

Interplay between State Courts and Arbitration: Bless or Curse?

Winter Academy on International Arbitration: Topic 1

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- ▶ We will be exploring the interplay between State courts and arbitration...
- ▶ ... through an examination of 5 frameworks:
 - » UNCITRAL Model Law
 - » England: Arbitration Act
 - » France: Code of Civil Procedure (CCP)
 - » Switzerland:
 - › Federal Act on Private International Law (PILA)
 - › Federal Code of Civil Procedure (CPC)
 - » Russia:
 - › Russian Federation Law on International Commercial Arbitration
 - › Arbitrazh Procedure Code



Overview of Topic 1



Court intervention in granting stays to enforce arbitration agreements



Court intervention in the appointment of arbitrators

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, **refer the parties to arbitration** unless it finds that the agreement is **null and void, inoperative or incapable of being performed**.

Default referral
to arbitration

(2) Where an action referred to in paragraph (1)... has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Parallel
proceedings



- ▶ Mandates referral to arbitration where relevant conditions satisfied
 - » Conditional on timely request of party → court cannot refer the parties to arbitration of its own motion
 - » Request must be submitted before the party submits its first statement on the substance of the dispute
 - » Specific grounds: null and void, inoperative or incapable of being performed
- ▶ ‘Refer the parties to arbitration’ does not specify the type of decision the court should make (e.g. stay, dismissal) → left to national frameworks
 - » Clarifies the court should refrain from hearing/determining the merits of the dispute

Section 9. Stay of legal proceedings.

(1) A party to an arbitration agreement against whom legal proceedings are brought... in respect of a matter which under the agreement is to be referred to arbitration may... **apply to the court in which the proceedings have been brought to stay the proceedings** so far as they concern that matter.

Ability to apply
for stay

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

(3) An application **may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings** against him or **after he has taken any step in those proceedings to answer the substantive claim.**

Limitation
on ability
to apply

(4) On an application under this section the court **shall grant a stay** unless satisfied that the arbitration agreement is **null and void, inoperative, or incapable of being performed.**

Default
stay

(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.



- ▶ Largely similar to the Model Law:
 - » Court must refer to arbitration if conditions for stay satisfied, unless the arbitration agreement is null and void, inoperative, or incapable of being performed
 - » Limitation on ability to apply – must apply before answering a substantive claim (e.g. filing defence, applying for security)
- ▶ Additional requirement that the applying party must take all necessary procedural steps to acknowledge the court proceedings

Article 1448

- ▶ When a dispute subject to an arbitration agreement is brought before a court, such court shall **decline jurisdiction**, except if an arbitral tribunal has **not yet been seized of the dispute** and if the arbitration agreement is **manifestly void or manifestly not applicable**.
- ▶ A court may not decline jurisdiction on its own motion.

Default
declining of
jurisdiction

- ▶ Largely similar to the Model Law:
 - » Court must refer to arbitration where a dispute the subject of an arbitration is brought before it
 - » Parties (not the court itself) must raise objections at the start of the proceedings
- ▶ Key differences
 - » Different grounds to refuse enforcement → where the arbitration agreement is 'manifestly void or manifestly not applicable' **and** a tribunal has not yet been seized of the dispute
 - » Enforcement of agreement = dismissal of litigation (not stay pending proceedings)
 - » Parties can agree that art 1448 will not apply

Article 7

- ▶ If... the parties have concluded an arbitration agreement, the court must **decline jurisdiction** unless:
 - ▶ (a) the defendant has entered an **unconditional appearance**;
 - ▶ (b) the court finds that the arbitration agreement is **null and void, inoperative or incapable of being performed**; or
 - ▶ (c) the **arbitral tribunal cannot be formed** for reasons for which evidently the respondent in the arbitration is answerable.

Default
stay

Grounds to
refuse stay

Article 186

- ▶ 1bis. [The tribunal] shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a State Court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.

Tribunal to
determine
challenge

- ▶ Largely similar to Model Law:
 - » Court must refer to arbitration disputes the subject of an arbitration agreement
 - » Grounds for refusal: null and void, inoperative or incapable of being performed
 - » Similar limitation that defendant must not have entered unconditional appearance
- ▶ Key differences
 - » Additionally provides for: inability to form tribunal caused by respondent
 - » Where tribunal seized first, court must stay proceedings (and dismiss the litigation where tribunal has confirmed its jurisdiction)
 - » Where court seized first, court decides validity of arbitration agreement (unfettered powers of review if seated abroad & summary examination if seated in Switzerland)

Article 8 (ICA)

1. A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, **terminate the proceedings and refer the parties to arbitration** unless it finds that the agreement is **null and void, inoperative or incapable of being performed**.

Default stay

2. Where an action referred to in clause 1... has been brought, arbitral proceedings may nevertheless be **commenced or continued**, and an award may be made, while the issue is pending before the court.

Parallel proceedings

[also reflected in] Article 148 (Arbitrazh Commercial Code)

The court shall **leave a statement of claim without consideration** if, after its acceptance for the court proceedings, it establishes that:

5) there exists an agreement... on an examination of the given case by a reference tribunal, if any one of the parties, **no later than on the day of filing its first claim on the merit of the dispute** in the first instance court, raises on this ground an objection with respect to the consideration of the case in the court, with the exception... when the court establishes that this **agreement is invalid, has lost force or cannot be executed**;

Default stay

- ▶ In substance, identical to Model Law
- ▶ Note, however:
 - » Practical limitations on 'arbitrable matters' e.g. cases involving [sanctions](#), environment harm compensation claims
 - » Some Russian courts do not take an arbitration-friendly approach; see, e.g.
 - › *Decision of the Federal Arbitrazh Court of the West-Siberian Circuit of 26 January 2006 in Case No. F04-9972/2005(19029-A81-28)*
 - › *Dredging and Maritime Management SA v. Inzhtransstroy (Case No. A40-176466/2017)*
 - › *Decision of 21 September 2009 in Case No. KG-A40/9109-09*
 - › *Arkhangelsknefteproduct v Belokamenka (Decision of the Federal Arbitrazh Court of the North-Western Circuit of 30 October 2009 in Case No. A42-6966/2008)*

Comparative Table



	Model Law	England	France	Switzerland	Russia
Can the court decline jurisdiction of its own motion?	No	No	No	Yes	No
Right to enforcement waived when party takes substantive steps in litigation?	Yes	Yes	Yes	Yes	Yes
Can tribunals commence/continue even if the dispute is pending in court?	Yes	Yes	Yes	Yes	Yes
Null and void, inoperative or incapable of being performed standard?	Yes	Yes	No (manifestly void/not applicable)	Yes	Yes
Method of referring to arbitration	N/A	Stay	Decline jurisdiction	Decline jurisdiction	Stay



Discussion

Court intervention in granting stays to enforce arbitration agreements: Bless or Curse?

Article 11. Appointment of arbitrators

(3) Failing... agreement [on an appointment procedure],

(a) [where] three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a **party fails to appoint the arbitrator within thirty days of receipt of a request** to do so from the other party, or if **the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other [prescribed] authority;**

(b) [where] sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, **upon request of a party, by the court or other [prescribed] authority.**

(4) Where, under an appointment **procedure agreed upon by the parties,**

(a) a party **fails to act as required...**, or

(b) the parties, or two arbitrators, are **unable to reach an agreement expected...**, or

(c) a **third party, including an institution, fails to perform any function entrusted to it...**

Default
appointment
procedure

any party may request the court or other [prescribed] authority to take the necessary measure, unless the agreement... provides other means for securing the appointment.

Default
appointment
procedure

(5) A decision on a matter entrusted by paragraph (3) or (4)... to the court or other [prescribed] authority shall be **subject to no appeal**.

No appeal

The **court or other authority**, in appointing an arbitrator, shall have **due regard to any qualifications required...** by the agreement of the parties and to such **considerations as are likely to secure the appointment of an independent and impartial arbitrator** and, in the case of a sole or third arbitrator, shall **take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties**.

Court
considerations

Model Law: Key Features



- ▶ Provides for party agreement and default procedures on procedure for appointment (for 3-member tribunals and sole arbitrators)
- ▶ 30-day default time limits – but no time limit for court to decide on appointment
- ▶ Limitations on court ability to intervene – prior failure to reach agreement or non-compliance with agreed appointment procedure
 - » Prioritises party agreement
- ▶ No appeal of court decision
- ▶ Prescribes matters court shall have regard to in appointment

- ▶ Typically, States adopting the Model Law delegate State courts as the relevant appointing authority
- ▶ However, in some jurisdictions, the power of appointment is delegated to arbitral institutions
- ▶ E.g.
 - » **Australia:** *International Arbitration Regulations 2011* (Cth) s 4
 - › “For subsections 18(1) and (2) of the Act, the **Australian Centre for International Commercial Arbitration** is prescribed.”
 - » **Singapore:** *International Arbitration Act 1994* (Sing) s 8(2)
 - › “The president of the Court of Arbitration of the **Singapore International Arbitration Centre** is to be taken to have been specified as the authority competent to perform the functions under Article 11(3) and (4) of the Model Law.”
 - » See also *Malaysian Arbitration Act 2005* s 13

Section 16 sets out default procedure for appointment

Section 18. Failure of appointment procedure

(1) The parties are **free to agree what is to happen in the event of a failure of the procedure for the appointment** of the arbitral tribunal.

There is **no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.**

(2) If or to the extent that there is no such agreement **any party to the arbitration agreement may... apply to the court** to exercise its powers under this section.

(3) Those powers are—

- (a) to **give directions** as to the making of any necessary appointments;
- (b) to **direct that the tribunal shall be constituted by such appointments** (or any one or more of them) as have been made;
- (c) to **revoke any appointments** already made;
- (d) to **make any necessary appointments itself.**

Extensive
court powers

(4) An appointment made by the court under this section **has effect as if made with the agreement of the parties.**

(5) The **leave of the court is required for any appeal** from a decision of the court under this section.

} Limited
appeals

Section 19. Court to have regard to agreed qualifications.

In deciding whether... and... how to exercise, any of its powers under section 16 (procedure for appointment of arbitrators) or section 18 (failure of appointment procedure), the court shall have **due regard to any agreement of the parties as to the qualifications required of the arbitrators.**

} Court
considerations

Section 17. Power in case of default to appoint sole arbitrator

(1) **Unless the parties otherwise agree**, where each of two parties to an arbitration agreement is to appoint an arbitrator and **one party (“the party in default”)** **refuses to do so, or fails to do so within [28 days]**, the other party, having duly appointed his arbitrator, **may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.**

(2) If the party in default does not within 7 clear days of that notice being given

(a) **make the required appointment**, and

(b) **notify** the other party that he has done so,

the **other party may appoint his arbitrator as sole arbitrator** whose award shall be binding on both parties as if he had been so appointed by agreement.

(3) Where a sole arbitrator has been appointed under subsection (2), the party in default may (upon notice to the appointing party) **apply to the court which may set aside the appointment.**

(4) The **leave of the court is required for any appeal** from a decision of the court under this section.

Special
power in
case of
default

Limited
appeals



- ▶ Default procedures for appointment largely match Model Law – prioritise party agreement
- ▶ Key differences
 - » Unique power for one party to appoint a sole arbitrator where the other party is in default
 - » Specifies particular court powers (Model Law broadly allows for ‘any necessary measure’)
 - » Only specifies that the court must take into account agreement as to required qualifications
 - » Shorter time limits than Model Law in default appointment procedures
 - » Limited appeals – with leave of court

Article 1452

If the parties **have not agreed on the [appointment] procedure:**

(1) Where... **sole arbitrator** and... the parties fail to agree on the arbitrator, he or she shall be appointed by the **[arbitral institution]** or, where there is no such person, by the **judge acting in support of the arbitration;**

(2) Where... **three arbitrators**, each party shall appoint an arbitrator and the two arbitrators so appointed shall appoint a third arbitrator. If a **party fails to appoint an arbitrator within one month following receipt of a request to that effect by the other party, or if the two arbitrators fail to agree on the third arbitrator within one month** of having accepted their mandate, the **[arbitral institution]** or, where there is no such person, the **judge acting in support of the arbitration**, shall appoint the third arbitrator.

Default
appointment
procedure

Article 1453

If there are **more than two parties** to the dispute and they **fail to agree on the procedure for constituting the arbitral tribunal**, the **[arbitral institution]** or, where there is no such person, the **judge acting in support of the arbitration, shall appoint the arbitrator(s).**

Article 1454

Any other dispute relating to the constitution of an arbitral tribunal shall be resolved, if the parties cannot agree, by the **[arbitral institution]** or, where there is no such person, by the **judge acting in support of the arbitration**.

Article 1455

If an arbitration agreement is **manifestly void or manifestly not applicable**, the judge acting in support of the arbitration shall **declare that no appointment need be made**.

Grounds to
refuse
appointment

Article 1460

Application to the judge acting in support of the arbitration shall be made **either by a party or by the arbitral tribunal or one of its members**.

Who can
apply

The judge acting in support of the arbitration shall **rule by way of an order against which no recourse can be had**. However, such order **may be appealed where the judge holds that no appointment need be made for one of the reasons stated in Article 1455**.

Limited
appeals

- ▶ Default procedures largely similar to Model Law
- ▶ Key differences
 - » Function of appointing arbitrators delegated to administering institution → court jurisdiction in residual cases
 - » Default procedure for appointing sole arbitrator and multi-party arbitration only allows for appointment by 3rd party (institution or court)
 - » Tribunal may determine no appointment need be made because arbitration agreement is ‘manifestly void or manifestly not applicable’
 - » Limited appeals where tribunal makes such a determination
 - » Tribunal, any member of tribunal, or party may apply to court
 - » No prescribed considerations to take into account in appointing
 - » Broad power for judge to resolve ‘any other dispute’ relating to constitution of tribunal

Article 179

2. In the absence of...agreement [as to appointment], the **judge where the arbitral tribunal has its seat may be seized with the question**; he shall apply, by analogy, the **provisions of the [CPC] on appointment, removal or replacement of arbitrators**.

3. If a judge has been designated as the authority for appointing an arbitrator, he shall **make the appointment unless a summary examination shows that no arbitration agreement exists...**

Grounds to
refuse
appointment

CPC (Federal Code of Civil Procedure)

Article 362. Appointment by a court

1. Where the arbitration agreement **does not provide for an authority to appoint** the arbitrators, or where **such body fails to appoint the arbitrators within a reasonable time**, the **court of competent jurisdiction** referred to in Art. 356(2) of this Code shall **make the appointment upon the request of a party** in the following cases:

Default
appointment
procedure

(a) where the **parties fail to agree** on the appointment of the sole arbitrator or the presiding arbitrator;

(b) where a **party fails to appoint its arbitrator within thirty days after service of the request** by the other party to do so; or

(c) where the **arbitrators fail to agree on the appointment of a presiding arbitrator within thirty days** of their appointment.

2. In case an arbitration **involves more than two parties**, the court of competent jurisdiction referred to in Art. 356(2) of this Code **may appoint all the arbitrators**.

3. If a court is **requested to appoint an arbitrator**, it **shall do so unless a summary examination of the matter shows that the parties are not bound** by an arbitration agreement.

Default
appointment
procedure

Grounds to
refuse
appointment

Switzerland: Key Features



- ▶ Largely similar procedure to Model Law
- ▶ Does not explicitly address failure of agreed appointment procedure – but case law indicates parties may nonetheless seek court assistance
- ▶ No time limits for parties in default procedure and for court to decide
- ▶ For multi-party arbitrations, court may directly intervene and appoint all the arbitrators
- ▶ No prescribed considerations for court in making appointment
- ▶ Limited appeals where court refuses to make an appointment
- ▶ Courts may refuse to enforce where on summary assessment arbitration agreement is invalid

Article 11. Appointment of arbitrators

3. Failing the agreement provided for in clause 2 [relating to appointment]:

1) [where] three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; **if a party fails to appoint the arbitrator within thirty (30) days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty (30) days of their appointment, the appointment shall be made, upon request of a party, by the competent court;**

2) [where] sole arbitrator, if the parties are **unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the competent court.**

4. **Any party may request the competent court to take the necessary measures**, taking into account the appointment procedure agreed upon by the parties, as long as the agreement on such procedure does not provide other means for securing the appointment, **in the event where under the appointment procedure agreed upon by the parties:**

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

Default
appointment
procedure

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

Default
appointment
procedure

Article 11. Appointment of arbitrators

- ▶ 5. If an arbitration agreement of the parties provides for administration of a dispute by a **permanent arbitration institution**, the parties **may by their direct agreement exclude the possibility of resolving this matter by a court** (if the parties by their direct agreement have excluded such possibility, in cases specified in second to fourth paragraphs of clause 4 of this article the arbitration terminates and the dispute may be referred for resolution to a competent court.)
- ▶ 6. In appointing an arbitrator the **competent court shall have due regard to any requirements to arbitrator stipulated by the agreement of the parties and any considerations which could assist in the appointment of an independent and impartial arbitrator.**

Ability to
waive

Court
considerations

- ▶ Largely mirrors Model Law, however:
 - » Court not expressly required to take into account advisability of appointing an arbitrator of a nationality other than that of the parties in the case of sole and third arbitrators
 - » If parties specifically agree in the arbitration agreement that their arbitration shall be administered by a permanent arbitration institution, which shall resolve all matters connected with the appointment of arbitrators, and that agreement fails, the arbitration proceedings thus terminate automatically and dispute may be resolved by court (serious deviation from Model Law)

Comparative Table



	Model Law	England	France	Switzerland	Russia
Appointing authority	Court (or arbitral institution in some jurisdictions)	Court	Administering institution or court (if ad hoc)	Court	Court
Who may apply to the appointing authority?	Party	Party	Any member of tribunal or party	Party	Party
Time for appointing a sole arbitrator	N/A	28 days	N/A	N/A	N/A
Time to appoint party-appointed arbitrator	30 days	14 days	1 month	30 days	30 days
Time to appoint third arbitrator	30 days	No limit	1 month	30 days	30 days
Relevant considerations for appointing authority	<ul style="list-style-type: none"> - qualifications agreed on by the parties - considerations as are likely to secure the appointment of an independent and impartial arbitrator - for a sole or third arbitrator, the advisability of appointing an arbitrator of a different nationality 	Agreement of the parties as to required qualifications	No express guidance	No express guidance	<ul style="list-style-type: none"> - requirements stipulated by party agreement - considerations which could assist in the appointment of an independent and impartial arbitrator

Comparative Table



	Model Law	England	France	Switzerland	Russia
Rights of appeal?	No	Yes (limited, in accordance with the Arbitration Act)	Yes (where judge holds that appointment not needed because of agreement's invalidity)	Yes (where judge holds that appointment not needed because of agreement's invalidity)	No
Other unique features?		<ul style="list-style-type: none"> - provides specific court powers - provides for umpire and two arbitrator procedures - power for sole party to appoint sole arbitrator where other party in default - limited appeals available 	<ul style="list-style-type: none"> - general court power to resolve 'any other dispute' relating to constitution of the tribunal - provides for multi-party arbitration procedure 	<ul style="list-style-type: none"> - power to refuse to appoint where no valid agreement - provides for multi-party arbitration procedure 	<ul style="list-style-type: none"> - if the parties directly agree that the arbitration will be administered by a permanent arbitration institution, which shall resolve matters relating to appointment, and that agreement fails, the arbitration proceedings terminate automatically



Discussion

Court intervention in the appointment of arbitrators:
Bless or Curse?



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