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JURISDICTION OF NATIONAL COURTS TO APPOINT AN ARBITRATOR TO PREVENT DENIAL OF JUSTICE

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Abstract

The scope of national courts' jurisdiction to intervene in arbitration process to assist the applicability of arbitration agreement has been discussed over many years by different scholars. A problematic issue that this thesis deals with is related to a situation when one party of an arbitration agreement fails to appoint a co-arbitrator when the arbitration is *ad hoc*, with no specification about the place of arbitration or the governing law of the arbitration procedure, with no acceptance by any national court to appoint the arbitrator or to decide the merits of the dispute. In this situation, the plaintiff faces a road block and no available justice. In 2005, for the first time French Court of Cassation faced this situation in the case of National Iranian Oil Company (NIOC) v. Israel (NIOC Case). In this case, the new ground for judicial appointment of an arbitrator applied by French Court by relying on "theory of denial of justice".

This thesis examines the facts and five different court's judgments in the NIOC case in light of the theory of international denial of justice to evaluate the new introduced ground for jurisdiction of the national court in appointing an arbitrator. This thesis shows an additional way of looking at different layers of international denial of justice which can justify the court intervention to appoint an arbitrator to imply justice by making the arbitration agreement applicable. This thesis employs both doctorial and comparative law methods for exploring a practical principle from the NIOC case. By distinguishing between total denial of justice and arbitral denial of justice, it concludes that the existence of all the elements of NIOC case combined with pro-arbitration policy create universal responsibility for national courts to appoint an arbitrator.

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Acknowledgement

To Maziar,

The Gorgeous Tree,

Stands Tall in the Middle of the Caspian Forest,

In the North of Iran.

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Table of Content

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Introduction

The expansion of international commercial arbitration is one of the consequences of globalization because of the prevailing influence of increased cross-border transactions.[1] The development of international trade over the boundaries of different states has led to a paradigmatic shift in the methods of solving disputes[2] between individuals, companies and states from litigation in national courts to settlement of disputes in Arbitration.[3]

There is a general agreement between scholars and practitioners that arbitration as a private dispute resolution mechanism is only a result of parties' consent which is directly reflected in their written agreement.[4] The freedom of choosing arbitration in a contractual framework is based on the principle of party autonomy, and consequently all the aspects of the arbitration process should be seen in light of parties' intentions and expectations.[5] In addition to the general principle of party autonomy, the New York Convention[6] and UNCITRAL Model Law[7] also explicitly require respect to the parties' choice of procedural provisions.

[1] Katherine Lynch, The Force of Economic Globalization: Challenges to the Regime of International Commercial Arbitration, 39-49 (2003).

[2] As the last published statistics of International Chamber of Commerce (ICC) says that the number of filed requests for arbitration in this institution in 1999 was 529 which concerned 1,345 parties from 107 countries and in 2014, the number of filed requests increased to 791 which concerned 2,222 parties from 140 countries and independent territories. Since ICC's creation in 1923, The ICC International Court of Arbitration has administered more than 20,000 disputes involving parties and arbitrators from some 200 countries and independent territories. See: http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/ (Last visited 01/12/2015)

[3] Regarding the debates of "Arbitration v. Litigation", see: Jan Paulsson, International Arbitration is not Arbitration, Stockholm International Arbitration Rev. 2008:2, 1-20.

[4] Gary Born, International Commercial Arbitration: Commentary and Material, 412 (2nd ed. 2001).

[5] Sigvard Jarvin, Objections to jurisdiction in the leading arbitration, Guide to International Arbitration, 83 (Lawrence W. Newman & Richard D. Hill eds. 2004).

[6] New York Convention on the Recognition and Enforcement of Foreign Awards (herein after will be called New York Convention), entered into force on 7 June 1959, at art. V(1)(d).

[7] U.N. Commission on Int'l Trade Law, UNCITRAL Model Law on International Commercial Arbitration (herein after will be called Model Law), at art.19 (1).

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As Gary Born rightly states, the contractual nature of the arbitration not only defines the arbitration mechanism but also grants the jurisdiction to the arbitral tribunal over a particular dispute. In other words, the arbitration agreement is not only the parties' evidence of consent to clarify their intention and expectations, but also specifies the arbitration scope and jurisdiction of the arbitral tribunal.[8]

The arbitration framework lets the parties choose their arbitrators, either by the parties themselves from their own country or the third country or by referring to arbitration institution rules or choosing appointing authority or referring to *lex Arbitri.* The nomination of the arbitrators who should resolve a dispute is the most important step for initiation of the arbitration process and depending on parties' appointment mechanism, the arbitration will be started, but in some circumstances the intervention of the national court in appointment of arbitrators becomes essential to support the arbitration agreement operation.

The grounds for court intervention in appointing arbitrators can be when there is "no mechanism for appointment of arbitrators, in failure of mechanism for appointment of Arbitrators, in failure of a party to make an appointment, in failure of arbitrators to appoint chairmen or umpire, and when the court itself is the appointing authority." [9]

It is true that even if the parties try to create their own "private universe"[10] for solving their potential disputes by arbitration, it seems that the arbitration process cannot be effectively operable without complex national law systems. In other words, the supremacy of the parties' intention in

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[8] Gary Born, Supra note no. 4, at 100.
[9] Fouchard, Gaillard and Goldman, International Commercial Arbitration, 413 (1999).
[10] Nigel Blackaby, Constantine Parasides, Alan Redfern & Martine Hunter, Redfern & Hunter on international Arbitration 3 (5th ed. 2009). (Herein after will be called Redfren & Hunter on International Arbitration).

arbitration is on the one side and the important role of national courts in operability of arbitration is on the other side.

Although, today's general trend in international arbitration is attempting to reduce the national courts' effects in the arbitration process, in practice there are still some situations that the national courts' "intervention", "assistance and supervision"[11] is needed.[12]

In case of the necessity of intervention of the national court to appoint the arbitrator, the place of arbitration to find the competent national court becomes very important. In this situation, the moving party would refer to the national court of the chosen place of arbitration (in case of unity of the chosen place and the forum) or refer to competent court based on procedural governing law of the arbitration (*Lex Arbitri*).[13] Redfren & Hunter on International Arbitration state that "the only ground for the national court jurisdiction in this circumstance is the place of arbitration."[14]

By accepting the role of "place of arbitration" for determination of the competent national court, a problematic issue arises in the *ad hoc* arbitration, when the parties 1) do not specify the place of arbitration, 2) do not specify the governing law of the arbitration procedure, 3) no national court accepts to appoint the arbitrator and 4) no national court is available to decide the merits of the dispute.

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[11] Even if Article 5 & 6 of Model Law attempted to make distinction between "court intervention" and "court assistance and supervision", but the respective scope of these two concepts largely overlapped. The concept of court assistance is broader and by considering the purpose of this thesis, the term of "intervention" will be used instead of "assistance and supervision".
See: Andreas Bucher, Court Intervention in Arbitration in International Arbitration in The 21st Century: Toward "Judicialization" and Uniformity 29-30 (Richard B. Lillich et al. 1993). Also in Particular: Delaum, Court Intervention in Arbitral Proceedings in Resolving Transnational Disputes through International Arbitration, Sixth Sokol Colloquium, 195 (T. Carbonneau ed. 1984). Parker School of Foreign & Comparative Law: International Commercial Arbitration & the Courts: A source Guide (1990).
[12] Julian D. M. Lew & Loukas A. Mistelis & Stefan Michael Kröll, Comparative International Commercial Arbitration, 355-356 (2003).
[13] The solution provided in Article 1493 of French NCPC, Book IV, in forced 14 May 1981.
[14] Redfren & Hunter on International Arbitration, at 212.

In 2005, for the first time the French Court of Cassation faced this situation in the case of National Iranian Oil Company (NIOC) v. Israel.[15] In this case, the dispute between the parties arose out of the Participation Agreement between NIOC and Israel in 1968 for construction, maintenance and operation of an oil pipeline in Israel.[16]

The arbitration clause in the contract has some clear defects such as no specification about place of arbitration or the law governing the arbitral procedure. When Israel failed to appoint a co-arbitrator, there was no other choice for NIOC but to request the Israeli courts to appoint an arbitrator on behalf of Israel however the Israel court declared that since Iran is an enemy of Israel, it is impossible for the government to participate in the arbitration process. Also on the other side, the Iranian courts declared no jurisdiction over the said dispute.

As clearly stated by Fouchard, in this situation, on one hand the arbitration agreement would be frustrated without appointment of an arbitrator and on the other hand the moving party is faced with denial of both involving state's courts. Subsequently the only available justice would be the settlement of dispute by arbitration,[17] yet the initiation of the arbitration was dependent on the appointment of arbitrator on behalf of refusing party.

In the NIOC case, NIOC requested the French Court —by considering the reference of arbitration clause to the ICC for appointing the third arbitrator and because ICC's headquarter is in Paris— appoint the arbitrator.

The French court's point of view in solving this issue was based on "theory of denial of justice", since no arbitral tribunal nor any courts was accessible for parties. So, to avoid the

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[15] National Iranian Oil Company (NIOC) v. Israel, judgment of the French Cour de Cassation, First Civil Chamber, February 1 2005, case No.01-13.742/02-15.237. (Herein after will be called NIOC case)
[16] The agreement between parties was highly confidential because firstly, Iran did not officially recognize Israel and secondly, the importance of Iran's relation with Arab world as the only non-Aran OPEC member in the region. See: Daniel Ammann, The King of Oil, The Secret Lives of Marc Rich, 64-65 (2009).
[17] Fouchard, Revue de l'arbitrage, 442-453, (2001).

international denial of justice and by considering the slim tie of the case with France, the court justified its jurisdiction and appointed the arbitrator. In other words, for the French court the necessity of avoiding denial of justice justified the rendering of a *contra legem* decision in the NIOC case.[18]

Six years later, in 2011, the result of this decision was directly reflected in *Nouveau Code de Procédure Civile* (NCPC)[19] in Article 1505(b), which added new grounds for "the entitlement of the *juge d'appui* –the President of Tribunal de Grande Instance who can support the justice when one of the parties is exposed to a risk of denial of justice."[20]

In the world of International law, the broadest sense of denial of justice includes general responsibility of the States toward the application of justice to all kinds of wrongful conducts. Its narrowest sense says that the States are limited to grant an alien the possibility of access to its courts.[21] By considering the NIOC case, it seems that the philosophy of the French legislator in Article 1505(b) of NCPC was granting access to its courts in the situation that the alien was faced with no available court and no availability of arbitration (total international denial of justice).

The NIOC case is a unique case that was not analyzed comprehensively from its specific aspect which is related to the concept of total denial of justice and its effects on international arbitration law. The objective of this thesis is, by examining the NIOC case in light of theory of denial of justice in international arbitration, to evaluate the new introduced legal ground for jurisdiction of the national court in appointing an arbitrator. And ultimately, to answer the principle

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[18] Jennifer Kirby, Introductory Note to the 2011 French Law on Arbitration, 50 International Legal Materials, No. 2, 259 (2011).
[19] Decree No. 2011-48 of January 13, 2011. (English version available at: http://www.sccinstitute.com/media/37105/french_law_on_arbitration.pdf (last visited: 14/11/15).
[20] Tibor Varady, John J. Barcelo III, Stefan Kroll & Arthur T. von Mehren, International Commercial Arbitration: A transnational Perspective, 522 (6th ed. 2015).
[21] F. V. Garcia-Amador, Louis B. Sohn, and R. R. Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens, 18o (1974).

question of whether prevention of denial of justice can justify the national court jurisdiction to appoint an arbitrator. The analysis will be done in the framework of facts and five different court's judgments in the NIOC case, in addition to considering the relevant arbitration cases and the arbitration rules.

In this thesis the fundamental theories regarding the national courts' intervention in arbitration process and leading theories in international public policy will be discussed by employing doctrinal research method. This method will be combined with comparative methodology to cover all the possible dimensions of the NIOC case and to compare its results with the only similar case in U.S jurisdiction.

To pursue the mentioned objective, this thesis is divided into three chapters. Chapter 1 as means of providing a context, examines the primary grounds for national court's jurisdiction in appointing the arbitrators that can provide an overview of the grounds which are already established in international arbitration. In Chapter 2 the exceptional situation of the NIOC case will be clarified by relying on the facts and the courts' reasoning. The theoretical foundation of the NIOC case will be examined in Chapter 3 by focusing on the theory of Denial of justice. In addition, a comparative analysis of established grounds of the NIOC case with another similar case in U.S jurisdiction will be made to show the different views in solving the issue of appointment of an arbitrator in case of denial of justice.

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Chapter 1: Primary Grounds for judicial Intervention in Appointing an Arbitrator

The generally accepted principle is that arbitration is built based on the parties' autonomy, which permits them to establish the whole arbitration procedure by creating their own pattern of decision making in their agreement. This can contain the composition of the arbitral tribunal, the mechanism of appointing arbitrators, the choice of the seat of arbitration, the rules of proceeding, the governing law and the language.

By respecting parties' autonomy, the New York Convention and Model Law provides four stages that national courts may involve in arbitration process that are "1) prior to the establishment of a tribunal, 2) at the commencement of the arbitration, 3) during the arbitration process; and 4) during the enforcement stage." [22] The judicial intervention for the appointment of the arbitrator mostly happens in the first stage before the constitution of the arbitral tribunal.

It is important to mention that the issue of court intervention in the appointing mechanism could exclusively be at *Ad hoc* arbitration when there is no institutional[23] or any procedural rules governing the arbitration agreement to support the operation of the arbitration procedure and the parties could not reach any mutual agreement in appointing the arbitrator to initiate the arbitration process.

Evidently, the established appointing mechanism by parties mainly depends on cooperation between them, and since in contrast with litigation arbitration does not have coercion power, the arbitration power and its scope of jurisdiction are limited to the defined contractual framework. Apparently, the parties, by choosing arbitration, attempt to benefit from being dependent on any

[22] Julian D. M. Lew & Loukas A. Mistelis & Stefan Michael Kröll, Comparative International Commercial Arbitration, supra note 12, 367-74 (2003).
[23] See, e.g., ICC Arbitration Rules Art. 12(4), Art. 12 (5)

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national courts/laws' effects[24] but at the same time relying on national courts' power to intervene and utilize its coercion power to assist the operation of arbitration, seems necessary to protect the original intention of the parties in referring to arbitration to settle their dispute. This is particularly when the parties' cooperation is lacking and consequently, "the party-driven process faces a road block".[25]

Qualification of the national court jurisdiction to assist the arbitration to come out of the said impasse is defined in Model Law in a case that the parties, the arbitrators or the appointing authority have failed in appointing the arbitrators. According to Article 11(4) of Model Law the court can intervene:

> Where, under an appointment procedure agreed upon by the parties,
> a) a party fails to act as required under such procedure, or
> b) the parties or two arbitrators are unable to reach an agreement expected of them under such procedure, or
> c) a third party, including an institution, fails to perform any function entrusted to it under the procedure, any party may request the court or other authority specifies in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.[26]

In line with the Model Law's approach, in most countries the national arbitration rules also provide a similar standard for the intervention of national courts such as Swiss Federal Statute on Private International Law Act (1987) in Article 179 (2); Act of 01 November 1994 of Czech Republic on Arbitral Proceedings and Enforcement of Arbitral Awards in Article 9; Arbitration Code, Promulgated by Law of Tunisia No. 93-42 of 26 April 1993 in Article 47; Netherlands

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[24] The concept of party autonomy in international commercial arbitration particularly refers to the dependence of relationship between the arbitration and national courts and also arbitration and national laws. See: Markus A. Petsche, The Growing Autonomy of International Commercial Arbitration, Sellier. European Law Publishers, 37-47, 129-143 (2005).
[25] Tibor Varady, John J. Barcelo III, Stefan Kroll & Arthur T. von Mehren, supra note 20, at 83.
[26] Model Law, Articles 6, 11.3, 11.4, 13, 14.

Arbitration Act in Articles 1027, 1028, 1073, USA Federal Arbitration Act in Chapter 1 Section 5; and the Polish Code of Civil Procedure in Article 1169.

Also, it is important to note that the competent national court (in a case of unity of chosen place and the forum) would be the court located in the place of arbitration. Redfern and Hunter emphasized that the only basis for the national court jurisdiction to appoint the arbitrator is that the court should be in the place of arbitration.[27]

By considering the general acceptance of the practicality of the element of "place of arbitration" in most legal systems as a factor for determining the competent national court in appointing arbitrators,[28] the general grounds that can entitle the national court to appoint the arbitrator are almost similar in different arbitration rules, for instance, the grounds mentioned in Article 47 of Arbitration Code, Promulgated by Law of Tunisia enacted in 1993, can be assumed as another version of Section 5 of USA Federal Arbitration Act enacted in 1947.[29]

To classify the said grounds, the criteria that is mentioned in Section 5 of USA Federal Arbitration Act will be taken into account as a sample model. So, the grounds can be classified into two main categories, firstly, the situation of the absence of appointing mechanism in the arbitration agreement; and secondly, when the appointing mechanism has failed[30] which can include three more sub-categories, the situation when "a) one of the parties, arbitrator or the appointing authority fails/refuse to make an appointment, b) an appointing authority ceased to exist, c) parties stipulated in their agreement non-existing appointing authority."[31]

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[27] Redfren & Hunter on International Arbitration, at 212.
[28] As an exception, in Netherlands Arbitration Act of 01 December 1986, Code of Civil Procedure: Article 1073 and in Portuguese Law No. 31/86 of August 29 1986: Article 12, in addition assume "jurisdiction on the basis of the domicile of one of the parties."
[29] USA Federal Arbitration Act Chapter I, Section 5, enacted in 1947. Available at: http://uscode.house.gov/statviewer.htm?volume=61&page=671 (last visited 20/12/15)
[30] Id.
[31] Redfren & Hunter on International Arbitration, at 229-304.

These grounds are particularly related to the pre-arbitration phase and the focus will be on the court intervention regarding appointing an arbitrator in the pre-arbitration stage when the arbitration tribunal is not still formed. The grounds for court intervention during and after the arbitration process are mostly about replacement and challenges on qualifications (including liabilities of arbitrators) which could be treated differently in different legislations based on their point of view toward independence of arbitration. For instance, U.S jurisdiction,[32] in line with French jurisdiction[33], relies on deferral pro-arbitration standard of review to limit the interference of the national court in the arbitration procedure after the tribunal is formed and issued the award.

1.1. Absence of Appointing Mechanism

Referring to the first category of the grounds, the national court's intervention in a case of absence of appointing mechanism is in fact one of the grounds that is reflected in most countries' legislations, for instance the USA Federal Arbitration Act, section 5, and also in section 3 of the U.S Uniform Arbitration Act which expressly states that the court can appoint arbitrators or umpire in the case of absence of an appointing mechanism. Consequently, the national court's jurisdiction would be activated by a moving party's request for appointing an arbitrator.

The French NCPC gives broader grounds for the intervention of French courts in article 1493 of NCPC when the seat of arbitration is in France or the arbitration agreement is governed by the French law of procedure, in a case that the composition of the arbitral tribunal faces

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[32] For example in the case Marc Rich & Co. v. Transmarine Seaways Corp. of Monrovia, 44 F. Supp. 386 (1978), the court held that "prime objective of arbitration which is to permit just and expeditious result with minimum of judicial interference can best be achieved by requiring an arbitrator to declare any possible disqualification and then leave it to his or her sound judgment to determine whether to withdraw; such decision will be subject to judicial review after award has been made."

[33] See: Chayaporn Rice ltd v. Ipitrade International, TGI Paris, 1987 Rev. ARB. 179, 2d decision and Fouchard note, reprinted in Fouchard, Gaillard and Goldman, International Commercial Arbitration, at 499:

difficulties.[34] Indeed, the wording of article 1493 of NCPC gives jurisdiction to French courts to intervene based on a variety of grounds; including the absence of appointing mechanism in the arbitration agreement.[35]

The same approach was followed in Swiss Federal Statute on Private International Law,[36] Indian Arbitration and Conciliation Act[37] and also Egyptian Law of Arbitration in Civil and Commercial Matters.[38]

The approach of English Arbitration Act[39] provides a mechanism instead of permitting direct intervention of the English court, so it prescribes the procedure that would be applicable if there is no appointing mechanism stipulated by parties. Indeed the appointing mechanism in English Arbitration Act would fill the gap in the arbitration agreement by providing a procedure; in other words, the English court cannot intervene solely because of absence of an appointing mechanism in the arbitration agreement.

In practice, in most cases the national court's jurisdiction in a case of absence of appointing mechanism does not raise difficulties, particularly in the enforcement stage.

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[34] French NCPC, Article 1492. Available at: www.legifrance.gouv.fr/content/download/1962/13735/.../Code_39.pdf (last visited at 24/12/15).

[35] It should be noted that the broad court jurisdiction under article 1493 is limited to pre-formation of the arbitration tribunal. See: Loukas A. Mistelis, Concise International Arbitration, French NCPC (Book IV), art. 1493, 876 (2010).

[36] Swiss Federal Statute on Private International Law Act, art. 179(1). Available at: https://www.swissarbitration.org/sa/download/IPRG_english.pdf (Last visited 25/12/15).

[37] Indian Arbitration and Conciliation Act, sec. 11(5). Available at: http://indiankanoon.org/doc/1841764/ (Last visited 25/12/15).

[38] *Law No. 27 of 1994 concerning Arbitration in Civil and Commercial Matters (as amended by Law No. 9 of 1997), art.9 & 17. Available at http://www.wipo.int/edocs/lexdocs/laws/en/eg/eg020en.pdf (last visited 25/12/15).*

[39] English Arbitration Act 1996, section 16. Available at: http://www.legislation.gov.uk/ukpga/1996/23/section/16 (Last visited 25/12/15).

1.2. Failure of Appointing Mechanism

Court intervention in a case where the defined appointing mechanism by parties has failed can be subcategorized into different situations: "a) one of the parties, arbitrator or the appointing authority fails/refuse to make an appointment[40], b) appointing authority ceased to exist, c) parties stipulated in their agreement non-existing appointing authority."[41]

In a case of failure of parties, arbitrators or the appointing authority, first of all, the consequences would depend on the provided procedure in the arbitration agreement. It is clear that if the arbitration agreement refers to the institutional rules or authority, the national court jurisdiction to intervene in the appointing procedure would not be activated.[42]

Sometimes the arbitration agreement contains a time limitation for appointment of the arbitrators, and failure of one party in appointing the co-arbitrator within the period entitles the other party to request the national court to appoint the co-arbitrator.

As Born rightly states, it is a very rare situation that the failure or refusal of one party could cause the stoppage of the arbitration process, but as there is no coercion power that can force a failed party to follow the appointing procedure and select the arbitrator. Besides, the appointment of the arbitrator for failed-party by another party would be against the principle of impartiality in the arbitration process and may breach the balance between parties, the national court intervention is acceptable.[43]

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[40] One may argue that this ground is not a failure of the appointing mechanism and it should be considered as breach of arbitration agreement. But here in this chapter, the purpose is to clarify a national court's jurisdiction to intervene and appoint the arbitrator in different situations, not clarifying the legal nature of failure of the appointing mechanism.
[41] Redfren & Hunter on International Arbitration, at 229-304.
[42] See, e.g., ICC Arbitration Rules Art. 12(4), Art. 12(5).
[43] Gary Born, International Commercial Arbitration, 1688 (2nd ed. 2014).

In cases where the failure of the party is because of delay, some courts are granting additional time for the appointment of the arbitrator to comply with the arbitration agreement (as the failure was not because of bad faith). For instance, in the case of *Texas E. Transmission Corp. v. Barnard*, the court ruled that "[the] party's failure to appoint the arbitrator within contractually-prescribed 30-day period did not warrant removing its appointed arbitrator, who was appointed before hearing."[44] And in the case of *Ancon Ins. Co. v. GE Reins. Corp*. "the court refused to enforce adverse selection clause in arbitration agreement because it considered that time was not of the essence, and that five-day delay of one party in appointment did not result from bad faith."[45]

But on the other hand, there are some other courts who chose a stricter point of view and ruled that non-conformity with the time limitation prescribed in the arbitration agreement means that the delayed party has waived his right to appoint his arbitrator and, as a result, it would be the national court's jurisdiction to appoint the arbitrator.[46]

In the national arbitration legislation, two different solutions are provided. The first solution is the English Arbitration act which in Section 17 specified that in a case of failure of a party to nominate his arbitrator, the chosen arbitrator by a non-failed party will act as sole-arbitrator. In the case *Al Hadad Bros. Entreprises, Inc. v. M/S Agapi*[47], the court ruled on enforceability of the award despite the failure of one party in appointing his arbitrator, since the

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[44] Texas E. Transmission Corp. v. Barnard, 285 F.2d 536, 6th Cir. 1960.
[45] Ancon Ins. Co. v. GE Reins. Corp., 480 F.Supp.2d 1278 (D. Kan. 2007) N.W. Nat'l Ins. Co. v. Kansa Gen. Ins. Co., 1992 U.S. Dist. LEXIS 17841 (S.D.N.Y.) (refusing to find party waived right to appoint arbitrator, despite delay, but finding waiver of right to demand that chairman be from neutral state); New England Reins. Corp. v. Tenn. Ins. Co., 780 F. Supp. 73 (D. Mass. 1991) (party's eight day delay in appointing arbitrator held not to waive right to appoint). Cited in Gary Born, International Commercial Arbitration, 1688 (2nd ed. 2014).
[46] Employers Ins. of Wausau v. Jackson, 527 N.W.2d 681 (Wis. 1995) (party lost right to select arbitrator when it failed to act within 30-day period in arbitration clause because time was of the essence). Cited by Gary Born, International Commercial Arbitration, 1688 (2nd ed. 2014).
[47] Al Hadad Bros. Entreprises, Inc. v. M/S Agapi, 635 F.Supp. 205 (D. Delaware. 1986).

composition of the tribunal with an arbitrator who was chosen by one party (acting as sole arbitrator) was in accordance with English Arbitration Act.[48]

The second solution is the judicial appointment of the arbitrator for failed-party by national court which the most accepted solution. Model Law, article 11(4), as mentioned before, prescribes the activation of a national court jurisdiction that is clearly based on the pro-arbitration approach. Specifically, this approach is about the assistance of the national courts via intervention in the parties' agreement in order to make effective the original intention of the parties in choosing arbitration as a dispute resolution method. Similarly, in Section 5 of USA Federal Arbitration Act, by request of non-defaulting party, the national court can appoint the co-arbitrator. The same point of view is also reflected in article 1452(2) of the French NCPC which says that:

> If a party fails to appoint an arbitrator within one month following receipt of a request to that effect by the other party…the person responsible for administering the arbitration or, where there is no such person, the judge acting in support of the arbitration, shall appoint the third arbitrator.[49]

The same approach is also taken by Swiss Law on Private International Law in article 179(2), Japanese Arbitration Law in article 17(2) and Italian Code of Civil Procedure in article 810.[50]

In addition, The Model Law and the most of the national arbitration rules provide the same solution for the situation that the arbitrators fail to appoint a chairman/umpire, who is referring the moving party to the national court and requesting the appointment of chairman/umpire.

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[48] One can argue that granting an opportunity to one party to elect the whole arbitration tribunal can cause imbalance and effect the whole the arbitration process, but on the other hand it seems that English Arbitration Act's point of view in rejecting the judicial appointment of arbitrators was to keep the speed of arbitration process.

[49] French NCPC, Art. 1452(2).

[50] Italian Civil Code of Procedure, article 810: A petition may be filed before the court of first instance in whose district the arbitration has its seat to make a substitutive the appointment. Available at: http://www.jus.uio.no/lm/italy.arbitration/doc.html (last visited 24/12/15)

Importantly, this situation will happen when the two arbitrators cannot reach an agreement regarding the third one, and the arbitration agreement does not contain any procedure or reference to the appointing authority or arbitration institution. For example, the Russian Arbitration Act of July 7, the German Arbitration Law of 1998 in section 1035(4) and the Swedish Arbitration Act of 1999 took the same approach of Model Law article 11(4)(b) about the reference to national courts for appointing the chairman/umpire.

In some cases the failure of the appointing mechanism is not because of the failure of the parties, arbitrators or appointing authority, but because the appointing authority ceased to exist. This problem occurred in the case of *Gatoil International, Inc. v. National Iranian Oil Company*[51] as the parties chosen the Appeal Court of Tehran as an appointing authority that ceased to exist due to the political changes after the revolution in Iran. In this case, the court considered three possible situations: "a) the whole arbitration agreement can be invalid, b) the provision for appointment can be invalid and c) the arbitration agreement is valid and the reference to the appointing authority ceased to exist should be interpreted as reference to the legal successor of the court."[52]

The court, in this case, chose the third solution by considering the fact that the parties' agreement on the appointing authority was concluded after the political changes in Iran and parties were aware of those changes, so the contractual provision in appointment of the arbitrator was not exhausted and the court could not intervene to appoint an arbitrator.

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[51] Gatoil International, INC. (Panama) v. National Iranian Oil Co. (Iran), England, High Court of Justice, Queen's Bench Division, 1988. 17 Yearbk. Comm. Arb'n 587 (1992).

[52] Id. one can argue that since the court chose the third solution it would be possible to consider that the "power of appointing arbitrator is heritable and can pass to the legal successor, so this solution also can be applicable when the ceased appointing authority is a natural person." This is an argument that mentioned in Tibor Varady, John J. Barcelo III, Stefan Kroll & Arthur T. von Mehren, supra note 20, at 546.

Furthermore, there are situations where the chosen authority for appointing the arbitrator does not exist, for instance in some instances when the arbitration clause is pathological, and the arbitration institution is not clearly stipulated like *Astra Footwear Industry v. Harwin International Inc.*[53], or in some cases like *Tennessee Imports, INC. v. P.P. Filippi & Prix Italia S.R.L*[54] where one of the parties argue that the "Arbitration Court of the Chamber of Commerce in Venice (Italy)" chosen by parties, does not exist, the national courts tried to interpret in a way that protect the effectiveness of the arbitration agreement and find the solution which is close to parties' intention. The situation of non-existing appointing authority would be interpreted the same way, and if the arbitration agreement is totally inoperative, and the parties could not cooperate to find a mutual agreement, the national court will appoint the arbitrator.

As described above, the first role of national courts toward appointing mechanism is respecting the stipulated mechanism in the arbitration agreement and making sure that the arbitration procedure can be initiated, even when the parties, arbitrators and appointing authority failed or the appointing mechanism is defective by itself.[55] So, as the mentioned preliminary grounds that are mostly accepted in national arbitration legislation will allow the national court to intervene in the appointing process.[56]

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[53] Astra Footwear Industry v. Harwin International Inc., United States District Court, Southern District of NY, 1978.
[54] Tennessee Imports, INC. v. P.P. Filippi & Prix Italia S.R.L, US District Court, Tennessee, 1990.
[55] Since the appointing procedure in a national court system can be time consuming, "most of the arbitration legislations seeks to ensure that the judicial appointment of arbitrators occurs in an expeditious fashion." So, to protect the element of speed in arbitration and to prevent the lengthy judicial procedure, Model Law provides a provision in article 11(5) that the judicial appointment is not appealable. This provision is almost accepted in different national arbitration rules. See: Gary Born, International Commercial Arbitration, supra note 44, at 1724.
[56] Julian D. M. Lew & Loukas A. Mistelis & Stefan Michael Kröll, Comparative International Commercial Arbitration, supra note 12, 224 (2003).

By accepting the necessity of court intervention based on the established grounds and by considering the crucial role of "specified place of arbitration", a problematic issue arises in the *ad hoc* arbitration, when; (a) one of the parties refuses/fails to appoint his arbitrator; (b) the arbitration agreement does not specify the place of arbitration and the governing law of the arbitration procedure, (c) the parties fails to come to agreement on (a) and (b); because the place of arbitration is not specified, by failure of one party in appointing the co-arbitrator, the determination of the competence court to intervene in appointing process is difficult. This issue is more complicated if no national court accepts to appoint the arbitrator and no national court is also available to decide the merits of the dispute."[57]

In 2005, for the first time, the French Court of Cassation faced this situation in the case of National Iranian Oil Company (NIOC) v. Israel[58] which "tested the limits of court's jurisdiction regarding appointment".[59] The French Court, based on article 1493(2) of NCPC, considers this situation as a new ground for the French court's jurisdiction to intervene and appoint an arbitrator to avoid denial of justice.[60] The solution that the French court applied based on the special facts and circumstances of this case will be analyzed in the next chapter.

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[57] This paragraph also explained in the introduction.
[58] National Iranian Oil Company (NIOC) v. Israel, judgment of the French Cour de Cassation, First Civil Chamber, February 1 2005, Supra note 16.
[59] Tibor Varady, John J. Barcelo III, Stefan Kroll & Arthur T. von Mehren, supra note 20, at 514.
[60] Julian D. M. Lew & Loukas A. Mistelis & Stefan Michael Kröll, Comparative International Commercial Arbitration, supra note 12, 242 (2003).

Chapter 2: NIOC case and Appointment of an Arbitrator

2.1. Background of the NIOC Case

On February 29, 1968, Iran and Israel signed a Participation Agreement for "the construction, maintenance and operation of an oil pipeline for transportation of crude oil" [61] under the governing law of Iran.[62] To be precise, the said agreement was a joint investment for "the construction of 254 kilometers of pipeline from Eilat to Ashkelon by Israel and supply of oil and financial investment by Iran. The pipeline's capacity could support 400000 barrels per day from Ashkelon to Eilat and 1.2 million barrels per day in opposite direction."[63]

Because the political changes in the region as a consequence of the 6-day war[64] and Iran's relation with Arab countries and its situation in OPEC,[65] the agreement was treated as highly confidential.[66] The aim of this agreement for both parties was to benefit from facilitating a shorter and cheaper way of oil transportation and also to rely less on the Suez Canal which was so influential in the region from both political and economic aspects.

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[61] Revue Suisse de Droit International et Européen, Vol.2, 24 année, 309 (2014).

[62] As mentioned in the judgment of National Iranian Oil Company (NIOC) v. Israel, judgment of the French Cour de Cassation, First Civil Chamber, February 1 2005, case No.01-13.742/02-15.237: *"Attendu que l'État d'Israël et la société de droit Iranien National Iranian oil Company (NIOC) ont conclu, en 1968, un accord de participation relatif a des opérations pétrolière …."*

[63] Anthony H. Cordesman, Energy Development in the Middle East, 229-230 (2004).

[64] "Also known as the June War, the 1967 Arab-Israeli War, was fought between June 5 and 10, 1967 by Israel and the neighboring states of Egypt, Jordan and Syria." See: John Quigle, The Six-day War and Israeli Self-defense: Questioning the Legal Basis for the preventive Way, 135 (2012).

[65] The Organization of the Petroleum Exporting Countries (OPEC) was founded in Baghdad, Iraq, with the signing of an agreement in September 1960 by five countries namely Iran, Iraq, Kuwait, Saudi Arabia and Venezuela (the Founders) to coordinate and unify the petroleum policies of its Member Countries and ensure the stabilization of oil markets in order to secure an efficient, economic and regular supply of petroleum to consumers. More information available at: http://www.opec.org/opec_web/en/17.htm (Last visited at 27/12/15)

[66] "The Arab boycott and Iranian apprehensions obliged the sides to operate through third companies, which were registered in Canada and Panama. Outwardly, two companies were active: the Eilat-Ashkelon Pipeline Company (EAPC), which was responsible for transporting and storing the oil inside Israel; and Trans-Asiatic Oil, Ltd., which was in charge of carrying and marketing the oil." See: Daniel Ammann, The King of Oil, supra note 16, 64-65 (2009).

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Ten years later, the contract was facing with difficulty. Iran's last supply of oil, containing five oil shipments was sent to Eliat at the end of 1978. The Islamic Revolution and its consequences, such as the strikes and demonstrations, prevented Iran from performing its contractual obligations. After the Islamic revolution in 1979, "the jointly-owned pipeline was effectively nationalized by Israel, after which Iran turned from being Israel's ally to its enemy, and Iran's assets were expropriated."[67]

It took Iran 16 years to return to the contract that it had with Israel and request compensation for the remedies. So, "Iran launched three international arbitration suits in Swiss and French courts[68] to receive its share of the revenues from Israel's continued operation of the pipeline, estimated to be in the millions of dollars and Iranian assets that were nationalized."[69]

On October 14, 1994, NIOC initiated a lengthy legal procedure by appointing an arbitrator and requesting Israel to appoint a co-arbitrator based on arbitration clause[70] that obliged each party to appoint one arbitrator. Moreover, "if such arbitrators fail to settle the dispute by mutual agreement or to agree upon a Third Arbitrator, the President of the International Chamber of

[67] See: http://www.haaretz.com/israel-news/1.657394 (Last visited 27/12/15)

[68] One of these three arbitration suits will be discussed in this thesis which is related to "Iran's share in the economic profits of a joint project to build an oil pipeline in Israel and operate a fleet of oil tankers. The other claims are related to the unpaid price of sold oil to three Israeli energy companies: Paz, Delek and Sonol." See: http://irancoverage.com/2007/10/13/the-story-of-iranian-oil-and-israeli-pipes/ (Last visited 27/12/15)

[69] Supra note 67.

[70] The arbitration clause was: "If at any time within the period of this Agreement or thereafter, any doubt, difference or dispute shall arise between the Parties concerning the interpretation or execution of this Agreement or anything connecting therewith or concerning the rights and liabilities of the Parties hereunder, the same shall, failing any agreement to settle it by other means, be referred to arbitration. Each Party shall appoint one arbitrator. If such arbitrators fail to settle the dispute by mutual agreement or to agree upon a Third Arbitrator, the President of the International Chamber of Commerce in Paris shall be requested to appoint such Third Arbitrator. The decision of the Board of Arbitrators so appointed shall be final and binding upon the Parties." See: Supra note 18.

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Commerce in Paris shall be requested to appoint such Third Arbitrator."[71]In fact, this arbitration clause had some problematic features that affected the later operation of the arbitration procedure. Firstly, it did not stipulate any reference to the institutional arbitration, so the arbitration was *ad hoc* and as explained in the previous chapter, in the case of failure of the appointing mechanism in ad hoc arbitration, no institutional arbitration rules would be applicable as a default rule for supporting the operation of the arbitration agreement, so the reference would be to national law of place of arbitration (*Lex arbitri*).

Secondly, the parties failed to clarify (or maybe intentionally didn't mention) the place of arbitration. As also mentioned in the previous chapter, the choice of place of arbitration would activate the national arbitration rule of the place of arbitration which entitles the national court to intervene and appoint the co-arbitrator in case of failure of the appointing mechanism. [72] In addition, there is no designation of any law to govern the procedure of arbitration procedure instead of *lex arbitri.*

Thirdly, in the arbitration clause, no contractual appointing authority was designated, meaning that no contractual reference was made to any courts, arbitration institution or any third party who could take a role of appointing authority in case of failure of the appointing mechanism.

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[71] Matthias Scherer and Domitille Baizeau, Swiss Federal Supreme Court confirms NIOC vs. Israel award: review of French court decision to appoint arbitrator in order to avoid international denial of justice, supra note no. 18.

[72] See chapter 1 of this thesis and particularly the UNCITRAL Model Law on International Commercial Arbitration Art. 1(2) relating to the Model Law's scope of application and Art. 6 relating to court assistance and supervision. See also Swiss Private International law Act Art. 179(1) providing for the competence of the courts of the seat to appoint arbitrators absent agreement between the parties.

2.2. NIOC Case in the First Instance Court of Paris (Tribunal de Grande Instance)

As mentioned above, the arbitration clause definitely had some defects, so the arbitration procedure was faced at an impasse when Israel refused to appoint its co-arbitrator. Since none of the mentioned primary grounds, for the national court's jurisdiction could be activated—as the element of "place of arbitration" was missed—the appointing mechanism was totally inoperative.

In 1995, One year after initiating the arbitration process through appointing of an arbitrator by NIOC, for the first time, NIOC requested the *Tribunal de Grande Instance* (TGI) of Paris to appoint a second arbitrator for the failed-party based on articles 1493(2) and 1457 of NCPC.[73]

Although the French court was entitled to appoint arbitrators by relying on the said rules, the TGI ruled that firstly the two grounds of article 1493 of NCPC (place of arbitration in France or French law as the governing law on procedure of arbitration) were not fulfilled in the NIOC case, so there was no legal basis for the French court's jurisdiction.

The TGI judge in his reasoning observed that under Israeli law[74] there is a possibility for NIOC for requesting the appointment of co-arbitrator from Israeli court but before taking any

[73] "Article 1457 NCPC contains a number of procedural rules applicable to judicial intervention in domestic arbitration in matters regarding the application of Articles 1444, 1454, 1456 and 1463 of the same Code. It is Article 1493, paragraph 2 which enables these procedural rules to be extended to international arbitration by the reference it makes to Article 1457. The rules contained in Article 1457 are relatively succinct, dealing in turn with the determination of the relevant jurisdiction (a), the organization of the hearing (b), and the finality of the resulting decision (c)." See: Fouchard, Gaillard and Goldman, International Commercial Arbitration, Kluwer Law International, Supra note no. 9, at 508.

[74] See: Israel Arbitration Law-1968, Chapter 3, Appointment and Removal of Arbitrator, Article 8: (a) when a dispute arises in a matter in which it has been agreed to refer to arbitration, and if an arbitrator has not been appointed under the agreement, the Court may – on application by a party – appoint an arbitrator. The Court may do so whether the arbitrator was to have been appointed by the parties or by one of them, or whether he was to have been appointed by the arbitrators appointed by the parties, or by a third party. (b) The Court will not appoint an arbitrator under subsection (a) unless the applicant has given his opponent written notice as provided hereunder and has met with no response within seven days from the day on which the notice was delivered. (1)When the arbitration agreement provides that each party will appoint an arbitrator, the applicant will, in the notice, name the arbitrator appointed by him and will call on his opponent to appoint an arbitrator; (2) in every other case, the applicant will, in the notice, propose an arbitrator and will call on his opponent to agree to his appointment; (c) When an arbitration agreement

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action, "NIOC was informed by his Israeli lawyers that any attempt on his behalf to initiate proceedings before an Israeli court would be rejected as a result of a prior judicial determination (in an unrelated case, but apparently having an effect equivalent to *stare decisis*) that Iran was and 'enemy state'."[75]

As also mentioned by Tibor Varady *et al*, in International Commercial Arbitration: A Transnational Perspective:

> After the decision of TGI, NIOC and Israel opened negotiations, but these negotiations were interrupted when on June 17, 1998 a Tel Aviv court rendered the Manbar judgment declaring Iran an enemy of Israel. This judgment was later confirmed by the Supreme Court of Israel. After the Manbar judgment, NIOC's Israeli lawyer informed NIOC that neither he nor any other Israeli attorney could represent NIOC, and no Israeli court could grant a NIOC request.[76]

In addition to the impossibility of appointing a co-arbitrator based on a precedent under Israel jurisdiction, which is also considered in the later proceeding by French *Court de Cassation*, Israel declared that it would not recognize the jurisdiction of the Iranian courts in appointing an arbitrator. On the other side, Iran declared that it did not have jurisdiction in appointment of an arbitrator on behalf of Israel.

So, NIOC returned to the TGI once again and, based on the same articles of NCPC and also the impossibility of referring to Israeli and Iranian courts, requested for the second time the appointment of a co-arbitrator on behalf of Israel. The judge was not satisfied about the fulfillment of the requirements of article 1493 NCPC. Also he did not accept that rejections by the Israeli and

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provides that each party will appoint an arbitrator, the Court may – on the application of a party which has appointed an arbitrator, appoint that arbitrator or another person as sole arbitrator.

[75] Jan Paulsson, Denial of Justice in International Law, 155 (2005).

[76] Tibor Varady, John J. Barcelo III, Stefan Kroll & Arthur T. von Mehren, supra note 20, at 514.

Iranian courts is a denial of justice. As these rejections might not be permanent since the court rulings would maybe be overturned in the future.[77]

Besides, the judge believed that the provided-evidences by NIOC could not show the practical impossibility of reference to any other foreign jurisdiction. So, the judge did not have any legal basis to rely on for judicial appointment of an arbitrator in this situation.[78] As a result, the second judgment of TGI in rejecting the NIOC request was issued on February 09, 2000.

2.3. NIOC Case in the Court of Appeal of Paris (Cour d'appel)

NIOC challenged that decision of TGI in the *Cour d'appel* of Paris. On March 29, 2001, the *Cour d'appel* reversed the TGI decision by different reasoning with a pro-arbitration point of view which created one of the famous case law in France. The reasoning of *Cour d'appel* contains that:

1) the relevant connection with France (as one of the requirements of article 1493 of NCPC)[79] exists, since ICC which mentioned in the arbitration clause as an appointing authority for the Third Arbitrator, is a legal person established in France,[80]

b) by not appointing the co-arbitrator by TGI, "the denial of justice is happened, as one of the parties may not exercise its rights to access to what contractually agreed as a right of reference to arbitration, since the national courts who has jurisdiction are not available."[81]

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[77] Thomas Clay & Philip Pinsolle, French International Arbitration Law Reports (1963-2007), Case No. 54, 464 (2014).
[78] Id.
[79] 1) If any difficulty arises in constitution of the arbitral tribunal, 2) The case shall have relevant connection with France (place of arbitration or the governing procedural rule).
[80] Id.
[81] Albert J. Van den Berg, Yearbook Commercial Arbitration, Vol. 25, 125 (2004).

c) "the right of a party to an arbitration agreement to have its claim submitted to arbitration is part of French public policy (*ordre public*) and that the French court, along with all others, must support such right by lending support to the arbitration."[82]

Consequently, the *Cour d'appel* ruled that:

> NIOC's action to be admissible in that it constituted an action to set aside on the grounds of contradictory reasons, and, setting aside a decision, granted the State of Israel a time frame in which to appoint an arbitrator, holding that the right of NIOC, party to an international arbitration agreement, to submit its claims to the arbitral tribunal chosen by the parties, was denied and France was the least badly placed to appoint an arbitrator and thus allow NIOC to access to the arbitral tribunal.[83]

The judgment and reasoning of *Cour d'appel* surprised many scholars,[84] since simply the scope of article 1493 did not allow the *Cour d'appel* to intervene in this case (jurisdictional issue), and the ruling of *Cour d'appel* in fact introduced new grounds for French court judicial intervention and expanded the scope of this article under the concept of denial of justice.

Setting aside the judgment of TGI is also surprising because the supporting role of *juge d'appui* in assisting the arbitration process by request of one party based on article 1493 (2) is not obligatory. In other words, the jurisdiction under the said article does not have a mandatory nature.[85] The *Cour d'appel* considered the judgment of TGI as a breach of fundamental procedural norm and excess of power, so set aside the judgment.[86]

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[82] Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration, 110 (2007).
[83] Id. Original text of judgment: *"....a déclaré recevable le recours de la société NIOC en ce qu'il constituait un appel-nullité formé comme en matière de contredit, et, annulant la décision, a imparti a l'État d'israël un delai pour désigner un arbitre, en estimant que le droit de la société se trouvait dénie et que le juge français état le moins mal place pour designer NIOC, partie a un arbitre et permettre ainsi a la société NIOC d'accéder a la jurisdiction arbitral. une convention d'arbitrage international, de vous soumettre ses prétention a la juridiction arbitral choisie pa lea parties ..."*
[84] Jan Paulsson, Denial of Justice in International Law, Supra note 75, at 156.
[85] Fouchard, Gaillard and Goldman, International Commercial Arbitration, supra note no. 9, at 491.
[86] Supra note 83.

Regardless of the explained jurisdictional issues, Jan Paulsson believes that the *Cour d'appel's* reasoning for establishing denial of justice in NIOC case does not have a strong reasoning. This is because even if the right of parties to submit their dispute to the arbitration based on their original intention was clear if it is not correctly reflected in the arbitration agreement, the expression of the parties' intention will be defected and not sufficient to be supported by court or in his words it is just a "wide-sweeping pronouncements."[87] "The fact that a party is frustrated in its attempts to initiate arbitral proceeding is not, in and of itself, denial of justice."[88] In other words, what Paulsson tried to clarify is that the necessary element for establishing a denial of justice could not be solely the deprivation of the parties to refer to arbitration based on their arbitration agreement.

Similarly, Fouchard in his comment on the *Cour d'appel'*s decision clearly explained that "the concept of a denial of justice cannot just be limited to the inaccessibility of arbitral tribunal to parties, and courts' available remedies also should be considered."[89]

So, the *Cour d'appel*, because of the failure of Israel to appoint an arbitrator in accordance with the issued order, appointed an arbitrator by the second challenged decision of NIOC on November 08, 2001.[90]

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[87] Jan Paulsson, Denial of Justice in International Law, supra note 75, at156.
[88] Id.
[89] Fouchard, Revue de l'arbitrage, supra note 19, at 451.
[90] "The arbitrator appointed by Cour d'appel was a French attorney belonging to the Jewish community in France. The arbitrator appointed by NIOC was a former president of the International Court of Justice." See: Fouchard, Revue de l'arbitrage, supra note 19.

2.4. NIOC Case in the French Supreme Court (Cour de Cassation)

Israel objected to the two decisions of *Cour d'appel* in *Cour de Cassation*, with five arguments:

> 1) challenged based on jurisdictional error in violating article 1493, para 1, and 1457, para 1 and 2 of NCPC, 2) Acknowledgment of a denial of justice on the invalid ground, even if the Israel court declared that he did not recognize the jurisdiction of Iranian courts in appointing arbitrator, even though these courts could have been petitioned, which NIOC withheld from doing, the challenged decision failed to provide a legal basis for its decision considering article 1493 and 1457 of NCPC, 3) the court limited its judgment to point that NIOC was unable to have recourse to arbitration without mentioning that the NIOC was unable to bring its contestation the merits before any national court, the challenged decision failed to provide a legal basis for its decision with regard to article 1493 and 1457 of NCPC, 4) failure of court in providing legal basis for the considerable ties of the case to France with respect to article 1493 and 1457 of NCPC, 5) the denial of justice, assuming that it is characterized, could not result in the French courts having jurisdiction the merits of the dispute not for the appointment of an arbitrator, so that in deciding as it did, the court violated the article 1493 and 1457 of NCPC.[91]

Israel's arguments include objections mainly on the issue of jurisdiction and the issue of denial of justice. Israel emphasized that denial of justice could not take place in this case as NIOC could request the Iranian court to appoint the arbitrator, and also NIOC failed to seek judgment on the merits of the case, so there were not enough evidence provided from NIOC regarding a denial of justice.

Furthermore, Israel clarified that even if it is presumed that the denial of justice is taking place, it could justify the jurisdiction of French court on the merits of the case and not for appointing the arbitrator, since the judicial appointment of the arbitrator is limited to the scope of article 1493.

The Cour de Cassation, in its judgment on February 1, 2005, rejected Israel arguments and held that: "a) NIOC is unable to access the court or arbitral tribunal (*l'imposibilite pour une partie*

[91] National Iranian Oil Company (NIOC) v. Israel, judgment of the French Cour de Cassation, First Civil Chamber, February 1 2005, case No.01-13.742/02-15.237.

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d'acceder au juge ,fut-il arbitral) to decide on the claim, excluding any national court (*a l'exclusion de toute juridiction étatique*) and to exercise the right which falls under international public policy, based on principles of international arbitration, b) Article 6.1 of the European Convention of Human Rights, constitutes a denial of justice (*déni de justice*) which grants international jurisdiction to the *juge d'appui* in its mission to assist and cooperate to constitute arbitral tribunal if there is any ties binding the dispute to France, which is established in this case by designation of ICC president as appointing authority for the third arbitrator, c) The Israel's express refusal based on the case-law of Supreme Court of Israel created the general and permanent inability for NIOC for undetermined amount of time which constitute the denial of justice."[92]

So, the *Cour de Cassation* approved the Cour d'appel's judgment and "characterized the negative excess of the power of *juge d'appui* in the refusal of appointing an arbitrator when there is no other states jurisdiction or willing to do so."[93]

Returning to Paulsson's opinion that denial of justice is not limited to availability of arbitration, the *Cour de Cassation* considered some other elements in a line with *Cour d'appel'*s reasoning. These elements of "generality and permanently of denial of justice" by relying on the strict judgment of Israel's jurisprudence that not only the claims related to Iran cannot be sought in Israel courts but also any judgment from Iranian could not have any chance to be recognized by Israeli courts. Besides there was not any time determination or possible prediction about any changes in Israeli and Iranian relation. Therefore, the *Cour de Cassation* realized that there is no available justice for NIOC in the competent courts.

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[92] Id.
[93] Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration, supra note 82, at 742.

Moreover, the *Cour de Cassation* relied on another legal ground for the judicial appointment of the arbitrator: Article 6.1 of the European Convention of Human Rights, and its effects on international public policy. It ruled on "right of access to a tribunal, including an arbitration, is part of the international order and is enshrined in the European Convention on Human Rights."[94]

In other words, the *Cour de Cassation* approved the *Cour d'Appel'*s decision under the concept of International denial of justice when "dispute did not involve French parties, did not take place in France, and where what certain refer to as the *lex arbitri* was not French law." [95] Clay and Pinsolle's well-observed point is that the *Cour de Cassation* rendered a *contra legem* decision—because of lack of legal jurisdiction under NCPC—to not allow the denial of justice.[96] This opinion was also accepted by Fouchard who explained that "even if the *Cour de Cassation* decision might be a breach of national rules but it rendered in benefit of international public policy to prohibit denial of justice, which is an obligatory responsibility of all states not just France."[97]

Regardless of the concept of denial of justice and its legal grounds which will be discussed in the next chapter, the *Cour de Cassation* remarkably chose a way of interpreting the arbitration clause in benefit of arbitration process. Israel in its argument stated that the denial of justice shall only be ended in French Court jurisdiction on merits of the dispute not appointing an arbitrator, but in fact the policy behind the decision of *Cour de Cassation* decision was: 1) the intention of parties in choosing arbitration; 2) the request from court was not merit-based but procedural-based; and 3) the pro-arbitration perspective of French jurisdiction.

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[94] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 222.
[95] Thomas Clay and Philip Pinsolle, French International Arbitration Law Reports (1963-2007), supra note 79, at xvii.
[96] Id.
[97] Fouchard, Revue de l'arbitrage, supra note 19, at 451.

2.5. NIOC Case in the Swiss Supreme Court

While Israel's objections were in the *Cour de Cassation*, the arbitration procedure commenced on October 08, 2002, "NIOC's first statement of claim was submitted on December 24, 2003 and Israel submitted his statement of defense contained the objection regarding the composition of the arbitration tribunal and violation of the arbitration agreement. On July 19, 2004, the arbitrators based on the Israel's suggestion and acceptance of NIOC, chose the seat of arbitration in Switzerland, Geneva."[98]

On February 2012, the arbitral tribunal issued the partial award and again the objection of Israel was rejected. The arbitral tribunal in its partial award held that appointment of the arbitrators based on the arbitration agreement is the "primary duty of any party"[99] and not appointing the arbitrator is breach of contract and it can't be an "*échappatoire*" (translated as "devise for escape"[100]) from the inevitable duty of the appointment of the arbitrator. So failure in this obligation can lead the other party to request the national court's assistance which is accepted popularly in most countries, such as Switzerland.

Furthermore, Israel had four times the opportunity to be heard and argue its objections, so the decision of *Cour de Cassation* in approving the appointment of arbitrator on behalf of Israel based on avoidance of denial of justice is perfectly valid.[101]

The last petition of Israel was to the Swiss Supreme Court to set aside the rendered partial award by arbitral tribunal.[102] Israel's arguments had two layers: 1) challenging the reliance of

[98] National Iranian Oil Co. v. State of Israel, Federal Supreme Court of Switzerland, January 10, 2013-4A-146/2012.
[99] Id.
[100] Tibor Varady, John J. Barcelo III, Stefan Kroll & Arthur T. von Mehren, supra note 20, at 519.
[101] Supra note no. 98.
[102] "The Israeli legal team prepared a "voluminous" file, as Judge Klett put it, in support of the argument that any payment made to the Islamic Republic of Iran would contradict the international norm of the sanctions regime. The file contained many documents referring to the UN and EU sanctions against Iran,

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French *Cour de Cassation* on article 6(1) of the European Convention on Human Rights to establish a right for judicial intervention of *juge d'appui* based on denial of justice; 2) Challenging the partial award as the arbitrators did not take into account the intention of the parties in their arbitration agreement. Considering the high confidential character, the personality of the parties and the strategic objective of the Participation Agreement, Israel argued that the parties intentionally defined such an appointing mechanism in the arbitration clause which can prohibit the intervention of any third party. In other words, the arbitration clause is conditional in a meaning that if the parties could not appoint the arbitrator, there would be no arbitration.

Regarding Israel's first argument, since the Swiss Supreme Court got its jurisdiction for setting aside the partial award from the intention of parties to choose the place of arbitration in Geneva, the Swiss Supreme Court did not review directly the judgment of French *Cour de Cassation*, nor the jurisdiction of French Court in appointing of the arbitrator (as the parties has enough opportunity to argue and defend in the highest court of France), but reviewed the partial award issued by arbitral tribunal.[103] In other words, the Swiss Supreme Court based its decision on the issue that whether or not the appointment of the arbitrator is in accordance with arbitration clause.

The Swiss Supreme Court did not accept the stated-argument of intentional silent of parties by holding that "the arbitration clause in the contract is adopted to dispose of the possible dispute in connection with the performance of the contract, so it could not be paralyzed *ab ovo* by the mere refusal of one of the parties to appoint the arbitrator, as it would be in conflict with the original intention of choosing arbitration."[104]

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detailed charts of past transactions between Iran and Israel, the joint contracts and the shell companies, and the opinion of a learned but unnamed Israeli professor." See: Supra note no. 98.

[103] The baker & McKenzie International Arbitration Yearbook, 316 (Liz Williams, ed. 2013-2014).

[104] Supra note no.98.

Also the Court added that the wording of the arbitration clause is not stating that the arbitration clause is conditional. In other words, if the condition (appointing of the arbitrator by each party) is not met, the arbitration process is going to be totally failed. So the court stated that "it is difficult to see how a party would have no objection to entering into a contract, the performance of which is subject to the other party's whims."[105] Besides, the general principle of *pacta sunt servanda* does not let one party of a contract to interpret the contract in way to disregard his obligations.[106]

The Swiss Supreme Court was certainly faced with a special situation that the judicial appointment of the arbitrator was made by a national court other than the place of arbitration based on defective arbitration clause and as a consequence of denial of justice. It seems that the Swiss Supreme Court in its reasoning relied on some specific principles: First, the court somehow bound itself to the French *Cour de Cassation* decision, specifically in the jurisdiction of the French courts in appointing the arbitrator. Second, the focus of the Swiss Supreme Court was on the fact that the Israel had its right to be fully heard and object the courts' decisions in a long procedure. Third, the decision of *Cour de Cassation* was reasonable for the Swiss Supreme Court. Even by accepting the arguments of Israel regarding the intentional silent in the arbitration clause or pathological clause; the consequence would be the same and NIOC would be faced with the denial of justice which would be against public policy of Swiss. Finally, the Swiss Supreme Court definitely took into account the speed of the arbitration procedure and acted in a timely manner in issuing the judgment (in around none months) and let the arbitration to go on.

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[105] Id.
[106] Nathalie Voser and Anya George, Swiss Supreme Court confirms "the regular constitution" of arbitral where French Courts had appointed arbitrator, Case Report (2013).

Chapter 3: Denial of Justice as a Ground for Judicial Appointment of an Arbitrator

In the long legal battle of NIOC versus Israel, clarified in chapter two, the defective arbitration clause which did not provide any alternative solution in case of failure of one of the parties in appointing the co-arbitrator led to difficulties. These difficulties resulted in impossibility of the arbitration process when the Israeli and Iranian courts denied the appointment of an arbitrator on behalf of the failed party (Israel).

During the litigation process for appointment of an arbitrator by the French court, the *Cour d'appel* decided that the issue was a denial of justice since one party of the contract was going to be deprived from exercising its contractual right of referring to arbitration and also the competent national courts were not available.[107] In addition, the court ruled that the contractual right of a party to refer to the arbitration was part of *ordre public* (public policy) which should be protected by supporting the parties as much as possible to submit their dispute to arbitration.[108]

The French *Cour de Cassation*, which confirmed the issue of denial of justice in NIOC case, also found that: a) the impossibility of access to court or arbitral tribunal by NIOC which was "general, permanent for unclear amount of time", and it was against French public policy; b) Article 6.1 of European Convention of Human rights[109] gives international jurisdiction to *juge d'appui* in it legal obligation in supporting arbitration when there is any relation with the raised dispute and France. So, the *Cour de Cassation* approved the *Cour d'appel*'s judgment and

[107] Albert J. Van den Berg, Yearbook Commercial Arbitration, Supra note 81.
[108] Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration, supra note 82, at 110.
[109] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 222.

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"characterized the negative excess of the power of *juge d'appui* in the refusal of appointing an arbitrator when there is no other states jurisdiction or willing to do so."[110]

These judgments of French courts shed light on the supporting legal grounds for recognizing the international denial of justice that can be categorized in two main groups: first, under the theoretical concept of international denial of justice; and second, the factual elements and legal grounds of denial of justice. In this chapter, these two categories of establishing the international denial of justice will be discussed to clarify whether or not the denial of justice was particularly recognizable in the NIOC case.

3.1. Concept of International Denial of Justice

The term "denial of justice" in the context of international law has a variety of aspects depend on not only the different perspectives of different legal systems but also on political and sovereignty issues. The concept of denial of justice is derived from a general principle of responsibility of states to provide equal and the same kind of justice to all persons under their jurisdiction. The interpretation of the concept of denial of justice refers to international delinquencies of a state toward the legal or natural person's rights in its territory.[111]

Based on the old theory of Calvo Doctrine,[112] the applicability of denial of justice is tied with the concept of sovereignty and diplomatic intervention, as a result the weaker nations will be

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[110] Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration, supra note 82, at 742.
[111] Chittharanjan Felix Amerasinghe, Local Remedies in International Law, 84-86 (2nd ed., 2004).
[112] Calvo Doctrine clarifies that the foreigners in settlement of their disputes will have the same rights as the local persons of the referred jurisdiction. In addition, the competent court for solving the dispute is the host country's court. The Clavo doctrine is the underlying doctrine of many international treaties and it was named after Carlos Calvo, the Argentine diplomat who first introduced this theory. Also see: http://www.britannica.com/topic/Calvo-Doctrine (last visited 03/02/2016).

more affected by the judicial and political influence of powerful nations. But in fact, the principle of international denial of justice is an attempt to secure the rights of access to "judge of the place" [113] and not affecting the sovereignty of the other nations, so the plaintiff can benefit from legal protections and the available local remedies for foreigner and citizens than affecting the sovereignty of other nations.

The leading definitions of the concept of denial of justice which are mentioned over and over in the literature are from two famous scholars —Charles C. Hyde and Fred K. Nielsen—who elaborate the broad definition of this concept. Hyde believed that "failure of the state in its duties imposed by international law toward an alien will be a denial of justice."[114] And Nielsen in line with Hyde added that the denial of justice is "a general ground for diplomatic intervention."[115] This broad definition of denial of justice in 1922, contained all types of state acts and ultimately created the vague obstruction and increase the confusion in practice.[116] For instance, the broad definition can go beyond the possibility of taking legal actions in local courts and includes any judicial wrong doing by administrative/executive bodies or judicial officers at any level.[117]

The necessity to clarify the concept led to a narrower definition with specific practical elements for the responsibility of states as a result of their international delinquency.[118] Where Paulsson analyzed the two famous arbitration awards of the *El Triunfo*[119] and *Robert E. Brown*,[120]

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[113] Amos S. Hershey, Denial of Justice, 21 Am. Soc'y Int'l L. Proc.27 (1927).
[114] Charles Cheney Hyde, International Law Chiefly as Interpreted and Applied by the United States, vol I, 491 (1922).
[115] Neer and Pauline Neer (US. v. Mexico), IV RIAA 60, 64, 15 October 1926.
[116] *Alwyn*. V. Freeman, The International Responsibility of States for *Denial of Justice*, 105, 1938.
[117] Commissioner Van Vollenhoven's opinion in Cattin case, USA v. Mexico, IV RIAA 282, 23 July 1927.
[118] In the Electricity Company of Sofia v. Bulgaria, the counsel for the Belgian government pointedly drew attention to "the difference between the broader view of the concept of denial of justice and the narrower views, showing a preference for the narrower." see the oral argument of 1 March 1939, PCIJ Series C No. 88, 414ff (1939).
[119] USA v. El Salvador, XV RIAA 455, 8 May 1902
[120] *Robert E. Brown* (United States) v. Great Britain, VI 120-13, 23 November 1923.

he attempted to extract the practical elements of denial of justice from the modern point of view. In the *El Triunfo* case, the arbitrators considered that the claimants should show that they appealed to the competent court who denied the justice. So, the need to exhaust local remedies was already established and still applicable for recognition of denial of justice. The exhaustion requirement should be proved by taking legal action in the competent court or showing the failure of the attempts to do so. Two decades later, in the *Brown* case, the arbitrators noted that because of some technical issues the local remedies were not totally exhausted, but if there is no available justice accessible to be exhausted, it construed the denial of justice even without total exhaustion of local remedies.[121]

The rule of exhaustion of the local remedy does not apply in situations of evident prevention or palpable denial of justice such as when the state ratifies the discriminatory rules to waive access to justice for specific claims or claimants, or when there exists a powerful precedent against availability of remedy for particular damages or claims.[122]

Moreover, it should be considered that if the broad definition of the denial of justice applies, it might damage the principle of *res judicata* since a vast variety of issues can be placed under the concept of denial of justice which justifies the re-opening of the case in other courts. On the other hand, if the definition is defined too narrowly, it will close the door to justice. To balance between broad and narrow definitions, the main point to be considered is that the "denial of justice is not license for international appellate review of national court decision, Instead, the modern consensus is clear…. that the factual circumstances must be egregious of state responsibility is to arise on the grounds of denial of justice."[123]

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[121] Jan Paulsson, Denial of Justice in International Law, supra note 75, at 48-51.
[122] Amos S. Hershey, Denial of Justice, supra note 113, at 28.
[123] Jan Paulsson, Denial of Justice in International Law, supra note 75, at 60.

In addition, analyzing the said cases Paulsson correctly concludes that the definitions established by Hyde and Nielsen were wrong and the denial of justice is the situation where the door to justice is closed (total denial of justice),[124] no matter if the reason is acts or omission by either government or administration/judicial bodies of government.[125] I agree with Paulsson's central argument that the "essence of denial of justice lies in a state's failure to maintain an adequate system of justice, and not in individual actions or decisions of the individual courts viewed in isolation."[126] As a consequence, although there should be an original failure to redress the damages which will make the necessary condition of the other state's intervention, it is not the sole ground for denial of justice, and it should be combined with another condition such as no availability of access to justice. The non-availability of access to justice can be the result of procedural and substantial barriers implied by the executive, legislative or judicial body.[127]

Moreover, it is important to note that the concept of denial of justice is not only a refusal of the court to hear the claim and issue the decision, but also it can contain all other types of influential irregularities by the court such as abusing its own procedural rules, committing fraudulent acts or crimes like bribery, issuing dishonest judgment.[128] Consequently, the reason of

[124] The expression of "total denial of justice" is not used by Paulsson, but he referred to "total absence of justice". Jan Paulsson, Denial of Justice in International Law, Supra note 75, at 72.
[125] Id, at 53.
[126] John R. Crook, Jan Paulsson's Denial of Justice in International Law, The American Journal of International Law, vol. 100, no. 3, 743 (2016).
[127] Paulsson believes that the denial of justice only has procedural essence not substantial. He argues that "Denial of Justice in a form of manifestly unjust domestic judgment is properly viewed as a deficiency in the process. The manifestly unjust judgment is evidence that the state has failed to provide judicial system that meets international Standard." I agree with John Crook that Paulsson's idea for exclusively procedural concept of denial of justice sets the bar for a successful denial of justice claim quit high and potentially make it more difficult to establish." See: Id, at 744. And Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties, 241 (2009), And John R. Crook, Jan Paulsson's Denial of Justice in International Law, The American Journal of International Law, supra note 122, at 475.
[128] Gerald G. Fitzmaurice, The Meaning of The Term Denial of Justice, 13 Brit. Yearbook of International Law, L. 93, 104 (1932). In these situations, there will not be any responsibility for the states as it will arise after the failure by courts happened in taking the possible steps to prevent damages and implement the

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a denial of justice can go beyond merely unjust acts or omissions and also include bad faith which blocks the access to proper justice for the plaintiff.

The denial of justice needs to be proven based on the requirements of the court to which the case is submitted, but the major elements of a denial of justice which should be proved in most jurisdictions are: 1) The denied right of access to the court; and 2) The denied right of benefiting from fair and equitable procedure (equal treatment).[129] The latter is the principle of equality, which is the right of the plaintiff to take legal action in a same form as other citizens of the competent jurisdiction and by referring to the same authority the same as other citizens of the competent jurisdiction. Besides, the plaintiff cannot invoke to the rules other than the national applicable laws of the competent jurisdiction, and like other citizens will access equal resources.[130]

As mentioned a denial of justice will be established by refusal to access courts, another judicial barriers such as refusal to decide, delay in rendering the judgment/decision or misapplying the law to a case can cause a denial of justice.[131] Refusal to render the decision without legitimate/legal justification definitely shows that the justice cannot be apply by the referred court. The same is the cases of voluntary, abnormal and illegal delays in rendering the decision.[132] Apparently, when the court relies on inappropriate and non-applicable law or disregard the main facts of the case the justice will be denied, too.

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necessary punishments. The issue of responsibility of the state regarding the consequences of the denial of justice is out of the scope of this thesis.

[129] Carlos Andres Hecker Pasilla, Denial of Justice to Foreign Investors, available at: http://e-revistas.uc3m.es/index.php/CDT/article/view/1082/400 (last visited 03/04/2016).

[130] J. Irizarry y Puente, The Concept of denial of Justice in Latin America, Michigan Law Rev, vol. 43, no. 2, 390 (1944).

[131] Id, at 395-397.

[132] "The denial of justice comprehend not only refusal of judicial authority to exercise its functions, and notably to pass upon petitions submitted to it, but also persistent delays on its part in pronouncing its decree …" See: Fabiani Case, Moore, Arbitration p. 4895, La Fontain, Pasicrisie, 355.

In defining the concept of denial of justice, an unclear situation arises when the applicable law is not adequate or there is no law applicable to the raised dispute. It is true that the judge can always return to the main principles of law, legislative history, equity and sprit of law, but the new areas of law —as a result of development of technology— which are not covered in all the jurisdictions have not been defined clearly.

In addition to the issue of new areas of law, the concept of denial of justice will not be sufficiently complete if it cannot contain all possible categories of situations in different legal systems. Providing a comprehensive definition and also balancing between broad and narrow definition is a complicated task especially by considering the variety of legal systems and local procedures. For instance in case of inadequate justice, the standard test for adequacy can be the standard of the civilized jurisdictions, but even in this context there is not any general agreement. Amos Hershey provides a precise example that the "refusal of trial by jury by countries in which the inquisitorial system prevails would not constitute a denial of justice,"[133] which might be a denial of justice in other legal systems. So, as the implementation of justice varies in different jurisdictions, in practice, one legal system can imply a broader definition of denial of justice than the other, and the general standard for what is adequate justice remains unclear.

Another debatable issue is whether or not the denied justice should be manifest, in other words, whether or not the manifest injustice is automatically a denial of justice. A simple example is the case of breaching due process and the right of the parties to be heard at court/tribunal.[134] Some scholars have a positive answer to this question; Henry Wheaton believed that "an unjust sentence [as a result of due process] must certainly be considered a denial of justice, unless the

[133] Amos S. Hershey, Denial of Justice, supra note 113, at 30.
[134] Loewen v. United Sates, ICSID ARB (AF)/98/3 (26 June 2003). In para 132 mentioned that: "Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety."

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mere privilege of being heard before condemnation is all that is included in the idea of justice."[135] The consequence of considering the manifest injustice as denial of justice might result in the fact that no proof of the total exhaustion of the local remedies is necessary.[136]

The main reasons for requirement of exhaustion of local remedies, are the superiority, efficiency and convenience of national legal systems to settlement of a dispute. Logically, the blockage in providing local remedies should be permanent or unpredictable for unclear duration of time, by considering that the passage of time does not create by itself a denial of justice, unless it construes the manifest denial of justice.

Since all the mentioned conditions of denial of justice were tied to the element of totality, meaning that there should be total denial of justice, this leads to the question whether the arbitral denial of justice is the same as denial of justice. In other words, can the plaintiff under the arbitral denial of justice enjoy the legal protection the same as occurrence of total denial of justice? *Seipem v. Bangladesh*[137] illustrates an explanation regarding the arbitral denial of justice. In this case, through failure of the pipeline construction contract, *Seipem* initiated an arbitration process before the ICC, and at the same time *Petrobangla* commenced a lawsuit in a local court in Bangladesh and opposed the arbitration procedure based on article 5 of the Bangladesh Arbitration Act[138] by which the local courts have priority over the international ones. During the local legal process, ultimately the Bangladesh Supreme Court voided the ICC's tribunal ruling. By depriving *Seipem*

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[135] Henry Wheaton, Elements of International Law, § 391 (1844). In Section 3.2.2, the issue of violation of due diligence will be discuss based on Article 6(1) of ECHR.
[136] The other consequence will be the automatic international responsibility of the states. See: Clyde Eagleton, Denial of Justice in International Law, The American Journal of International Law, vol. 22, no. 3, 553 (1928).
[137] Saipem S.p.A. v. Bangladesh, ICSID ARB/05/7, §155 (30 June 2009).
[138] Article 5 of the Bangladesh Arbitration Act of1940: "The authority of the appointed Arbitrator or umpire shall not be revocable except by leave of the court, unless a contrary intention is expressed in the arbitration agreement"

the right to submit the dispute to the contractually accepted arbitral tribunal, it initiated a legal action before ICSID in which the court ruled that the obstacles that are created by Bangladesh courts were a clear abuse of rights and misuse of judicial control that caused denial of justice for *Seipem*.[139]

Taking into account the explained elements of the total denial of justice and comparing them with arbitral denial of justice that clarified in the *Seipem* case, shows that Paulsson is right in his statement that "the fact that a party is frustrated in its attempts to initiate arbitral proceeding is not, in and of itself, denial of justice."[140] In other words, what Paulsson tried to clarify is that the necessary element for establishing a denial of justice could not be solely the deprivation of the parties to refer to arbitration based on their arbitration agreement.

If the deprivation of the right of referring to the arbitration is a result of abuse of judicial control by government or breach of due process by local courts in a way that the access to appropriate justice became impossible for plaintiff, the arbitral denial of justice will end up in total denial of justice. The main way to distinguish between total and arbitral denial of justice is that even by deprivation from arbitration process, the door to justice can be still open for plaintiff by referring to litigation which should be always available. Thus, if the arbitral denial of justice is not

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[139] The other example is a personal experience of the author as a legal advisor of Sinopec in case of Sinopec Co. v. Khalkhaldasht Co. (KKD). In this case, KKD initiated a local legal action to oppose the commencement of the arbitration procedure by Sinopec. The Iranian courts (in the first instance and also court of appeal) relied on Article 975 of Iran's Civil Code on public policy and deprived the defendant from submitting the dispute to the arbitration tribunal. The broad scope of public policy which can be personally interpreted by the judges allowed the Iranian courts to clearly breach the arbitration agreement and manifestly helped the Iranian party (KKD) to stop the performance of the contract and freeze the bank guarantees to not be seized by Sinopec. The manifest breach of due process by discriminatory acts of the courts got the first acceptance of Supreme Court for recognition of denial of justice and possibility of referring to arbitration. (The case is still pending) See: Sinopec v. Khalkhaldasht (KKD), Branch 27th of Public Civil Court of Tehran, 930453, (25 August 2014).

[140] Jan Paulsson, Denial of Justice in International Law, supra note 75, at156.

ended in the total denial of justice in the competent jurisdiction, it cannot be recognized as a denial of justice to justify other jurisdiction intervention.

In the end, one of the almost comprehensive definitions is provided by "The Law of Responsibility of States for Damages Done in Their Territory to the Person or property of foreigner":[141]

> Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial of remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.[142]

In this definition, it is established that denial of justice is a re-assertion of the state's responsibility which will be recognized after the local remedies are requested and failed. The "denial of justice is not exclusively judicial in character; nor are all judicial injuries to be called denial of justice. Not every international illegality is a denial of justice; but every denial of justice is an international illegality."[143]

As all the possible elements of establishment of denial of justice are introduced, the next discussion will be an elaboration of the legal grounds which could justify the intervention of another state's jurisdiction to rescue the justice for the plaintiff.

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[141] 1929 Harvard Draft, 23 AJIL Spec Sup 173, chapter 1, §1.10, for historical back grounds on the 1929 Harvard Draft.

[142] Id, Article 9. The commentary to the Harvard Draft 1929, at 175. The commentary provides a number of examples: "the failure to apprehend a criminal, denial of free access to the courts, failure to render a decision or undue delay in rendering judgment, corruption in the judicial proceeding, discrimination or ill-will against the alien as such, or as a national of a particular state, the refusal in bad faith to apply the local law, executive interference with the freedom or impartiality of the judicial process, failure to execute judgment, denial of an appeal where local law ordinary permits it, negligently permitting a prisoner to escape, refusal to prosecute the guilty, or premature pardon of a convicted person, have all been deemed, under particular circumstances, instances of "denial of justice"".

[143] Clyde Eagleton, Denial of Justice in International Law, The American Journal of International Law, supra note 136, at 559.

3.2. Legal Grounds of International Denial of Justice

When justice cannot be rendered and the plaintiff losses the chance of obtaining redress before the competent court, either because of unavailability/impossibility of local remedies or international inadequacy of the government or judicial/administrative/executive bodies, the plaintiff can rely on "denial of Justice".

As explained above, the historical evolution of the concept of denial of justice from Hyde to Paulsson shows that it is strictly tied with accessing to justice via equal treatment to all persons under the competent jurisdiction: "The principle of equal treatment is confirmed by customary rule requiring prior exhaustion of local remedies as a precondition of diplomatic protection.[144] It is the international obligation of every state to ensure access to courts to aliens and to administer justice in accordance with due process."[145]

Based on the principle of access to justice as part of international customary law, the right to access to competent court is guaranteed for everyone. In case of denial of justice in one jurisdiction, the question of who are the other competent courts and which third state's courts can have jurisdiction over the dispute is a debatable one. The traditional view was close to the principle of *res inter alios acta*[146] and imposed more limitations on the general jurisdiction of third states;

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[144] The diplomatic protection is based on a theory that "a state will take diplomatic or other action against another state on behalf of its national whose rights and interests have been injured by the other state." See: Andrew Paul Newcombe and Lluís Paradell, Law and Practice of Investment Treaties, 5-12 (2009).

[145] Francesco Francioni, Access to Justice and International Investment Law, European Journal of Interantional Law, vol. 20, no. 3, 731 (2009).

[146] "Latin for "a thing done between others does not harm or benefit others") is a law doctrine which holds that a contract cannot adversely affect the rights of one who is not a party to the contract. Res inter alios has a common meaning: A matter between others is not our business." See: Admissibility of Evidence res inter alios acta. Admissibility of Evidence res inter alios acta. Columbia Law Review, vol. 10, no. 8, 759–761(1910). Available at: http://doi.org/10.2307/1110818 (last visited: 03/05/2016).

the modern view is close to more cooperation between states toward implementation of justice. For instance, in foreign investment law, for the private investors the right to access to international justice is recognized through different international instruments such as NAFTA[147] and also investment arbitration, "the right of access to justice for the investor has shifted from inter-state claims to the private-to-state arbitration where private actors have direct access to international remedial proceedings without the traditional need for the interposition of their national state in diplomatic protection."[148]

In addition to the specific international instruments and bilateral treaties between the states, there are some general legal grounds which allow the third states to intervene to provide proper remedies after the justice is denied in a competent jurisdiction based on "an obligatory responsibility for all the states to prevent denial of justice".[149]

In fact, these legal grounds accelerate the shift from traditional perspective on limiting the states' jurisdiction to internationalization of the right to access to justice. In this section, the two major legal grounds for the internationalization of right to access to justice based on the NIOC case—specifically the judgment of *Cour de Cassation* and Supreme Court of Switzerland—will be discussed as a) International public policy; and b) Article 6(1) of ECHR.[150]

3.2.1. Denial of justice and International Public Policy

Public policy is an arguable issue because of its unclear definition in different jurisdictions and also in international law. In civil law countries, the expression of "ordre public international"

[147] North American Free Trade Agreement between Canada, the United States, and Mexico, entered into force on 1 Jan. 1994, 32 ILM, 289 (1993).
[148] Francesco Francioni, Access to Justice and International Investment Law, supra note 146, at 732.
[149] Fouchard, Revue de l'arbitrage, supra note 19, at 451.
[150] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 222.

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is derived from French jurisdiction, and simply means the concept of public policy as used in private international law, particularly in enforcement of an arbitration award, foreign judgments and rendering a judgment in cases of denial of justice. The concept of public policy can also apply in public international law, for instance in cases of international sanctions. Pierre Mayer clarified that to avoid any confusion, the expression of 'truly international public policy' can be used for public policy in international public law.[151]

One of the important conventions in which public policy is directly reflected is the New York Convention of 1958. Article 5 allows the refusal of the enforcement of the award by a court if it is against public policy. Although, the concept of public policy is directly mentioned, the convention does not provide a definition. Consequently, in practice, different perspectives are held by different courts but the major point of views are almost close to one general concept. For example, one court in United State held that public policy is the "most basic notions of morality and justice"[152] and in French courts international public policy contains the norms of "most fundamental and universal with binding nature even if the French law is not an applicable law."[153]

Although, an accepted definition of international public policy is missing, Matti Kurkela and Santtu Turunen believe that the "international public policy is in the process of emerging as an identifiable and defined concept."[154] In 2002, the International Law Association (ILA)[155] provided a definition for international public policy, and in its Recommendations Section (2b) it

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[151] Pierre Mayer, Effect of International Public Policy in International Arbitration, in Pervasive Problems in International Arbitration, 61 (Loukas A. Mistelis and Julian D.M. Lew QC ed., 2006).
[152] Parsons & Whittemore Overseas Co. Inc. v. Societe General de L'industrie du Papier RAHTA and Bank of America, 508 F.2d 969, U.S. Ct. of Appeal, 2d Cir, (1974). (Summarized in Yearbook Commercial Arbitration, vol.1, 215-217 (1976).)
[153] Tibor Varady, John J. Barcelo III, Stefan Kroll & Arthur T. von Mehren, supra note 20, at 852.
[154] Matti Kurkela and Santtu Turunen, Due Process in International Commercial Arbitration, 21 (2010).
[155] In 2002, The International Law Association (ILA) adopted a resolution on public policy as a Bar to Enforcement of International Arbitral Awards (Recommendation). Adopted at ILA's 70th conference held in New Dehli, India (April 2002).

introduced two criteria which can be considered to determine an issue of public policy: 1) the international nature of the dispute; and 2) existence of international consensus regarding the issue.[156]

Moreover, the ILA Recommendations described three categories of norms which can construe the international public policy:

> a) Fundamental Principles pertaining to justice and morality that the state wished to protect even when it is not directly concerned. (Given example: as to substantive fundamental principle abuse of rights and as to fundamental procedural principle the requirement that tribunals be impartial.)
>
> b) Norms designed to serve the essential political, social or economic interests if the state, these being known as *lios de police* or public policy rules. (Example given: antitrust law;
>
> c) The duty of the State to respect its obligations toward other states and International Organizations. (Example given: U.N. resolution imposing sanctions).[157]

By considering the first category as fundamental principles of justice and morality, the issue of denial of justice—either because of unavailability/impossibility of local remedies or international inadequacy of the government or judicial/administrative/executive bodies— will be a matter of public policy. [158]

In the NIOC case in the issue of public policy had two layers: denial of justice because of unavailability of remedies in competence jurisdiction and denial of justice because of deprivation of relying on arbitration as an agreement between two state-owned companies. The *Cour d'appel* reasoned that "the right of a party to an arbitration agreement to have its claim submitted to

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[156] Matti Kurkela and Santtu Turunen, Due Process in International Commercial Arbitration, supra note 154.
[157] Id.
[158] The debate regarding the "Legal Grounds of International Denial of Justice" clarified at the beginning of §3.2 of this thesis.

arbitration is part of French public policy (ordre public)" but when the "matter has relation to France".[159]

Regarding the second layer, the court's judgment was based on a principle that the breach of right of parties to submit their dispute to the arbitration—based on their agreement because of misconduct or failure of the governments—constituted a breach of international public policy. This principle was established previously in *Bentele v. Belgium* case[160] and the *Elf Aquitaine Iran v. NIOC* case[161] in which the arbitrator stated that:

> It is a recognized principle of international law that a State is bound by an arbitration clause contained in an agreement entered into by the State itself or by a company owned by the State and cannot thereafter unilaterally set aside the access of the other party to the system envisaged by the parties in their agreement for the settlement of disputes.[162]

It has been numerously argued that when a state or the state-owned company signed an arbitration agreement and afterward at the time of dispute refused to participate in the arbitration, whether or not this situation constitutes the denial of justice under the public international law.[163]

[159] Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration, supra note 82.

[160] Ad Hoc-Award of November 18, 1983 by C. Reymond, President, K.H. Bockstiegel and M. Franchimont, arbitrators, in Benteler v. Etat Belge, 1989 Rev. ARB. 339.

[161] Ad Hoc-Award of January 14, 1982, Elf Aquitaine Iran (France) v. National Iranian Oil Company, YCA 1986, at 97, 102 et seq.

[162] Id.

[163] Stephen Schwebel, International Arbitration: Three salient problem, 61 (1987). He deals with a question whether "where a treaty or contract contains a clause providing for arbitration of disputes arising thereunder, the termination, nullification or suspension of the treaty or contract necessarily vitiates the arbitration clause. The argument, based on logic, that if the treaty or agreement is terminated, the arbitral clause falls with it, writes Schwebel, yields to the experience provided by practice and practical requirements, which have supported the severability of the arbitration clause from the substantive agreement. Moreover, the rule of la competence e de la competence is too firmly established in too firmly established in the law of international tribunals." Also see: Herbert W. Briggs, Review of International Arbitration: Three Salient Problems, The American Journal of International Law, vol. 82, no. 2, 394–396(1988). Available at: http://doi.org/10.2307/2203210 (last visited 03/05/2016).

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The French jurisdiction in different cases considers this issue as breach of ordre public.[164]Also Fouchard *et al* state the mentioned case laws confirm that "the subjective arbitrability of international disputes involving a state or state-owned entity is a principle of a truly international public policy in international arbitration law, and the position of that entity's domestic law is irrelevant."[165]

Even if there is not an entire consensus regarding the specific definition of International public policy, it is generally accepted that as a consequence of recognized international public policy situation, it creates a universal mandatory rule for the courts over the submitted dispute. In fact, the mandatory character of the public policy rule supersede the applicable law[166] and lets the court go beyond the applicable law in favor of protecting international public policy.

3.2.2. Denial of justice and Article 6(1) of ECHR

Article 6 of European Convention of Human rights ("Convention") is a guarantee for "the right to a fair and public hearing in the determination of an individual's civil rights and obligations or of any criminal charge against him".[167] Actually, Article 6 provides a skeleton of a nature of

[164] Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration, Supra note 82.

[165] Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, John Savage, Foucahrd Gaillard Goldman on International Commercial Arbitration, 328-329 (1999).

[166] "The parties are entitled to submit their legal relationship to whatever law they chose, and to exclude national laws which would apply in the absence of a choice, consequently, the provisions of the law thus excluded can only prevail over the chosen law insofar as they are matters of public policy. See: Westacare, op. cit., fn. 19, ASA Bull, 301-330-332 (1995), upheld by Swiss Fed. Trib., (30 Dec 1994).

[167] Article 6, the European Convention on Human Rights, entered into force on 3 September 1953: "6 (1): In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

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right of access to a fair trial for citizens and legal entities,[168] even if the definition of the "civil rights and obligations" and "criminal and charges" are different in different jurisdictions.

The Convention's mission is "determination of issues on public-policy grounds and thereby raising the general standard for protection of human rights";[169]in line with this mission, access to a fair hearing is the central point of Article 6 which contains various aspects of the due process, including "the right of access to court, a hearing in the presences of the accused, freedom from self-incrimination, equality of arms, the right to adversarial proceedings and a reasonable judgment."[170]

The issue in the NIOC case was the impossibility to access the arbitration tribunal in a situation where none of the competent courts was available. Regarding the specific issue of access to court, article 6 does not provide an express provision, yet in *Golder v. The United Kingdom* case the court held that "the fair, public and expeditious characteristics of judicial proceeding are of no value at all if there are no judicial proceedings." [171] To put it differently, the objective of article 6 is not only to secure the availability of a fair court for everyone in Member States, but also to guarantee the accessibility to "efficient judicial mechanism".[172]

Regarding accessibility to efficient judicial mechanism, there is a question whether access to arbitration tribunal is also guaranteed by article 6 or is limited to access to courts. The

[168] Canea Catholic Church v. Greece, European Court of Human rights, Strasbourg, no. 25528/94, 16 December 1997. The court considered that in addition to citizens, article 6 can apply over the legal persons and held that as "the applicant church did not have legal personality in Greek law" cannot be benefit from this article.
[169] Konstantin Markin v. Russia, European Court of Human rights, Strasbourg, no.30078/06, 7 October 2010.
[170] Nuala More and Catharina Harby, A Guide to the Implementation of Article 6 of the European Convention on Human Rights, Human rights handbook, no. 3, 38 (2006).
[171] Golder v. The United Kingdom, European Court of Human Rights, Strasbourg, no. 4451/70, 21 February 1975.
[172]Martin Kuijer, Promoting Efficiency of Bulgarian Judiciary in the Area of Human Rights Protection, National Institute of Justice, BLHR Foundation (2006).

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affirmative answer to this issue is mentioned in different cases such as *Regent Company v. Ukraine* as the court held that "the arbitration tribunal is a "court" established by law on terms of paragraph 1, Article 6 of Convention."[173]

The arbitration mechanism is an alternative dispute resolution and by its contractual nature, it is categorized as non-obligatory judicial mechanism. Interestingly the court in *Bramelid v. Malmström* distinguished between the obligatory and voluntary arbitration as following:

> A distinction must be drawn between voluntary arbitration and compulsory arbitration […]. If […] arbitration is compulsory […] the parties have no option but to refer their dispute to an arbitration board, and the board must offer the guarantees set forth in Article 6 (1).*[174]*

So, in addition to *Regent Company v. Ukraine* in which the court ruled that the arbitration tribunal is the same as court in Article 6(1), based on *Bramelid v. Malmström*, deprivation from compulsory arbitration is a definite breach of Article 6(1).

The applicability of Article 6 also depends on exhaustion of local remedies. In other words, until the time that the courts under the competent jurisdiction still have the chance to correct the defects and violation of Article 6, this article will not be applicable.[175]

In addition to rule of exhaustion of local remedies as a requirement that has a role in case of NIOC, there are four more requirements that should be met for applicability of Article 6(1): a) There should be legal dispute between two parties based on some legal relation to the right;[176] b)

[173] Regent Company v. Ukraine, European Court of Human Rights, Strasbourg, no. 773/03, 3 April 2008.
[174] Bramelid v. Malmström– Sweden, European Court of Human Rights, Strasbourg, no. 8588/79; 8589/79, 12 December 1983.
[175] This condition is in fact necessary for filing of an application before the International court of Human Rights but on the other hand till the time that the justice can be render through the competent courts, the applicability of Article 6 is not an issue. See: C. F. Amerasinghe, Local Remedies in International Law (1990), A.A. Cancado Trindade, The Application of the Rule of the Exhaustion of Local Remedies, Its Rational in the International Protection of Human Rights (1983).
[176] In French "*contestation*" is also used in Convention, it has substantive meaning which may not only relate to "the actual existence of a rights but also to its scope or the manner in which it may be exercised." See: Pudas v. Sweden, European Court of Human Rights, Strasbourg, no. 10426/83, §31, 1987.

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There should be a civil right (in applicable law the disputed right defined as civil); c) The dispute should be recognizable under the applicable law (The right can be argued under the applicable law[177]); and d) the violation of Article 6 is already occurred in competent jurisdictions.[178]

Moreover, it is important to note that the interpretation of Article 6(1) is based on "universally recognized fundamental principles of law, and the principle of international law which forbids the denial of justice".[179] This Article should be seen in view of these internationally accepted principles.

To conclude, the detailed elaboration of denial of justice in light of public policy and Article 6(1) of ECHR in line with NIOC facts and related judgments is done in this chapter. NIOC case is a landmark case that afterward its holding entered into French *Nouveau Code de Procédure Civile* (NCPS) in Article 1505. This article provides the circumstances that authorize the *Juge d'Appui* to support justice in more expanded situations compare to previous the decree of 1981.

The *Juge d'appui* authorization under 1505 will be activated when: a) the place of arbitration is in France; or b) the French procedural law is governing the arbitration based on the parties agreement; or c) the French court is expressly chosen as supporting court for the disputes related to arbitral procedure; or d) one of the parties is likely to suffer a denial of justice.[180]

The Article 1505 clearly goes beyond the holding of NIOC case as there will be no need for any link to France to benefit from the assistance of *Juge d'appui*, meaning that the French court

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[177] Masson and Van Zon v. The Netherlands, European Court of Human Rights, Strasbourg, no.15346/89, 1579/89, §48, 28 September 1995.
[178] The Court has held that a "tenuous connection or remote consequences" do not suffice for Article 6 ECHR. See for example: Le Compte, Van Leuven v. De Meyere – Belgium, European Court of Human Rights, Strasbourg, no. 7238/75 & 6878/75, §47, 23 June 1981.
[179] Nuala More and Catharina Harby, A Guide to the Implementation of Article 6 of the European Convention on Human Rights, Human rights handbook, supra note 170.
[180] Decree No. 2011-48 of January 13, 2011. (English version available at: http://www.sccinstitute.com/media/37105/french_law_on_arbitration.pdf (last visited: 14/11/15).

will have universal jurisdiction over any plaintiffs who faced denial of justice and request for receiving assistance of French courts.[181] It seems that the philosophy of French legislator in Article 1505(b) was granting the access to its courts in the situation that the alien is faced with both situations of no availability of court and no availability of arbitration tribunal (total international denial of justice).

In next Section, the found case in U.S jurisdiction which has similar elements with NIOC case will be analyzed to show the different perspectives between French and U.S jurisdiction regarding the judicial appointment of an arbitrator in denial of justice, interpretation of the arbitration agreement and pro-arbitration policy.

3.3. Applicability of NIOC's Legal Grounds in Ashland Case in U.S Jurisdiction

The NIOC case is a special one not only because of the new interpretation of French Court in judicial appointment of an arbitrator, but also because of the political relation between two countries who declared each other as enemies and this situation caused the manifest denial of justice. These specific features of NIOC case made it a unique one between the International arbitration cases.

The one case that somewhat similar is an interesting case in which NIOC is again a plaintiff who took legal action against Ashland Oil Inc. (Ashland) in U.S. district court of Mississippi for appointment of an arbitrator for Ashland ("Ashland Case").[182] The comparison between the legal

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[181] See: Jean-Pier Harb and Christophe Lobier, New Arbitration Law in France, The Decree of January 13, 2011 (2011). Available at: http://www.mondaq.com/x/135218/Arbitration+Dispute+Resolution/New+Arbitration+Law+In+France+The+Decree+Of+January+13+2011 (Last visited 03/08/2016)

[182] NIOC v. Ashland Oil Inc., Civ. A. No. J85-1064(L). United States District Court, S.D. Mississippi, Jackson Division, June 27, 1986.

grounds of these two cases will practically clarify how the NIOC principle[183] can apply in other jurisdictions.

The dispute between Ashland and NIOC arose from a series of long term international sales contract during 1970s when NIOC was Ashland's primary supplier of crude oil. As in the NIOC case, in Ashland the revolution in Iran between 1978 and 1979 made the performance of the contract difficult and NIOC several times repudiated the contract, but after negotiations restarted oil shipments. The crude oil supply was continued till November 4, 1979 when the American Embassy was seized and more than sixty diplomats and citizens were held hostage in Tehran[184] totally stopped the performance of contact. At this time, Ashland refused the payments of received shipments by reasoning that:

> (1) NIOC, in order to receive payment for these cargoes, was to present certain documents to certain banks pursuant to the terms of documentary letters of credit provided in the contract, which presentation was not made; (2) the money withheld was to cover damages suffered by AOTL[185] as a result of NIOC's breaches of the March and April contracts. The disputed amount totals some $282,000,000.00.[186]

The arbitration clause provided that the seat of arbitration be in Tehran and each party should choose one arbitrator. In 1985, NIOC requested the Mississippi district court to appoint an arbitrator for Ashland and also compel the arbitration clause in Jackson, Mississippi to prevent denial of justice.

Federal Arbitration Act in 9 U.S.C. § 4 provides that "a party to a contract containing an arbitration clause may petition any federal district court for an order directing that such arbitration

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[183] The author used the phrase of "NIOC Principle" which contains the explained legal grounds of NIOC case which can justify the judicial appointment of an arbitrator.
[184] Tim Wells, Four Hundred and Forty-Four Days: The Hostages Remember, Harcourt Brace Jovanovich Publishers (1985).
[185] Ashland's subsidiary and contract party with NIOC.
[186] NIOC v. Ashland Oil Inc., Civ. A. No. J85-1064(L). United States District Court, S.D. Mississippi, Jackson Division, June 27, 1986.

proceed in the manner provided for in such agreement".[187] But this provision is limited within the district that the petition is filed. Also, there is 9 U.S.C. § 206 which "allows a district court to enter an order compelling arbitration, in accordance with the agreement, at any place specified in the agreement, provided that such situs is in a foreign jurisdiction which is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention)".[188]

As Iran was not a signatory to the Convention, NIOC could not benefit from 9 U.S.C. § 206, so NIOC tried to get a court order for compelling the arbitration in state of Mississippi—even though in the arbitration clause the place of arbitration was Tehran/Iran—by relying on the strong federal policy favoring the arbitration.[189]

In the case in hand, the court had to choose between the pro-arbitration policy —which could lead to compelling the arbitration clause and judicial appointment of arbitrator—and strict interpretation of contract. It chose the latter one and ruled that it would be out of power of the court to re-write the contract. The arbitration provision in the contract was restricted to the chosen place of arbitration in Tehran and the court could not amend or change the contract. In other words, the enforcement of arbitration clause is limited to its wordings and its defined scope by parties overwrites the Federal pro-arbitration policy. Thus, as the arbitration clause was impractical, with no need to appoint an arbitrator on behalf of Ashland and the court said that the judicial litigation in U.S court can be initiated.

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[187] Article 9 U.S. Code § 4: Regarding the failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination. See the full text at: https://www.law.cornell.edu/uscode/text/9/4 (last visited: 03/08/2016).
[188] See: https://www.law.cornell.edu/uscode/text/9/206 (last visited: 03/08/2016).
[189] See: Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 105 S. Ct. 1238, 1242-43, 84 L. Ed. 2d 158 (1985): "The preeminent concern of Congress in passing the arbitration Act was to enforce private agreement into which parties has entered, we rigorously enforce agreements to arbitration." Also see: Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983): "Any doubt concerning the scope of arbitration issued should be resolved in favor of arbitration"

The Ashland case can be compared with the NIOC case by considering the most important issue of denial of justice for judicial appointment of an arbitrator. To examine the occurrence of denial of justice, the first element is the principle of exhaustion of local remedies.

The plaintiff who is looking for judicial appointment of an arbitrator because of denial of justice should prove the "exhaustion of local remedies" in a way to show the unavailability of access to (adequate) justice under the competent jurisdictions. The dispute in the Ashland case was raised because of fundamental changes in political relation between the countries of parties of contract. On one hand, this can be seen as manifest denial of justice in Iran since any kind of relation with U.S was stopped after the hostage-taking of American embassy in Tehran, and on the other hand it is not clear that the stoppage of political relations also blocked any legal actions universally.

Turning to one of the arguments of Israel in *Cour de Cassation* regarding non-occurrence of denial of justice in NIOC case was: "the denial of justice could not be an issue in this case as NIOC failed to seek judgment on merits of the case in Iranian court".[190] Considering the important fact that in the NIOC case the Iranian court declared that Iran had no jurisdiction and the argument of Israel had no effect. But in the Ashland case, the unavailability of Iranian court to issue a judgment on merits of the case should be proved (no manifest denial of justice).[191]

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[190] As The *Cour de Cassation* in NIOC case stated "the Israel's express refusal based on the case-law of Supreme Court of Israel created the general and permanent inability for NIOC for undetermined amount of time which constitute the denial of justice."[190] In fact, the *Cour de Cassation* for establishing the total denial of justice shed light on the important point that if the reasons for the denial of justice is temporary or clear for specific duration of time, it would not be a total denial of justice. See: National Iranian Oil Company (NIOC) v. Israel, judgment of the French Cour de Cassation, supra note 91.

[191] For sure, the enforcement of the court's judgment should be considered as an important factor. If NIOC could get the judgment against Ashland through Iranian courts, with no possibility for Ashland to attend to the court hearings, or inadequacy of justice for Ashland in Iranian court, it can also result the violation of U.S public policy and impossibility of enforcement of judgment for NIOC.

Even by presuming total unavailability of local remedies in place of arbitration (via arbitration tribunal or in courts), the denial of justice could not happen without exhaustion of the local remedies for parties also in U.S courts which in this case could provide remedies for the plaintiff. The facts of the case apparently show that NIOC in the Ashland case faced an arbitral denial of justice, not a total one.

The other important difference between Ashland and NIOC Case is the position of the U.S court towards the implementation of Federal pro-arbitration policy. As explained in chapter 2, the tendency of French courts is to provide more protection to applicability of arbitration clause by relying on discovery of the true intention of the Parties. Thus, if the minds of parties met in agreement on solving their disputes via referring to arbitration, the parties' intention should be protected. This is the logic behind the role of *judg d'appui* in old article 1493 and new article 1505: protecting the intention of parties by protecting applicability of arbitration agreement.

In the Ashland case without the assistance of the court, the arbitration clause would be effectively rescinded. Actually, the court not only dealt with the judicial appointment of an arbitrator, but also compelled the arbitration in a new place other than the contractual chosen place. But, the court preferred to limit the Federal pro-arbitration policy by stating that the "court's power is limited to enforcing arbitration agreements according to their terms and does not include a roving equitable license to accommodate the convenience of the parties by providing a forum for arbitration upon request."[192] Specifically, the U.S court used the term of "convenience" and not arbitral denial of justice which means that the convenience of one party might not always justify the amendment of the arbitration clause, but the arbitral denial of justice combined with pro-arbitration policy can.

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[192] NIOC v. Ashland Oil Inc., Civ. A. No. J85-1064(L). United States District Court, S.D. Mississippi, Jackson Division, June 27, 1986.

In addition to different approaches about pro-arbitration policy, there is a French jurisdiction in which depriving of parties of their agreement in the arbitration clause is a matter of French ordre public. This was reflected in *Cour d'appel* reasoning that "the right of a party to an arbitration agreement to have its claim submitted to arbitration is part of French public policy (ordre public)".[193] And when a party of arbitration agreement is a state-owned company the issue will be "a matter of truly international public policy in international arbitration law and the position of the entity's domestic la w is irrelevant."[194]

It is important to note that Fouchard *et al* did not clarify the situation in which the non-compliance with arbitration agreement was done by non-state owned company toward a state-court company, and whether it is still an issue of truly international public policy or not. In this case, Ashland was not a state-owned company and the issue of public policy is not as clear as NIOC case, so it depends on internal public policy of U.S which did not take in t account by the U.S court.

The Ashland case was on one hand an attempt to clarify the practicality of legal grounds of denial of justice applied in the NIOC case in other similar cases, and on the other hand, it shows the different approaches about pro-arbitration policy, public policy and denial of justice. But the issue of applicability of the NIOC case and Article 1505(b) of NCPC was not applied in any other case after the NIOC case, so the real applicability and courts to judicial intervene and appoint an arbitrator and how to interpret the facts in favor of protection of arbitration are issues which needs to be examined by courts in future.

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[193] Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration, supra note 82.

[194] Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, John Savage, Foucahrd Gaillard Goldman on International Commercial Arbitration, 328-329 (1999).

Conclusion

This thesis examined the NIOC case in light of theory of denial of justice in international arbitration, and evaluated the introduced legal ground for jurisdiction of the national courts in appointing an arbitrator. Over the last three chapters, an analysis was made in the framework of facts and five different court's judgments in the NIOC case. Through this analysis, I answered the principle question of whether prevention of denial of justice—combined with pro-arbitration policy—can justify the national court jurisdiction to appoint an arbitrator: Thus, consequently this thesis found that the existence of all the elements of NIOC case combined with pro-arbitration policy create a universal responsibility for national courts to appoint an arbitrator.

What this thesis has showed through the detailed analysis of the NIOC case is an additional way of looking at concept of denial of justice in international arbitration which can permit the court to intervene and appoint an arbitrator to imply justice by making the arbitration agreement applicable. The only similar case to NIOC was found in U.S jurisdiction and the comparison of the two cases illustrated the different views of French and U.S jurisdiction to solve the issue of appointment of an arbitrator to prevent denial of justice.

The NIOC case represented a specific combination of facts that caused the problem of international denial of justice as: 1) the arbitration was *ad hoc*; 2) there was no specification regarding the place of arbitration; 3) there was no specification regarding the governing law of arbitration procedure; 4) no national court accepted to appoint an arbitrator and 3) no national court was available to decide the merits of the dispute.

By considering all these elements, in Chapter three the requirements for recognition of denial of justice were clarified; these requirements were reflected commonly in various cases in

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all jurisdictions. NIOC is a unique case of denial of justice for three reasons. First, the result of denial of justice in most cases is establishment of jurisdiction on merits of the dispute, but in the NIOC case the result was the appointment of a co-arbitrator and deferring the case to the arbitration. Second, the holding of the court in this case was entered in *Nouveau Code de Procédure Civile* in Article 1505(b) and created a statutory ground for future cases in France. Third reason is the effect of NIOC case on International arbitration by introducing a new ground for judicial appointment of an arbitrator to prevent denial of justice. I agree with Emmanuel Gaillard that the NIOC case is one of the most important pro-arbitration cases of the decade as it shows that the national courts can, by relying on denial of justice, breach the law in favor of applicability of arbitration.[195]

Although the interpretation of the concept of denial of justice (reflected in 1505 (b) NCPC) can be flexible enough to support the specific facts and elements of the NIOC case, its universal applicability needs time to be examined in different jurisdictions. Whilst this thesis has met its objective, by considering the important issue of dependence of Arbitration as a volunteer settlement of dispute mechanism from the national judicial system, there is still an issue open for more research to find out that whether the French jurisdiction could, instead of expanding the jurisdiction of the national court to intervene in the arbitration procedure, assist to find a solution for expansion of the jurisdiction of an international arbitral institutions (such as ICC) to solve the issue of total denial of justice and also assist the parties in arbitral denial of justice. As a result, the expansion of jurisdiction of the international arbitral institutions via their arbitration rule can not only prevent denial of justice but also can reduce the risk of unenforceability of an award issued

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[195] Emmanuel Gaillard, La jurisprudence de la Cour de cassation en matière d'arbitrage international, Rev. arb. 2007.697, spec. no. 2.

by assistance of *Juge d'appui*, based on Article V(1)(d) of the New York Convention.[196] It can also prevent the risk of double jurisdictions to appoint an arbitrator.

In addition, further research can be done for analyzing the Article 1505(b) in line with theory of delocalization of international arbitration, besides to evaluate the possibilities and the effects of this article on creation of a dependent authority, from any national jurisdiction, for settlement of any disputes related to arbitration process in future.

On a final note, through this research, the applicability of the new ground for appointment of arbitrator to prevent international denial of justice is clearly defined which can also open a door for future research on different aspects of denial of justice in arbitration.

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[196] Art. V(1)(d) of the New York Convention which requires the composition of the arbitral tribunal to be "in accordance… with the law of the country where the arbitration took place."

Bibliography

Books

Katherine Lynch, The Force of Economic Globalization: Challenges to the Regime of International Commercial Arbitration (2003).

Gary Born, International Commercial Arbitration: Commentary and Material (2nd ed. 2001).

Sigvard Jarvin, Objections to jurisdiction in the leading arbitration, Guide to International Arbitration, 83 (Lawrence W. Newman & Richard D. Hill eds. 2004).

Fouchard, Gaillard and Goldman, International Commercial Arbitratio (1999).

Nigel Blackaby, Constantine Parasides, Alan Redfern & Martine Hunter, Redfern & Hunter on international Arbitration (5th ed. 2009).

Andreas Bucher, Court Intervention in Arbitration in International Arbitration in The 21st Century: Toward "Judicialization" and "Uniformity" (Richard B. Lillich et al. 1993).

Particular: Delaum, Court Intervention in Arbitral Proceedings in Resolving Transnational Disputes through International Arbitration, Sixth Sokol Colloquium (T. Carbonneau ed. 1984).

Julian D. M. Lew & Loukas A. Mistelis & Stefan Michael Kröll, Comparative International Commercial Arbitration (2003).

Daniel Ammann, The King of Oil, The Secret Lives of Marc Rich (2009).

Tibor Varady, John J. Barcelo III, Stefan Kroll & Arthur T. von Mehren, International Commercial Arbitration: A transnational Perspective (6th ed. 2015).

F. V. Garcia-Amador, Louis B. Sohn, and R. R. Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974).

Markus A. Petsche, The Growing Autonomy of International Commercial Arbitration, Sellier. European Law Publishers (2005).

Anthony H. Cordesman, Energy Development in the Middle East (2004).

John Quigle, The Six-day War and Israeli Self-defense: Questioning the Legal Basis for the preventive Way, (2012).

Jan Paulsson, Denial of Justice in International Law (2005).

Thomas Clay & Philip Pinsolle, French International Arbitration Law Reports (1963-2007), Case No. 54 (2014).

CEU eTD Collection

Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration (2007).

The baker & McKenzie International Arbitration Yearbook, 316 (Liz Williams, ed. 2013-2014).

Nathalie Voser and Anya George, Swiss Supreme Court confirms "the regular constitution" of arbitral where French Courts had appointed arbitrator, Case Report (2013).

Chittharanjan Felix Amerasinghe, Local Remedies in International Law (2nd ed., 2004).

Gerald G. Fitzmaurice, The Meaning of The Term Denial of Justice, 13 Brit. Yearbook of International Law, L. 93, 104 (1932).

Henry Wheaton, Elements of International Law, § 391 (1844).

Andrew Paul Newcombe and Lluís Paradell, Law and Practice of Investment Treaties (2009).

Pierre Mayer, Effect of International Public Policy in International Arbitration, in Pervasive Problems in International Arbitration (Loukas A. Mistelis and Julian D.M. Lew QC ed., 2006).

Matti Kurkela and Santtu Turunen, Due Process in International Commercial Arbitration (2010).

Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, John Savage, Foucahrd Gaillard Goldman on International Commercial Arbitration (1999).

Nuala More and Catharina Harby, A Guide to the Implementation of Article 6 of the European Convention on Human Rights, Human rights handbook, no. 3 (2006).

Martin Kuijer, Promoting Efficiency of Bulgarian Judiciary in the Area of Human Rights Protection, National Institute of Justice, BLHR Foundation (2006).

Jean-Pier Harb and Christophe Lobier, New Arbitration Law in France, The Decree of January 13, 2011 (2011).

Tim Wells, Four Hundred and Forty-Four Days: The Hostages Remember, Harcourt Brace Jovanovich Publishers (1985).

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 105 S. Ct. 1238, 1242-43, 84 L. Ed. 2d 158 (1985).

Articles:

Jan Paulsson, International Arbitration is not Arbitration, Stockholm International Arbitration Rev. 2008:2, 1-20.

CEU eTD Collection

Fouchard, Revue de l'arbitrage, 442-453, (2001).

Jennifer Kirby, Introductory Note to the 2011 French Law on Arbitration, 50 International Legal Materials, No. 2, 259 (2011).

Revue Suisse de Droit International et Européen, ol.2, 24 année, 309 (2014).

Albert J. Van den Berg, Yearbook Commercial Arbitration, Vol. 25, 125 (2004).

Amos S. Hershey, Denial of Justice, 21 Am. Soc'y Int'l L. Proc.27 (1927).

Charles Cheney Hyde, International Law Chiefly as Interpreted and Applied by the United States, Vol I, 491 (1922).

John R. Crook, Jan Paulsson's Denial of Justice in International Law, The American Journal of International Law, vol. 100, no. 3, 743 (2016).

J. Irizarry y Puente, The Concept of denial of Justice in Latin America, Michigan Law Rev, Vol. 43, no. 2, 390 (1944).

Clyde Eagleton, Denial of Justice in International Law, The American Journal of International Law, Vol. 22, no. 3, 553 (1928).

Francesco Francioni, Access to Justice and International Investment Law, European Journal of Interantional Law, Vol. 20, no. 3, 731 (2009).

Admissibility of Evidence res inter alios acta. Admissibility of Evidence res inter alios acta. Columbia Law Review, Vol. 10, no. 8, 759–761(1910).

Herbert W. Briggs, Review of International Arbitration: Three Salient Problems, The American Journal of International Law, Vol. 82, no. 2, 394–396(1988).

Westacare, op. cit., fn. 19, ASA Bull, 301-330-332 (1995), upheld by Swiss Fed. Trib., (30 Dec 1994).

Emmanuel Gaillard, La jurisprudence de la Cour de cassation en matière d'arbitrage international, Rev. arb. 2007.697, spec. no. 2.

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Online sources:

ICC website, http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/

Italian Civil Code of Procedure: http://www.jus.uio.no/lm/italy.arbitration/doc.html

The Organization of the Petroleum Exporting Countries (OPEC): http://www.opec.org/opec_web/en/17.htm

The Iran Coverage: http://irancoverage.com/2007/10/13/the-story-of-iranian-oil-and-israeli-pipes/

The Haaretz: http://www.haaretz.com

The Britannica: http://www.britannica.com/topic/Calvo-Doctrine

Denial of Justice to Foreign Investors, available at: http://e-revistas.uc3m.es/index.php/CDT/article/view/1082/400

The Cornell University Law School: https://www.law.cornell.edu/uscode/

Rules and Statutes

The New York Convention on the Recognition and Enforcement of Foreign Awards, 1959.

The U.N. Commission on Int'l Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 2010.

The French NCPC, Decree No. 2011-48 of January 13, 2011. (English version available at: http://www.sccinstitute.com/media/37105/french_law_on_arbitration.pdf (last visited: 14/11/15).

The ICC Arbitration Rules 2012.

The Netherlands Arbitration Act of 01 December 1986.

The Portuguese Law No. 31/86 of August 29 1986.

The USA Federal Arbitration Act Chapter I, Section 5, enacted in 1947. Available at: http://uscode.house.gov/statviewer.htm?volume=61&page=671 (last visited 20/12/15).

The Swiss Federal Statute on Private International Law Act, Chapter 12, International Arbitration.

The Indian Arbitration and Conciliation Act, Section 11(5).

The England Arbitration Act 1996, section 16.

The Israel Arbitration Law,1968.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 222.

The Bangladesh Arbitration Act of1940.

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The 1929 Harvard Draft, 23 AJIL Spec Sup 173, chapter 1, §1.10, for historical back grounds on the 1929 Harvard Draft.

North American Free Trade Agreement between Canada, the United States, and Mexico, entered into force on 1 Jan. 1994, 32 ILM, 289 (1993).

The International Law Association (ILA)

List of Cases

National Iranian Oil Company (NIOC) v. Israel, judgment of the French Cour de Cassation, First Civil Chamber, No.01-13.742/02-15.237 (2005).

Marc Rich & Co. v. Transmarine Seaways Corp. of Monrovia, 44 F. Supp. 386 (1978).

Chayaporn Rice ltd v. Ipitrade International, TGI Paris, Rev. ARB. 179, 2d decision (1987).

Texas E. Transmission Corp. v. Barnard, 285 F.2d 536, 6th Cir. (1960).

Ancon Ins. Co. v. GE Reins. Corp., 480 F.Supp.2d 1278 (D. Kan. 2007)

N.W. Nat'l Ins. Co. v. Kansa Gen. Ins. Co., U.S. Dist. LEXIS 17841 S.D.N.Y. (1992).

Employers Ins. of Wausau v. Jackson, 527 N.W.2d 681 (Wis. 1995).

Al Hadad Bros. Entreprises, Inc. v. M/S Agapi, 635 F.Supp. 205 (D. Delaware. 1986).

Gatoil International INC. (Panama) v. National Iranian Oil Co. (Iran), England, High Court of Justice.

Astra Footwear Industry v. Harwin International Inc., United States District Court, Southern District of NY (1978).

Tennessee Imports, INC. v. P.P. Filippi & Prix Italia S.R.L, US District Court, Tennessee (1990).

National Iranian Oil Co. v. State of Israel, Federal Supreme Court of Switzerland, January 10, 2013-4A-146 (2012).

Neer v. Pauline Neer (US. v. Mexico), IV RIAA 60, 64, (15 October 1926).

Alwyn. v. Freeman, The International Responsibility of States for *Denial of Justice*, 105 (1938).

USA v. Mexico, IV RIAA 282, (23 July 1927).

CEU eTD Collection

Sofia v. Bulgaria,1 March 1939, PCIJ Series C No. 88, 414ff (1939).

USA v. El Salvador, XV RIAA 455 (8 May 1902).

Robert E. Brown (United States) v. Great Britain, VI 120-13 (23 November 1923).

Loewen v. United Sates, ICSID ARB(AF)/98/3 (26 June 2003).

Saipem S.p.A. v. Bangladesh, ICSID ARB/05/7, §155 (30 June 2009).

Golder v. The United Kingdom, European Court of Human Rights, Strasbourg, no. 4451/70 (21 February 1975).

Sinopec v. Khalkhaldasht (KKD), Branch 27th of Public Civil Court of Tehran, 930453 (25 August 2014).

Parsons & Whittemore Overseas Co. Inc. v. Societe General de L'industrie du Papier RAHTA and Bank of America, 508 F.2d 969, U.S. Ct. of Appeal, 2d Cir, (1974).

Ad Hoc-Award of November 18, 1983 by C. Reymond, President, K.H. Bockstiegel and M. Franchimont, arbitrators, in Benteler v. Etat Belge, 1989 Rev. ARB. 339.

Ad Hoc-Award of January 14, 1982, Elf Aquitaine Iran (France) v. National Iranian Oil Company, YCA (1986).

Canea Catholic Church v. Greece, European Court of Human rights, Strasbourg, no. 25528/94 (16 December 1997).

Konstantin Markin v. Russia, European Court of Human rights, Strasbourg, no.30078/06 (7 October 2010).

Regent Company v. Ukraine, European Court of Human Rights, Strasbourg, no. 773/03 (3 April 2008).

Bramelid v. Malmström– Sweden, European Court of Human Rights, Strasbourg, no. 8588/79; 8589/79 (12 December 1983).

Pudas v. Sweden, European Court of Human Rights, Strasbourg, no. 10426/83, §31 (1987).

Masson and Van Zon v. The Netherlands, European Court of Human Rights, Strasbourg, no.15346/89, 1579/89, §48 (28 September 1995).

Le Compte, Van Leuven v. De Meyere – Belgium, European Court of Human Rights, Strasbourg, no. 7238/75 & 6878/75, §47 (23 June 1981).

CEU eTD Collection

NIOC v. Ashland Oil Inc., Civ. A. No. J85-1064(L). United States District Court, S.D. Mississippi, Jackson Division (27June 1986).

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