had subjected the material issues of their contractual relationship to German law; (2) performance of the contract was due in Germany; (3) the language of the contract was German; (4) the terms of the contract were specified by the "German Standard Terms for Construction" (VoB) and the German Civil Code; and (5) the price was expressed in German currency. The Court found these facts indicative that the parties did not want a foreign arbitral tribunal, composed of foreign arbitrators unfamiliar with German law"[67].

Italian legislator provided for a broader area of jurisdiction of the courts. Article 810 of Italian Code of Civil Procedure stipulates that in case parties do not agree upon the appointment of

63 Lew, Julian D.M.; Mistelis A. Loukas; Krőll M. Stefan, „Comparative International Commercial Arbitration", (2003) p. 360

64 Schäfer E., Verbist H., Imhoos Ch., „ICC Arbitration in Practice", (2005), p. 4

65 ZPO, section 1062 (2)

66 Brandenburgisches Oberlandesgericht, 8 SchH 1/00, 26 June 2000, CLOUT Case 439

67 Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXVIII (2003), pp. 251 - 252

arbitrators, "the party which has made the request may, through a recourse, petition the president of the tribunal in whose district the arbitration has its seat to make the appointment. If the parties have not yet determined the seat of the arbitration, the petition shall be made to the president of the tribunal of the place where the arbitration agreement has been concluded or, if such place is abroad, to the president of the tribunal of Rome"[68]. It seems that Italian legislator approach is much more liberal as it broadens the sphere of applicability of its national courts' jurisdiction.

According to the Fouchard, Gaillard and Goldman, in France, in international arbitration, "the President of the Paris Tribunal of First Instance will only have jurisdiction to assist with difficulties concerning the constitution of the arbitral tribunal if there is a connection between the arbitration in question and France: either the arbitration must take place in France, or the parties must have agreed that it is to be governed by French procedural law[69]". Same authors point out that "Such interventionism would not be tolerated outside France, and there would be a substantial risk that the validity of the constitution of an arbitral tribunal with which a French court had assisted would be challenged on the basis that the court had exceeded its jurisdiction"[70]. In Societe Europe Etudes v. Societes E.T.P.O., L.T.P.A. et Al Ashram Contracting & Co[71] , the court refused to make the appointment due to the lack of jurisdiction, as arbitration clause did not provide that French law shall be applied or that the place of arbitration would be France.

Taking into consideration that there are just a few states that provides for other criteria than the agreed place of arbitration, there is still a big chance that the parties will not have the chance to arbitrate their dispute if they did not even provided a place for arbitration in the agreement, as

68 Italian Code of Civil Procedure, art. 810

69 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p.486

70 Ibidem, p.487

71 Societe Europe Etudes v. Societes E.T.P.O., L.T.P.A. et Al Ashram Contracting & Co; note Varady T., Barcelo J., von Mehren T., "International Commercial Arbitration. A Transnational Perspective", (3rd ed.2006), p. 372

courts may refuse to make the appointment due to lack of jurisdiction.

2.1.2. Court's power to make the appointment

Most national laws offer powers for the national courts to provide assistance during the arbitration process. As it was emphasized above, national courts are usually enabled to appoint arbitrators in certain cases. All states that enacted Model Law designated a single or a few law courts to perform the functions pursuant to art.6 Model Law and have empowered these courts as well.

2.2. Appointment of the Arbitrators by the Court in Order to Prevent Denial of Justice

There are cases when courts shall intervene in formation of the arbitral tribunal in order to avoid denial of justice. The available case law and commentaries shows that French courts dealt with this issue and they extended "their jurisdiction where the treatment of the plaintiff by the foreign courts that would otherwise have jurisdiction amounts to a denial of justice."[72]

In the National Iranian Oil Co. (NIOC) v. Israel case[73]

„ the agreement included an arbitration clause stipulating that any problems arising under the agreement shall be submitted to a three-judge arbitration panel governed by the International Chamber of Commerce (ICC) (where each party had to appoint one arbitrator). However, the clause did not state a specific site for the arbitration Israel failed to appoint its own arbitrator. NIOC addressed to the Tribunal de Grande instance of Paris, to enforce the arbitration clause The Tribunal de grand instance found it had no jurisdiction to hear this case, reasoning that the contract provided no connection to France, and subsequently denied NIOC's claim. Negotiations began between NIOC and Israel but came to a halt in June 1998 when the Tel Aviv District Court decided

72 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p. 169

73 National Iranian Oil Co. v. Israel case, Cour d'appel de Paris, 29.03.2001, Revue de l'Arbitrage 2001, p.609, note: Varady T., Barcelo J., von Mehren T., "International Commercial Arbitration. A Transnational Perspective", (3rd ed.2006)

the Manbar case, which, *inter alia*, declared Iran an enemy of the state of Israel. After negotiations ceased in February 2000, NIOC brought its suit back to Paris, this time asserting jurisdiction on the grounds of denial of access to justice. The Tribunal de grand instance found it lacked jurisdiction to hear the claim, stating there was no "denial of justice" since NIOC had failed to show that no other court could hear this claim.

NIOC appealed the decision to the Court of Appeals of Paris, reasserting its contention that the laws of France provided a remedy for "denial of justice." The Court of Appeals agreed with NIOC and held the claim was admissible under a new third condition of "denial of justice," interpreted into the new code of civil procedure in article 1493"[74].

The French Court held that "the right of a party to an arbitration agreement to submit its claims to arbitration is a matter of public policy under French law". [75] According to the arbitration agreement between the parties "any problems arising under the agreement shall be submitted to a three-judge arbitration panel governed by the ICC. ICC is a legal person constituted under the French Law with its seat in Paris. On the basis of this fact the French court established that there was a link with France. Therefore the court had jurisdiction to decide upon the issues at hand.

At the same time, it was pointed out that "this remedy should be applied on a case-by-case inquiry, or France might be deluged with cases where parties submitted to arbitration under ICC Rules and later found themselves without a forum that would provide a remedy."[76]

74 Chichester L. „National Iranian Oil Co. v. Israel: France Reinterprets its Code to Prevent "Denial of Justice," Leaving Israel Between Iran and a Hard Place"

75 Varady T., Barcelo J., von Mehren T., "International Commercial Arbitration. A Transnational Perspective", (3rd ed.2006), p. 380

76 Chichester L. „National Iranian Oil Co. v. Israel: France Reinterprets its Code to Prevent "Denial of Justice," Leaving Israel Between Iran and a Hard Place"

CHAPTER III -- THE MOMENT IN TIME WHEN THE JUDICIAL APPOINTMENT IS BEING MADE

3.1. Appointment by the Court before the Constitution of the Arbitral Tribunal

According to Professor Hunter, there are at "least three situations in which the intervention of the court may be necessary at the beginning of the arbitral process:

- the enforcement of the arbitration agreement;
- the establishment of the tribunal; and
- challenges to jurisdiction".[77]

The establishment of the arbitral tribunal is the issue at hand. As it was mentioned above, the intervention of the court is necessary if parties did not agree upon the procedure of appointment, or , in case they agreed

1. a party fails to act under the agreed procedure as required under such procedure, or
2. the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
3. a third party, including an institution, fails to perform any function entrusted to it under such procedure.[78]

3.1.1. Purpose of judicial appointment of arbitrators

According to scholars, by performing judicial appointment, two main aims is achieved: to support arbitration and to respect parties will to arbitrate. As professor Born mentions "The

77 Redfern A. & Hunter M., „Law and Practice of International Commercial Arbitration", (2003), para 7-06

78 Model Law on International Comercial Arbitrastion, art. 11 (4)

availability of judicial appointment ensures that arbitral proceedings can be pursued, even where the parties have not agreed upon either an arbitrator or an appointing authority".[79]

National legislations enable courts to assist the arbitral procedure, without exceeding the limits that would interfere in the parties will. There is a visible trend to support arbitration not only in national laws, but in the case-law as well. In the Delma Engineering Corp.v.K & L Construction Co., despite the fact that the authority that parties appointed (New York Building Congress), refused to act, the Appellate Division held that "agreement providing for arbitration of controversies in accordance with rules of New York Building Congress did not constitute agreement to arbitrate before particular arbitrators and, hence, even though such Congress had refused application for arbitration, action at law involving arbitrable controversy would be stayed pending arbitration before arbitrators appointed by court"[80].

Another aspect of supporting arbitration by judicial appointment is to preclude the frustration of the arbitral proceedings. Scholars recognize that "the failure of a party to appoint an arbitrator, or of a party-appointed arbitrator to participate in the appointment of the chairman for the arbitral tribunal, are perhaps, the oldest and best-tried tactics for disrupting the normal working of the arbitration".[81] There fore the court shall stop or preclude the delaying or disrupting tactics from the parties.

In practice, before *de facto* appointment is made by the court, an important issue arises, whether the court shall or shall not examine if there is a valid arbitration agreement between the parties.

79 Born G.B., „International Commercial Arbitration", (2nd ed. 2001), p. 629

80 Delma Engineering Corp. v.K & L Construction CO., Supreme Court, Appellate Division, Second Department, New York.

81 Gaillard E., "Laws and Court Decisions in Civil Law Countries", p. 65

3.1.2. Prima facie examination of the valid arbitration agreement existence: duty or discretion?

It reasonable to assume that in case a party does not want to cooperate on the appointment of arbitrators or changes his mind to address the dispute to arbitration, he would rely on the invalidity of the arbitration agreement: "in court proceedings for the appointment of an arbitrator the defaulting party will invariably invoke the invalidity of the arbitration agreement and ask the court not to appoint the arbitrator"[82]. Whether the court is enabled to examine the existence of the valid arbitration agreement is subject to the national laws provisions. Usually it is provided that a summary examination on the existence of the valid arbitration agreement shall be done before the court decides whether it has jurisdiction to make the appointment.

Professor Varady considers that in a way or another the court will examine the arbitration clause as the information that might serve for the establishment of court's jurisdiction lies in the arbitration agreement itself[83]. In the Wellington Associates Ltd. v. Kirit Mehta (2000) , the Court held that even if the Chief Justice or his designate under Section 11(12) of the Arbitration and Conciliation Act (1996) is to be treated as an administrative authority, the position is that when the said authority is approached seeking appointment of an arbitrator under s.11 and a question is raised that there is no arbitration clause at all between the parties, the Chief Justice has to decide the said question[84].

Still the decision upon the validity of the arbitration agreement will not have the effect of *res*

82 Lew, Julian D.M.; Mistelis A. Loukas; Kr̋ll M. Stefan, „Comparative International Commercial Arbitration", (2003) p.353, para 14-75

83 Varady T., Barcelo J., von Mehren T., "International Commercial Arbitration. A Transnational Perspective", (3rd ed.2006), p. 372

84 Wellington Associates Ltd. v. Kirit Mehta (2000), summary on this issue available in "Arbitration Law in Selected SAARC Countries",

judecata which could exclude further proceedings in the court. [85] In support of this approach, Gaillard mentions that a decision of the court can be appealed "when the judge has the power to determine the clear absence or nullity of an arbitration agreement and on that basis refuses to appoint an arbitrator."[86] In any case, from the point of view of efficiency it would be more reasonable for the courts "to refrain from assisting in the creation of an arbitral mechanism which may be costly, time consuming, and which is doomed to failure because of the obvious lack of a valid arbitration agreement"[87]. First of all it would be more efficient and practical for the parties.

3.1.3. Procedure of judicial appointment of arbitrators

Pursuant to art.11(3) Model Law, courts are empowered to appoint arbitrators at the request of the party, regardless whether it is a sole arbitrator or it is supposed to be three-member panel arbitration. Most Model Law countries provide specific time limit after the expiration of which, a party may request the court to make the appointment, as the other party did not redress the situation by designating an arbitrator or by failing to agree upon a sole arbitrator with the other party. Austrian Code of Civil Procedure[88] provides a term of four weeks within which, a party shall appoint the arbitrator or the two appointed arbitrators shall designate the third one. The term starts to run from the moment of receipt of a written request from the other party to do the appointment. If party or the arbitrators fail to do the appointment within the frame limit, the party is entitled to address to the court for performing the appointment. In a German case[89], upon the respondent's

85 Lew, Julian D.M.; Mistelis A. Loukas; Kr̋ll M. Stefan, „Comparative International Commercial Arbitration", (2003), p. 354,

86 Gaillard E., "Laws and Court Decisions in Civil Law Countries", p. 73

87 Varady T., Barcelo J., von Mehren T., "International Commercial Arbitration. A Transnational Perspective", (3rd ed.2006), p. 371

88 Austrian Code of Civil Procedure, art. 587

89 Bayerisches Oberstes Landesgericht, Z SchH 9/01, 16 January 2002, CLOUT Case 563

failure to appoint the arbitrator, claimant addressed Highest Regional court. Before the could decide on the application, respondent nominated the arbitrator. The Court held that that the respondent's designation was late so that, under §1035(4) ZPO, the right to appoint the arbitrator had been transferred to the court. Court also held that the aim of legislation on providing one month limit is to prevent dilatory tactics.

Consequently, main requirements would be that a party shall ask the court for assistance; and, the request shall be done after the expiration of a reasonable fixed period within which the other party/arbitrators should have redress the situation. Most probable that court will make the decision after consulting with the parties.

Article 11(5) Model Law provide that court, in making the appointment "shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties[90]". An issue in this case is whether courts "would consider – or may be even verify – language skills in making the appointment"[91]. Even if there are no express requirement towards the courts to verify the language skills of the arbitrators, case law emphasizes that if the agreement provide expressly that arbitrators shall posses at a high level a certain language, the court shall take it into consideration.

In the Societe Campenon Bernard v. Eurodisneyland SCA[92], the arbitration agreement provided that arbitrators should not only have experience in international construction disputes, but also to

90 UNCITRAL Model Law on International Commercial Arbitration, art. 11(5)
91 Varady T., "Language and Translation in International Commercial Arbitration", p.57
92 Société Campenon Bernard v. Société Eurodisneyland SCA et autres, note Varady T., "Language and Translation in International CommercialArbitration", p.59

have "full command of English".[93] Court took this requirement into consideration and asked ICC to provide the list of arbitrators that would satisfy the language criteria of the parties.

Even if the court would be able to solve the arbitration by appointing impartial and independent arbitrator(s), it is under the sphere of influence of the parties to provide necessary qualification of the arbitrator(s) in such a way as order to be satisfied with the development of arbitration proceeding.

3.2. Appointment of Substitute Arbitrator by Court during the Arbitral Proceedings

Generally, since the arbitral tribunal is formed, there is no need to refer to the court is order to proceed with arbitration itself. However it can happen that at this stage "the involvement of a national court is necessary in order to ensure the proper conduct of the arbitration"[94]. The main difficulties that might occur at this stage are:

- one or more of the arbitrators may be challenged, or
- the arbitral tribunal may need a new arbitrator[95].

The second difficulty can be solved by the substitution of the arbitrator. This is the case that will be analyzed further.

According to the provisions of article 15 Model Law, where the mandate of the arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced[96]. The termination of the mandate under art.15

93 Varady T., "Language and Translation in International CommercialArbitration", p.59
94 Redfern A. & Hunter M., „Law and Practice of International Commercial Arbitration", (2003), p. 345
95 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p. 502
96 UNCITRAL Model Law on Interational Commercial Arbitration, art. 15

"relates only to the pre-award stage of the proceedings"[97] and is not applicable in case of the automatic termination of the mandate. Under art. 15 Model Law, mandate of the arbitrator terminates in case of:

- withdrawal from office;
- revocation of his mandate by agreement of the parties;
- arbitrator's failure or impossibility to act;
- challenge of the arbitrator by a party or by the arbitral tribunal.

In the case if one of the above mentioned causes occurs, the tribunal has to be "reconstituted."[98] by appointing a new arbitrator if there was only „one arbitrator or if the remaining arbitrators cannot or do not want to act as a truncated tribunal".[99]

In order a court to be able to appoint a substituting arbitrator, the same requirements applies to the jurisdiction and power of the court: "unless otherwise agreed by the parties, decisions relating to […] replacement of arbitrators are generally made by the courts at the seat of arbitration that have jurisdiction territorially and on account of the nature of the dispute according to the procedural law applicable to them".[100]

Even if under Model Law it is possible to make the substituion in case of the sole arbitrator, as well as in case of a three arbitrators panel, Veeder considers that a possible option for the parties is not covered by art.15, as it does not provide any solution for the case where the parties are required to replace a named sole arbitrator. Consequently, the most reasonable in these circumstances is: a) to let parties to decide themselves by whom to replace the arbitrator, b) let parties to apply to court, or

97 Binder P., „International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions", p.137
98 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p. 505
99 Lew, Julian D.M.; Mistelis A. Loukas; Kr̋ll M. Stefan, „Comparative International Commercial Arbitration", (2003), p. 318
100 Schäfer E., Verbist H., Imhoos Ch., „ICC Arbitration in Practice", (2005), p. 4

c)let parties to decide that "even […] their arbitration agreement to lapse." [101]

According to scholars, before proceeding to the replacement of the arbitrator, the courts "should have the power to decide whether the arbitral proceedings have merely been suspended and to determine exactly how they will be resumed with the new arbitrator"[102]. Article 15 Model Law does not contain any "provision determining what effect the substitution has, namely whether proceedings shall be repeated or not." [103] According to Professor Kroll, before oral hearings have been held it is still sufficient time for the substituting arbitrator to read the pleadings and the other documents exchanged, as well as it would not take so much time for him to give his assent in written form to any procedural directions issued by the tribunal." [104]

Under article 14 of the UNCITRAL Arbitration rules, if the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated, but if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal[105]. Therefore, if there are no other requirements under the *lex arbitri* regarding this issue, it is up to the arbitral tribunal to decide what parts of the proceedings shall be repeated.

3.2.1. Procedure of appointment of substituting arbitrator

The competent court will proceed with the appointment of substitute arbitrator at the request of one party. The lodging of the request as well as the examination of it be done in accordance with the provisions of national law of the respective country. For example, in France, the rules

101 Veeder V.V., "Laws and Court Decisions in Common Law Countries and the UNCITRAL Model Law", p.76
102 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p.508
103 Binder P., „International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions", p.139
104 Lew, Julian D.M.; Mistelis A. Loukas; Kr̋ll M. Stefan, „Comparative International Commercial Arbitration", (2003), p. 320
105 UNCITRAL Arbitration rules, art.14.

concerning this stage "are relatively succinct, dealing in turn with the determination of the relevant jurisdiction, the organization of the hearing and finally with the resulting decision"[106]. The same model is applied in the most countries. During the procedure of appointing the substituting arbitrator court are fulfilling two main objectives:

a) They more or less involve parties in the process of making the choice of replacement arbitrators. As the will of the parties is the main pillar of the arbitration, court will pay attention to the common interest and intent of the parties. In taking the decision upon the substituting arbitrator, court firstly consult parties whether they have preferences of objections hear and would offer time to parties to "nominate the arbitrators, or to provide a list of names, or to express their opinion on the arbitrator or arbitrators whom they wish to appoint"[107].

b) Moreover, by judicial appointment of the substituting arbitrator the potential delay of the arbitration proceeding that could be caused by one of the parties is avoided. By providing fixed periods during which parties can decide by themselves the issue of the substituting arbitrators, courts ensure that it will not be endless. Moreover, courts themselves have limited period of time for adopting decisions, this is the case of the decision on appointing substituting arbitrator as well.

106 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p. 508
107 Idem

CHAPTER IV – REFUSAL TO APPOINT ARBITRATORS

4.1. Reasons for refusal by the Court to appoint the arbitrator(s)

Before proceeding to the analysis of the basis for the court's refusal to appoint arbitrators, we shall establish the nature of the court's function to appoint arbitrators. According to the wording of the art.6 Model Law, to the extend that the Court's functions envisaged by art.6 are administrative, as the functions can be entrusted to a non judicial body for speedy action. Most countries do support this approach, but India. In two cases[108] Supreme Court of India held that the function of appointing arbitrator under the Indian Act is entrusted tot the Chief Justice of his nominee as a judicial power. Still before chief justice van appoint an arbitrator, he must be first satisfied that the court has the requisite jurisdiction, that there is an arbitration agreement to which t he entity requesting appointment of the arbitrator is party and that the despite is arbitrable. Nevertheless, whether this function is considered to be judicial or administrative, decision of the court on appointing arbitrators can not be appealed.

Court is entitled to refuse the appointment of the arbitrator(s) on the basis of one or more of the following reasons":

- Lack of jurisdiction can occur on the basis that: a) national law does not empower the court to make the appointment in arbitration; or b)parties specify another procedure of appointment in their arbitration agreement, even if national law is permissive in this issue. The last case is specifically emphasized in France. As Fouchard, Gaillard and Goldman point out, "although it is seldom

108 Supreme Court of India, 26 October 2005, S.B.P. & Co (India) v Patel Engineering Ltd (India); Supreme Court of India, 17 April 2006, Rodemadan India Limited v. International Trade Expo Centre Limited

mentioned by the courts, the language "in the absence of a clause to the contrary" plays a major part in the case law"[109]. It shows that courts are required to refuse to interfere in the arbitration if parties provided a solution themselves in the arbitration agreement and it is a functional. In France President de Grande Instance Paris shall refuse make the appointment if parties provided other procedure for the appointment.

- Inexistence of valid arbitration agreement. The issue of the preliminary examination by the courts of the existence of a valid arbitration agreement becomes relevant as in most legislation, in case there is no arbitration agreement, or it is invalid, courts will refuse to make the appointment.

4.2. Is the court decision upon appointment/refusal to appoint of arbitrators subject to appeal?

Under art.11(5) Model Law, the decision on the matter of appointing arbitrators by the court or other authority specified in art. 6 shall be subject to no appeal. Same provision is embodied in national laws of Model Law countries. As scholars observe, here is no reason to broaden the scope for appeals against the court decisions in international arbitration[110] . In France, at least theoretically, there were attempts to broaden the sphere of the ways of attack over this kind of decisions: if the ordinary appeal is not possible against courts' decisions on appointment, whether the extraordinary way of attack is possible (recourse). In a number of cases the Court de Cassation held that appeals of such decisions were all inadmissible.[111] The most recent of these decisions clearly explains the court's reasoning.

The only exception form the rule of no-appeal that is discussed by the scholars is the *ultra vires* decision, and only in exceptional case. More recently, "the Paris Court of Appeals clearly

109 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p. 492
110 Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p. 515
111 Idem

authorized this form of appeal, where the decision of the President of the lower court is "seriously defective as a result of the violation of a fundamental principle or of public policy," if it is *ultra vires*, or if it "contravenes the parties' fundamental rights.[112]"

Still the basic tendency is to provide no appeal against the decision of the court to appoint arbitrator(s). Presumably the main reason is to not give additional possibilities for the parties to apply dilatory tactics or to disrupt arbitration. Therefore, not only the function of appointing but the character of the decision is aimed to support parties' will to arbitrate.

112 Unpublished decision, No. 60194/96. Recourse taken against this decision was ruled inadmissible by the Paris Court of Appeals (see CA Paris, 1e Ch., Sec. C., Sept. 30, 1997, General Establishments for Chemical Industries (GECI) v. Industrialexport, Case No. 96/88637 and 97/455, unpublished), Fouchard Ph., Gaillard E., Goldman B.; „On International Commercial Arbitration", p. 493

CONCLUSION

Despite the fact that arbitration becomes more and more popular and is considered to be quite independent mean of alternative dispute resolution, it can not function always properly without the court intervention. Most national legislative acts indeed support arbitration not only by providing the opportunity to the parties to opt fur such dispute resolution possibility, but also expressly stipulation the function of the national courts to assist arbitration at any stage. The main requirement for such support to take place is: legal provision that empowers the courts, courts shall have jurisdiction and a party shall lodge a request to the court in the view o obtaining support.

The role of the court intervention at any stage of the arbitral procedure is aimed at solving the arbitration itself. Due to the specific provisions of national laws, most of which that are based on Model Law, the abuse from the courts is exclude, as court may intervene only if parties apply to it. It is not necessary to provide for the court interference in the arbitration agreement itself; court in majority of the cases can support arbitration in the virtue of national law. Court's assistance in formation of the arbitral tribunal or its reconstruction prevent dilatory tactics that can be used consciously by the parties, in such a way protecting the weak party, or, if the failing of appointing is involuntary, court supports the basic will of the parties to address the dispute to arbitration. At choosing the arbitrator, court will definitely consult parties and find out their requirement concerning the qualifications and other professional or relevant (ex: working languages) of the arbitrators.

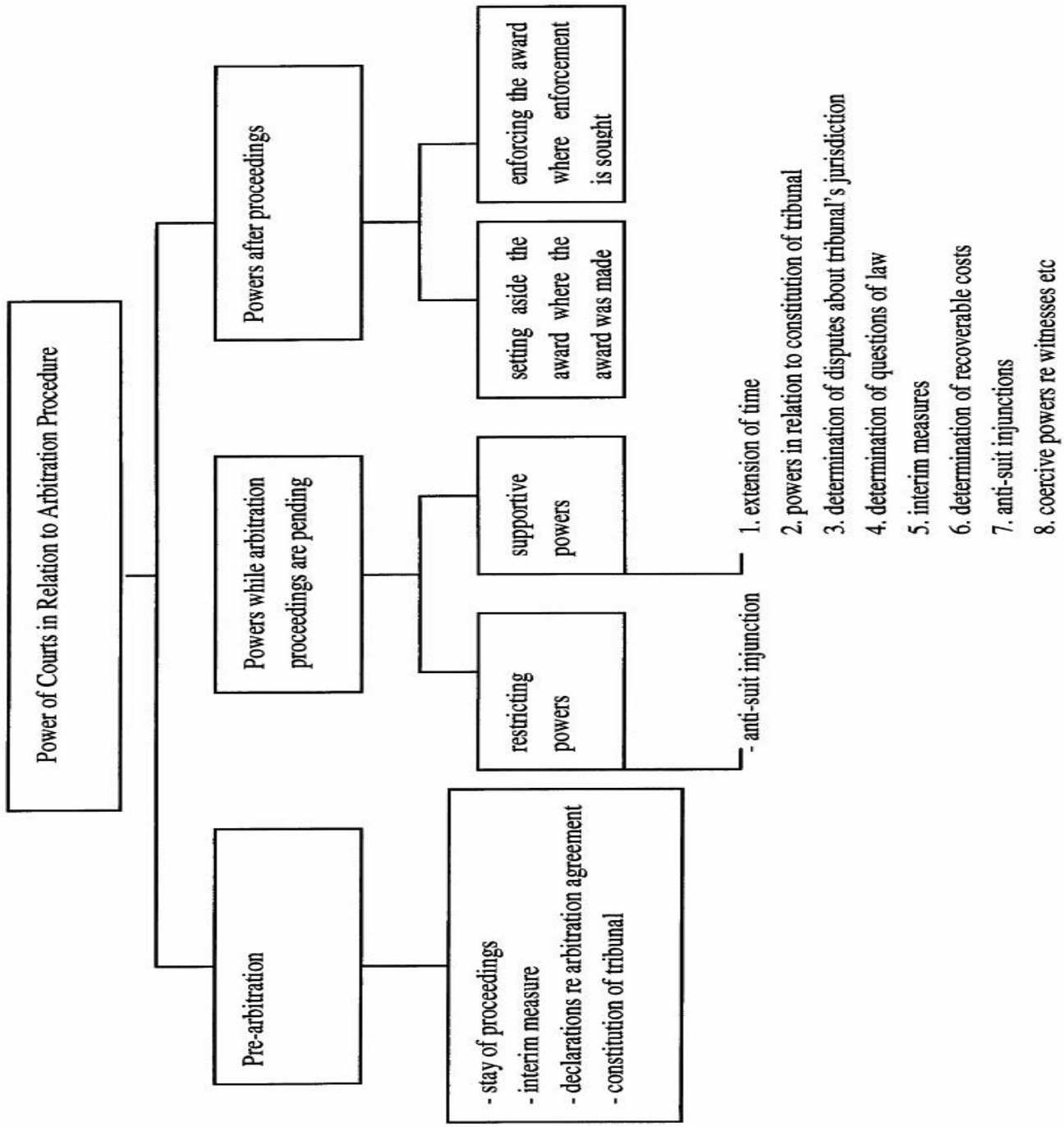
The nature of the decision taken by the court is such that it can not be appealed regardless whether under it court accepted and appointed arbitrators or refused to do so. In case of the refusal, it is advisably that the decision on refusal shall not be accompanied by the decision on the invalidity

of arbitration agreement.

Therefore, indeed, courts are those that can function in support of arbitration, primarily, but no solely at the initial stage when the arbitral tribunal is formed. This assistance is very precious for the party/parties that have invested in the formation of the arbitral tribunal, but it failed to be formed not because of their fault. Court's main rule is to protect rights and interests, in the present case, by doing the appointment of the initial arbitral panel or by appointing substitute arbitrator courts are protecting parties right and interest to have their dispute solved by arbitration, with small remark: courts shall have jurisdiction and power to do, most commonly there shall be a valid arbitration agreement and parties voluntarily address to the court for support in such matters.

ANNEX 1:

Powers of the Court in Relation to Arbitration Procedure according to Lew, Julian D.M.; Mistelis A. Loukas; Kről M. Stefan, Comparative International Commercial Arbitration", (2003) Kluwer Law International Kroll, p. 375



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