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FOREIGN COURT SUPPORT IN APPOINTING ARBITRATORS: AN OPTION FOR PARTIES TO PATHOLOGICAL CLAUSES

ĀRVALSTU TIESU ATBALSTS ŠĶĪRĒJTIESNEŠU IECELŠANĀ: PATOĻĪSKU KLAUZULU PUŠU IESPĒJA

Keywords: court support, appointment of arbitrators, pathological clauses, blank clauses, seat of arbitration, place of arbitration, France, CPC, Germany, ZPO, Switzerland, IPRG/PILA

Atslēgvārdi: tiesu atbalsts, šķīrējtiesnešu iecelšana, patoloģiskas klauzulas, tukšās klauzulas, šķīrējtiesas sēdeklis, šķīrējtiesas vieta, Francija, CPC, Vācija, ZPO, Šveice, IPRG/PILA

Summary

The article explores the possibilities offered by the laws of Germany, France and Switzerland with regard to state court support in appointing arbitrators. It enlists the situations in which such foreign court assistance might prove necessary and the conditions that must be satisfied in order to qualify for such assistance.

Kopsavilkums

Rakstā izpētītas Vācijas, Francijas un Šveices likumu sniegtās iespējas saistībā ar valsts tiesu atbalstu šķīrējtiesnešu iecelšanā. Rakstā tiek apskatīts, kādās situācijās šāda valsts tiesu palīdzība var izrādīties nepieciešama un kādi priekšnoteikumi izpildāmi, lai tai kvalificētos.

Introduction

One of the characteristics of the freedom to resort to arbitration is the amount of support measures enacted by a state – the more options for assistance allowed, the greater the possibility to fully enjoy that freedom and be a party to arbitration

proceedings that result in an enforceable award. A crucial stage is the composition of the tribunal without which there is no arbitration.

Parties to pathological (mostly *ad hoc*, but possibly also institutional) arbitration clauses finding it impossible to compose the tribunal might be at risk of failing their attempt to arbitrate altogether, especially if the law at the seat of arbitration (*lex arbitri*) does not offer the court support or the clause is blank and the law where parties have their seat also does not offer court support (or that support is unavailable).

Latvian law does not offer court support to (*inter alia*) appoint arbitrators, however, it does not mean that parties to pathological clauses are left without remedies. Inspired by the lack of Article-11-of-UNCITRAL-Model Law¹-type norms in Latvian law (which is about to change shortly, as relevant amendments to the Arbitration Law² and the Civil Procedure Law³ are underway), the Author investigates the cross-border court assistance provided by three select foreign jurisdictions – Germany, Switzerland and France.

1. Importance of seat

The court support to foreign parties in Germany, Switzerland and France is dependent upon the seat of arbitration – or, more precisely, default of seat or default of court-executed appointment mechanism at the seat. Although the seat is generally not regarded as part of *essentialia negotii* of an arbitration agreement⁴ and thus not a condition for its validity, it is as essential for its enforcement as the reference to “arbitration” and “definite disputes” engraved in the definition of arbitration agreement in Article II(2) of the New York Convention.⁵ Namely, an arbitration agreement is only enforceable when there exists a link to a legal system which ensures the appointment of arbitrators – be it a reference to arbitration rules (institutional or *ad hoc*) or to seat of arbitration (opening access to support mechanisms envisaged in *lex arbitri*).⁶ Switzerland, in contrast with other European

¹ UNCITRAL Model Law on International Commercial Arbitration 1985. With amendments as adopted in 2006. Available: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [viewed 04.12.2023.].

² Draft Law “Amendments to Arbitration Law”. No. 1918. Adopted in the 2nd reading at the Parliament on 27.03.2024. Available in Latvian: <https://titania.saeima.lv/LIVS14/SaeimaLIVS14.nsf/0/645BAC4FA3DDEB29C2258AE700521463?OpenDocument> [viewed 15.04.2024.].

³ Draft Law “Amendments to Civil Procedure Law”. No. 1917. Adopted in the 2nd reading at the Parliament on 27.03.2024. Available in Latvian: <https://titania.saeima.lv/LIVS14/SaeimaLIVS14.nsf/WEBRespDocumByNum?OpenView&restricttocategory=488/Lp14|1917|> [viewed 15.04.2024.].

⁴ Plavec K. *Auslegung von Schiedsvereinbarungen. Eine rechtsvergleichende Untersuchung.* Tübingen: Mohr Siebeck, 2021, S.7.

⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Signed in New York on 10.06.1958. [in the wording of 10.06.1958.].

⁶ Poudret J. F., Besson S. *Comparative Law of International Arbitration* (2nd ed.). London: Sweet&Maxwell, 2007, pp. 125–127.

states, has declared the link with a directly or indirectly determined legal system an essential component part of an arbitration agreement. Importantly – the source of this doctrine is jurisprudence of the Federal Supreme Court of Switzerland,⁷ not normative acts.

Foreign court support therefore comes into play in case of blank clauses (when there is neither effective appointment mechanism, nor seat of arbitration), or when court support at the seat is unavailable.

This Article does not apply to situations when parties to an arbitration agreement come from the Member States of the European (Geneva) Convention on international commercial arbitration,⁸ as its Article IV provides for a correction mechanism for pathological clauses, including the designation of place of arbitration and appointment of arbitrators,⁹ entrusting Presidents of the competent Chambers of Commerce of the defaulting party's residence or other bodies (state courts) with this task.

2. Germany – court appointment available if one party seated in Germany

Article 1025(1) of the German Civil Procedure Law (*Zivilprozessordnung* (ZPO) – German)¹⁰ since its adoption in 1998 regulates the scope of the law, stipulating that the general principle is to apply it in cases where the place of arbitration is in Germany, but also defines exceptions, namely norms (Article 1032, 1033 and 1050), which are applicable even if the place of arbitration is in a foreign country or is not determined (Article 1025(2)).

On the other hand, if the arbitration agreement without the place of arbitration does not also provide for the appointment of arbitrators or it is not possible, the prerequisite for court support is the seat or permanent residence of at least one party in Germany (Article 1025(3)). In such case, a German court (Higher Regional Court (*Oberlandesgericht* – German))¹¹ is entitled to carry out the tasks specified in Article 1035 (appointment of arbitrators, if the parties, arbitrators or another competent person does not fulfil the agreed appointment

⁷ Judgment of the Swiss Federal Supreme Court of 02 February 2018 in Case No. 4A 490/2017; Judgment of the Swiss Federal Supreme Court of 13 November 2020 in Case No. 4A 124/2020.

⁸ European Convention on international commercial arbitration. Signed in Geneva on 21.04.1961. [in the wording of 21.04.1961.].

⁹ For more on Article IV see Pierhuroviča L. The European Convention on International Commercial Arbitration As a Standard for Repairing Defective Arbitration Clauses. Grām.: Czech Yearbook of International Law. Volume VIII. Application and Interpretation of International Treaties. The Hague: Lex Lata, 2017, pp. 261–279.

¹⁰ Code of Civil Procedure of the Federal Republic of Germany. Available: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html [viewed 03.12.2023.].

¹¹ Article 1062 (3) ZPO.

mechanism).¹² Thus, in matters relating to the composition of the arbitral tribunal, the “legal tourism” of parties to international pathological arbitration agreements to Germany is only permitted if one of the parties is of German origin. Of course, if the parties are able to agree that the place of arbitration is in Germany, the support of the German courts in appointing the composition becomes available to them according to Article 1025(1) ZPO.

In addition, the court decision on the nomination of an arbitrator includes only a preliminary check of the validity of the arbitration agreement¹³ – in-depth analysis is reserved for other procedures envisaged in Article 1032(2) (admissibility control) and 1040(3) ZPO (court review of arbitral tribunal’s decision on its jurisdiction).¹⁴ Article 1032(2) ZPO, which can be invoked as a counterclaim against the application under Article 1035 for the court to appoint arbitrators,¹⁵ is universally available to parties of blank arbitration clauses without connection to Germany and allows requesting a court opinion on the admissibility of the arbitration process (*Zulässigkeitskontrolle* – German) until the formation of the tribunal. The purpose of this provision is to resolve the question of jurisdiction already in the beginning of the dispute¹⁶ by checking whether there is a valid arbitration agreement (or not “invalid, void”), whether it is enforceable (or not “unenforceable”) and whether its scope includes the particular dispute (verification of arbitrability).¹⁷ Therefore, verification of the validity of the arbitration agreement by the court, including interpretation, is possible even if the seat of arbitration and also *lex arbitri* are unknown. However, as stated in case law,¹⁸ the applicant should prove legitimate interest which is the likely enforcement of the award in Germany.

¹² Article 1025(3) ZPO also pertains to the functions laid out in Articles 1034 (appointment of arbitrators, if the appointment mechanism agreed by the parties is favourable to only one party, even if the tribunal has already been appointed), 1037 (rejection of arbitrators if the rejection is not satisfied within the arbitration process) and 1038 (termination of the arbitrator’s mandate if he is unable to fulfil it, and if he does not resign or the parties are unable to agree on the termination of his mandate).

¹³ Nacimiento P., Abt A., Stein M. §1035 – Appointment of Arbitrators. In: Böckstiegel K.-H., Kröll S. M., Nacimiento P. (eds.), *Arbitration in Germany. The Model Law in Practice*. Second edition. Kluwer Law International, 2015, p.174.

¹⁴ Huber P., Bach I. §1032 – Arbitration Agreement and Substantive Claim Before Court. In.: Böckstiegel K.-H., Kröll S. M., Nacimiento P. (eds.), 2015, p. 118.

¹⁵ *Ibid.*, p. 126.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 129.

¹⁸ BGH 30.06.2011, SchiedsVZ 2011, 281 para. 12. Cited in: Huber P., Bach I. §1032 – Arbitration Agreement and Substantive Claim Before Court. In.: Böckstiegel K.-H., Kröll S. M., Nacimiento P. (eds.), 2015, p. 131.

3. Switzerland – court appointment available in case of no seat

Article 179 of the Swiss Private International Law Act (*Bundesgesetz über das Internationale Privatrecht* (IPRG/PILA) – German)¹⁹ provides for the support of local level – cantonal²⁰ – courts in the appointment of arbitrators, if the parties have not agreed on the appointment mechanism or it does not work. According to the 179(2) IPRG/PILA, if the parties have not agreed on the place of arbitration or only that the place is Switzerland (without specifying the jurisdiction of a specific canton), the court of any canton (i.e., support judge *juge d'appui*– French) first approached has jurisdiction to compose the tribunal.

As evident from the legal text and as indicated in literature, Article 179(2) IPRG/PILA does not require connection with Switzerland.²¹ According to Article 179(3) IPRG/PILA, the court is obliged to appoint the arbitrators when the parties or the arbitrators do not do so within 30 days after they are obliged to do so (Article 179(4) IPRG/PILA), unless summary examination (*summarische Prüfung* – German) shows that the arbitration agreement is void. This means that the invalidity of the arbitration agreement must be obvious for the court to refuse to appoint arbitrators, for example, the agreement does not provide for an arbitration court, but an expert's conclusion. A blank arbitration agreement is likely to pass this summary test, as only the essential element (reference to “arbitration”) is sufficient to establish the validity of the arbitration agreement.

There is no requirement in the IPRG/PILA that Swiss court support measures are dependent upon the non-availability of court assistance to parties at their countries of origin.

4. France – risk of denial of justice

Article 1505(4) of the French Code of Civil Procedure (*Code de procédure civile* (CPC) – French)²² provides for the jurisdiction of the support judge (*juge d'appui*), whose function is performed by the President of the Paris court, if one of the parties is exposed to risk of denial of justice.

¹⁹ Federal Act on Private International Law of the Swiss Confederation. Available: https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en#chap_12/lvl_VI [viewed 03.12.2023.].

²⁰ Azeredo da Silveira M., den Hartog S. Commercial Arbitration: Switzerland [last verified 28.03.2023.]. Available: <https://globalarbitrationreview.com/insight/know-how/commercialarbitration/report/switzerland/#CFA9EF5656A0BB92DA3DADF7D52E965F8E95EFBF> [viewed 04.12.2023.].

²¹ Kunz C. A., Furner C. Switzerland. Gräm.: Tirado J. (ed.). Global legal insights. International arbitration. 9th edition. Global Legal Group, 2023, p.220. Available: https://www.lalive.law/wp-content/uploads/2023/04/GLI-IA23_Switzerland.pdf [viewed 04.12.2023.]; Besson S., Rigozzi A. The 2021 Reform of Chapter 12 PILA. In: Müller C., Besson S., Rigozzi A. (eds.), *New Developments in International Commercial Arbitration 2022*. Berne: Stämpfli Editions, 2022, p. 20.

²² Code of Civil Procedure of the Republic of France. Available in French: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070716/ [viewed 04.12.2023.].

The support judge can decide on the appointment of arbitrators if the parties have not agreed on it (Article 1452), and if there are more than two parties to the dispute and they cannot agree on the appointment of the composition (Article 1453), as well as consider any other dispute related to the appointment of arbitrators, if it is not resolved by the person appointed by the parties and responsible for organizing the arbitration (Article 1454).

It is not necessary to establish the connection of parties to France, and this includes the cases where the place of arbitration is unknown (as there is a risk that no national court could be seized to appoint arbitrators)²³ or the place is in a foreign country but it is impossible to appoint arbitrators there (which most probably entails an existing denial).

The “risk of denial of justice” criterion was adopted into the CPC in 2011 drawing inspiration²⁴ from the 2005 ruling of the Cassation Court (*Cour de Cassation* – French) in the case *State of Israel v NIOC*.²⁵ The court stated that, where the claimant (Iranian company) could not apply to another foreign (Israeli) court to obtain judicial appointment of an arbitrator on behalf of the respondent (Israel), and therefore could access neither court, nor arbitration and thus exercise a right which is part of the international public order sanctified in the principles of international arbitration and Article 6(1) of the European Convention on Human Rights,²⁶ constitutes a denial of justice which justifies the President of the Paris Court of First Instance’s international jurisdiction.²⁷ Here, though, the connection with France had to be established and was found via the ICC Court in Paris, which had been designated in the arbitration agreement as the appointment authority for the third arbitrator.²⁸

As confirmed by case law, there would be no denial of justice, if a party was excluded from arbitration proceedings by the administrative body of arbitration institution due to inexistence of arbitration agreement (even if it created a possibility of conflicting judgements), but could nevertheless pursue the dispute before a state court.²⁹ Furthermore, the termination of proceedings before an

²³ Christophe Seraglini & Jérôme Ortscheidt, *Droit de l'arbitrage interne et international* (2nd ed., LGDJ 2019), at 771 para. 779. Cited in: Bizeau M., Fedosova A. Forum of Necessity: Using French Law’s ‘Juge d’appui’ in Foreign-Seated Arbitrations As a Cure for Denial of Justice. *Journal of International Arbitration*, Vol. 39, No. 5, 2022, p. 756.

²⁴ Bizeau M., Fedosova A., 2022, p.750. of the Republic of France

²⁵ Judgment of the Cassation Court of the Republic of France of 1 February 2005 in Case No. 01-13.742, 02-15.237. Available in French: <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007052101/> [viewed 04.12.2023.].

²⁶ European Convention on Human Rights. Signed in Rome on 04.11.1950. [in the wording of 01.08.2021.].

²⁷ Judgment of the Cassation Court of the Republic of France of 1 February 2005 in Case No. 01-13.742, 02-15.237, para. 3.

²⁸ *Ibid.*

²⁹ Judgment of the Paris Court of First Instance of 16 April 2021 in Case No. 21/50115, p. 10.

arbitration tribunal due to failure to advance costs has been rejected as a case of denial of justice.³⁰

The support judge refuses to appoint arbitrators if the arbitration agreement is clearly invalid or unenforceable (Article 1455 CPC), which should not include pathological arbitration agreements, since the conclusion regarding their validity requires interpretation.

Even though Article 1505(4) CPC is applicable to all sorts of international arbitration relations, most of the reported case law seems to concern state – investor disputes,³¹ presumably due to the influence of states as parties to arbitration over their courts as regards support measures in arbitration. The fact that a state does not fulfil its duty to appoint an arbitrator, however, does not automatically mean that a state court is inaccessible. The Author is of opinion that it should not even mean that there is a “risk” of justice denial – at least in a democratic country a court is expected to appoint an arbitrator if the law so allows even against the wishes of the state as a party to arbitration.

5. Comparison

Out of the three appointment mechanisms, the Swiss one seems the most easily accessible from the perspective of justification requirements – it is sufficient to submit an international arbitration agreement in which no place of arbitration exists in order for a Swiss court to seize jurisdiction. For this reason, the Swiss approach is praised for offering “asylum” to foreign parties facing the impossibility to appoint arbitrators, and for creating universal jurisdiction of Swiss courts in this matter.³² However, both the IPRG/PILA and the ZPO cover only blank clauses, whilst neither can solve cases in which there exists a seat of arbitration abroad with no possibility to appoint arbitrators via state court there, which is currently the case of Latvia (at least there is no evidence that the courts would interpret the respective norms accordingly).

The French notion of “risk of denial of justice”, on the other hand, is wide enough to justify court support both in case of blank clauses and when there is a seat, but it does not offer any protection to a party whose opponent would not nominate an arbitrator. At the same time, it is unclear whether any weight is accorded to

³⁰ Judgment of the Paris Court of Appeal of 24 May 2016 in Case No. 15/23553.

³¹ UNCITRAL Arbitration Award of 15 Dec. 2014 in Case Hesham TM Al Warraq v Republic of Indonesia. Available: www.italaw.com/sites/default/files/case-documents/italaw4164.pdf [viewed 04.12.2023.]; Permanent Court of Arbitration Award of 23 Dec. 2016 in Case No. 2015-25 Kontinental Conseil Ingénierie v Gabonese Republic. Available: <https://jusmundi.com/en/document/decision/fr-kontinental-conseil-ingenierie-v-gabonese-republic-sentence-finalefriday-23rd-december-2016> [viewed 04.12.2023.]; Interim Order of the Paris Court of First Instance of 29 Oct. 2019 in Case No. 19/57445; Judgment of the Paris Court of Appeal of 23 Mar. 2021 in Case No. 18/05756.

³² Besson S., Rigozzi A. The 2021 Reform of Chapter 12 PILA. In: Müller C., Besson S., Rigozzi A. (eds.), 2022, p. 20.

the accessibility of court support before home state courts of both the applicant and the respondent. It seems that the notion of merely “risk”, not actual denial of justice, warrants that there is no need to explore options connected to personal jurisdiction of other states – otherwise the universal support jurisdiction of France would have already lost its appeal.

Another decisive factor playing a role in choosing between the three countries (two, if there is no party connection to Germany) in case of no seat, might be the costs for the application to support judge and lawyer’s fees. For example, in France all the applications are centralized before one *juge d’appui* – President of the Paris Court, but in Switzerland state fees differ according to canton³³ and thus, if convenient, one can choose the canton with the most advantageous fee.

Conclusions

1. Although seat is generally not regarded as part of *essentialia negotii* of an arbitration agreement, it is essential for its enforcement – an arbitration agreement is only enforceable when there exists a link to a legal system which ensures the appointment of arbitrators – be it a reference to arbitration rules (institutional or *ad hoc*) or to seat of arbitration (opening access to support mechanisms envisaged in *lex arbitri*).
2. Foreign court support comes into play in case of blank clauses (when there is neither an effective appointment mechanism, nor seat of arbitration) or when court support at the seat is unavailable.
3. The fact that a state does not fulfil its duty to appoint an arbitrator does not automatically mean that a state court is inaccessible for appointment. It should not even mean that there is a “risk” of justice denial – at least in a democratic country a court is expected to appoint an arbitrator if the law so allows, even against the wishes of the state as a party to arbitration.
4. Out of the three appointment mechanisms, the Swiss one seems the most easily accessible from the perspective of justification requirements – it is sufficient to submit an international arbitration agreement in which no place of arbitration exists in order for a Swiss court to seize jurisdiction. However, both the IPRG/PILA and the ZPO cover only blank clauses, whilst neither can solve cases in which there exists a seat of arbitration abroad with no possibility to appoint arbitrators via state court there.
5. The notion of “risk of denial of justice” in Article 1505(4) CPC is sufficiently extensive to justify court support both in case of blank clauses and in case when there is a seat, but it does not offer any protection to a party whose opponent would not nominate an arbitrator.

³³ ICLG Litigation & Dispute Resolution Laws and Regulations Switzerland 2023, published: 08/03/2023, <https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/Switzerland> [viewed 04.12.2023.].

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