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DESIGNATING APPOINTING AUTHORITIES IN UNCITRAL ARBITRATION: WRONG AND IMPERFECT DESIGNATIONS*

Abstract: *In an international arbitration, the parties have a right to designate an appointing authority that will select and appoint the arbitrators in case the parties cannot agree on their appointment, and decide on challenges to arbitrators. However, if the parties lack experience, knowledge or are simply not careful enough, they can make wrong designations which result in appointing authorities that are not neutral. Sometimes, also, errors in drafting clauses that designate the appointing authority lead to imperfections and incoherence, which may frustrate the parties' choice of the appointing authority and adversely affect the entire arbitration. This paper examines the operation of arbitration clauses designating appointing authorities on two relatively recent examples from the combined UNCITRAL-ICC practice, with the aim to identify potential problems arising from wrong and imperfect designations and to suggest solutions.*

Keywords: *International Arbitration, Appointing authorities, UNCITRAL Arbitration Rules, ICC as appointing authority.*

1. INTRODUCTION

National arbitration statutes generally confirm the parties' right to designate an appointing authority that shall select the arbitrators and possibly decide on challenges to arbitrators in an international arbitration.[1] The Serbian Arbitration

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[1] E.g. The Federal Arbitration Act, *U.S. Code* Volume 9, Title 9 § 5, Arbitration Act 1996, *UK Public General Acts*, 1996 c.23 § 18(1), Swiss Private International Law Act, Art. 179(1), French Code of Civil Procedure, Art. 1508, etc.

Act makes provision for such appointments in Articles 16 (3), 17(2) and 17(3)[1]: the designated appointing authority has the power (1) to select the sole arbitrator or presiding arbitrator of a tribunal if the parties or their appointed arbitrators do not reach an agreement on who to appoint; (2) to select an arbitrator on behalf of a party (where that party fails to make its own selection), and (3) to determine the number of arbitrators. In case no appointing authority is designated the appointments are made and the number of arbitrators is determined by the competent state court. Similar provisions are found in Articles 6-10 of the 2010/2013 UNCITRAL Arbitration Rules. However, the UNCITRAL Arbitration Rules provide for additional powers for the appointing authority, in particular to appoint the entire tribunal and, in doing so, to revoke any appointment already made, and to designate who would be the presiding arbitrator in case of multiple parties as claimant or respondent.[2] The UNCITRAL Arbitration Rules also provide a different fallback solution in case the parties do not designate an appointing authority. According to Article 6(3), any of the parties may then request the Secretary-General of the Permanent Court of Arbitration (hereinafter: the PCA)[3] to designate an appointing authority. The PCA therefore has the function of a „designating authority" under the 2010 UNCITRAL Rules.[4]

An appointing authority is a person or entity that has the power to appoint arbitrators without the disputing parties' consent to the appointment of that particular person.[5] In addition to this principal role, the appointing authority is often attributed additional roles, such as deciding on challenges of arbitrators and arbitration

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[1] Zakon o arbitraži (The Arbitration Act), "Službeni glasnik Republike Srbije", No. 46/06.

[2] In addition to those powers provided in Art. 10(1), the UNCITRAL Arbitration Rules provide several other functions for the appointing authority: to decide on challenges – Art. 13(4), to appoint a substitute arbitrator – Art. 14, review the arbitral tribunal's proposal on determining its fees and expenses and make adjustments – arts. 41(3) and 41(4), make comments to the arbitral tribunal concerning the amount of the deposits – Art. 43(3), etc. See in more detail: Brooks W. Daly, "Permanent Court of Arbitration", in: C. Giorgetti (ed.), *International Litigation in Practice: The Rules, Practice and Jurisprudence of International Courts and Tribunals,* Leiden – Boston 2012*,* 42. Sarah Grimmer, "Expanded Role of the Appointing Authority under the UNCITRAL Arbitration Rules 2010", *Journal of International Arbitration*, 28/2011, 501-518. For the enumeration of six main functions for the appointing authority *see* Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010), para. 30.

[3] Basic information on the Secretary-General of the PCA and the list of all previous holders of the function is available at: Introduction: Secretary General, *https://pca-cpa.org/en/about/introduction/secretary-general/*, 27 October, 2020. The Secretary-General has always been a Dutch national.

[4] The term "designating authority" appears in the title to Article 6 of the 2010/2013 UNCITRAL Rules. It did not appear in the 1976 version of the Rules. Under the 2010/2013 UNCITRAL Rules, Article 6.1. the PCA can also be designated as an "appointing authority".

[5] David Gaukrodger, "Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview", *A Consultation Paper* 2018, 22. *https://www.oecd.org/investment/investment-policy/ISDS-Appointing-Authorities-Arbitration-March-2018.pdf.* 27 October, 2020.

costs, and providing administrative support to the arbitral tribunal. The term "appointing authority" seems to have been coined by the UNCITRAL Secretariat during the drafting of the UNCITRAL Arbitration Rules.[6] The term, as such, does not appear in earlier international documents such as the European Convention on Commercial Arbitration (hereinafter: ECICA) and the New York Convention on the Recognition and Enforcement of Arbitral Awards. Fouchard, Gaillard and Goldman observe that the list system that was introduced together with appointing authorities was used by the American Arbitration Association and the Netherlands Arbitration Institute, and that the American and the Dutch practitioners involved in the drafting of the UNCITRAL Rules "pushed for the adoption of that system".[7] Pieter Sanders, Special Consultant to the UNCITRAL Secretariat, said that "the appointment of arbitrators was the most delicate issue in the entire set of arbitration rules".[8] This is not surprising considering the central importance of these appointments for the quality and outcomes of arbitral decision-making.

The topic of appointing authorities does not appear too often in law journals. A title search in the HeinOnline Law Journal Library and Index to Foreign Legal Periodicals renders only a few results.[9] However, the topic has attracted more attention recently in connection with ISDS.[10]

[6] The author could not find the previous international documents that were used as models for the rules (such as the Rules of Procedure of the Inter-American Commercial Arbitration Commission), and therefore could not check whether they contained this term proper. The assumption that the term was coined by UNCITRAL is based on the fact that the UNCITRAL *travaux preparatoires* occasionally refer to appointing authorities under quotation marks which indicates that the term, although not the function itself, was new. See e.g. "International Commercial Arbitration", U.*N. Commission on International Trade Law Yearbook,* 1/1968-1970, 260-284, 266; Report of the Secretary-General: revised set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/112), para.15, undocs.org/en/A/CN.9/112, 27 October, 2020. The 1976 UNCITRAL Arbitration Rules provide for designation of appointing authorities in arts.3(4), 6-8, 12, 38, 39 and 41(3).

[7] Emmanuel Gaillard, John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Kluwer Law International, The Hague – Boston 1999, 538.

[8] UNCITRAL, Committee of the Whole (II), Summary record of the 3rd Meeting, A/CN.9/9/C.2/SR.3, 15 April 1976, para. 53. The initial version of the draft arbitration rules was prepared by the UNCITRAL Secretariat in consultations with the Dutch Professor Pieter Sanders. Report of the Secretary-General: revised set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/112) undocs.org/en/A/CN.9/112, 27 October, 2020".

[9] Tibor Varady, "On Appointing Authorities in International Commercial Arbitration, *Emory Journal of International Dispute Resolution*", 2(2)/1988, 311-358; Gaius Ezejiofor, "Appointment of an Arbitrator under the Nigerian Law: The Procedure and Powers of an Appointing Authority – Nigerian Paper Mills Ltd. v. Pithawalla Engineering GMBH", *African Journal of International and Comparative Law*, 7 (3)/1995, 663-671; Serge Lazareff, "Fostering and Rating Arbitrators' Efficiency: The View of the Appointing Authorities", *Journal of World Investment & Trade*, 5 (1)/2004, 77-88; Ruth Teitelbaum, "Challenge of arbitrators and the Iran-United States Claims Tribunal: defining the role of the appointing authority", *Journal of International Arbitration*, 23/2006, 547-562; S. Grimmer, 3, 501-518.

[10] D. Gaukrodger, 7

It is not accidental that the designation of an appointing authority comes into focus mainly in the context of the UNCITRAL Arbitration Rules. These rules were drafted for the purpose of *ad hoc* arbitration, and it is in the *ad hoc* arbitration that the need for an alternative appointment mechanism usually arises. If the arbitration clause provides for arbitration under the rules of an arbitral institution, there is no need to designate an appointing authority, since the mechanism of appointment of arbitrators, in case the parties cannot agree, will be one of the principal themes of the institutional rules.[11]

2. SIMPLY WRONG DESIGNATIONS: WHEN THE CHOSEN AUTHORITY IS NOT NEUTRAL

Difficulties in selection of impartial judges are well known in domestic judicial systems.[12] They are no less pronounced in selection of international adjudicators. For example, the Hague Conference of 1907 failed in the establishment of an international court of justice (which it was hoped this conference would establish), only because of its inability to reach an agreement as to the method of election of judges.[13] Mr. Elihu Root, the Secretary of State of the United States of America, and one of the leading figures at the Conference, said that:

"There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrations to which they submit may not be impartial."[14]

It is common knowledge that the selection of arbitrators depends on who is making the selection. The organ that is to perform that task must not be biased towards the parties or the subject-matter of the dispute. However, designating a neutral appointing authority ahead of a dispute may prove to be a challenging task for parties unversed in arbitration, because it requires knowledge of the underlying context of different arbitration bodies and of the competences of various players on the international arbitration scene.[15] Also, the circumstances may change from

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[11] The Serbian Arbitration Act also provides in Article 16(4): "If an arbitration is administered by a permanent arbitral institution, the institution shall act as an appointing authority."

[12] Attila Bado, Izbor sudija – nepristrasnost i politika, Zbornik radova, Vol. 48, Issue 1, 2014, pp. 277-316.

[13] Frank B. Kellogg, Limits of the Jurisdiction of the Permanent Court of International Justice, The American Journal of International Law, Vol. 25, No. 2, 1931, pp. 203-213, 208.

[14] Ibid.

[15] Gus van Harten, "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law", in Stephan Shill, *International Investment Law and Comparative Public Law*, Oxford University Press, New York 2020, 643-648. Also available as: All Papers. Paper 13. http://digitalcommons.osgoode.yorku.ca/all_papers/13, 27 October, 2020.

the time the contract is concluded until the arbitration clause in the contract needs to be activated. The arbitral practice is full of examples of mistakes and unexpected turns of events which make the designation of the appointing authority defective for one reason or another. It is worth mentioning the example of *Losinger*[16] that resulted in the claim by Switzerland against Yugoslavia, before the Permanent Court of International Justice in 1935. The failure of arbitration in that case could be said to have originated in the lack of neutrality of the appointing authority. The relevant contract was originally entered into between an American company and a Yugoslav municipality. The arbitration clause provided for two arbitrators each to be appointed by one party. "If these two arbitrators fail to agree, or if one of the Parties fails to appoint an arbitrator within the time specified, the case shall be referred either to the President of the Swiss Federal Court or to a neutral person, who shall be appointed by the latter, and who shall, in the capacity of umpire, give his decision alone upon the dispute." The arbitration clause thus contemplated a dispute between the American company and the Yugoslav municipality, in which a Swiss high-ranking judge as appointing authority would be a neutral. Eventually, the contractual parties changed. The American company as the contractor was replaced by Losinger, a Swiss company. On the other side, the Yugoslav Kingdom stepped into the shoes of the previous employer, the Municipality of Požarevac. Oddly enough, the arbitration clause remained unchanged. When the first claim was filed in 1933, the two arbitrators appointed by the parties, one Swiss and one Yugoslav national, met for the hearing and deliberation in June 1934 in Belgrade but could not agree. The dispute was then referred to the President of the Swiss Federal Tribunal, Henri Thélin who, acting in the capacity of umpire, rendered an award in favor of the claimant, the Losinger company, on 31 October 1934. Several weeks later, in November 1934, a second arbitration was instituted by the Losinger company. This time the Yugoslav government failed to appoint its arbitrator within the time-limit fixed by Losinger. On 24 December 1934, the claimant reappointed Henri Thélin as umpire, less than a week before he would retire and cease to be President of the Swiss Federal Tribunal. Although the Yugoslav government expressed the view that Mr. Thélin could not be arbitrator because he was not a neutral, and suggested modification of the arbitration clause, this did not materialize. Mr. Thélin submitted the respondent's proposal for the modification to Losinger, who did not accept it, so the arbitration continued. Mr. Thélin did not recuse himself and continued to act as umpire. His jurisdic-

[16] PCIJ, *Losinger & Co., Switzerland v. Yugoslavia*, order of 27 June 1936, series A/B no. 67 (joining preliminary objections to merits); PCIJ, *Losinger & Co., Switzerland v. Yugoslavia,* order of 14 December 1936, series A/B no. 69 (discontinuance of proceedings). See in more detail: Maja Stanivuković, Sanja Đajić, "From Losinger to ATA v. Jordan: Retroactive application of national law to arbitration agreements", *Yearbook on International Arbitration and ADR*, (eds. Roth Marianne Herausgeber, Michael Geistlinger) VI/NWV/Wien/2019, 149-170, 156.

tional decision eventually led to the international dispute between the two countries, Switzerland and Yugoslavia. The defect of the arbitration clause in this case lay in the fact that it empowered the President of the Swiss Federal Tribunal to be an appointing authority or arbitrator, at his own choice, in a contractor-state dispute involving a national of Switzerland. Judging by today's rules and standards, such as the ICSID or ICC rules of arbitration, a national of an investor's state could not act as the sole arbitrator without both parties' express consent, and would never be appointed by those institutions.[17] Also, under the UNCITRAL Rules, the appointing authority "shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."[18]

The same rule should apply *mutatis mutandis* to the designated appointing authority. Although Losinger and Yugoslavia failed to amend the arbitration clause at the time of subrogation of the Swiss company into the rights of the American company, the fundamental rule of neutrality of arbitrators -- and also neutrality of appointing authorities -- should have prevailed over the original agreement under the changed circumstances. *Losinger* shows that selecting an office-holder as appointing authority is not always a risk-free decision. It carries similar risks as appointing an individual:[19] the risks that the incumbent will eventually become unavailable (gone out of office) or conflicted.

The question of nationality of the appointing authority, that is an individual holding an office in an international body, has not been regulated in international arbitration law. Nationality is a parameter that is recognized as directly affecting the neutrality of the arbitrator, and for that reason, it is considered when appointing sole and presiding arbitrators, and sometimes even the whole tribunal. Chiara Giorghetti says that: "the nationality requirement, which bars parties from selecting arbitrators who are their nationals [in investment arbitration], is a good example of a guidepost", which is a tool used "to ensure that choice of an arbitrator by the parties is fair and not abused."[20] Pierre Lalive speaks of the "national

[17] Under both ICSID and UNCITRAL Arbitration Rules, as well as under the ICC Rules, certain nationality restrictions apply with regard to appointment of arbitrators.

[18] 2013 UNCITRAL Rules, Art. 6(7); 1976 UNCITRAL Rules, Art.6(4). For example, in an UNCITRAL arbitration between a Serbian branch of the major software producer and the Serbian Republic Geodetic Authority under the World Bank financed software procurement contract, the respondent, upon receiving the notice of arbitration, failed to appoint an arbitrator. The Claimant then applied to the Secretary-General of the PCA, who designated a Belgian national as appointing authority, who appointed a Swiss national as the second arbitrator. See more detail about this case in: Maja Stanivuković, "Adjudication as a Preliminary Step to Arbitration: A Case of First Impression in Serbia", in: *Harmonisation of Serbian and Hungarian Law with the European Union Law*, Novi Sad Faculty of Law, Novi Sad 2018, 137-167.

[19] Gary B. Born, *International Commercial Arbitration*, second edition, Kluwer Law International, Netherlands 2014, 1704.

[20] Chiara Giorgetti, "Who decides who decides in international investment arbitration ", University of Pennsylvania Journal of International Law, Vol. 35, Issue 2, 2013, 431-486, 471.

neutrality" of the third arbitrator as the symbol of impartiality.[21] Nationality should be treated with the same precaution as regards the appointing authorities who are individuals. Nationality of those individuals may affect their actual or perceived neutrality. However, neither the UNCITRAL Rules,[22] nor other international sources of arbitration law,[23] mention this requirement, nor for that matter, the requirement that the appointing authority must be neutral.[24] Before designation, the Secretary-General of the PCA advises the potential appointing authority that it should be and remain independent and impartial.[25] Impartiality presumes that the appointing authority is neutral, i.e. impartiality comes as a result of neutrality.[26] However, there is no recourse under the UNCITRAL Rules in case the appointing authority, designated by the parties, ceases to be neutral for some reason (e.g.

[21] Pierre Lalive, "On the Neutrality of the Arbitrator and of the Place of Arbitration", *Recueil des travaux suisses sur l'arbitrage international*, Lausanne, 1984, pp. 23-33, 28.

http://www.lalive.ch/data/publications/43_-_On_the_Neutrality_of_the_Arbitrator_and_of_the_Place_of_Arbitration_Recueil_de_travaux_suisses_sur_l'arbitrage_international.pdf 30 October 2020.

[22] The *travaux preparatoires* of the UNCITRAL Rules 1976 contain the following remark: „The Chairman said that the question of the nationality of the appointing authority also arose. It is not very practicable to model paragraph 3 on the procedure for the choice of a sole arbitrator and allow the party which named one arbitrator to have the second arbitrator named by a national authority. Thus under article 8, paragraph 3(b), the claimant would be able to apply to the international authority, and if that was the Permanent Court of Arbitration at the Hague, the Court would designate an appointing authority which would designate an arbitrator, without, of course, using a list-procedure." A/CN.9/9/C.2/SR.5, 2, para. 3.

[23] An example of an agreement that takes into account the possibility that the designated appointing authority might eventually become conflicted is the 1933 Concession Agreement between the Government of Persia and the Anglo-Persian Oil Company, Art. 22, which provided that in default of the parties' agreement the third arbitrator was to be appointed by the President of the Permanent Court of International Justice (hereinafter: the PCIJ). If the President of the PCIJ was a British or Persian national or a national of another closely related country designated in that Article, the third arbitrator was to be appointed by the Vice President of the PCIJ. *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Written Proceedings, Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland, 10 October 1951, 256. icj-cij.org/en/case/16/written-proceedings. A more contemporary example is the India Model BIT (2016), Article 18.3., which provides that the appointing authority, whether in ICSID or UNCITRAL should not be a national of either party. If their nationality is the same, the arbitrators shall be appointed by the President of the ICJ, or Vice-President, or the next most senior judge, who is not a national of either party. See in more detail, Prabhash Ranjan and Pushkar Anand, "Chapter 19: Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does it Go Too Far?" in: Julien Chaisse and Luke Nottage*, International Investment Treaties and Arbitration Across Asia*, Brill, Nijhoff, 2018, 579-611, 595.

[24] This is perhaps implied but not expressly stated in the Rules. *See* Chiara Giorgetti who states that: "International arbitrators are selected by parties or *neutral* appointing authorities after much vetting and thought…" [emphasis added]. C. Giorgetti, 21, 472.

[25] S. Grimmer, 3, 502.

[26] Tibor Varadi, "O nepristrasnosti u rešavanju međunarodnih sporova", Zbornik radova, Vol. 23, 1989, 163-180, 169.

because of the change of his or her nationality).[27] It is interesting to note that at its eighth session, the UNCITRAL had given overwhelming support to the establishment of a single appointing authority under the United Nations auspices, probably looking for a completely neutral organ.[28] At the proposal of the Soviet representative, Mr. Lebedev, it was later decided that no additional organ or body except the Secretary-General of the PCA was to be established under the UN auspices for the designation of the appointing authority.[29]

During the negotiations leading to the ECICA, finding a neutral appointing authority in *ad hoc* arbitrations was a difficult issue for the negotiating states because of the then prevailing divide between the East and the West.[30] Ultimately, the contracting parties agreed on a very elaborate procedure that involves: (a) the President of the competent Chamber of Commerce of the respondent's habitual place of residence or seat at the time of notification of the request for arbitration, (b) the President of the Chamber of Commerce of the agreed place of arbitration; and (c) the Special Committee established under the Convention. In case the respondent fails to appoint its arbitrator, the claimant may apply to (a), and subsidiarily to (c), whereas in case the parties cannot agree on the appointment of a sole arbitrator or presiding arbitrator, the claimant may apply either to (a) or (b) if the place of arbitration has been agreed upon by the parties. If no place of arbitration has been agreed upon, the claimant may apply either to (a) or to (c). The Parties may, of course, agree upon a different appointing authority. These provisions that strive to preserve neutrality are rarely put into action, as *ad hoc* arbitrations are nowadays mostly submitted to the UNCITRAL Arbitration Rules, in which case, Article 6 of the UNCITRAL Rules prevails.[31]

Serbia has recently demonstrated that it is not a very good student in arbitration as it did not learn much from the historical experience of Losinger, when it accepted, in negotiations of a BIT with Canada, the following provision on the appointing authority:

> "If a Tribunal, other than a Tribunal established under Article 28, has not been constituted within 90 days from the date that a claim is submitted to arbitration, a

[27] Sarah Grimmer notes a case where the claimant requested that the Secretary-General of the PCA replace the appointing authority on the ground of bias in favor of the respondent. The request was rejected for lack of competence to act. The Secretary-General found that he was not empowered to remove the appointing authority on that ground. S. Grimmer, 3, 503.

[28] UNCITRAL, Ninth session, Committee of the Whole (II), Summary Record of the First Meeting, A/CN.9/9C.2/SR.1 14 April 1976, para. 13.

[29] Summary Record of the Fourth Meeting, A/CN.9/9C.2/SR.4 14 April 1976, para. 37.

[30] Markus Schifferl, "Article IV: Organization of the Arbitration", in Gerold Zeiler and Alfred Siwy, *The European Convention on International Commercial Arbitration: A Commentary*, Kluwer Law International, The Netherlands 2018, 71-80, 73, para. 6. The detailed provisions on the appointment of arbitrators in *ad hoc* arbitration are found in Article IV of the Convention.

[31] *Ibid.*, 74, para. 8.

> disputing party may ask the Secretary-General of ICSID to appoint the arbitrator or arbitrators not yet appointed. The Secretary-General of ICSID shall make the appointment at his or her own discretion and, to the extent practicable, this appointment shall be made in consultation with the disputing parties. The Secretary-General of ICSID may not appoint as presiding arbitrator a national of a Party."[32]

It seems that it is Canada's general policy to identify the Secretary-General of ICSID as the appointing authority in each investment treaty.[33] Such treaty designations of an appointing authority by other countries remain exceptional.[34]

At the time of negotiating the draft of the Treaty, and at the time of writing this Article, the Secretary-General of the ICSID was and is a Canadian national.[35] There is no mechanism in the BIT that would enable a challenge of the appointing authority for lack of neutrality.[36] The scope of the power to designate is broad: it applies regardless of arbitration rules selected, i.e., not only in ICSID arbitrations,[37] but also in UNCITRAL arbitrations that are envisaged under Article 24.[38] In the event of consolidation of several actions which may happen if a disputing party (usually a claimant) seeks a consolidation, the Secretary-General of ICSID is empowered to appoint the entire tribunal, including an arbitrator who is a national of the respondent

[32] Agreement Between Canada and the Republic of Serbia for the Promotion and Protection of Investments, signed on 1 September 2014, entry into force 27 April 2015, Art. 26(4).

[33] Those are the Canada-Moldova BIT (2018), Art.25(4), Canada-Mongolia BIT (2016), Art.25(4), Canada-Hong-Kong BIT (2016), Art.25(4), Canada-Guinea BIT (2015), Art.26(4), Canada-Burkina-Faso BIT (2015), Art.27(4), Canada-Cote-d'Ivoire BIT (2014), Art.25(4), Canada-Mali BIT (2014), Art.25(4), Canada-Senegal BIT (2014), Art.26(4), Canada Nigeria BIT (2014), Art.26(4) (not in force), Canada Cameroon BIT (2014), Art.25(4), Canada-Tanzania BIT (2013), Art.25(3), Canada-Benin BIT (2013), Art. 28(4), Canada-China BIT (2012), Art. 24(5), Canada-Kuwait BIT (2011), Art.25(4), Canada-Jordan BIT (2009), Art.30, etc. The BITs concluded by Canada in or after 2009 when the current Secretary-General of ICSID was appointed, that did not designate this office-holder as appointing authority are the BITs with the Slovak Republic (2010), Latvia (2009), Romania (2009) and the Czech Republic (2009). The benefit of being part of the EU club and therefore a more powerful or more sophisticated negotiator comes out very clearly in this enumeration. Data taken from the UNCTAD Investment Policy Hub, investmentpolicy.unctad.org 30 October 2020.

[34] D. Gaukrodger, 6, 7.

[35] The current Secretary-General of ICSID is a former government official with extensive ISDS experience as counsel of the Canadian government.

[36] Soon after the entry into force of the Agreement, a first ICSID case was initiated against Serbia by a Canadian investor. The Parties have managed to reach agreement on the appointment of the arbitral tribunal and there was no need for action of the appointing authority (Article 26(1) of the BIT provides that the presiding arbitrator shall be appointed by agreement of the disputing parties). The case is still pending.

[37] In ICSID arbitrations, the Secretary-General has an important role in making appointments anyway. For example, the formal appointing authority, the Chairman of the Administrative Council, performs this function as an appointing authority on the recommendation of the Secretary-General. Carolyn Lamm, Ciara Giorgetti and Mairée Uran-Bidegain, "International Centre for Settlement of Investment Disputes", in C. Giorgetti (ed.), 3, 86.

[38] Such broad scope of appointing authority's power used to be provided in NAFTA Article 1124(1).

Party (Serbia).[39] One could imagine a scenario similar to the Argentinian case *Abaclat*,[40] but initiated instead by a multitude of Canadian investors in Serbian state bonds, with a Canadian national designating the entire tribunal. Any potential national bias towards the bondholders on the part of the Secretary-General could easily lead to appointment of investor-friendly arbitrators that could wreak a financial catastrophe on the respondent Party (Serbia) equal to a tsunami. Winston Churchill wrote, "Those that fail to learn from history are doomed to repeat it."

3. IMPERFECT DESIGNATIONS

An *ad hoc* arbitration clause can be vulnerable. Its survival depends on the quality of the drafting. If the drafting is poor, this may cause disputes regarding which institution was designated as the appointing authority. In case of such preliminary disputes, the cooperation of both parties, as well as their knowledge of the basics of arbitration, would be essential and would determine whether the arbitral tribunal would be properly constituted and empowered to render an award. If some of this is lacking, the process of constitution of the arbitral tribunal may become excessively time-consuming and expensive, and may even be "quashed" at a later stage by the selected arbitrators themselves, or by the state court.

Errors in designation of the appointing authority are a common defect affecting arbitration clauses[41] and can make them ineffective or inoperative. The operation of imperfect (pathological) arbitration clauses designating appointing authorities can be demonstrated on two relatively recent examples from the combined UNCITRAL-ICC practice -- *Econet Wireless v. First Bank of Nigeria* and *X, Isle of Man v. Y, Bosnia and Herzegovina* – with the aim to identify the problems and the ways by which they can be overcome.

3.1. Econet Wireless v. First Bank of Nigeria[42]

A Bermuda corporation created a Nigerian corporation to bid for a GSM (cellular telephone) license in 2000. A Shareholders' Agreement was signed by

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[39] The power to establish the entire tribunal in case of consolidation is provided under Article 28 of the Serbia-Canada BIT.

[40] ICSID, *Abaclat and others v. Argentine Republic*, Case No. ARB/07/05, Decision on Jurisdiction and Admissibility of 4 August 2011. This was an investment arbitration where more than 180.000 Italian bondholders claimed that Argentina's sovereign debt restructuring violated their rights under the Italy-Argentina BIT.

[41] G. Born, 20, 1723-1724.

[42] *Econet Wireless Ltd. (UK/South Africa) v First Bank of Nigeria, et al. (Nigeria)*, Award, 2 June 2005 in, Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, Volume XXXI, Kluwer Law International, The Netherlands 2006, 49 – 65 (hereinafter: Econet Wireless).

twenty-one persons and entities, some of them local Nigerian companies, including the First Bank of Nigeria. The Shareholders' Agreement included an arbitration clause which provided:

> "Any dispute, controversy or claim between the Parties arising out of or in relation to the interpretation or execution of this agreement or the breach, termination or invalidity thereof shall be finally settled by arbitration in accordance with the UNCITRAL Arbitration Rules in effect as at the date of the dispute. The number of arbitrators shall be three and they shall be appointed by the Chief Judge of the Federal High Court of Nigeria upon an application by any of the Parties. The Chief Judge shall specify which of the three arbitrators shall serve as the Chairman of the arbitral tribunal. The venue of arbitration shall be Nigeria and the language of the arbitration shall be English."

A dispute eventually arose between the shareholders. In August 2003, the Bermuda corporation initiated arbitration by serving the First Bank of Nigeria, and several other respondents, with a Notice of Arbitration in accordance with the 1976 UNCITRAL Arbitration Rules and the arbitration clause in the Shareholders' Agreement. A copy of this Notice was sent to the Chief Judge, as the designated appointing authority, asking her to appoint the tribunal. The respondents objected to the appointment of arbitrators, arguing that no dispute has yet arisen between the parties. They also argued that the Nigerian court had exclusive jurisdiction for the case as the dispute arose both from the Shareholders' Agreement and from the operation of the Nigerian Companies Act, and it was doubtful whether the scope of the parties' agreement to arbitrate encompassed matters other than their rights and obligations under the Shareholders' Agreement. A litigation in the Federal Court of Nigeria ensued regarding the arbitrability of the case. In those circumstances, the Chief Judge refrained from appointing the arbitrators.

The claimant then addressed the Secretary-General of the Permanent Court of Arbitration (PCA) in The Hague with a request to designate a substitute appointing authority pursuant to Article 7(2) of the 1976 UNCITRAL Rules.

As a rule, when the Secretary-General receives a request to designate an appointing authority, he first conducts a screening of the documents submitted by the party in order to determine that he is competent to act.[43] If the Secretary-General is requested to designate a replacement appointing authority, he or she may remove the existing appointing authority only where the original appointing authority "refuses to act" or "fails to appoint an arbitrator."[44] This *prima facie* review in *Econet Wireless* resulted in a decision reached in November 2003, by which the PCA designated the International Court of Arbitration of the International

[43] S. Grimmer, 3, 502.
[44] Ibid. 503.

Chamber of Commerce (hereinafter: ICC) as a substitute appointing authority. In December 2003, the Bermuda corporation submitted a request to the ICC to appoint all three members of the arbitral tribunal. In February 2004, the ICC informed the parties that it had appointed the arbitral tribunal. The Chairperson of the tribunal was Professor Jan Paulsson.

At the outset of the proceedings, the tribunal carried out a *de novo* analysis of the validity of its own composition, noting that it was not bound by the preliminary decisions of the PCA and the ICC, which acted in a purely administrative capacity, without the benefit of full pleadings, evidence and oral arguments from the parties.[45] The tribunal considered that, in determining whether it was properly constituted, it should first refer to the arbitration clause, then to the 1976 UNCITRAL Rules and finally, where neither of those offered a solution, to the relevant provisions of the Nigerian Arbitration Act.

The tribunal noted that the arbitration clause was somewhat unusual in that the parties abandoned the more common practice whereby one arbitrator is appointed by each side, and the chairperson is appointed by the two arbitrators or an outside institution. This commonplace manner of constituting the tribunal, that is also contained as the default rule in Article 7(1) of the 1976 UNCITRAL Rules, was in this case replaced with an entirely different system, providing for the appointing authority, namely the Chief Justice, to appoint all three arbitrators. Nonetheless, the tribunal understood the parties' motivation. The parties to the Shareholders' Agreement could not have known at the outset how many "sides" would be to any future dispute. Therefore, they chose to delegate the appointment of the entire tribunal to an outside person, presumably one viewed as neutral and trustworthy. Such modification was fully consistent with the spirit and letter of the UNCITRAL Rules according to which "disputes shall be settled in accordance with these rules subject to such modification as the parties may agree in writing".[46] It was also in accordance with the expectations of the parties, who viewed the Nigerian legal system as having a close connection to their activities and their contract.[47] However, the provision offered no fallback procedure to follow, should the Chief Judge fail to carry out her duty. [48]

The tribunal then turned to the 1976 UNCITRAL Arbitration Rules, which the parties incorporated by reference. Article 7 of the UNCITRAL Rules provided:

> "1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.

[45] *Econet Wireless*, para. 5
[46] Ibid. para. 16.
[47] Ibid. para. 23.
[48] Ibid. para. 13-14.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:

(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or

(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within 30 days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6."

The claimant argued that by adopting an alternative appointment procedure, which replaced Article 7(1) of the UNCITRAL Rules, the parties had implicitly agreed to also modify Arts. 7(2) and 7(3) as necessary to ensure, in case of failure of the Chief Justice to appoint, the same outcome as would arise where one of the parties failed to appoint under the standard wording of UNCITRAL Rules Article 7(1): that the vacancies are filled by an appointing authority selected by the PCA.

This argument was rejected. The tribunal compared the text of Arts. 7(2) and 7(3) and the suggested modifications and concluded that "the implicit modification of UNCITRAL Rules Art. 7 suggested by the Claimant would require substantial wordsmithing to be effective."[49]. It would "constitute a major departure from the written text of the Parties' agreement."[50] The tribunal did not outright reject the possibility of such interpretation. Instead, it examined the intentions and expectations of the parties considering that such an interpretation could be justified if it clearly served "to advance the parties' intent". The evaluation of the parties' expectations was based on the following indications: the parties chose Nigerian procedural and substantive law to govern the arbitration; they entrusted the Chief Judge with the appointment of all the arbitrators. On the basis of these factors, the tribunal concluded that the parties must have contemplated that all three arbitrators chosen would be Nigerian jurists, with whom the Chief Judge would naturally be most familiar.[51] The literal interpretation of Arts. 7(2) and 7(3) of the UNCITRAL Rules would not lead to the collapse of the arbitration, because there was the

[49] Ibid. para. 21.
[50] Ibid. para. 22.
[51] Ibid. para. 23.

gap-filling function to be served by the *lex arbitri*. Therefore, the tribunal turned to the Nigerian Arbitration and Conciliation Act (hereinafter: NACA), because neither the Shareholders' Agreement nor the UNCITRAL Rules provided a satisfactory answer to the question posed. The NACA provided that the following procedure should be applied:

> "(3) Where, under the appointment procedure agreed upon by the parties –
> …..
> (c) a third party, including an institution, fails to perform any duty imposed on it under the procedure, any party may request the court to take the necessary measure, unless the appointment procedure agreed upon by the parties provides other means for securing the appointment."

The claimant argued that the "safety net" created by the NACA was illusory. This provision merely permitted a petition to the same instance – the Chief Judge of the Federal High Court – that failed to appoint the tribunal in the first place. The tribunal rejected this argument as unpersuasive. It did not matter for the purpose of the tribunal's analysis whether the NACA provided an effective mechanism to constitute an arbitration tribunal after the Chief Judge failed to carry out her duty. The only questions that the tribunal had to answer were whether the parties reasonably expected that such recourse could be unsuccessful and whether they agreed the PCA would be charged with the task of preventing that eventuality.[52] The tribunal found that there was insufficient evidence to support the notion that the parties agreed or intended to agree to the PCA as the appropriate alternative designating authority. Therefore, the tribunal found that the parties did not agree to any specific procedure to follow should the Chief Judge fail to appoint all three arbitrators:

> "While the Parties may have signed an imperfect arbitration agreement, and one which leads to an undesired result for the Claimants in the present specific circumstances, it is not for us to repair it for them after the fact."[53]

The PCA was therefore not authorized to act as designating authority and to designate the ICC as the appointing authority,[54] and the tribunal, as the product of the ICC's subsequent appointments, therefore declared itself lacking jurisdiction

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[52] Ibid. para. 38.

[53] Ibid. para. 40.

[54] Some authors misunderstood the role played by the PCA in this case to had been the role of an appointing authority: "...the arbitral tribunal decided that the PCA had not in fact been authorized to act as appointing authority in the parties' arbitration agreement (despite doing so)... The PCA was not proper appointing authority under parties' arbitration agreement, which incorporated Nigerian law, requiring Nigerian courts to select arbitrators in default of contractually-agreed mechanism." G. Born, 20, 1708, fn. 400.

to adjudicate the parties' dispute.[55] As it had no jurisdiction, the tribunal declined to apportion the costs and to order the claimant as the losing party to pay them.[56]

The parties drafting the contract in this case have opted to designate the holder of an office, a State-court judge, as appointing authority. Such a choice makes little sense, as State-court judges usually have focuses and competences other than selecting international arbitrators,[57] and concerns other than just the smooth unfolding of an arbitration. Some State-court judges will refuse to act as appointing authority due to their views on the validity of the arbitration clause and/or priority of the court proceedings in which that validity is challenged. Another mistake that the parties made, out of the best intention, was to provide appointment of all three arbitrators at once. This arrangement replaced Article 7 of the UNCITRAL Rules in its entirety, and thus took away authorization from the PCA to substitute the designated appointing authority with another one.

Econet Wireless illustrated not only that there can be imperfect, "pathological" designations of an appointing authority,[58] but also that the 1976 UNCITRAL Rules were insufficient to cure this imperfection.[59] When the time came to amend the UNCITRAL Rules in 2010, this insufficiency was not forgotten. The Rules were appropriately amended. If the appointing authority designated in the contract failed to appoint the arbitrators, the parties to an arbitration agreement similar to the one in *Econet Wireless,* but falling under the 2010 UNCITRAL Rules, could nowadays turn to the PCA and request the PCA to appoint an alternative appointing authority in reliance on Art. 6(4) of the 2010/2013 UNCITRAL Rules:

> "Except as referred to in Article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority."

In spite of the improved wording, the provision could still raise some interpretative issues because it mentions only a failure to appoint one arbitrator ("or if

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[55] *Econet Wireless,* para. 43.

[56] The information on the amount of costs that the parties have incurred to obtain the award of no jurisdiction is not available. However, since the jurisdictional phase of the arbitral proceedings lasted for more than a year, those costs must have been considerable.

[57] G. Born, 20, 1704.

[58] Francisco Gonzalez de Cossio, El Caso Econet: Réquiem por un Acuerdo Arbitral Frustrado, *Revista Brasiliera de Arbitragem*, Vol. IV, 2007, pp. 168-171, 168.

[59] It seems that eventually, another arbitration tribunal was empaneled and the claimant Econet Wireless succeeded with its claims. *See,* https://www.freshfields.com/en-gb/what-we-do/case-studies/econet-case-study/

it fails to appoint an arbitrator''), whereas in *Econet Wireless*, the Chief Judge failed to appoint all three arbitrators. Nevertheless, the non-appointment of all three arbitrators undoubtedly represents a breakdown in the process of constituting an arbitral tribunal that would trigger the application of the first clause of the provision – "if the appointing authority refuses to act". Such interpretation is plausible and would not require the "wordsmithing" that was required under previous Article 7(2) and 7(3) UNCITRAL in *Econet Wireless* to become operative. The revised Article 6 of the 2010/2013 UNCITRAL Rules[60] thus seems to resolve the ambiguity resulting from the situation when the appointing authority refused to act.[61]

3.2. X, Isle of Man v. Y, Bosnia and Herzegovina[62]

In 2010, when the new UNCITRAL Arbitration Rules were revised, the provision on their temporal scope of application was inserted into Article 1(2). According to that provision "the parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules." Accordingly, the arbitration agreements concluded before 15 August 2010 are not presumed to be governed by the 2010 Rules, irrespective of the date of commencement of the proceedings.[63] As a rule, those old agreements remain governed by the 1976 Rules. Thanks to that provision, there are still, even today, a considerable number of arbitrations going on pursuant to the original UNCITRAL Arbitration Rules. One of them was *X, Isle of Man v. Y, Bosnia and Herzegovina* initiated in 2015.

The case concerned a dispute between the claimant, a limited company incorporated in the Isle of Man, and the first respondent, a joint-stock company incorporated in Bosnia and Herzegovina. The dispute arose from a Joint Venture Contract incorporating a company in Bosnia and Herzegovina [the Joint-Venture Company]. In the section on the applicable law, Article 61 provided for the application of the substantive laws of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, while Article 64 provided a dispute resolution clause as follows:

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[60] The UNCITRAL Arbitration Rules have been amended in 2013, by introducing Article 1(4) on transparency in investor-state arbitration. However, this change is of no direct concern to our present topic.

[61] Clyde Croft, The Revised UNCITRAL Arbitration Rules of 2010: A commentary, 9, http://www.austlii.edu.au/au/journals/VicJSchol/2010/55.pdf, 28 October, 2020.

[62] The case has not been reported.

[63] This approach to *ratione temporis* application of the chosen arbitration rules is distinct from the usual approach as reflected in the ICC Rules 2012/2017, Art. 6(1) which provides for the application of "the Rules in effect on the date of commencement of the arbitration, unless [the parties] have agreed to submit to the Rules in effect on the date of their arbitration Agreement."

> "The contracting parties agree to amicably solve disputes that might arise from this contract. In case that is not possible they agree to go to arbitration nominating one representative each who will nominate president by mutual consent. If they do not succeed, the president will be nominated by the Chamber of Commerce Arbitration in Vienna whose decision shall be final and executive.
>
> Arbitration procedure shall apply the rules of UNCITRAL".

As the Joint Venture Contract was signed in 2003, the dispute entailed the application of the 1976 UNCITRAL Arbitration Rules.

The notice of arbitration was sent on 28 April 2015. The claimant invoked Article 64 of the Contract, proposed that the seat of the arbitration be London and the language of the arbitration English, and informed that the details of its nominated arbitrator would be communicated to the respondent once the appointment was made. On 1 October 2015, the claimant informed the respondent that it nominated an English QC as its arbitrator. The claimant invited the respondent to nominate its arbitrator within 30 days from the date of the letter and warned: "Failure to do so will result in the Court appointing the arbitrator on your behalf."

As no response was received from the respondent, the claimant took steps to constitute the tribunal turning to the ICC as if the ICC was the appointing authority designated in the Joint Venture Contract. A Request for Appointment of Arbitrator accompanied with the Notice of Arbitration was sent to the Secretariat of the ICC International Court of Arbitration on 13 November 2015, asking it to appoint an arbitrator on behalf of the respondent pursuant to Article 9(2) of the UNCITRAL Rules and Article 5(1) of the Rules of ICC as Appointing Authority in UNCITRAL or Other *Ad Hoc* Arbitration Proceedings. Noting that the respondent had failed to nominate an arbitrator within 30 days in accordance with the UNCITRAL Rules, the claimant requested the ICC to nominate a suitable arbitrator on behalf of the respondent. At the same time, the claimant remitted the payment of 3000 US$ to the ICC as a fee payable for the Request.

On 25 November 2015, the ICC Secretariat asked the respondent to respond to the Request for Appointment of Arbitrator. In its letters sent on 3 and 11 December 2015, the respondent wrote that it was challenging jurisdiction of the "International Court of Arbitration Headquarters" in this arbitration and would not propose an arbitrator for the following reasons, *inter alia*: the contract did not designate the place of arbitration, the parties should first try to resolve disputes amicably, and in the event they fail, each party shall appoint one arbitrator and the arbitrators of both parties shall mutually agree on the president. In case they do not agree, the president shall be appointed by the International Court of Arbitration of the Chamber of Commerce in Vienna.

On 24 December 2015, the claimant amended the notice of arbitration, but the proposals regarding the place and language of arbitration, and the nominated arbitrator, remained the same.

On 13 January 2016 the ICC Secretariat notified the parties that the matter would be submitted to the Special Committee of the Court shortly. On 27 January 2016, the claimant urged the ICC to act, without undue delays, to avoid causing prejudice to the rights of the claimant.

On 28 January, the respondent's counsel wrote to the claimant, with a copy to the ICC Secretariat, acknowledging the receipt of the amended notice of arbitration and invoking the respondent's right to appoint their own arbitrator or representative, pursuant to Article 7 of the UNCITRAL Arbitration Rules. The counsel stated that the arbitration clause contained in the Contract did not provide for a strict time limit for appointment of the second arbitrator. Even if the thirty-day limit from Article 7(2) of the UNCITRAL Arbitration Rules were applicable, it would start to run, in the respondent's opinion, from the date of receipt of the amended notice of arbitration, which was 4 January 2016. The counsel further noted, regarding the claimant's request to appoint the second arbitrator, that the ICC Court of Arbitration was not designated by the Parties as the appointing authority in Article 64 of the Contract. Firstly, the parties had departed from the mechanism provided in Article 7 of the 1976 UNCITRAL Rules, and had set their own mechanism for appointment of arbitrators. Within the contractual mechanism, the appointing authority was not authorized to appoint the second arbitrator, but only the third, presiding arbitrator. Secondly, even if the appointment of the presiding arbitrator was at stake, the parties had not designated the ICC Court of Arbitration in Paris, but had instead designated the Arbitration Institution of the Chamber of Commerce in Vienna as the appointing authority. For those reasons, the respondent would challenge any appointment of the second arbitrator by the ICC Court as not being made in accordance with the agreement of the parties. The counsel continued by appointing an arbitrator on behalf of the respondent. Regarding the place of arbitration, the respondent's counsel rejected London as an unsuitable venue for the arbitration. Since the Joint Venture Contract was entered into in the Bosnian language (Article 66), and the parties had chosen Bosnian law as the applicable law to the substance of the dispute (Article 61), and since the dispute concerned a company governed by Bosnian law, the most suitable place of arbitration, according to the respondent's assessment, would be Sarajevo. The respondent alternatively proposed Vienna as the place of arbitration. The respondent also proposed that the language of arbitration should be Bosnian, due to the closest connection of the Joint Venture Contract with BiH and the applicability of Bosnian law. As the parties have agreed that the language of their contract was Bosnian (Article 66), the arbitration should also be conducted in the Bosnian language.

After receiving a copy of the respondent's counsel's letter, the ICC Court decided not to act as Appointing Authority for the appointment of a co-arbitrator on behalf of the respondent. However, the Secretariat drew the parties' attention to Article 7(2)(b) of the 1976 UNCITRAL Arbitration Rules, which provides that

in case of the refusal or failure of the appointing authority to appoint an arbitrator within 30 days following the receipt of a party's request, such party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. Should the Secretary General of the PCA designate the ICC as appointing authority, the ICC was ready to proceed with the parties' request without them having to pay another filing fee.

The last-mentioned notice prompted the claimant to address the Secretary-General of the PCA on 1 February 2016, and to request it to designate the ICC Court of Arbitration as the appointing authority pursuant to Article 7(2)(b) of the 1976 UNCITRAL Rules. The claimant remitted the fee of 750 euros to the PCA. The respondent informed the Secretary-General of the PCA on 8 February 2016, that it had appointed the arbitrator on 28 January 2016, enclosing a copy of the letter sent to the claimant on that date. The respondent argued that the request to designate the ICC Court of Arbitration as the appointing authority should be rejected by the Secretary-General since the parties have already designated the appointing authority in their contract. The respondent submitted that the two arbitrators nominated by the parties should proceed to nominate the president by mutual consent. Only if they would not succeed, the power to appoint the president would pass to the designated appointing authority, the Arbitration Institution of the Chamber of Commerce in Vienna. The Secretary-General of the PCA informed the parties that considering that the respondent had appointed the arbitrator on January 28, 2016, the two arbitrators had 30 days (i.e. until February 29, 2016) to agree on the choice of a presiding arbitrator in accordance with Article 7(3) of the UNCITRAL Rules. An unexpected development took place on 15 February 2016 when the arbitrator appointed by the claimant filed a declaration of matters falling under the Orange list of the IBA Guidelines on Conflicts of Interest in International Arbitration.[64] The claimant then appointed another arbitrator on 22 February 2016. In the letter informing the respondent of this new appointment, the claimant stated that the two arbitrators were required to agree on the choice of the presiding arbitrator by 29 February 2016. The two arbitrators informed the parties on 18 March 2016 that they could not agree on the presiding arbitrator. Finally, on 21 March 2016, the claimant contacted the Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), requesting VIAC to act as appointing authority and nominate a suitable presiding arbitrator in the case, pursuant to Article 7(3) of the 1976 UNCITRAL Rules. The claimant remitted the sum of 2000 euros to the VIAC's bank account. After the VIAC sought some clarifications as to the place and language of arbitration, the parties agreed that the seat of arbitration should be Vienna, but could not agree on the language of the arbitration,

[64] The arbitrator had been appointed by the claimant in two other ongoing arbitrations, which fell under paragraph 3.1.3 of the Orange list.

the claimant persisting on English, and the respondent on the Bosnian language. As a result, on 29 April 2016, the VIAC appointed a presiding arbitrator capable of conducting the arbitration proceedings in both English and Bosnian.

The difficulties in constituting the arbitral tribunal in this case (the process of constitution took exactly one year) stemmed from an imprecise designation of the appointing authority and the claimant's misinterpretation of that designation. Pursuant to Article 64 of the Contract, the parties agreed that the authority to nominate the presiding arbitration is "the Chamber of Commerce Arbitration in Vienna". However, this was the translation of the Bosnian text (pursuant to Article 66, the contract was made in the Bosnian language), which stated: "predsjednika arbitraže će imenovati Arbitraža trgovinske komore u Beču". If translated correctly, this would mean that the authority to nominate the presiding arbitrator was the *Arbitration Institution* of the Chamber of Commerce in Vienna (the common way of naming the arbitral institution in the Bosnian language is "Arbitraža", the capital letter indicating the reference to an arbitral institution). However, in the claimant's understanding, the reference to "the Chamber of Commerce Arbitration in Vienna" meant ICC. Supposedly for that reason, the claimant addressed the ICC Secretariat in Paris when the respondent initially failed to appoint an arbitrator. The 2004 Rules of ICC as Appointing Authority in UNCITRAL or other *Ad Hoc* Arbitration Proceedings at that time in force provided that "the present Rules shall also apply where an authority within ICC is requested to act as appointing authority in accordance with the parties' agreement" In a footnote, the 2004 Rules explained that such authority within ICC could be the Chairman or Secretary General of ICC or the President or Secretary General of the ICC International Court of Arbitration. However, it could also be the national committee of the International Chamber of Commerce in Vienna. In that sense, the designation made in Article 64 of the contract could be stretched by a broad interpretation, so as to point to the ICC. In one case before the Paris *Tribunal de grande instance*, the court interpreted a designation of "the official Chamber of Commerce in Paris" as a designation of the ICC as appointing authority.[65] If the ICC court had endorsed such broad interpretation and appointed the second arbitrator on the respondent's behalf, it could have happened that the arbitrators so appointed would later deny jurisdiction as had happened in *Econet Wireless*. The result would have been a waste of time and money spent, only to find out that the whole arbitration procedure had to be commenced anew. The potential disaster was prevented by the respondent's belated appointment of an arbitrator. Such late appointments of co-arbitrators by the parties are often taken into consideration and accepted out of the desire to protect the parties' equal rights in the process of constituting the arbitral tribunal,

[65] Judgment of 13 December 1988, *Societe Asland v. Societe Euro'n Energy Corp*., *Revue de l'arbitrage*, 1990, 521; referred to in: G. Born, 20, 1724.

and to avoid the potential lopsidedness of an arbitral tribunal, in which one party has appointed its chosen co-arbitrator while the other has not.[66] Nevertheless, some uncertainties remained, and the constitution of the tribunal in *X, Isle of Man* did not immediately enter safe waters after that appointment. When addressing the Secretary-General of the PCA, the claimant invoked Article 7(2)(b), the provision which was intended for the situations when:

> "no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor..."

The Secretary-General of the PCA could have interpreted that the clause in question did not validly designate the appointing authority, and could have designated the ICC as appointing authority, as was suggested in the letter from the ICC Secretariat. This scenario could also have led to the arbitrators' declaration of lack of jurisdiction due to the constitution of the tribunal not in accordance with the parties' intentions. The parties have pointed out the close connection of the contract with Bosnia and Herzegovina. Also, the reference to Vienna in the arbitration clause was surely not accidental. Vienna is geographically and culturally far closer to Bosnia than Paris, and the parties' choice of Vienna arbitration institution as the appointing authority made sense, because that institution was more likely to select an arbitrator capable of conducting proceedings in both English and Bosnian languages, as it ultimately did. In this case the *Econet Wireless* disaster was avoided thanks to the timely intervention of the respondent's counsel.

What would have happened if VIAC refused to appoint the presiding arbitrator because it considered, for example, that it was not correctly designated? In that case, Articles 7(3) of the 1976 UNCITRAL Rules could have been invoked by the claimant, and the Secretary-General of the PCA could have been asked to designate a new appointing authority, which would appoint the presiding arbitrator. Thus, although the parties did not determine the place of arbitration, their choice of the 1976 UNCITRAL Rules, provided they did not fundamentally change

[66] G. Born, 20, 1691. *See* for more detail on this common situation, S. Grimmer, 3, 508-509. For example, in the first case of *Mytilineos Holdings v. State Union of Serbia and Montenegro and the Republic of Serbia* (https://www.italaw.com/cases/documents/726, 28 October, 2020), the governments of the State Union of Serbia and Montenegro and the Republic of Serbia initially failed to appoint their arbitrator in the UNCITRAL arbitration, initiated pursuant to the 1997 Greece-Serbia BIT. The claimant therefore applied to the Secretary-General of the PCA to designate the appointing authority who would appoint the arbitrator on behalf of the respondent. The Secretary-General designated Professor Christoph Schreuer. In the meantime, the governments had decided to participate in the arbitration and sent a letter nominating Professor Dobrosav Mitrović as their arbitrator. Professor Schreuer accepted this belated initiative and appointed Professor Mitrović as the second arbitrator.

them, would ensure that the arbitral tribunal would be appointed, although with considerable delay.

Another hypothetical situation would arise if the respondent simply refused to appoint the second arbitrator.[67] The arbitration clause was incomplete in the sense that the parties provided, for the intervention of an appointing authority only in the event the third arbitrator could not be appointed. However, the parties failed to provide for the intervention of the same appointing authority if the second arbitrator could not be nominated. If the claimant had turned to VIAC for this appointment, the arbitral institution could have refused to make the appointment due to lack of power to appoint the second arbitrator, pursuant to the arbitration agreement. The question that would then arise is whether, by agreeing on a procedure of appointment of the party arbitrators that was equivalent to Article 7(1) of the UNCITRAL Arbitration Rules, and by expressly providing for a procedure similar to Article 7(3) for the appointment of the presiding arbitrator (similar although not equivalent, since no time limit was provided for the appointment of the presiding arbitrator), the parties have replaced the entirety of Article 7, including Article 7(2).

In his 1988 article on appointing authorities,[68] Varady discusses two historical cases where a similar issue arose. In the *Peace Treaties Case*,[69] Bulgaria, Hungary and Romania declined to appoint their representatives on the arbitration commissions. By the terms of the Treaties, the Secretary-General of the UN was authorized to appoint the third member of the arbitration commission, in the absence of agreement between the parties in respect of this appointment. The question that the ICJ had to answer was whether the Secretary-General could proceed to make this appointment, even if one of the parties had failed to appoint its representative. In its second Advisory Opinion of 18 July 1950, the Court, reaching its decision by majority, replied that this method could not be adopted since it would result "only in the constitution of a two-member Commission. A Commission consisting of two members is not the kind of commission for which the Treaties have provided."[70] Thus, the issue in this case was not whether the appointing authority could appoint the party-appointed arbitrator, but whether it could fulfil its mission by making its own appointment, which would result in a truncated tribunal. The Court further explained:

> "As the Court has declared in its Opinion of March 30th 1950, the Governments of Bulgaria, Hungary and Romania are under an obligation to appoint their represent-

[67] It was noted that since 2005, approximately 70% of all requests to the Secretary-General of the PCA for the designation of an appointing authority were triggered by a respondent's failure to appoint a second arbitrator. S. Grimmer, 3, 504.

[68] T. Varady, 10, 320-321.

[69] *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania*, 1950 I.C.J. 65, 221.

[70] Ibid. 228.

atives to the Treaty Commissions, and it is clear that refusal to fulfil a treaty obligation involves international responsibility. Nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties for the exercise by the Secretary General of his power of appointment. These conditions are not present in this case, and their absence is not made good by the fact that it is due to the breach of a treaty obligation. The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation cannot be remedied by Creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them."[71]

In the second case, the arbitration clause provided a panel of two arbitrators, and in the event they do not agree, an appointment of an umpire (*tiers arbitre*), to be made by the president of the Paris *Tribunal de grande instance*, who would render a binding award.[72] The *Tribunal de grande instance*, that was designated as appointing authority, when addressed by the claimant, because the respondent had refused to appoint the second arbitrator, considered that this was a simple difficulty in constituting the arbitral tribunal that the court was competent to resolve ("*une simple difficulté dans la constitution du tribunal arbitral qu'il appartient au Président du Tribunal de grande instance de trancher, en application de l'article 1444 du nouveau Code de procedure civile*").[73] Accordingly, the Court set forth a period of one month in which the respondent was bound to appoint the arbitrator, and stated that the two appointed arbitrators had to appoint the third arbitrator within the shortest time, so that the arbitral tribunal is completed. Finally, the Court scheduled the following hearing for some forty days later, at which time it would decide on the difficulties that could arise in the constitution of the arbitral tribunal. Although Varady cites this decision as an example of broader powers of state courts in comparison to contractually designated appointing authorities, and concludes that "the Paris court proceeded to nominate an arbitrator",[74] such an outcome is only looming from the published decision of the Paris *Tribunal de grande instance*. The Court was cautious, and obviously reluctant, to deprive the respondent of its power to appoint the second arbitrator contrary to the parties' agreement.

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[71] Ibid. 228-229. See the overview and the documents of this case at the International Court of Justice website: icj-cij.org/en/case/8, 28 October, 2020.

[72] The umpire system (*tiers-arbitre*) was valid in 1976, at the time when the contract was concluded, but was abrogated in 1980 under Article 1453 of the New Code on Civil Procedure. As a rule, the problem of this kind of arbitration clause was resolved by application of provisions of Article 1454 of the NCCP, under which the court was to appoint the third arbitrator who was to participate in the decision-making from the outset of the proceedings. Philippe Fouchard, Note, Tribunal de grande instance de Paris (Ord. référé) 26 mars 1986, Revue de l'arbitrage, 191.

[73] *Judgment, mars 26, 1986*, Tribunal de grande instance Paris, *Revue de l'arbitrage* 179, 1987.

[74] T. Varady, 10, 321

In the hypothetical scenario in which, first the respondent, and then the VIAC in the *X, Isle of Man* would refuse to appoint the second arbitrator, the claimant would surely turn to the PCA for an appointment of a substitute appointing authority pursuant to Article 7(2)(b) of the 1976 UNCITRAL Rules. The PCA would then, perhaps, designate ICC as the appointing authority. As stated before, the ICC was ready to proceed with the claimant's request to appoint the second arbitrator without the claimant having to pay another filing fee. Since the decision of the ICC would be purely administrative in nature,[75] the arbitral tribunal so appointed could engage in a *de novo* analysis of the validity of its own composition. Thus, ten years later, the *Econet Wireless* drama could have been replayed.

4. CONCLUSION

The real problem with imperfect designation of appointing authorities is not that the arbitrators will not be appointed, but that the parties' intention on who the appointing authority should be and what qualities it should have, may be frustrated. Professional arbitral institutions that often act as appointing authorities follow certain rules that need to ensure a timely constitution of arbitral tribunals, and prevent obstruction of arbitration by a party, usually a recalcitrant respondent. Oriented towards this goal, they may sometimes lose sight of the parties' intent and accept the empowerment that was intended for someone else. There is no legal remedy against their decisions, except asking the very arbitrators that have been appointed by them, to review the validity of that decision. Once the tribunal is constituted, and the empowerment is confirmed by the arbitrators, the parties can do little to prevent their dispute from being arbitrated by the arbitrators appointed by an appointing authority that they did not intend to designate. The last resort is the annulment action before the court, after the whole procedure has been completed and the award rendered. An annulment would certainly not be the most efficient way to correct the issues related to the uncontemplated designations. The key factor is ensuring the participation of the parties in the appointment procedure from the very beginning, and their representation by competent counsel. If those two factors are ensured, it is unlikely that an arbitral institution would accept to act as appointing authority without unequivocal entitlement in the parties' agreement.

Appointing authorities are placed in a key position in an UNCITRAL arbitration. As stated by Gaukrodger,[76] they are positioned at the apex of the arbitral

[75] "[T]he assessments made by the appointing authority (the I.C.C. Court of Arbitration) leading to appointment are by no means *res judicata* for the arbitrator. On the contrary, it appears that the arbitrator must review these assessments, and the decision of the arbitrator may eventually be subject to court review. [references omitted]" T. Varady, 9, 353.

[76] Gaukrodger, 12.

dispute resolution system. They have the power to decide on the selection and appointment of the sole and presiding arbitrators, players who are widely seen as the most important figures for the outcome of the arbitration game, and can also make decisions concerning an appointment of a co-arbitrator on behalf of a non-co-operative party. It is, therefore, of primary importance for the parties to an *ad hoc* arbitration agreement, to designate a neutral appointing authority, and to designate it with sufficient precision, so that no doubts can exist once the dispute arises, on who has the appointing power. The discussed practice of the 1976 UNCITRAL Rules demonstrates that they are not perfect in their regulation of appointing authorities. They do not provide fully developed fallback rules if the party-designed appointment mechanism fails. They do not protect the parties against designation of non-neutral appointing authorities, which raises concerns about possible bias. They also do not provide any recourse for challenging the acceptance of an individual, office holder or an institution to act as appointing authority, when their designation as appointing authority is questioned.[77] Some of these flaws have been mended in 2010 when the new UNCITRAL Rules were promulgated, but some of them remain unamended. In the current system, it is the responsibility of arbitrators to keep in check the possible irregularities in their own appointment procedure. The decision of appointing authorities interpreting *ad hoc* arbitration agreements should be scrutinized so that the true intentions of the parties about their arbitration are implemented. In today's world of increased transparency and accountability, no player in the arbitration game should be exempt from control.

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[77] Article 16 of the 2010/2013 UNCITRAL Arbitration Rules provides that the parties waive, to the fullest extent permitted under the applicable law, any claim against the appointing authority based on any act or omission in connection with the arbitration safe for intentional wrongdoing.

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Одређивање органа именовања у арбитражи по правилима УНЦИТРАЛ-а: грешке и несавршености

Сажетак: *Странке у међународној арбитражи имају право да одреде орган именовања који ће одабрати и именовати арбитре у случају да странке не могу да се споразумеју о томе и који ће одлучивати о изузећу арбитара. Међутим, ако странке немају довољно искуства и знања, или једноставно не посвете томе довољно пажње, може се десити да начине грешке у именовању које ће имати за последицу одређивање органа именовања који није неутралан. Понекад, такође, грешке у састављању одредаба којима се одређују органи именовања чине те одредбе несавршеним и некохерентним, што може да осујети намере странака о избору органа именовања и да се неповољно одрази на арбитражу у целини. У овом раду, испитујемо примену арбитражних клаузула којима се одређују органи именовања користећи два релативно нова примера из праксе у којима су била уговорена Арбитражна правила УНЦИТРАЛ-а, а било је спорно да ли Међународни арбитражни суд МТК (ICC) може да поступа као орган именовања. Циљ овог испитивања је да се утврде проблеми који могу настати због грешака и несавршености у одређивању органа именовања и да се понуде решења.*

Кључне речи: *међународна арбитража, органи именовања, Арбитражна правила УНЦИТРАЛ-а, Међународни арбитражни суд МТК (ICC) као орган именовања.*

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