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Interpretation of Pathological Arbitration Agreements: Non-existing and Inaccessible Elements

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I. INTRODUCTION

A distinctive—but common—pathology exists when the arbitration agreement refers to an arbitration institution or to institutional arbitration rules which simply do not exist.[1] Accordingly, the arbitration agreement contains a *non-existing element*. It is characteristic that the arbitration agreement contains standard features and—as commercial arbitration agreements most often do—refers to a specific arbitration institution. For instance: "the New York Commercial Arbitration Association", "the American Arbitration Society in Bakersfield, California", "the United States Council of Arbitration", "the Copenhagen Maritime Arbitrators Association", or "the International Arbitration Center of European countries".

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[1] Lawrence Boo, *The Enforcement of Arbitration Agreements under Article 8 of the Model Law*, *in* THE UNCITRAL MODEL LAW AFTER TWENTY-FIVE YEARS: GLOBAL PERSPECTIVES ON INTERNATIONAL COMMERCIAL ARBITRATION 29, 43, (Frédéric Bachand & Fabien Gélinas eds., 2013) ("common"); SIMON GREENBERG, CHRISTOPHER KEE & J. ROMESH WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 1, 200 (2011) ("the most common," and references therein); JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN MICHAEL KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 7–75, (2003) ("A typical defect"); JAN PAULSSON, ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 1, 130 (3rd ed. 2000) ("probably the most frequent one").

The examples initially appear to be realistic designations, which are hardly distinguishable from the names of existing institutions. In other words, the pathology is not visible to the naked (untrained) eye and therefore typically only surfaces when a party is about to initiate arbitration proceedings and finds that the institution in question does not actually exist. However, this is not an issue if—despite inaccurate or incorrect designation—it is in reality clear from the circumstances, which institution is referred to.

It is likewise not an issue if the non-existent element is merely stated as *an example*, e.g. "*such as* the rules of the London Arbitration Association".[2] Correspondingly, this is the case if the reference in the arbitration agreement is not to a specific institution, but on a more general level refers to e.g. "an arbitrary commission applying French laws."[3]

In most cases, it is a matter of conjecture as to how non-existent elements find their way into commercial contracts. Case law rarely discusses the reasons behind it.[4] However, it is not difficult to imagine how the parties reach an agreement on institutional arbitration in New York but fail to pay sufficient attention to the name of the institution. Something including "Association," "Center," or "Chamber" is a good guess, and due to haste, the parties do not check the exact names. Alternatively, it may simply be due to bad (machine) translations. However, there are no examples in case law providing the basis for questioning the parties' good faith in respect of the non-existence; which is moreover consistent with the fact that the phenomenon often involves foreign (non-local) parties or parties drafting in a foreign language.[5]

Closely related to the non-existing elements are the cases where the arbitration agreement refers to an institution or a person that exists (or has existed), but which due to other circumstances is *inaccessible* to the parties, e.g. because the institution refuses to handle the appointment and administrate the process, or because the person in question is no longer practising or is fully booked.[6] In the following, inaccessible elements are included concurrently with non-existing elements, while the main focus—in accordance with the concentration of case law—will be on the latter.[7]

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[2] Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 473 (9th Cir. 1991) (emphasis added).

[3] Jain v. de Mere, 51 F.3d 686, 688 (7th Cir. 1995).

[4] *But see* HKL Group Co. Ltd. v. Rizq Int'l Holding Pte. Ltd., [2013] SGHCR 5, ¶ 2 ("This clause was drafted without legal assistance . . . ."); Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 1 H.K.C. 404, 408 (H.K.) ("I imagine the problem is caused by contract drafters not drafting in their native tongue . . . ."); *Standard Fruit Co.*, 937 F.2d at 473 (9th Cir. 1991) ("'deep sense of urgency on both sides,' the 'exceedingly tight time schedule,' and the 'highly political nature of the agreement . . . .' [D]uring the negotiation themselves, neither side could remember the name of the arbitration body in London . . . .").

[5] *See Lucky-Goldstar Int'l (H.K.) Ltd.*, [1993] 1 H.K.C. at 408 ("Many contract drafters seem to have difficulty in the fairly simple task of drafting an arbitration clause or even replicating a standard form clause. . . . I imagine the problem is caused by contract drafters not drafting in their native tongue").

[6] *See generally id.*

[7] If the inaccessibility is caused by subsequent circumstances (i.e. after the conclusion of the arbitration agreement), it may be argued that the instance cannot be qualified as a 'pathology' (see further in Part II below). However, as

Arbitration agreements with non-existing or inaccessible elements are pathological, because the agreed terms of the arbitration process (the procedural rule) de facto are inoperable. Based on the distinction between jurisdictional allocation and procedural rules the following scenarios exist:[8]

(1) *The procedural rule is 'curable'*: In the analysis, an existing or accessible element is identified and the arbitration agreement is enforced in its entirety (*Solution 1*).

(2) *The procedural rule is 'incurable,' but the pathology does not 'infect' the jurisdictional allocation*: The pathological procedural rule is severed and the jurisdictional allocation is enforced; the arbitration agreement is potentially supplemented with new ('healthy') procedural rules (*Solution 2*).

(3) *The procedural rule is 'incurable' and 'infects' the jurisdictional allocation:* The pathology is fatal to the jurisdictional allocation and the arbitration agreement is disregarded in its entirety (*Solution 3*).

There is hardly any doubt that if the circumstances of a case provide the basis for establishing that the parties in reality intended to refer to a specific existing or accessible institution/person, the arbitration agreement will be interpreted accordingly (*Solution 1*).[9] This is consistent with the general contract law interpretation principles. However, case law shows that such basis rarely exists,[10] which undeniably correlates with the arbitration agreement's status as a *midnight clause*.[11] Therefore—in practice—the choice typically stands between *Solution 2* and *Solution 3*.

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case law does not provide a basis for making a distinction in this regard, such a distinction will not be pursued in the following.

[8] *See infra* Part II concerning the components of the arbitration agreement.

[9] *See* Laboratorios Grossman, S.A. v. Forest Labs., Inc., 295 N.Y.S.2d 756, 757 (N.Y. App. Div. 1968) ("[I]f it should be found that the parties really intended to arbitrate pursuant to the rules of the Inter-American Commercial Arbitration Commission [as submitted by one of the parties], then arbitration before that tribunal should be directed, and nothing further need be determined.").

[10] *See* Tennessee Imports, Inc. v. Filippi, 745 F. Supp. 1314, 1326 (M.D. Tenn. 1990) (where the arbitration agreement's reference to the non-existent "Arbitration Court of Chamber of Commerce in Venice (Italy)" was interpreted as an agreement on ICC arbitration in Venice (Italy), as submitted by the Italian party and unchallenged by the American counterparty).

[11] *See, e.g.* NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN & HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.01, 2.04 (6th ed. 2015) ("These [arbitration] clauses are often 'midnight clauses'—that is, the last clauses to be considered in contract negotiations, sometimes late at night or in the early hours of the morning. Insufficient thought is given to how disputes are to be resolved (possibly because the parties are reluctant to contemplate falling into dispute), and an inappropriate and unwieldy compromise is often adopted"); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 771 (2d ed. 2014) ("Indeed, it is surprising how frequently parties purport to enter into gravely defective or 'pathological' arbitration agreements."); KAJ HOBÉR, INTERNATIONAL COMMERCIAL ARBITRATION IN SWEDEN 1, 142 (1st ed. 2011) ("These simple facts notwithstanding, arbitration clauses are still being neglected by contract negotiators. They are often saved until the end of the negotiations"); LEW ET AL., *supra* note 1, at ¶¶ 8-2, (2003) ("The arbitration clause is frequently included late in contract negotiations, sometimes as a boilerplate clause or as an afterthought, without debate or consideration of the specific needs of the case."); PAULSSON, ET AL., *supra* note 1, at 128 ("Some negotiators seem to believe they can remain in limbo, poised timorously somewhat between arbitration and ordinary court action and

A narrow linguistic interpretation supports *Solution 3*, because the non-existing or inaccessible element—the procedural rule—can inherently not be carried through.[12] However, weighing against *Solution 3* is the fact that the arbitration agreement—discounting the non-existing or inaccessible element—typically does not give rise to calling the jurisdictional allocation into question.[13] By way of illustration see the following arbitration agreement: "*All disputes shall be finally settled by arbitration* in New York in accordance with the Commercial Arbitration Rules of the New York Commercial Arbitration Association" (emphasis added).[14]

Even though the 'Arbitration Association' in question does not exist, there is, all other things being equal, no reason to doubt that the arbitration clause is based on an intention of the parties to settle disputes by arbitration (in New York). Thus, the question is, whether the jurisdictional allocation and the unenforceable procedural rule are inseparably linked—i.e. whether the pathological procedural rule '*infects*' the jurisdictional allocation (*Solution 3*)—or whether the jurisdictional allocation as expressed in the arbitration agreement survives the pathology (*Solution 2*).

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not needing to strike out on one path or the other until a dispute arises. This is a fallacy."); PAUL A. GÉLINASARBITRATION CLAUSES: ACHIVING EFFECTIVENESS, IN IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 47 (Albert Jan van den Berg ed., 1999) ("How many contracts providing for arbitration are negotiated and drafted with any arbitration expertise input? I venture to say that only a minimal number benefit from any real contribution in this regard."); Eric Robin, *What Companies Expect of International Commercial Arbitration*, 9 J. INT'L ARB. 31, 32 (1992) ("Very often that clause is the last to be discussed by the parties in their negotiations. In a hurry to finalize their negotiations, they often tend to overlook it. Was the contract not the subject of lengthy and arduous discussion! It is, therefore, difficult to conceive that it should contain any ambiguity: there was provision for every possibility, everything was in order. Is it not unbecoming to envisage a dispute even before finalizing negotiations? Would that not awake doubts in the other party's mind and make him suspect bad faith and thus compromise the long-awaited finalization? In addition, engineers or businessmen are not at ease in the field of pure law."); Piero Bernardini, *The Arbitration Clause of an International Contract*, 9 J. INT'L ARB. 45, 45 (1992) ("This lack of attention is usually explained by the fact that the negotiators of both parties tend to concentrate their efforts on the economic, financial and commercial terms of the deal they intend to conclude and are not prepared, once agreement is reached on those terms, to run the risk of discussions being reopened and the signing of the agreement being delayed for what they consider to be simply one of several 'boiler-plate' clauses, to be left to the care of their respective legal counsels, such as provisions dealing with *force majeure*, applicable law or notices.").

[12] PHILIPPE FOUCHARD & BERTHOLD GOLDMAN, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 263 (Emmanuel Gaillard & John Savage eds., 1999) ("If interpreted literally, these clauses would be ruled ineffective.").

[13] LEW ET AL., *supra* note 1, at ¶¶ 7–75, (2003) ("While these clauses refer to non-existing institutions they show clearly that the parties intended to submit their disputes to arbitration. For this reason, courts and tribunals are reluctant to consider these clauses void for uncertainty."). *See also* DAVID JOSEPH, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT ¶ 4.78 (3d ed., 2015) ("The court, however, will be very reluctant, except in an extreme case, to find that a dispute resolution agreement simply fails for uncertainty or unworkability," and references therein).

[14] Warnes S.A. v. Harvic Int'l, Ltd., 1993 WL 228028 (S.D.N.Y. June 22, 1993).

Therefore, it is relevant to look at the correlation between having the arbitration agreement set aside, because it is "inoperative or incapable of being performed",[15] and the lex arbitri default-mechanism for remedying a defective procedure. To the extent that the lex arbitri rules regulate where the arbitration procedure cannot proceed as agreed and thus *enable the arbitration process to proceed in spite of the defect,* it can inherently not generally be assumed that the arbitration agreement is inoperable with reference to same defect.

It has been stated that the enforcement of arbitration agreements containing non-existing or inaccessible elements may imply a risk of a later arbitration award being set aside, because the arbitration procedure "was not in accordance with the agreement of the parties".[16] However, the assumption seems to ignore that this is not a case of setting aside or amending an agreement between the parties, but of interpreting and supplementing an unclear/defective procedure using the gap-filling rules. The purpose and the considerations behind the New York Convention and the UNCITRAL Model Law do not support that "the agreement of the parties"[17] be interpreted narrowly as a reference to the exact wording of the agreement—with the result that many arbitration agreements must be set aside as inoperable.

In accordance with this, *Lucky Goldstar* states that the possibility that inaccessibility *may* imply that the arbitration agreement is "incapable of being performed": "would *only* apply if the curial law of the state where the arbitration was taking place had no provision equivalent to ss. 9 and 12 of the [Hong Kong] Arbitration Ordinance and Article 11 of the Model Law."[18] Further *Born* states: "[The UNCITRAL Model Law] Article 11(4) also impliedly confirms that an arbitration agreement may generally remain valid and binding, notwithstanding the failure of the parties' agreed mechanism for appointing the arbitrator(s)."[19] See also *KVC Rice*: "[I]n a case to which either s 13 of the [SG]AA or Art 11(3) of the Model Law applies, the absence of provisions concerning the establishment of the arbitral tribunal would not pose significant difficulties because the parties can invoke the statutory mechanisms […] to make the necessary appointments."[20]

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[15] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(3), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]; U.N. Commission on International Trade Law, Model Law on International Commercial Arbitration, Art. 8(1), U.N. Doc A/40/17, Annex I (June 21, 1985) [hereinafter UNCITRAL Model Law].

[16] Milo Molfa, *Pathological Arbitration Clauses and the Conflict of Laws*, 37 H.K. L.J. 161, 181–82, and n. 75–76 (2007) ("The risk of being too eager in rescuing arbitration clauses containing an inaccurate reference to an arbitral institution would be to trigger the application of Art V(1)(d) [NYC] when the enforcement of the award is sought").

[17] New York Convention, *supra* note 15, at art. V(1)(d); UNCITRAL Model Law, *supra* note 15, at art. 36(1)(*a*)(iv).

[18] Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 1 H.K.C. 404, 407 (H.K.) (emphasis added).

[19] BORN, *supra* note 11, at 1715.

[20] K.V.C. Rice Intertrade Co. Ltd. v. Asian Mineral Res. Pte. Ltd. [2017] SGHC 32, ¶ 30.

Conversely, the possibility that the arbitration agreement may lapse due to pathological procedural rules is not precluded under the New York Convention, the UNCITRAL Model Law, or the typical lex arbitri.[21]

In the following, I will initially present the terminological and analytical framework for handling pathological arbitration agreements (Part II). Against this background, I will analyse case law from USA (Part III), Singapore and Hong Kong (Part IV), and England (Part V) in order to establish under which circumstances *Solution 1*, *Solution 2* and *Solution 3* apply in respect of arbitration agreements containing non-existing and inaccessible elements. Finally, Part VI considers an adjoining—although fundamentally different—interpretation situation across jurisdictions. Part VII provides a summary as well as concluding remarks on the drafting of arbitration agreements.

II. THE PATHOLOGY CONCEPT AND THE COMPONENTS OF THE ARBITRATION AGREEMENT

The arbitration law expression "pathological arbitration agreement" is ascribed to the Frenchman Frédéric Eisemann's iconic article *La clause d'arbitrage pathologique* from 1974.[22] Eisemann is a former secretary general of the ICC's International Court of Arbitration, and the article provides—in Eisemann's own words—insight into the *musée noir* of arbitration law and presents the most characteristic *perles*, which Eisemann encountered in ICC context.[23] According to Eisemann, an arbitration agreement is pathological if—due to its drafting—it does not support one or more of the arbitration agreement's four essential functions.[24]

Eisemann places pathological arbitration agreements into two main categories: (A) Arbitration agreements that—even though they do not directly contradict the essential

[21] *See also* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 159 (1981). Regarding the question of "incapable of being performed" under the New York Convention art. II(3), "[i]t would also apply to cases where the arbitrator named in the agreement refuses to accept his nomination, or the appointing authority designated in the agreement refuses to make the appointment of the arbitrator. Under the law applicable to the arbitration agreement, these cases may cause the termination of the arbitration agreement."

[22] Frédéric Eisemann, *La Clause d'arbitrage pathologique*, *in* COMMERCIAL ARBITRATION: ESSAYS IN MEMORIAM EUGENIO MINOLI 129–61 (1974). As an example of the continuing practical relevance of Eisemann's article, see, e.g. HKL Group Co. Ltd. v. Rizq Int'l Holding Pte. Ltd., [2013] SGHCR 5, ¶ 17–19.

[23] Eisemann, *supra* note 22, at 129.

[24] *Id.* at 130 (*les fonctions essentielles de la clause d'arbitrage*) (referenced by Benjamin G. Davis, *Pathological Clauses: Frederic Eisemann's Still Vital Criteria*, 7 ARB. INT'L 365, 365–88 (Dec. 1991) ("(1) The first, which is common to all agreements, is to produce mandatory consequences for the parties, (2) The second, is to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award, (3) The third, is to give powers to the arbitrators to resolve the disputes likely to arise between the parties, (4) The fourth, is to permit the putting in place of a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement.")).

functions of the arbitration agreement—cause difficulties that must be overcome, and (B) arbitration agreements that do not fulfil one or more of the essential functions:

Pathology group A (Les clauses pathologiques au 1er degré) consists of arbitration agreements that give rise to difficulties with respect to (a) appointment of arbitrators and (b) procedure and choice of law.[25] This category includes arbitration agreements that set out ambiguous, inoperable, or incomplete requirements for the appointment of arbitrators or the procedure in general, including requirements that complicate the interaction with (ICC's) arbitration rules.[26] This category also includes excessive levels of detail.[27]

Pathology group B (Les clauses pathologiques au second degré) is subdivided into (a) arbitration agreements where the appointment of arbitrators requires a new agreement or the intervention of the courts; (b) arbitration agreements where "dangerous" limits for the jurisdiction of the arbitration tribunal are set out; and (c) arbitration agreements that have been so poorly drafted that they cannot even be designated as arbitration agreements (*les clauses hyperpathologiques*).[28]

Eisemann's categorizations are not (any longer) operational for the pathologies most often seen in case law.[29] The core of the pathology concept is that the arbitration agreement is *born* (agreed on) with an *inherent disease* (defect),[30] i.e. that the agreement is drafted in a way that from the time of entering into the agreement raises questions concerning its own interpretation,[31] and hence is liable to disrupt the smooth progress of the arbitration.[32]

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[25] Eisemann, *supra* note 22, at 132.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 149.
[29] *See* Davis, *supra* note 24.
[30] Defect or defective is often used as an alternative or synonym for pathological. *See e.g.* BLACKABY, ET AL., supra note 11, at ¶ 2.197; Derek P. Auchie, *The Liberal Interpretation of Defective Arbitration Clauses in International Commercial Contracts: A Sensible Approach?*, 10 INT'L ARB. L. REV. 206 (2007); Clive M. Schmitthoff, *Defective Arbitration Clauses*, J. BUS. L. 9 (1975).
[31] James Spigelman, *The Centrality of Contractual Interpretation: A Comparative Perspective*, 81 ARB. 234, 246 (2015) ("contain verbal and grammatical errors which require interpretation."); BORN, *supra* note 11, at 771 ("parties frequently agree to less detailed – and sometimes much more confused – arbitration clauses."); PAULSSON, ET AL., *supra* note 1, at 127 n. 1 ("mistakes in drafting arbitration agreements and clauses, not with fraud."); Marie-Helene Maleville, *"Pathological" Arbitration Clauses*, 1 INT'L BUS. L. J. 61, 61–83 (2000), ("the ambiguity or imprecision of [arbitration] clauses."); Dorothee Schramm, Elliott Geisinger & Philippe Pinsolle, *Article II, in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 37, 58 (Herbert Kronke et al. eds., 2010) ("poorly drafted agreements that are incomplete, unclear, or contradictory, and thus lead to confusion as to the parties intent.").
[32] *Compare* FOUCHARD & GOLDMAN, *supra* note 12, at 261–262 ("[C]ontain a defect or defects liable to disrupt the smooth progress of the arbitration."), *with* Molfa, *supra* note 16, at 162, *and* ANDREA M. STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION ¶ 7.46 (Loukas Mistelis ed., 2012). *See* Duarte G. Henriques, *Pathological Arbitration Clauses, Good Faith and the Protection of Legitimate Expectations*, 31 ARB. INT'L 349, 354 (June 2015) ("[C]ontains a defect or defects liable to disrupt the smooth progress of the arbitration"); STEFAN LINDSKOG, SKILJEFÖRFARANDE: EN KOMMENTAR 117 (2d ed., 2012) (roughly stating "an arbitration agreement that for vari-

From this, three delimitations follow:

First, the pathology concept presumes the existence of a valid agreement. Traditional questions of existence and validity, among others, fall outside the concept.[33]

Second, the pathology concept is not delimited to agreements, which *cannot be enforced*, i.e. instances where the disease is *incurable* and thus fatal for the arbitration agreement.[34] Such (narrow) perception is not expedient, since the pathology concept in this case obtains a prescriptive content, which presumes a preceding procedure. The value of the concept lies in describing an *inherent state* of the arbitration agreement. Whether (and how) this state is "curable" does not change the original "sickliness". See also Singapore Court of Appeal:

Calling the Arbitration Agreement 'pathological' does not, of course, change its legal character or its substance. [...]A defect in an arbitration clause does not necessarily negate the agreement thereby constituted. It depends on the nature or the substance of the defect, or whether the defect is curable. The concept of a pathological clause fulfils a *descriptive* function rather than a *prescriptive* function and labelling or describing a clause as 'pathological' does not automatically invalidate it as an agreement.[35]

Third, the concept solely includes issues in the agreement, which can be ascertained *from the beginning*, i.e. already on the basis of the wording of the arbitration clause.[36]

The question of interpreting the *scope of the arbitration agreement* thus falls outside the pathology concept. The scope of the arbitration agreement concerns which disputes the agreement includes, i.e. the wording of the scope may cause difficulties with respect to delimiting the arbitration tribunal's jurisdiction.[37] However, these difficulties arise in light of the substantive disputes and claims between the parties that arise later and thus are not an expression of an *inherent disease* that can be ascertained at the time of entering the agreement.[38]

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ous reasons does not work,"). *See also* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 2-16, reporters' note (a) (AM. LAW INST., Tentative Draft No. 4, 2015) ("[A]greements drafted in such a way that, rather than providing for speedy resolution of the underlying dispute, they inadvertently generate disputes as to their own interpretation and may even cause the arbitration agreement to be denied enforcement altogether.").

[33] See in this regard UNCITRAL, *UNICTRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 38, U.N. Sales No. E.12.V.9, https://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf ("[T]he problem relates not to the existence or validity of the respondent's consent to contractual terms, but rather to whether those terms express an intention to resort to final and binding arbitration.").

[34] *See* Henriques, supra note 32 ("irrespective of the fact that such defect renders it impossible to proceed with the arbitration.").

[35] Insigma Tech. Co. Ltd. v. Alstom Tech. Ltd. [2009] SGCA 24, ¶ 37–38, and references therein. *See also* HKL Group Co. Ltd. v. Rizq Int'l Holding Pte. Ltd., [2013] SGHCR 5, ¶ 12 ("Whether that clause may or may not be upheld depends on the nature and extent of its pathology.").

[36] Spigelman, *supra* note 31.

[37] *Id.* at 234–36.

[38] *Id.* at 240.

The arbitration agreement may analytically be divided into the following four (forensic) components:

(I) A derogation agreement that *takes away* jurisdiction from the national courts to settle disputes.[39]

(II) A prorogation agreement that *bestows* jurisdiction on an arbitration tribunal to settle disputes.[40]

(III) Procedural rules, i.e. the (expressly or implictly) agreed terms in respect of *the contents of the arbitration proceedings*, including the choice of seat, appointment of arbitrators, administration, language, choice of law, etc.[41]

(IV) The scope of the arbitration agreement, i.e. the statement of *which disputes* the agreement (components I and II) covers.[42]

This division into components creates —together with the pathology concept—the basis for a functional system for identifying, analysing and comparing interpretative issues (and their solution) across jurisdictions.

A forum agreement usually contains both derogating and prorogating elements.[43] Accordingly, components I and II will jointly be referred to as the *"jurisdictional allocation*", i.e. the obligation to settle disputes in an arbitration procedure instead of a litigation process. Correspondingly, the derogation and prorogation agreements are rarely individually and separately described in the arbitration clause.[44] If the provision indicates prorogation, e.g. "disputes shall be referred to and finally resolved by arbitration", it is normally unnecessary to indicate the derogation separately: *Opting in* arbitration implies the corresponding *opting out* of litigation.[45]

In principle, nothing prevents the parties from limiting the arbitration agreement's derogating or prorogating effects in various ways, e.g. via time limits, right of choice or observing a preceeding procedure.[46] However, it makes no sense in a meaningful way to talk about an "arbitration agreement", which is solely derogating (let alone solely

[39] Julian D. M. Lew, *Does National Court Involvement Undermine the International Arbitration Processes?*, 24 AM. U. INT'L L. REV. 489, 491 (2009).
[40] *Id.*
[41] Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941, 963 (1996).
[42] *Id.*
[43] Ingrid M. Farquharson, *Choice of Forum Clauses – A Brief Survey of Anglo-American Law*, 8 INT'L L. 83, 86 (1974).
[44] Tiong Min Yeo, *The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements*, 17 SING. ACAD. L.J. 306, 312–14 (2005).
[45] *See* New York Convention, *supra* note 15, at art. II; UNCITRAL Model Law, *supra* note 15, at art. 5, 8.
[46] Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, 24 J. INT'L ARB. 327, 327–30 (2007).

prorogating). A forum agreement that opts out litigation, but not at the same time opts in arbitration (to some extent), is not an "arbitration agreement" in the sense of the New York Convention and the UNCITRAL Model Law.[47] However, the arbitration agreement's practical value is closely connected to the derogating effect: If the courts do not recognize and respect the opt-out – typically in connection with considering the defendant's motion for dismissal (or request to *stay* court proceedings) with reference to the arbitration agreement – the opt-in in reality fades in importance.[48]

The question about interpretation of arbitration agreements may arise at different stages of the arbitration process: (i) the arbitration tribunal's ruling on its own jurisdiction;[49] (ii) the courts' review of the decision of the arbitration tribunal in respect of its own jurisdiction;[50] (iii) the courts' decision on the defendant's motion for dismissal;[51] and (iv) the courts' consideration of setting aside or enforcement of the arbitration award.[52]

In order to obtain a sufficiently nuanced analysis, the interpretation must be seen in relation to the individual components of the arbitration agreement. The arbitration agreement may thus contain a pathological component, e.g. pathological procedural rules (component III), which seen in isolation may be "*curable*" or "*incurable*".[53] True to the pathology terminology, the relation between the different components may be described using "infection" terminology: If, for instance, a pathological and incurable procedural rule implies that the derogation and prorogation agreement is unenforceable (i.e. that the pathology becomes fatal for the arbitration agreement as such), the procedural rule has "*infected*" the derogation and prorogation agreement. If, however, the pathological element is "curable" (and is therefore not "infectious"), the arbitration agreement as such may also be considered as "*cured*" (or "*rescued"*).

The arbitration clause will (but not always) contain explicit indications of component IV (scope), which is typically the first part of the arbitration clause, and component III (procedural rules), which are typically the last part of the arbitration clause.[54] As a rule, the derogation agreement (component I) is implied.[55] The contents and the interaction between the components may be illustrated by SIAC's model clause:

[*Component IV*:] Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, [*component II (and I):*] shall be referred to and finally resolved by arbitration [*Component III*:] adminis-

[47] New York Convention, *supra* note 15; UNCITRAL Model Law, *supra* note 15, at art. 5, 8.
[48] YEO, *supra* note 44.
[49] UNCITRAL Model Law, *supra* note 15, at art. 16(1).
[50] *Id.* at art. 16(3).
[51] *Id.* at art. 8.
[52] *Id.* at art. 34, 36.
[53] Spigelman, *supra* note 31.
[54] Fischer & Haydock, *supra* note 41.
[55] Yeo, *supra* note 44.

tered by the Singapore International Arbitration Centre ('SIAC') in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') for the time being in force, which rules are deemed to be incorporated by reference in this clause.[56]

Components I, II and III are general themes in the pathology dealt with in this article.

III. US AMERICAN LAW

A. The Default Mechanism

Arbitration agreements referring to non-existing and inaccessible elements are not a new phenomenon in US American law, but they are primarily experienced in an international context.[57] The pathology concept makes FAA Section five (which has existed since 1925 and is the FAA's counterpart to the UNCITRAL Model Law Article 11(c)) relevant to the court's jurisdiction in assisting in the appointment process:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or *if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators* or umpire, or in filling a vacancy, then upon the application of either party to the controversy *the court shall designate and appoint an arbitrator or arbitrators* or umpire, as the case may require.[58]

The US American default mechanism thus provides the courts with a broad ("for any other reason") obligation ("shall") upon application to appoint the members of the arbitration tribunal. The provision is interpreted broadly,[59] and hardly provides the basis for making a distinction between an institution ceasing to exist before or after the conclusion of the agreement.[60]

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[56] *SIAC Model Clause*, SIAC (Sept. 2018), http://www.siac.org.sg/model-clauses/siac-model-clause.

[57] *See* Christopher J. Karacic & Howard S. Suskin, *When the Arbitration Forum is Unavailable: What Happens Next?*, AM. B. ASS'N (Aug. 9, 2017), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2014/when-arbitration-forum-is-unavailable-what-happens-next/.

[58] 9 U.S.C. § 5 (1947) (emphasis added).

[59] Khan v. Dell Inc., 669 F.3d 350, 356 (3d Cir. 2012) ("To take a narrower construction of Section 5 would be inconsistent with the 'liberal federal policy in favor of arbitration' articulated in the FAA.").

[60] Stinson v. America's. Home Place, Inc., 108 F. Supp. 2d 1278, 1285 (M.D. Ala. 2000) (stating that "this distinction is immaterial" as it relates to the "for any other reason" provision of section five of the Federal Arbitration Act).

B. The Intention of the Parties

In an early ruling of the New York Supreme Court, *Lab. Grossman*,[61] which still plays a role in case law, a Mexican and an American business had agreed on arbitration "in accordance with the rules and procedures of the Pan-American Arbitration Association", which, however, did not exist.[62] The American party claimed that the parties' real intention was to refer to "the Inter-American Commercial Arbitration Commission"—an organization set up by the Pan-American Union — which the Mexican party contested.[63] The court in New York did not settle the specific interpretation dispute,[64] but in general stated:

> If it should be found that the parties really intended to arbitrate pursuant to the rules of the Inter-American Commercial Arbitration Commission [(as stated by the American party)], then arbitration before that tribunal should be directed, and nothing further need be determined. If, however, it should be determined that the parties did not so agree, the issue to be decided is whether the *dominant purpose of the agreement was to settle disputes by arbitration, rather than the instrumentality through which arbitration should be effected.* […] In such event, there being no viable organization named in the agreement, through which arbitration may be had, the court may direct arbitration before such tribunal as it may determine would be the most appropriate in the circumstances. (emphasis added)[65]

Therefore, the essence according to *Lab. Grossman* is to assess whether the agreement's *dominant purpose* was (i) the jurisdictional allocation ("to settle disputes by arbitration") rather than (ii) the procedural rule ("the instrumentality"). In the former situation, the jurisdictional allocation is enforced, and the procedural rule is supplemented in the "most appropriate" way by the courts, while in the latter situation the arbitration agreement lapses.[66] However, this does not apply if it can be established that

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[61] Laboratorios Grossman, S.A. v. Forest Labs., Inc., 295 N.Y.S.2d 756, 757 (N.Y. App. Div. 1968).

[62] *See* In re HZI Research Ctr. v. Sun Instruments Japan Co., 1995 WL 562181 (S.D.N.Y. Sept. 20, 1995); Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 1 H.K.C. 404, 404 (H.K.). Both of which are further described and discussed in the following.

[63] *Laboratorios Grossman*, 295 N.Y.S.2d at 575 ("The appellant denies that such was the agreement, and states further that the agreement to arbitrate was conditioned upon arbitration being conducted in Mexico.").

[64] *Id.* (The court merely concludes that "in the light of these conflicting positions a hearing should be had to determine the true intent of the parties").

[65] *Id.*

[66] *Id.* Although the court does not explicitly refer to the lapse of the arbitration agreement, this is to be implied. *See also* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 2-17, reporters' note (a)(i) (AM. LAW INST., Tentative Draft No. 4, 2015) ("when it appears that the parties' dominant intention was to arbitrate before a specific arbitral institution or arbitrator, courts will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail", and references therein).

the parties' real intention was to refer to an *existing* element, because the arbitration agreement will in such case be construed accordingly.[67]

In light of the initially described solution models (see Part II above), the approach in *Lab. Grossman* is clear and indeed quite operational: *Solution 1* takes precedence if there is a specific, interpretative basis for it.[68] Otherwise, *Solution 2* is applied if the arbitration agreement's *dominant purpose* must be assumed to be dispute resolution by arbitration.[69] Only where the impracticable (pathological) procedural rule is not merely secondary, but is an integral part of the dominant purpose of the agreement will the result be *Solution 3* (i.e. that the jurisdictional allocation is "infected" and the arbitration agreement lapses).

As for the "dominant purpose" criteria's origin, *Lab. Grossman* refers to *Golenbock*,[70] which again refers to *Marchant*.[71] The court in New York held that:

There was no agreement here to arbitrate before particular arbitrators. *The dominant intent was to arbitrate, with the machinery of selection of the arbitrators subordinate and incidental*. The court in its discretion may appoint arbitrators from the former panel used by the New York Building Congress, Inc., at the time it engaged in arbitration. (emphasis added)[72]

The dominant purpose approach is reiterated in *HZI Researchs* [73] where an American developer of medical equipment and a Japanese distributor had agreed on the following in terms of dispute resolution: "each party shall select an arbitrator and the two arbitrators shall select a third arbitrator, all of whom shall be Members of the American or Japanese Arbitrator Society, who will resolve the dispute." As opposed to the "American Arbitration Association" (AAA) and the "Japan Commercial Arbitration Association" (JCAA), the two named societies did not exist. The American party

[67] RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 2-17, reporters' note (a)(i) (AM. LAW INST., Tentative Draft No. 4, 2015).
[68] *See Laboratorios Grossman*, 295 N.Y.S.2d 756.
[69] *Id.* at 575.
[70] Golenbock v. Komoroff, 2 A.D.2d 742, 742 (N.Y. App. Div. 1956) (Botein, J., dissenting) (emphasis added) ("[I]n agreements where an intention to arbitrate is *clearly paramount* and the method of choice or the identity of the arbitrator is *incidental or implemental*, the courts will . . . designate a substitute arbitrator so that the intention of the parties can be effectuated. That section should not be invoked, however, to frustrate the basic intention where the identity of the arbitrator agreed upon is a *vital provision of the contract*.").
[71] Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 295 (N.Y. 1929) ("There may be a dominant intention to arbitrate at all events, the machinery of selection being merely modal and subordinate. If so, the failure of the means will not involve as a consequence the frustration of the end. . . . On the other hand, the promise to arbitrate may be so wedded to the means that the failure of the one will be the destruction of the other."); *see also* Delma Eng'g Corp. v. K & L Constr. Co., 174 N.Y.S.2d 620, 621 (N.Y. 1958) (two (apparently American) businesses had agreed on arbitration "in accordance with the rules of the New York Building Congress, Inc.", which, however, dismissed the case).
[72] *Marchant*, 252 N.Y. at 295.
[73] In re HZI Research Ctr. v. Sun Instrument Japan Co., 1995 WL 562181, at *2 (S.D.N.Y. Sept. 20, 1995).

claimed institutional arbitration under the AAA, which the Japanese party contested.[74] The US American court, which initially referred to the federal policy,[75] held that the reference to non-existing institutions

> [F]urnishes no impediment to enforcement of the arbitration agreement. *The dominant purpose of the parties, clearly expressed in their contract, was to resolve disputes by arbitration*. If the parties imperfectly or incorrectly designate the instrumentality through which arbitration should be effected, the court will enforce the contract by making an appropriate designation. (emphasis added)[76]

The parties were subsequently referred to AAA.[77]

HZI Research thus enforces the jurisdictional allocation – in spite of two non-existing elements – and supplements the procedural rule at its discretion (*Solution 2*), since the parties' dominant purpose was "to resolve disputes by arbitration."[78]

In *Astra Footwear* a contract for the acquisition of shoes between a Yugoslav manufacturer and an American distributor stated that "[f]or all claims of disputes […] is competent the arbitrage for export trade at the Federal Chamber of Commerce in Beograd. In the case that the buyer is accused, *the Chamber of Commerce in New York is competent*" (emphasis added). [79] The question was whether the reference to the non-existing "Chamber of Commerce in New York" referred to (i) ICC in New York (as submitted by the Yugoslav seller) or (ii) New York Chamber of Commerce (NYCC) (as submitted by the American buyer).[80] The buyer claimed that "the naming of NYCC was an integral part of the substantive rights bargained for", and that the arbitration agreement had therefore lapsed, because NYCC prior to the conclusion of the agreement had ceased its arbitration activities (in connection with the conversion to the New York Chamber of Commerce & Industry (NYCCI)). [81] The court agreed with the buyer that the parties "intended the New York Chamber of Commerce NYCC, and not the

[74] *Id.* ("arguing that its Agreement with HZI did not state that any arbitration would be conducted by the AAA, nor that the arbitration would take place in New York.").

[75] *Id.* at *3 ("Arbitration agreements, favored by public policy, are construed broadly and in accordance with common sense").

[76] *Id.* (referencing Astra Footwear Indus. v. Harwyn Int'l Inc., 442 F. Supp. 907 (S.D.N.Y. Jan. 11, 1978)). *See generally* Laboratorios Grossman, S.A. v. Forest Labs., Inc., 295 N.Y.S.2d 756, 757 (N.Y. App. Div. 1968); Delma Eng'g Corp. v. K & L Constr. Co., 174 N.Y.S.2d 620, 621 (N.Y. 1958); Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 1 H.K.C. 404, 404 (H.K.).

[77] *In re HZI Research Ctr.*, 1995 WL 562181, at *4 ("In the case at bar, the [AAA] is an entirely appropriate designation. I direct that the arbitration of disputes between the parties proceed before that body forthwith, subject to whatever procedural rules the AAA may think right.").

[78] *Id. See also Astra Footwear*, 442 F. Supp. at 908 where the same court some years earlier — based on a combination of *Solution 1* and *Solution 2* — denied that the arbitration agreement's reference to a specific chamber of commerce, which prior to entering into the agreement had ceased its arbitration activities, was "an integral part of the substantive rights bargained for."

[79] *Astra Footwear*, 442 F.Supp. at 908.

[80] *Id.* at 908–09.

[81] *Id.*

[ICC] which has an office in New York",[82] but did not find that NYCC's non-existence was fatal for the jurisdictional allocation. The court appointed (at the suggestion of the parties) the members of the arbitration tribunal in accordance with section 5 of the FAA (as requested by the Yugoslav seller).[83]

The 'primary/secondary' distinction is also applied in the more recent ruling in *Travelport,* where a distribution agreement between Dutch and Nigerian parties indicated "arbitration in the United States in accordance with the UNCITRAL Arbitration rules in force at the date of reference.[84] The Appointing Authority shall be *the United States Council of Arbitration* and such appointment will be in accordance with its 'Procedures for Arbitration.'" (emphasis added).[85] The fact that the latter 'Appointing Authority' does not exist did not "infect" the jurisdictional allocation:[86] "The parties clearly expressed their intention to resolve this dispute through arbitration in the Distribution Agreement. This was the parties' primary intention; the agreement as to the particular forum was secondary. The Court may therefore designate a proper arbitral body."[87]

As opposed to *HZI Research*, to which *Travelport* refers, supplementing the procedural rule was not necessary in *Travelport*, because the rules for the arbitration tribunal's appointment were already set out in the UNCITRAL rules, which are incorporated in the arbitration agreement.[88] In other words, the arbitration agreement was "cured" by severing the secondary, pathological element.[89]

As for the specific "dominant purpose" assessment, case law suggests that the arbitration agreement's *dominant purpose* is presumed to be dispute resolution by arbitration (and thus *Solution 2*), unless specific points exist to dispel such presumption; cf. in this respect also the federal policy in general and the default mechanism in the FAA, section 5, in particular.[90] As distinctly expressed in *Astra Footwear*:

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[82] *Id.* at 910. The Court referred to the fact that "even the [seller] when seeking arbitration applied first to the New York Chamber of Commerce and Industry. In addition, the [ICC] when approached as an arbitrator also suggested that the parties try the New York Chamber of Commerce."

[83] *Id.* at 910–11.

[84] Travelport Glob. Distrib. Sys. B.V. v. Bellview Airlines Ltd., 2012 WL 3925856, at *1 (S.D.N.Y. Sept. 12, 2012).

[85] *Id.*

[86] *Id.* at *5. Initially, the court referred to *inter alia* "a strong federal policy favoring arbitration." *Id.* at *3.

[87] *Id.*, at *5 (referencing In re HZI Research Ctr. v. Sun Instrument Japan Co., 1995 WL 562181, at *2 (S.D.N.Y. Sept. 20, 1995)).

[88] *Travelport*, 2012 WL 3925856, at *5 ("The Distribution Agreement is construed so as to mandate composition of an arbitral panel in accordance with these rules.").

[89] *See also* Constitution Reins. Corp. v. Republic W. Ins. Co. 1999 WL 126462, at *1 (S.D.N.Y. Mar. 10, 1999), where the arbitration agreement included in a reinsurance contract referred to the non-existing "Rules of Procedure of Excess/Primary–Reinsurance Arbitration Forum of the Insurance Arbitration Forums, Inc.," but at the same time also stated that the existing "Insurance Arbitration Forums, Inc. ['IAF'] shall appoint the arbitrators." *Id.* The court found that "[g]iven that the arbitration clause expressly states that the IAF 'shall appoint the arbitrators[,]' it seems reasonable that this matter may be heard by arbitrators appointed by Arbitration Forums, Inc. and in accordance with that organization's rules of procedure." *Id.* at *2.

[90] Astra Footwear Indus. v. Harwyn Int'l, Inc., 442 F.Supp. 907, 910–11 (S.D.N.Y. Jan. 11, 1978).

The Court finds that [FAA] § 5 was drafted to provide a solution to the problem caused when the arbitrator selected by the parties cannot or will not perform. In view of the federal policy to construe liberally arbitration clauses and to resolve doubts in favor of arbitration […], the Court concludes that it cannot ignore the plain language of [FAA] § 5, nor do the equities of the case warrant doing so. The Court thus agrees to appoint an arbitrator pursuant to [FAA] § 5."[91]

This is supported by *Warnes*,[92] which is often emphasised in international arbitration literature.[93] A sales contract between an Argentinian and an American business stated that disputes "shall be finally settled by arbitration in New York in accordance with the Commercial Arbitration Rules of the New York Commercial Arbitration Association." The "Association" in question did not exist, and so the Argentinian party demanded "AAA arbitration," while the counterparty claimed that the arbitration was not binding.[94] The court referred initially to the federal policy,[95] and held that "an agreement on a non-existent arbitration forum is *the equivalent of an agreement to arbitrate that does not specify a forum*, because the parties had the intent to arbitrate, even in the absence of a properly designated forum."[96] Based on the arbitration agreement (which in reality is blank) left after severing the non-existing element, the parties were referred to the AAA.[97]

It is stated that, with respect to *Warnes,* the non-existing element "*was interpreted* as meaning [AAA] in New York."[98] This explanation of the judgment (indicating *Solution 1*) is however too undifferentiated. The method is that the non-existing element is disregarded, and subsequently the court – either via the FAA's supplementary rules or discretionarily – designates a new forum (*Solution 2*).

Correspondingly, *Travelport* and *HZI Research* merely emphasise the parties' dominant intention to arbitrate as "clearly expressed" in their contract. In other words, parties having incorporated a jurisdictional allocation in the contract are assumed to dominantly intend dispute resolution by arbitration.

As for specific interpretation elements, it can be emphasised that the *Travelport* arbitration agreement clearly sets out (i) the dispute resolution form ("arbitration"), (ii) the place of arbitration ("in the United States"), and also (iii) an existing set of rules

[91] *Id.*
[92] Warnes S.A. v. Harvic Int'l, Ltd., 1993 WL 228028 (S.D.N.Y. June 22, 1993).
[93] *See e.g.* BLACKABY ET AL., *supra* note 11, at ¶ 2.66; BORN, *supra* note 11, at 778; Boo, *supra* note 1, at 43; Gaillard, *supra* note 12, at 264.
[94] *Warnes*, 1993 WL 228028, at *2 ("the parties are not bound to arbitrate").
[95] *Id.* ("a liberal federal policy favoring arbitration,") cf. *inter alia* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").
[96] *Id.* (emphasis added).
[97] *Id.* at *3.
[98] FOUCHARD & GOLDMAN, *supra* note 12, at 256 (emphasis added).

("the UNCITRAL Arbitration rules").[99] Against this background it is, all other things being equal, difficult to fairly claim that the "fourth" and last part of the arbitration agreement —a non-existing appointing authority—was essential for the jurisdictional allocation.

Concerning the *HZI Research* arbitration agreement, it can be emphasised that the non-existing institutions ("the American or Japanese Arbitrator Society") were merely designated as a basis for identifying some degree of affiliation for the arbitrators, and thus were not—as is normally customary—assigned appointing (or other significant) powers in the arbitration process.[100]

Overall, it does not appear as a separate element in the assessment whether or not the jurisdictional allocation is specifically worded as *a separate part* from the procedural rule – as is e.g. the case in *Travelport* and *Warnes*, but not in e.g. *HZI Research* and *Astra Footwear*.[101] The opposite would also suggest a (narrow) linguistic interpretation approach, for which there is no basis under US American arbitration law.

C. Specifically, About Mutual Mistake Objections

Arbitration agreements containing non-existing elements are from time to time attacked based on the general contract law principles of *common/mutual mistake*.[102] According to general US American and English principles on *common/mutual mistake*, an agreement may be *null and void* if the parties had a *misapprehension/erroneous perception* in respect of the actual circumstances on which the agreement was entered into.[103] However, the misapprehension must be material.[104]

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[99] Travelport Glob. Distrib. Sys. B.V. v. Bellview Airlines Ltd., 2012 WL 3925856, at *2 (S.D.N.Y. Sept. 12, 2012).

[100] In re HZI Research Ctr. v. Sun Instruments Japan Co., 1995 WL 562181, at *8 (S.D.N.Y. Sept. 20, 1995)

[101] *See Travelport*, 2012 WL 3925856, at *2 ("*[A]rbitration in the United States* in accordance with the UNCITRAL Arbitration rules in force at the date of reference. The Appointing Authority shall be the United States Council of Arbitration and such appointment will be in accordance with its 'Procedures for Arbitration.'") (emphasis added); *Warnes,* 1993 WL 228028, at *1 ("[The outcome] *shall be finally settled by arbitration* in New York in accordance with the Commercial Arbitration Rules of the New York Commercial Arbitration Association."); *but see HZI Research*, 1995 WL 562181, at *5 ("[E]ach party shall select an arbitrator and the two arbitrators shall select a third arbitrator, all of whom shall be Members of the American or Japanese Arbitrator Society, who will resolve the dispute."); Astra Footwear Indus. v. Harwyn Int'l, Inc., 442 F.Supp. 907, 908 (S.D.N.Y. Jan. 11, 1978) ("In the case that the buyer is accused, the Chamber of Commerce in New York is competent.").

[102] JOSEPH CHITTY, CHITTY ON CONTRACTS (H.G. Beale ed., 32d ed. 2015).

[103] Concerning the concept of *common mistake* in English contract law, see *id.* at ¶ 6-001 and EDWIN PEEL, TREITEL ON THE LAW OF CONTRACT ¶ 8-001 (14th ed., 2015). As to the concept of *mutual mistake* in American law, see for example, RESTATEMENT (SECOND) OF CONTRACTS § 152 (AM. LAW INST. 1981) and EDWARD A. FARNSWORTH, FARNSWORTH ON CONTRACTS ¶ 9.3 (3d ed., 2004).

[104] Chitty, *supra* note 102, at ¶ 6-015 ("so fundamental that it makes the 'contractual adventure' impossible, or makes performance essentially different to what the parties anticipated"); RESTATEMENT (SECOND) OF CONTRACTS § 152(1) (AM. LAW INST. 1981); and FARNSWORTH, *supra* note 103, at ¶ 9.3 ("has a material effect on the agreed

Under English contract law an agreement may as well be *ineffective*, if the agreed *machinery* fails.[105] However, if the machinery is merely assessed to be "subsidiary and inessential," the courts may substitute it and the defect will have no effect on the enforcement of the contract.[106]

Occasionally, an *impossibility of performance* objection is raised as an alternative to *mutual mistake*, where the arbitration agreement refers to non-existing arbitration rules. The objection has been flatly rejected by the US American courts,[107] and will not be considered further in this article.

Since there will typically be no basis for doubting the parties' good faith in respect of the non-existence (and thus the existence of misapprehension), the key issue in practice will be whether the misapprehension affects the entire arbitration agreement (particularly the jurisdictional allocation) or merely the non-existing element (the procedural rule).

In *Control Screening,*[108] a purchase contract between an American seller and a Vietnamese buyer stated that "disputes shall be settled at International Arbitration Center of European countries for claim in the suing party's country under the rule of the Center."[109] The Center in question did not exist.[110] The Vietnamese party instigated arbitration proceedings in Belgium, and subsequently the American party petitioned for arbitration in New Jersey, USA (so-called *petition to compel arbitration*) before the court in New Jersey.[111] The Court of Appeal initially emphasized that the New York Convention's "null and void" exception must be read narrowly,[112] and that the reference to the non-existing institution was an expression of a *mutual mistake*.[113] The court further stated:

Since the parties mistakenly designated an arbitration forum that does not exist, *the forum selection provision* of the arbitration agreement is "null and void" under [NYC] Article II(3). . . . Even though *the forum selection portion* of the arbitration clause is

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exchange of performances"); GLEN BANKS, NEW YORK CONTRACT LAW ¶ 6:6 (2006) ("The mistake must go to the foundation of the agreement.").

[105] Chitty, *supra* note 102.

[106] PEEL, *supra* note 103, at ¶ 2-096; Chitty, *supra* note 102, at ¶ 2-138.

[107] Gar Energy & Assocs. v. Ivanhoe Energy Inc., No. 1:11–CV–00907 AWI JLT, 2011 WL 6780927, at *8 (E.D. Cal. Dec. 27, 2011) ("In order to be an excuse for nonperformance of a contract, the impossibility of performance must attach to the *nature of the thing to be done* and not to the inability of the obligor to do it. . . . Here, the 'nature of the thing to be done' is arbitration, and impossibility does not attach to the procedure by which the arbitration is accomplished.").

[108] Control Screening LLC v. Tech. Application & Prod. Co., 687 F.3d 163, 166 (3d Cir. 2012).

[109] *Id.*

[110] *Id.* at 170.

[111] *Id.*

[112] *Id.* ("[T]he 'null and void' language [of NYC art. II(3)] must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate.").

[113] *Id.* ("[A] result that could have come about only through mistake"); *see also* Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 1 H.K.C. 404, 406 (H.K.).

'null and void,' there is *sufficient indication* elsewhere in the contract of the parties' *intent to arbitrate*, meaning that the parties' agreement to arbitrate remains in force. . . . Thus, we find that the invalid forum selection provision is *severable* from the rest of the arbitration agreement. Because the forum selection provision is 'null and void', the otherwise valid arbitration agreement is treated as if it does not select a forum. (emphasis added)[114]

Accordingly, the court does not merely establish that misapprehension exists. The decisive factor is whether there is *sufficient indication* that the parties intended a jurisdictional allocation *in spite of* the inoperative procedural rule.[115] In the opinion of the court, this was the case in *Control Screening* —cf. in this respect the specific wording of the provision, among others — and therefore the forum requirement is severable and the effectively blank arbitration agreement that remains after the severing is enforced in accordance with the FAA's general rules (*Solution 2*), i.e. the court compels arbitration in its own district: New Jersey USA (FAA, section 4, cf. section 208).[116]

Control Screening disregards the arbitration agreement's reference to "in the suing party's country" (based on a contextual interpretation).[117] Alternatively, however, the arbitration agreement may be considered to distinguish between institution ("International Arbitration Center") and seat ("in the suing party's country"). The consequence of disregarding the non-existing institution would then be that the seat of arbitration according to the remaining (*floating*) arbitration agreement will be either USA or Vietnam (depending on which party is the claimant).[118]

Another alternative approach would be to maintain the parties' intention to arbitrate in *Europe* ("European countries,") which is a "neutral" forum for the parties.[119] However, maintaining such vague geographical designation has the immediate disadvantage that the court by compelling arbitration "in Europe" does not identify the place of arbitration (and thus not the applicable lex arbitri). The latter approach does not seem to be supported in case law.[120]

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[114] *Control Screening*, 687 F.3d at 170.

[115] *Id.*

[116] *Id.* ("[The arbitration clause] states that: 'Decision of arbitration shall be final and binding [sic] both parties[,]'" and "provides that the losing party shall bear '[a]ll expenses in connection with the arbitration'. . . . Furthermore, both parties have expressed a willingness to arbitrate their dispute notwithstanding the uncertain meaning of the forum selection provision.").

[117] *Id.*; *see also Lucky-Goldstar Int'l (H.K.) Ltd.*, [1993] 1 H.K.C. at 404.

[118] *See Control Screening*, 687 F.3d at 169.

[119] *Id.* at 170 n. 5 ("[T]he parties apparently intended to arbitrate in Europe.").

[120] *See* Rosgoscirc *ex rel* SOY/CPI P'ship v. Circus Show Corp., Nos. 92 Civ. 8498 (JSM), 93 Civ. 1304 (JSM), 1993 WL 277333, at *3 (S.D.N.Y. July 16, 1993) (where "the International Arbitration in the Hague (the Netherlands)" is not considered as a designation of Holland as the seat). *See also* Jain v. de Mere, 51 F.3d 686, 688 (7th Cir. 1995) (where a reference to "an arbitrary commission applying French laws" is not seen as a designation of France as the seat); discussions in Marc J. Goldstein, *Where Shall Arbitration Be Compelled if the Agreement Is Unclear: Searching for a Better Solution*, ARB. COMMENTARIES (Aug. 8, 2012),

Control Screening in its approach resembles the earlier ruling in *Rosgoscirc* to which *Control Screening* also refers. In *Rosgoscirc*,[121] an American and a Russian party had originally entered into an agreement to arbitrate before the "American Arbitration Association in New York" (as part of a partnership in respect of the performance of "the Moscow Circus" in among other places the US), which the parties later changed to the non-existing "International Arbitration in the Hague (the Netherlands)."[122] In connection with a specific dispute, the Russian party instigated AAA arbitration (cf. the original agreement), but the American party submitted that the arbitration should have its seat "at the International Bureau of the Permanent Court of Arbitration at The Hague, The Netherlands", with reference to this being "the nearest arbitration association in the region most recently agreed upon by the parties."[123] The parties agreed that the non-existing element was due to "a mutual mistake," and against this background the court in short found that "[h]ence, *the provision* should be considered void under Article II(3) of the [NYC]."[124] Since the *forum* requirement is therefore unenforceable,[125] the court can solely *compel arbitration* in its own district (FAA, section 4, cf. section 208), and the parties are therefore compelled to AAA arbitration in New York (in compliance with the Russian party's petition).[126]

Thus, *Rosgoscirc* distinguishes—as in *Control Screening*—between the jurisdictional allocation and the ineffective procedural rule and enforces and supplements the arbitration agreement in accordance with the FAA's general rules on *compelling arbitration* (*Solution 2*).[127] In addition, the court in *Gar Energy*, with respect to the *mutual mistake* issue, finds that reference to the non-existing "Arbitration Rules of American

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http://arbblog.lexmarc.us/2012/08/where-shall-arbitration-be-compelled-if-the-agreement-is-unclear-searching-for-a-better-solution/.

[121] *Rosgoscirc*, 1993 WL 277333, at *1.

[122] *Id.* at *1–2. The change of forum was caused by a compromise where the parties agreed on "a neutral region." *Id.*

[123] *Id.* at *3. The litigation arose because the American party requested a *stay* of the arbitration which the Russian party had initiated in New York. In response, the Russian party requested "compelling the arbitration already initiated at the AAA in New York." The reasons behind the *American* party seeking arbitration in *the Netherlands*, rather than on their 'home turf', are not illuminated in the judgment. *Id.*

[124] *Id.* at *4 (emphasis added).

[125] Although the judgment is not explicit in this regard, it is clear (cf. also the application of FAA's gap-filling rules) that *Rosgo* does not disregard the entire arbitration agreement, but merely the procedural rule on the "non-existent forum." Accordingly, the Court points out at the outset that "the [N.Y.] Convention's 'null and void' exception is to be narrowly construed." *Id.* at *3–4, and the references therein.

[126] *Id.* at *4–5. The court also carries out a (short) alternative analysis based on the "basic contract principles" (where as the above referenced is based on "federal arbitration law") and reaches the same result: "the intent of the parties would best be approximated by designating the AAA rather than sending the parties to a 'dark horse' forum whose only link is its geographical proximity to a fictitious entity. Alternatively, the fact that the amendment contained a mutual mistake regarding the designated forum means that there was no 'meeting of the minds' and that the amendment, or at least the provision changing the arbitration forum, is void; the previous agreement providing for arbitration at the AAA thus governs this dispute." *Id.* at *5–6.

[127] Control Screening LLC v. Technological Application & Production Co., 687 F.3d 163 (3d Cir. 2012).

Arbitration Society in Bakersfield, California"[128] does not constitute an "integral part" of the arbitration agreement:[129]

[T]he material portion of the agreement is the *commitment to arbitrate* the claims. There is no evidence the parties' agreement to arbitrate depended on the use of the [non-existent] AAS's rules, or that a material term of the arbitration agreement was the use of these rules. To the contrary, it is apparent that neither party *has ever seen the rules* of the [AAS] nor had any meaningful knowledge or contact with the AAS.[130]

Correspondingly, in *Kwasny*,[131] where the court—with an initial reference to the federal policy[132]—finds that the non-existing "appointing and administrating body" to which the arbitration agreement refers,[133] following a specific (and rather comprehensive) *mutual mistake* assessment, "is severable from, and does not render unenforceable, the parties' broad and overarching agreement to arbitrate."[134] The court emphasizes the burden of proof,[135] the broad wording and regulation of the provision in question,[136] the

[128] The arbitration agreement, contained in a Confidentiality Agreement associated with a consultancy arrangement between an American and a foreign company, had the following wording: "Any dispute […] shall be settled before a panel of three arbitrators, one selected by each of the Parties and the third by the arbitrators selected by the Parties, in accordance with the Arbitration Rules of the American Arbitration Society in Bakersfield, California." *See* Gar Energy & Assocs. v. Ivanhoe Energy Inc., No. 1:11–CV–00907 AWI JLT, 2011 WL 6780927, at *2 (E.D. Cal. Dec. 27, 2011). The parties agreed that the "Society" concerned had not existed since 1926, and there was no even clarity as to whether the institution in question had then had "Arbitration Rules." *Id.* at *8. The defendant sought AAA arbitration, but the plaintiff submitted that the arbitration agreement was unenforceable. *Id.* at *10.

[129] At the outset, the court refers to the federal policy as "'[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'" and that "'there is a presumption of arbitrability' and arbitration should only be denied when 'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *See Gar Energy*, 2011 WL 6780927, at *6 (citations omitted).

[130] *See Gar Energy & Assocs.*, 2011 WL 6780927, at *9 (original emphasis). Accordingly, the court establishes that each party designates one arbitrator who together designate the third arbitrator, and that the arbitration rules and venue are to be determined by the arbitration tribunal. *Id.* at *10.

[131] Kwasny Co. v. Acrylicon Int'l Ltd., No. 09-13357, 2010 WL 2474788 (E.D. Mich. June 11, 2010).

[132] *See Kwasny*, 2011 WL 2474788, at *3 ("[T]he Court is guided by ordinary contract law principles, but 'any doubts regarding arbitrability should be resolved in favor of arbitration.'" (citations omitted)).

[133] The arbitration agreement, which was contained in a license agreement between an American party and a UK based party with its place of business in Norway, stated that "Any controversy […] shall be finally settled by arbitration in accordance with [ICC Rules]. *See Kwasny*, 2011 WL 2474788, at *2. The appointing and administrating body will be the English Centre for International Commercial Arbitration." *Id.* The named "English Centre" did not exist.

[134] *See Kwasny*, 2011 WL 2474788, at *6.

[135] *See id.* ("Defendant has failed to identify any basis for the Court to conclude that the parties' mistaken reference to a non-existent arbitration body in their Agreement should be viewed as integral to, and not severable from, the parties' expressly stated intent to arbitrate.").

[136] *See id.* ("This arbitration clause is quite broad, reflecting the parties' shared intent to arbitrate any dispute 'relating to' the Agreement, and it specifies a number of details about how this arbitration is to be conducted, including the rules governing the arbitration process, the forum for the arbitration proceedings, and the method for selecting arbitrators.").

incorporation of (existing) arbitration rules,[137] and the contract's general *severability* provision and the parties' actions after the dispute arose.[138]

See also the principle in *Great Earth,*[139] where it was established that "the arbitral forum selection clause" (which referred to "Nassau County, New York") could not be enforced (due to *fraudulent inducement*), and the question arose "whether the agreement to arbitrate all disputes was separate and severable from the forum selection clause."[140] Based on a specific assessment the Court of Appeal concluded that this was the case, and the parties were compelled to arbitrate in Michigan in accordance with FAA, section 4.[141] Also in *Vegter*, where the court "severs and declares unenforceable" a specific seat for the arbitration (due to *unconscionability*), but enforces and supplements the remaining arbitration agreement.[142]

Even though the terminology varies, it is a general feature that the non-existing element is considered *null and void* (cf. the New York Convention, art. II(3)), but that the "incurable" procedural rule is *severed*—and thus does not "infect" the jurisdictional allocation (*Solution 2*)—if the parties' *dominant purpose* with the agreement was to arbitrate.[143] If so, the remaining (blank) arbitration agreement is enforced, which generally implies *compelling arbitration* under the FAA.[144] See also *National Material*,[145]

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[137] *See id.* ("[T]he clause itself mitigates, to a significant extent, the parties' mistaken reference to a nonexistent administrative entity, by virtue of the parties' stipulation to arbitrate in accordance with the [ICC Rules]. . . . These rules, in turn, expressly identify the International Court of Arbitration as 'the arbitration body attached to the ICC' that is responsible for administering the ICC rules . . . thereby suggesting the identity of the agency the parties might have had in mind with their mistaken reference to the 'English Centre for International Commercial Arbitration.'") The last-mentioned assumption is open to discussion because the explicit reference to an administering body *other* than the ICC Court, all other things being equal, indicates an intention of *hybrid arbitration*. However, the issue of hybrid arbitration was not contested in the case. *Id.* The court also refers to other contractual provisions as well as the parties' behavior. *Id.*

[138] *See id*.

[139] Great Earth Cos., Inc. v. Simons, 288 F.3d 878 (6th Cir. 2002).

[140] *See id.* at 890 ("This conclusion follows from the straightforward application of the 'general rule of contract law,' . . . that where provisions of a contract are rescinded due to fraudulent inducement, the failure of a distinct part of a contract does not void valid, severable provisions. . . . 'Whether the agreement to arbitrate is entire or severable turns on the parties' intent at the time the agreement was executed, as determined from the language of the contract and the surrounding circumstances.'") (citations omitted).

[141] *See id.* at 890–92.

[142] Vegter v. Forecast Financial Corp., 2007 WL 4178947, at *5 (W.D. Mich. Nov. 20, 2007).

[143] Control Screening LLC v. Technological Application & Production Co., 687 F.3d 163, 170 (3d Cir. 2012) (needing "sufficient indication"); Gar Energy & Assocs. v. Ivanhoe Energy Inc., No. 1:11–CV–00907 AWI JLT, 2011 WL 6780927, at *9 (E.D. Cal. Dec. 27, 2011) ("[T]he material portion of the agreement is the commitment to arbitrate the claims."); Kwasny Co. v. Acrylicon Int'l Ltd., No. 09-13357, 2010 WL 2474788, at *6 (E.D. Mich. June 11, 2010) (finding "broad and overarching agreement to arbitrate any dispute"); Rosgoscirc *ex rel* SOY/CPI P'ship v. Circus Show Corp., Nos. 92 Civ. 8498 (JSM), 93 Civ. 1304 (JSM), 1993 WL 277333 (S.D.N.Y. July 16, 1993).

[144] *See Control Screening*, 687 F.3d at 171; *see Rosgoscirc*, 1993 WL 277333, at *3.

[145] Nat'l Material Trading v. M/V Kaptan Cebi, No. C.A. 2:95-3673-23, 1997 WL 915000 (D.S.C. Mar. 13, 1997). Note, on the other hand, that the conclusion in Marks 3-Zet-Ernst Marks v. Presstek, Inc., 455 F.3d 7 (1st Cir. July 11, 2006) is caused by procedural circumstances (finding "[h]ad Marks chosen a different strategy, a different

where the court declares the *entire* arbitration agreement *null and void* with reference to the fact that the court "can give no meaning to the arbitration terms", and cannot "re-write the contract".[146] The arbitration agreement (contained in an international sales contract) referred to the non-existing "Court of Arbitration at the Chamber of Commerce and Industry of Switzerland".[147] The approach in *National Material* does not comply with other (more recent or earlier) case law.[148] Further, the decision may have been influenced by a consideration of avoiding dyfucation of the proceedings with several parties from different countries.

It does not appear as a decisive element in the *mutual mistake* assessment whether the jurisdictional allocation is specifically worded as a *separate part* from the pathological procedural rule, see e.g. the arbitration agreement in *Control Screening*.[149] Even though certain decisions indicate a more thorough, specific assessment,[150] there also in respect of the *mutual mistake* objections seems to a general presumption that the pathology does not "infect" the jurisdictional allocation (*Solution 2*), see in this respect in particular *Kwasny*: "Defendant has failed to identify any basis for the Court to conclude that the parties' mistaken reference to a non-existent arbitration body in their Agreement should be viewed as integral to, and not severable from, the parties' expressly stated intent to arbitrate."[151] And in *Gar Energy*: "There is no evidence the parties' agreement to arbitrate depended on the use of the [non-existing] rules, or that a material term of the arbitration agreement was the use of these rules."[152]

In conclusion it does not—with respect to the enforcement of the arbitration agreement (*Solution 2*)—seem to be of any real importance if non-existing elements are challenged particularly on the basis of general contract law principles of *mutual mistake* (*null and void*). A central feature for the existence of legally relevant misapprehension is an assessment of the misapprehension's significance for the agreement,[153] which is

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outcome may have been warranted. But to allow Marks to avoid the consequences of its strategic decision would lead to delay and minipulation").

[146] *See Nat'l Material*, 1997 WL 915000 , at *6 ("There is no mutual mistake of fact as alleged; it is simply a unilateral mistake of [seller]. That is to say, [seller] named a court of arbitration that simply does not exist. The court can give no meaning to the arbitration terms, so as to validate this clause. . . . This court has no authority to rewrite the contract . . . . If this court were to compel . . . arbitration at the forum specified in the sales contract, the parties could not implement such an order because recourse cannot be had to a nonexisting forum. Consequently, no meaningful effect may be given to this clause, and it is declared null and void.").

[147] See *Nat'l Material*, 1997 WL 915000, at *6.

[148] *See also* BORN, *supra* note 11, at 780 (finding the court's reasoning "unsatisfactorily").

[149] *See Control Screening*, 687 F.3d at 167–71.

[150] *See id.* at 163; Kwasny Co. v. Acrylicon Int'l Ltd., No. 09-13357, 2010 WL 2474788, at *6 (E.D. Mich. June 11, 2010).

[151] *See Kwasny*, 2010 WL 2474788, at *6.

[152] Gar Energy & Assocs. v. Ivanhoe Energy Inc., No. 1:11–CV–00907 AWI JLT, 2011 WL 6780927, at *9 (E.D. Cal. Dec. 27, 2011).

[153] Chitty, Chitty, *supra* note 102, at ¶ 6-015 (being "so fundamental that it makes the 'contractual adventure' impossible, or makes performance essentially different to what the parties anticipated"); RESTATEMENT (SECOND) OF CONTRACTS § 152(1) (AM. LAW INST. 1981); FARNSWORTH, *supra* note 103, at ¶ 9.3 (finding that apprehension

also expressed in arbitration case law.[154] This corresponds to the *dominant purpose* assessment as expressed in the case law mentioned in Part III.B above.

D. Specifically, About Inaccessibility

The cases where the arbitration agreement refers to an institution or a person that exists (or has existed), but which due to other circumstances is *inaccessible* to the parties differs from non–existing elements in that the inaccessibility to a greater extent may be the result of circumstances which occur after entering into the agreement. The question is whether this justifies a difference in approach and solution. Where non–existence can be viewed on the basis of general contract law principles of *mistake* (see Part III.C above), a parallel may in respect of inaccessibility be drawn to the general principles on *impracticability of performance/frustration of purpose*. The essence in respect of the latter is whether the unforeseen circumstance has an effect on the agreement's basic assumptions.[155]

In *Khan*,[156] the contract between Dell and an American consumer (Mr. Khan) stated that disputes should be settled "exclusively and finally by binding arbitration administered by the National Arbitration Forum (NAF) under its Code of Procedure."[157] NAF was prohibited from administering consumer arbitration, and therefore the arbitration agreement was in Khan's opinion "unenforceable." Kahn was unsuccessful.[158] The Court of Appeals (the majority), which initially emphasized the federal policy,[159] as well as the fact that FAA section 5 "provides a mechanism for substituting an arbitrator when the designated arbitrator is unavailable,"[160] referred to the following standard:

"has a material effect on the agreed exchange of performances"); BANKS, supra note 104, at ¶ 6:6 ("The mistake must go to the foundation of the agreement.").

[154] *See Gar Energy*, 2011 WL 6780927, at *9 ("Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern will the failure of the chosen forum preclude arbitration", and the references therein); and *see Kwasny*, 2010 WL 2474788, at *5 (finding that "a mutual mistake voids a contractual provision only if mistake is material – that is, if 'the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties.' . . . In the specific context of mistakes in arbitration clauses, the courts have framed the pertinent inquiry as whether the parties' overarching intent to arbitrate a dispute, as evidenced by the language of their arbitration agreement and any relevant surrounding circumstances, survives and is severable from a particular infirmity or ambiguity within this agreement").

[155] *See* RESTATEMENT (SECOND) OF CONTRACTS, §§ 261–62, 265–66 (AM. LAW INST. 1981).

[156] Khan v. Dell Inc., 669 F.3d 350 (3d Cir. 2012).

[157] *Id.* at 351. The arbitration agreement was contained in Dell's "Terms and Conditions of Sale," which Mr. Khan had accepted when purchasing a computer online. *Id*. The arbitration agreement is within the ambit of the FAA due to the fact that it concerns "interstate commerce" (FAA section 1). *Id*. Mr. Khan did not dispute that an arbitration agreement was concluded and as such valid. *Id*. The fact that a consumer is involved does not seem to matter to the court.

[158] *Id.* at 350.

[159] *Id.* at 354 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("The FAA reflects a 'liberal federal policy favoring arbitration.'").

[160] *Id.*

Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern, will the failure of the chosen forum preclude arbitration." In other words, a court will decline to appoint a substitute arbitrator, as provided in the FAA [§ 5], *only if the parties' choice of forum is* "*so central to the arbitration agreement that the unavailability of that arbitrator brings the agreement to an end*." In this light, the parties must have *unambiguously expressed their intent not to arbitrate* their disputes in the event that the designated arbitral forum is unavailable. (emphasis added).[161]

The relation between the procedural rule and the jurisdictional allocation, which is a general issue in connection with non–existing elements (see Part III.B-III.C above), was thus also decisive in *Khan* ("integral part" vs. "ancillary logistical concern").[162] *Khan* is also clear in respect of the strength of presumption: The jurisdictional allocation is only "infected" (*Solution 3*), if the parties *unambiguously* have expressed their intent *not* to arbitrate their disputes in the event of inaccessibility.[163] The mere choice of forum is in this respect insufficient. The ambiguity in respect of the consequence of inaccessibility is resolved to the advantage of the jurisdictional allocation and the court's supplementing power under the FAA, section 5 (*Solution 2*).[164]

Khan is one among a number of US American decisions on primarily consumer purchase contracts and employment contracts, where the arbitration agreement is affected by an inaccessible element.[165] Even though case law is not stringent, the majority support the approach in *Khan*.[166]

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[161] *Id.* (references, internal quotation marks, and square brackets omitted).

[162] *Id.* at 353–54.

[163] *Id.* at 354.

[164] *Id.* at 356 ("The language relied on by Khan is at best ambiguous as to whether the parties intended to have their disputes arbitrated in the event that NAF was unavailable for any reason. Because of the ambiguity, it is not clear whether the designation of NAF is ancillary or is as important a consideration as the agreement to arbitrate itself."). "Therefore, we must resolve this ambiguity in favor of arbitration." *Id*.

[165] *See generally id.* at 350.

[166] *See id.*, inter alia, Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 742 F.Supp. 1359, 1364–65 (N.D. Ill. 1990) ("[C]ourts look to the 'essence' of the arbitration agreement; to the extent the court can infer that the essential term of the provision is the agreement to arbitrate, that agreement will be enforced despite the failure of one of the terms of the bargain. If, on the other hand, it is clear that the failed term is not an ancillary logistical concern but rather is as important a consideration as the agreement to arbitrate itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail. . . . In cases where the failed term establishes the identity of the arbitrator or arbitrators, the [FAA § 5] steps in to cure the defect.") (footnote omitted); Brown v. ITT Consumer Financial Corp., 211 F.3d 1217, 1222 (11th Cir. 2000) ("Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern' will the failure of the chosen forum preclude arbitration. Here there is no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate.") (footnote omitted); Reddam v. KPMG LLP, 457 F.3d 1054 (9th Cir. 2006); Adler v. Dell Inc., No. 08–cv–13170, 2009 WL 4580739, at *2 (E.D. Mich. Dec. 3, 2009) ("As a general rule, when the arbitrator named in the arbitration agreement cannot or will not arbitrate the dispute, the court does not void the arbitration agreement. Instead, it appoints a different arbitrator, as provided in the [FAA section 5]. The exception to this rule occurs when 'it is clear that the failed term is not an ancillary logistical

The approach of the US courts to inaccessible elements therefore in principle does not differ from the approach to non-existing elements.[167] This is consistent with the fact that the courts' supplementing authority, FAA, section 5, is the same in both situations and is driven by the same considerations, just as the situations in reality also are congruent: the procedural rule de facto cannot be carried through.[168]

Also, there seems to be no fundamental difference in whether the arbitration agreement refers to a *specific person* as opposed to—as is generally the case—an institution. *See*, *Ballas*:

[A] proper construction of the contract is that the intention to arbitrate is the dominant intention, *the personality of the arbitrator being an auxiliary incident* rather than the essence, and that frustration of that dominant intention is not to be permitted merely because the precise method of accomplishing that intent has become impossible . . . . (emphasis added).[169]

Correspondingly *Domke on Commercial Arbitration*: "The unavailability of the arbitrator named in the arbitration agreement does not demonstrate a lack of agreement by the parties or invalidate an arbitration clause."[170] Also *Born* where it is concluded:

In effect, these courts (correctly) adopt a presumption that the parties' fundamental agreement is to arbitrate and that, absent a contrary showing, their choice of a particular institution, arbitrator, or appointing authority is an ancillary component of that agreement which, if inoperable, can be cured by the court or arbitral tribunal.[171]

This approach is consistent with the fact that the arbitration agreement would otherwise become a quite unpredictable affair; as it is inherently subject to significant uncertainty whether a specific person has the time, wish for and opportunity to take on the assignment as arbitrator at an unforeseeable future date. Such fundamental uncertainty cannot as a general rule be assumed to be intended between rational, commercial parties. On the contrary. As a couple of earlier decisions from the New York Supreme Court point out, the parties must be familiar with the vicissitudes of life: "they agreed to arbitrate and named [Person X] as arbitrator, and they must be deemed to have known that the vicissitudes of life are such that he was apt to become unavailable as time moved on."[172]

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concern but rather is as important a consideration as the agreement to arbitrate itself.'") (footnote omitted); *but see* Gutfreund v. Weiner (*In re* Salomon Inc. Shareholders' Derivative Litig.), 68 F.3d 554 (2d Cir. 1995) (where Court of Appeal concluded that the FAA, section 5, does not apply in cases where the agreed forum rejects arbitration).

[167] *See* cases cited *supra* note 166.

[168] *See* cases cited *supra* note 166.

[169] Ballas v. Mann, 82 N.Y.S.2d 426 (N.Y.S. 1948); *compare* Delma Eng'g Corp. v. K & L Constr. Co., 174 N.Y.S.2d 620, 621 (N.Y. 1958) ("There was no agreement here to arbitrate before particular arbitrators.").

[170] MARTIN DOMKE, GABRIEL M. WILNER, & LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION: THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION 8 (3d ed. 2003).

[171] BORN, *supra* note 11, at 782.

[172] Ballas v. Mann, 82 N.Y.S.2d 426, 427–28 (N.Y.S. 1948).

It may be that in most agreements to arbitrate future differences the dominant intent of the parties is to arbitrate – preferably with the person or persons named in the agreement, but to arbitrate in any event. Parties who adopt an arbitration clause when entering into a venture or transaction that may breed future differences have woven the arbitration concept into the very fabric of their venture right at the start of their dealings. They must be aware of the many contingencies that could arise over an indeterminate period of time to render the named arbitrator unavailable for service. When parties are alerted by such an awareness it might not be unreasonable to hold that if they do not restrict the arbitration to the named arbitrator in clear and specific terms, they intend to proceed to arbitration at all events with some substitute.[173]

If the parties really wish that the arbitration tribunal must consist of Person A *and no one else*—with the consequence that the jurisdictional allocation in the event of Person A's inaccessibility (regardless of the cause) lapses—the parties are free to agree on this. But ambiguity is interpreted to the advantage of the jurisdictional allocation. In this respect the New York Court of Appeals in 1929 noted:

We assume in favor of the defendant that it is possible to phrase an arbitration clause with a method of selection so transparently essential as to leave no room whatever for the process of construction. This might be so, for illustration, if there were a promise to arbitrate through a named person, and no one else . . . Here, on the contrary, promise and intention are not so free from uncertainty that construction is impossible. In the forefront of the clause is the statement of the dominant purpose that controversies of a given order shall be settled by arbitration. What follows may be figured, at least with a show of reason, as incidental and subsidiary.[174]

IV. HONG KONG AND SINGAPORE

A. The Default Mechanism

The courts in Hong Kong and Singapore have contributed with a couple of (in)famous cases of enforcement of arbitration agreements containing non-existing elements.[175] Both jurisdictions have incorporated the Model Law by reference, including art. 11(4), concerning the courts' authority to assist in the appointment process (see the Singapore International Arbitration Act at art. 8 and the Hong Kong Arbitration Ordinance at pages 13 and 24).[176] Article 11(4)(c) of the Model Law sets out the following default mechanism to remedy a defective procedure:

[173] Golenbock v. Komoroff, 2 A.D.2d 742, 743 (N.Y. App. Div. 1956).
[174] Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 296–97 (N.Y. 1929); *see also*, *Ballas*, 82 N.Y.S.2d at 427 ("The parties here did not agree to arbitrate through [Person X] and no one else.").
[175] *See generally* Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 1 H.K.C. 404 (H.K.).
[176] *See* International Arbitration Act (Cap 143a, 2002 Rev Ed) s 8; Arbitration Ordinance, (2011) Cap. 609, 13, 24 (H.K.).

> Where, under an appointment procedure agreed upon by the parties, . . . a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court . . . to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.[177]

The consideration behind the default mechanism is to "*cure*" pathological appointment procedures and thus prevent unenforceability and unnecessary delays.[178] The broad wording and purpose of the provisions imply that the *background* for the ineffective appointment is of secondary importance, just as it cannot be decisive *which* (defective) appointment procedure is initially agreed upon.[179]

B. Hong Kong: Lucky-Goldstar

One of the most widely discussed decisions concerning pathological arbitration agreements, Lucky-Goldstar International v. Ng Moo Ke Enginerring[180] has been characterized as an "extreme case"[181] and as a "leading authority"[182]—presumably because the decision concerns (and enforces) an arbitration agreement with an ambiguous statement of *both* seat ("3rd Country") and institution (non-existent) based on a straight out purpose-oriented interpretation.

In *Lucky-Goldstar* the parties had agreed that "any dispute . . . shall be arbitrated in the 3rd Country . . . in accordance with the rules of procedure of *the International Commercial Arbitration Association.*" (emphasis added)[183] However, the "Arbitration Association" referenced did not exist. Therefore, the plaintiff wanted the arbitration agreement to be set aside with reference to the existence of a *common mistake*;[184] alter-

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[177] UNCITRAL Model Law, *supra* note 15, at art. 11(3)(c).

[178] Seventh Secretariat Note, Analytical Commentary on Draft Text (A/CN.9/264 (25 March 1985)), ¶ 4, reprinted in HOWARD M. & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 381–83 (1989). "Paragraph (4) describes three possible defects in typical appointment procedures and *provides a cure* thereof by allowing any party to request the Court . . . to take the necessary measure instead (i.e. instead of the 'failing' party, persons or authority . . .). Assistance by this Court is provided in order *to avoid any deadlock or undue delay in the appointment process*." (emphasis added). *Id.*

[179] UNCITRAL Model Law, *supra* note 15, at art. 11(3)(c), which generally concerns situations where an institution "fails to perform any function entrusted to it under such [appointment] procedure".

[180] *Lucky-Goldstar Int'l (H.K.) Ltd.*, [1993] 1 H.K.C. at 404–09.

[181] LEW ET AL., *supra* note 1, at ¶¶ 7–77.

[182] BORN, *supra* note 11, at 778.

[183] The arbitration agreement's floating element ("3rd Country") is not discussed in this article. *Lucky-Goldstar Int'l (H.K.) Ltd.*, [1993] 1 H.K.C. at 404–09.

[184] *Id.* at 406 ("He submitted that when the parties have agreed to undertake arbitration only in certain circumstances, and according to certain rules and those rules turn out to be non-existent, the consent to arbitration is therefore nullified.").

natively, that the arbitration agreement was "incapable of being performed."[185] But the parties apparently did not argue that the reference was actually aimed at the ICC or another existing institution.[186]

The court in Hong Kong dismissed the *common mistake* objection with reference to the parties' clear intention to arbitrate disputes:

It is perfectly clear that the parties, by this clause, intended to arbitrate any disputes that might arise under this contract. This agreement is not nullified because they chose the rules of a non-existent organisation . . . . As there are no rules of this non-existent organization the arbitration has to be conducted under the law of the 3rd Country chosen by the Plaintiff.[187]

The view about incapability of performance did not win acceptance either, in light of the parties' "clearly expressed" intention:

I cannot see how it can be said that this arbitration clause is 'inoperative or incapable of being performed'. True, it is, that there will be no arbitration under the rules of the International Commercial Arbitration Association, but there will be an arbitration under the law of the place of arbitration chosen by the Plaintiffs and they have a very wide choice indeed . . . I believe that the correct approach in this case is to satisfy myself that the parties have *clearly expressed the intention to arbitrate any dispute which may arise under this contract*. I am so satisfied . . . . As to the reference to the non-existent arbitration institution and rules, *I believe that the correct approach is simply to ignore it*. I can give no effect to it and I reject all reference to it so as to be able to give effect to the clear intention of the parties . . . . I fail to see how it can be argued that either party could have placed any importance on a non-existent set of rules. (emphasis added)[188]

The fate of the arbitration agreement is thus decided by the clear *jurisdictional allocation* ("intention to arbitrate any dispute"), which the arbitration clause reflects, and not the pathological *procedural rule* contained in the clause.[189] Based on the jurisdictional allocation, the court severs the pathological and unworkable procedural rule and enforces the remaining part of the arbitration agreement (*Solution 2*).[190] The court's categorical reasons in a sense resemble *Warnes v. Harvic Int'l*, where a New York court found "an agreement on a non-existent arbitration forum is *the equivalent of an agreement to arbitrate which does not specify a forum*: since the parties had the intent to arbitrate, even in the absence of a properly designated forum." (emphasis added)[191]

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[185] UNCITRAL Model Law, *supra* note 15, at art. 8.

[186] *Lucky-Goldstar Int'l (H.K.) Ltd.*, [1993] 1 H.K.C. at 406. In this regard, the Court merely notes that "[n]o useful purpose can be served by speculating as to what was actually intended by the use of these words." *Id.*

[187] *Id.*

[188] *Id.* at 407–08.

[189] *Id.*

[190] *See id.*

[191] Warnes S.A. v. Harvic Int'l, Ltd., 1993 WL 228028, at *7 (S.D.N.Y. June 22, 1993).

See also Guangdong Agriculture Company Ltd. v. Conagra International (Far East) Ltd., [1993] 1 H.K.L.R. (H.C.) concerning an "arbitration" clause under which a dispute "can then be submitted to *the chartered loss adjuster* for arbitration. The arbitration shall take place in Hong Kong and shall be executed in accordance with *the rules of Hong Kong* and the decision made by the adjuster*s* shall be accepted as final and binding." (emphasis added).[192] The plaintiff claimed, inter alia, that the provision was unenforceable, because it was unclear, *who* ("the chartered loss adjuster"), *how many* ("adjuster" vs. "adjuster*s*"), and *which rules* ("the rules of Hong Kong") the agreement referred to.[193] The court dismissed the submissions with reference to the fact that "the parties plainly agreed to settle any dispute by arbitration . . . . Should the parties be unable to agree the precise number of arbitrators or the rules to be followed, the Model Law will assist them."[194]

The decisions are clearly based on a distinction between jurisdictional allocation, which is assumed to be the parties' *dominant* intention with the arbitration agreement, and the procedural rules, which in relation to the jurisdictional allocation take on a *secondary* role—as is also characteristic for US approach.[195] As in US American case law, *Lucky-Goldstar* leaves an option open that a non-existing element under the circumstances *may* be of decisive importance, and thus cause the arbitration agreement to lapse (*Solution 3*).[196] But, the court notes (*obiter dictum*) with reference to the *dominant purpose* test in *Lab. Grossman (N.Y.S. 1968)*, which the court finds "useful."

I have no doubt that the parties' dominant intention was to settle disputes by arbitration rather than the instrumentality through which arbitration was to be conducted. This is clear from the fact that the organization referred to was non-existent and further, unlike in the case cited, neither party deposed to intending any specific alternate arbitral institution.[197]

As the court in Hong Kong indicates, it must inherently be difficult to substantiate that an element, which does *not exist*, and which the parties therefore cannot have had any meaningful knowledge of, was important to the parties.[198] The presumption is that the parties had a fundamental intention to arbitrate disputes, and this intention is not "infected" by the non-existing element.

Even though the arbitration agreements in *Lucky-Goldstar* and *Guangdong Agriculture* are not initially supplemented by the courts (as is usual in US American case law), it is an essential point in the decisions that the arbitration agreements do not leave the

[192] *Guangdong Agriculture Company Ltd.*, [1993] 1 H.K.L.R. (H.C.).
[193] *Id*. at ¶ 5.
[194] *Id.* at ¶ 9.
[195] *See supra* Part III.
[196] Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 1 H.K.C. 404, 407–08 (H.K.).
[197] *Id.* at 409.
[198] *See also* Gar Energy & Assocs. v. Ivanhoe Energy Inc., No. 1:11–CV–00907 AWI JLT, 2011 WL 6780927, at *9 (E.D. Cal. Dec. 27, 2011) ("[I]t is apparent that neither party has ever seen the rules of the [AAS] nor had any meaningful knowledge or contact with the AAS.").

parties in limbo, but actually provide a possibility for instigating an arbitration procedure (*Lucky-Goldstar*), potentially with the assistance of the courts (*Guangdong Agriculture*).[199]

C. Singapore: HKL Group and KVC Rice

In the *HKL Group* cases[200]—which initially obtained its fame as the keeper of the hybrid arbitration agreement—international commercial parties had, as part of a contract for the sale of sand from Cambodia to be delivered in Singapore agreed that "all dispute[s] . . . shall be settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce."[201] As opposed to the ICC rules, "the Arbitration Committee at Singapore" does not exist, and the court had to consider whether the arbitration agreement was therefore *inoperable*.[202]

The Singapore High Court found that the courts will generally seek to uphold the parties' *intent to arbitrate* (cf. the principle of "effective interpretation").[203] In the analysis, the court discusses case law from Germany and Hong Kong as well as international and comparative arbitration literature.[204] Specifically, the High Court did not find that there was a basis for concluding that *institutional* arbitration had been agreed in the form of either ICC[205] or SIAC,[206] and continued:

Nonetheless, in my view, the arbitration clause is operative and workable for the following reasons. First, it *clearly evi[de]nces the intention of the parties to resolve any dispute by arbitration*. Second, it provides for mandatory consequences in that if a dis-

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[199] *Lucky-Goldstar Int'l (H.K.) Ltd.*, [1993] 1 H.K.C. at 404–07 ("As there are no rules of this non-existent organization the arbitration has to be conducted under the law of the third Country chosen by the plaintiffs . . . . [T]here will be an arbitration under the law of the place of arbitration chosen by the plaintiffs and they have a very wide choice indeed."); *Guangdong Agriculture Company Ltd.*, [1993] 1 H.K.L.R.at 4 ("[T]he Model Law will assist them.").

[200] In both cases, the decisions were made by an Assistant Registrar ("AR"), i.e. that the decisions are not formally binding for other courts. HKL Group Co. Ltd. v. Rizq Int'l Holding Pte. Ltd., [2013] SGHCR 5; HKL Group Co. v. Rizq International Holding Pte. Ldt. [2013] SGHCR 8.

[201] *HKL Group Co.*, [2013] SGHCR 5, ¶ 1.

[202] *Id*.

[203] *Id.* at ¶ 13 ("[T]he court generally seeks to give effect to that [pathological] clause, preferring an interpretation which does so over one which does not.") (referencing Insigma Tech. Co. Ltd. v. Alstom Tech. Ltd. [2009] SGCA 24, ¶ 15 ("[T]he overarching principle of effective interpretation"; "the broad aim is to keep the clause alive."); and ¶ 24 ("[G]ive primacy to the decision of the parties to arbitrate and will seek to resolve the various pathologies with the aid of the principle of effective interpretation.")).

[204] *HKL Group Co.*, [2013] SGHCR 5, ¶ 17.

[205] *Id.* at ¶ 26. The court notes that if an ICC National Committee had existed in Singapore, "the reference to the ICC rules would then be strongly indicative of an ICC arbitration administered by the National Committee." It may seem obvious that the High Court's reference to the National Committee cannot be taken literally (since such a committee actually exists in Singapore), but as a reference to the fact that ICC was not or did not have a 'local arbitration institution' in Singapore.

[206] *Id.* ("[S]ince the SIAC does not ordinarily apply the ICC rules.").

pute arises, the matter has to be referred to arbitration. Third, it states the place of the arbitration, namely, Singapore. Fourth, it provides that the arbitration is to be governed by a particular set of rules, namely, the ICC rules. (emphasis added) [207]

Since there is therefore no basis for applying *Solution 1*,[208] the non-existing element is severed from the arbitration agreement and it is left to the parties to find an existing institution (SIAC, ICC or a third institution), which will accept the administration of the arbitration proceedings on the remaining, agreed terms (*Solution 2*);[209] i.e. the place of arbitration being Singapore and subject to the ICC rules. If this proves not to be possible, it must be assumed that the parties may proceed according to the Model Law, art. 11(4) (cf. SIAA, art. 8) in order for the president of the SIAC Court to appoint the members of the arbitration tribunal.[210] In this way, the parties were not left with an arbitration agreement, the operability of which was conditional upon a party's consent or third party acceptance.[211]

HKL Group thus upheld—as in the twenty years earlier *Lucky-Goldstar*—the jurisdictional allocation and the operable part of the procedural rules.[212] *HKL Group* attaches (as does *Lucky-Goldstar*) particular importance to giving affect to the arbitration agreement "as it stands,"[213] and does not take the opportunity to make an (objectively) more effective choice for the parties.[214] As opposed to *Lucky-Goldstar, HKL Group* finds, however, no reason to emphasize the "dominant intention" test.[215]

Even though *HKL Group* leaves it unanswered whether a situation corresponding to the one in *Lucky-Goldstar*—where ambiguity existed about *both* the place of arbitration and the institution/rules—would have had the same outcome in Singapore, there is hardly any reason to doubt that this would in principle be the case:

Although I leave open the question, as it is not before this court, of whether the Singapore courts will likewise uphold an arbitration clause where there is uncertainty as

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[207] *Id.* at ¶ 27.

[208] *See also* Jason Fry, *HKL Group Ltd v. Rizq International Holdings Pte. and HKL Group Co. Ltd. v. Rizq International Holdings Pte Ltd.*, 30 J. INT'L ARB. 453, 456 (2013) ("[T]he court found that the clause referred to an unidentifiable arbitral institution.").

[209] *HKL Group Co.*, [2013] SGHCR 5, ¶¶ 28–29, 37 ("I will stay the proceedings, but, given the defect in the arbitration clause, I impose the condition that parties obtain the agreement of the SIAC or any other arbitral institution in Singapore to conduct a hybrid arbitration applying the ICC rules . . . ."). *See also* HKL Group Co. v. Rizq International Holding Pte. Ldt. [2013] SGHCR 8, ¶ 12 (maintaining the condition but clarifying that hybrid arbitration is just one of several options). This is probably also what the Court is referring to with the unclear remark on "with liberty to apply should they fail to secure any such agreement." *HKL Group Co.*, [2013] SGHCR 5, ¶ 37.

[211] *Id.* at ¶ 38.

[212] *Id.*

[213] *Id.*

[214] The court invited, however, the parties to agree on pure institutional arbitration, thereby avoiding "the procedural gymnastics of […] hybrid arbitration." *Id.* Accordingly, the parties subsequently agreed on SIAC arbitration. *HKL Group Co.*, [2013] SGHCR 8, ¶ 4.

[215] Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 1 H.K.C. 404, 409 (H.K.).

to both the arbitral institution and the place of arbitration, it will suffice to note that the Singapore courts will, consistent with the approach under international arbitration law, *give primacy to the decision of the parties to arbitrate and will seek to resolve the various pathologies with the aid of the principle of effective interpretation*. (emphasis added)[216]

Although the arbitration agreement's statement of place of arbitration (Singapore) and applicable arbitration rules (ICC) may be said to limit the specific importance of the pathology in *HKL Group*, there is no basis for assuming that the presence of such additional (operable) procedural rules will be decisive. As is the case in the Hong Kong decisions, the essential issue is the parties' *intention to arbitrate*, as expressed in the arbitration agreement,[217] and the resulting distinction between the jurisdictional allocation—which takes precedence ("primacy")—and the (secondary) procedural rules, which if necessary are interpreted and supplemented by the courts in light of the object of upholding the parties' wish to arbitrate.[218]

This approach is generally confirmed in *KVC Rice,*[219] which enforces two arbitration agreements, which—in addition to meaningless references to "Indian Contract Rules" and "Singapore Contract Rules" respectively—are blank, with reference to the default mechanism in respect of the appointment of the arbitration tribunal.[220] Since the question in *KVC Rice* solely was, whether the arbitration agreements provided the basis for staying the legal proceedings, the Singapore High Court did not resolve the question as to the specific importance of the meaningless/non-existing element.[221] However, the court noted that "It is well known and accepted that courts will disregard meaningless words in arbitration clauses in order to construe such clauses in a workable manner", with reference to *Lucky Goldstar* and *HKL Group*.[222]

V. ENGLISH LAW

There is no basis for assuming that the English courts will take a fundamentally different approach than that reflected in case law from the Model Law countries Hong Kong and Singapore (see Part IV above). As stated in *Russell on Arbitration*—with reference to *Lucky Goldstar* and *HKL Group*: "The arbitration agreement will not be

[216] *HKL Group Co.*, [2013] SGHCR 5, ¶ 24.
[217] *Id.* at ¶ 27. ("[C]learly evinces the intention of the parties to resolve any dispute by [mandatory] arbitration"); *see also Lucky-Goldstar Int'l (H.K.) Ltd.*, [1993] 1 H.K.C. at 408 ("[T]he parties have clearly expressed the intention to arbitrate any dispute"); *Guangdong Agriculture Company Ltd.*, [1993] 1 H.K.L.R. at ¶ 9 ("[T]he parties plainly agreed to settle any dispute by arbitration.").
[218] *HKL Group Co.*, [2013] SGHCR 5, ¶¶ 24–27.
[219] K.V.C. Rice Intertrade Co. Ltd. v. Asian Mineral Res. Pte. Ltd. [2017] SGHC 32.
[220] *Id.* at ¶ 54.
[221] *Id.*
[222] *K.V.C. Rice Intertrade Co Ltd.*, [2017] SGHC 32, ¶ 53.

inoperative or incapable of being performed just because reference is made to the rules of a non-existent arbitration institution, provided *the underlying intention to arbitrate is clear*."[223] Further, as stated by David Joseph:

[I]t is suggested that an English court is likely to conclude that the parties' agreement to arbitrate should remain enforceable. *Without more, the parties will be taken to have still intended to arbitrate* at the particular seat under the general provisions applicable by reference to the governing arbitration law but not under the auspices of the identified but failed rules/institution." (emphasis added)[224]

Where Hong Kong and Singapore follow the default mechanism of the Model Law in respect of the courts' assistance in appointing the arbitration tribunal, the English "gateway"[225] is, however, worded differently in the English Arbitration Act (EAA), section 18:

(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. […]

(2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) 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 anyone or more of them) as have been made;

(c) to revoke any appointments already made;

(d) to make any necessary appointments itself.[226]

The English courts' jurisdiction thus appear to be—even if drafted in light of the Model Law[227]—more flexible (unpredictable) than the same in the Model Law, both in respect of *whether* the courts will assist, and if so, *which* measures ("powers") the courts will take. However, in respect of a view on "unfettered discretion", the English High Court has stated:

Respect for this principle [of party autonomy] and the desirability of holding the parties to their agreement together provide strong grounds for exercising the court's discretion *in favour of constituting the tribunal* except in the small number of cases in

[223] DAVID ST. JOHN SUTTON, JUDITH GILL, & MATTHEW GEARING, RUSSELL ON ARBITRATION 7 (24th ed. 2015) (emphasis added); *see also* BORN, *supra* note 11, at 783 (labelling Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 1 H.K.C. 404 as a "leading authority.").

[224] DAVID JOSEPH, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT ¶ 4.86 (3d ed. 2015).

[225] SUTTON ET AL., *supra* note 223, at ¶ 7–100.

[226] English Arbitration Act 1996, c. 23, § 18.

[227] DEPARTMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW, REPORT ON THE ARBITRATION BILL, 1996, ¶ 87 (UK) ("[W]e have had the Model Law in mind when drafting this provision."); *see also* BRUCE HARRIS, ROWAN PLANTEROSE & JONATHAN TECKS, THE ARBITRATION ACT 1996: A COMMENTARY 112 (5th ed. 2014).

which it can be seen that the arbitral process *cannot result in a fair resolution of the dispute*. (emphasis added)[228]

The English courts are thus prepared—as a clear main rule—to assist in the appointment of the arbitration tribunal and thus support the operability of the arbitration agreement.[229] The High Court also emphasized that it would be "contrary to the spirit of the [New York] Convention", if one country's courts are obliged to dismiss actions on disputes subject to an arbitration agreement, while another country's courts reject assisting in the appointment of the arbitration tribunal under the same arbitration agreement.[230] Maintaining a consistent international framework regulation, which counteracts that the parties remain in limbo, must be a strong consideration.

EAA section 18 applies generally in the event of "the failure of the appointment procedure," including also "if an appointing person or body no longer existed."[231] In such event, the English court may either decide that the appointment be made by another person/institution, or make the appointment itself.[232] To illustrate this, see *Chalbury McCouat International Ltd. v. P G Foils Ltd.*, where the High Court, with reference to the international aspects of the case, found that the LCIA president "should make the necessary appointment of an [a]rbitrator and that the arbitral tribunal shall be constituted by that appointment."[233]

The English High Court's ruling in *China Agribusiness Development Corp. v. Balli Trading*[234] is interesting even though it does not concern a 'pure' event of *inaccessibility*. A contract between international parties stated that disputes "shall then be submitted for arbitration to the [FETAC] in accordance with the Provisional Rules of Procedure of the [FETAC]."[235] FETAC did exist, but the question was whether arbitration should take place according to the stated "Provisional Rules"–which already prior to entering the contract were outdated–or according to the Rules in force from time to time.[236]

After the conclusion of the contract but before the dispute arose, FETAC changed its name to CIETAC, but it was undisputed in the case that CIETAC was the proper arbitration institution.[237] CIETAC arbitration in China was carried through based on CIETAC's applicable rules. During the enforcement proceedings in England, the Eng-

[228] *Atlanska Plovidba & Anor*, [2004] EWHC 1273 (Comm) [24] (Moore-Bick J).
[229] *Id.* at ¶ 39.
[230] *Id.* at ¶ 33 ("If the defendant sought to pursue a claim that fell within the arbitration agreement in Spain, the court would be bound to grant a stay under the New York Convention. In these circumstances it would be contrary to the spirit of the Convention for this court to refuse to exercise its power to appoint an arbitrator.").
[231] HARRIS ET AL., *supra* note 227, at 112.
[232] *Id.* at 114.
[233] Chalbury McCouat Int'l Ltd. v. P.G. Foils Ltd., [2010] EWHC 2050 (TCC).
[234] China Agribusiness Dev. Corp. v. Balli Trading, [1998] 2 Lloyd's Law Rep 76 (English High Court).
[235] *Id.* at 76.
[236] *Id.*
[237] *Id.* at 77.

lish party claimed that the arbitration proceedings were not in compliance with the parties' agreement[238] with reference to the parties having "agreed to arbitration under the old provsional rules" and "[i]f that agreement could not be performed there was no arbitration agreement."[239]

The High Court concluded in favor of the applicable rules,[240] with reference to the fact that the arbitration agreement would otherwise be inoperable:[241]

> if the agreement were to be construed as an agreement to arbitrate only under the provisional rules, the parties would have agreed to do something impossible. Of course, parties to a contract are free to agree something which is in the event impossible and the Courts will have to determine the legal consequence, but *a Court will try to avoid imputing to the parties an intention to do something which cannot be done*. (emphasis added)[242]

Interesting in a broader perspective is also the High Court's framing of the important issue of the case:

> The question here is whether the parties have agreed that there shall be arbitration . . . in China, or whether they have gone further and agreed that if any arbitration is to take place it will only take place in China under provisional and out of date rules, *and if that cannot be done there is to be no arbitration at all*. (emphasis added) [243]

The parties had not used "clear enough words" to obtain the latter result.[244] In line with this is also *Khan v. Dell Inc.*, where the US American circuit court held that "the parties must have unambiguously expressed their intent not to arbitrate their disputes in the event that the designated arbitral forum is unavailable."[245]

See in this respect also *Comtec Components Ltd. v. Interquip Ltd.*,[246] where the arbitration tribunal, according to the agreement, should be appointed by HKIAC, which, however, rejected to arrange for the appointment. The court in Hong Kong did not find that this immediate inaccessibility was fatal to the arbitration agreement:

> I do not believe that the initial refusal by the HKIAC to make an appointment makes the arbitration agreement incapable of being performed. The parties are free to agree on an arbitrator. […] In the last resort, this court, I believe, has a residuary juris-

[238] Compare the English Arbitration Act 1996, c. 23, § 103(2)(e) which incorporates the New York Convention, *supra note* 15, at art. V(1)(d).
[239] *China Agribusiness Dev. Corp.*, [1998] 2 Lloyd's Law Rep. 76, at 77–78.
[240] *Id.* at 78.
[241] *Id.* at 79. Further, the High Court emphasized that "the word 'provisional' is no more than a word of identification, not a word of differentiation intended to indicate an earlier version of rules by which, and by which alone, the parties were to be bound." *Id*. at 78.
[242] *Id.* at 79.
[243] *Id.*
[244] *Id.*
[245] Khan v. Dell Inc., 669 F.3d 350, 354 (3d Cir. 2012).; *see supra* Part III.D.
[246] Comtec Components Ltd. v. Interquip Ltd., [1998] HKCFI 803.

diction to make an appointment to implement the intention of the parties that their disputes should be resolved by arbitration.[247]

Obviously, the main rule to be derived from the aforementioned case law is that pathological procedural rules do not "infect" the jurisdictional allocation.[248]

VI. DISTINCTION: DOUBT ABOUT THE JURISDICTIONAL ALLOCATION ITSELF

In compliance with the basic distinction between jurisdictional allocation and procedural rules, it is important to distinguish those situations where the arbitration agreement not only contains a pathological procedural rule, but also raises doubts as to whether the provision actually contains a *prorogation*, such as a choice of arbitration.

In the English *Flight Training International v. International Fire Training Equipment Ltd.,* the "Settlement of Disputes" provision in a contract for the delivery of anti-terror training facilities between an American and an English business set out that disputes "shall be submitted to *the Advisory, Conciliation and Arbitration Services (ACAS) London*. Legal fees and costs shall be paid by either party which does not *prevail at mediation*" (emphasis added).[249] However, ACAS did not administer commercial disputes and therefore refused the request from the American party, who then requested the English courts assist in appointing an arbitration tribunal.[250] The High Court dismissed the request with reference to the fact that there was no arbitration agreement:

> [The clause] does not incorporate an agreement to submit future disputes to arbitration. It refers disputes to a body which does not deal with the resolution of commercial disputes, but which, in the field of employment relations and related matters provides conciliation services, mediation services and arbitration services. I emphasize that these three sets of services are *distinct*. [The clause] specifically refers to 'mediation' in the second sentence. This provides a strong indication of an intention to select mediation out of the services provided by ACAS.[251]

Flight Training and *Teck Guan* are both characterized by the fact that the interpretation issues cannot be isolated to a question of inoperable procedural rules, since it is essentially questionable whether the parties had agreed to resolve disputes by arbitration. This interpretation situation is thus fundamentally different compared to the most frequently occurring events, where it must be decided—based on a clear jurisdictional allocation—what importance pathological procedural rules have with respect to the

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[247] *Id.*
[248] *See id.*
[249] Flight Training International v. International Fire Training Equipment Ltd., [2004] EWHC (Comm) 721.
[250] *Id.*

[251] *Id.*; *see also* Teck Guan Sdn Bhd v. Beow Guan Enterprises Pte Ltd., [2003] 4 SLR 276 (where the provision "any dispute . . . to be governed by the rules of the Cocoa Merchants' Association of America Inc." did not constitute an arbitration agreement because the CMAA's rules do not give the parties the right or the obligation to arbitrate).

enforcement and operability of the arbitration agreement. Judgments like these therefore do not contradict the fundamental distinction between jurisdictional allocation and procedural rules, which is the general theme in case law, and the judgments are not an expression of a restrictive interpretive approach towards arbitration agreements. Indeed, if anything, these decisions underline the fundamental distinction between the jurisdictional allocation and procedural rules and the fundamental importance of the arbitration agreement containing a prorogation.

Compare *Lovelock Ltd. v. Exportles*,[252] where the English Court of Appeal rejects the independent importance of one of the two hopelessly conflicting parts of the arbitration agreement, because the appointing authority to which this part of the arbitration agreement referred, refused to make the appointment.[253] *Lovelock* is peculiar and has not created a precedent for a particularly restrictive interpretation principle in English law.

If the dispute resolution provision merely refers to an institution, which provides different forms of alternative dispute resolution, and where arbitration is merely one among several options of equal standing, an immediate prorogation for arbitration does not exist, unless there is a separate basis for establishing that the parties have chosen arbitration. However, this does not change the fact that the *derogation* in such events is typically clear. The parties have chosen not to use litigation; it is merely unclear *which* ADR procedure should be applied instead. Against this background, it hardly takes much for establishing that an arbitration agreement exists.[254] A heading alone ('Arbitration') must therefore be sufficient, unless headings have been agreed to have no interpretative importance, just as other terms in the provision ("final and binding," "award," etc.) can point in that direction.

In light of *Flight Training,* it may be considered whether an arbitration agreement exists, if a provision merely refers to the fact that disputes "shall be submitted to the advisory, conciliation and arbitration services of" an existing and accessible institution.[255] The derogation (opting out litigation) is clear, but–as also pointed out by the High Court in *Flight Training*–the listed services are different, and therefore prorogation (of arbitration) is not certain unless a choice is made or can otherwise be deduced.[256] In such cases, it may be important whether it follows from the institutional rules in question that the parties ultimately must resolve disputes by arbitration.

[252] Lovelock Ltd. v. Exportles, [1968] 1 Lloyd's Law Report 163 (English Court of Appeal).

[253] *Lovelock*, [1968] 1 Lloyd's Law Report 163 at 166–67 ("So the first part of the clause could not be operated") (Lord Denning) ("proved impossible to work the provisions of the clause . . . because of the refusal of the chairman of the [institution] to appoint an umpire") (Diplock LJ).

[254] Joseph, *supra* note 13, ("[T]he clause might not be enforceable as an arbitration agreement if the institution in question conducts both conciliation and arbitration. . . . However, it will be seen below that, as long as parties do evidence an intention to refer disputes to arbitration, the courts will strive to uphold that bargain.").

[255] *See Flight Training Int'l*, [2004] EWHC 721.

[256] *See id.*

In this respect, *TMT*[257] from Singapore must be mentioned. The case concerned the following "Arbitration" provision in a *trading account agreement* (referred to as "FAA Account Agreement") between a Liberian company (TMT) and The Royal Bank of Scotland (RBS):

Any dispute arising from or relating to these terms or any Contract made hereunder shall, unless resolved between us, be referred to arbitration *under the arbitration rules of the relevant exchange* or any other organisation as *the relevant exchange* may direct and both parties agree to, such agreement not to be unreasonabl[y] withheld, before either of us resort to the jurisdiction of the Court. (emphasis added)[258]

TMT summoned RBS before the courts in Singapore.[259] RBS claimed that the case be *stayed*–with reference to the fact that the dispute was subject to the arbitration agreement–to which TMT objected and stated that the arbitration agreement presupposed the involvement of a "relevant exchange," which was not the case since the trade under the FAA agreement had been concluded through a *clearing house*, which is not an *exchange*.[260] This fact was undisputed.[261] Even though the High Court rejected the case on other grounds subject to a choice of venue agreement in a "Settlement Agreement," the court found reason to state (*obiter*) that the arbitration agreement did not justify dismissal of the case by the courts:[262]

The difficulty is apparent from the plain words. [The arbitration clause] clearly contemplates that there be an exchange. . . . Thus, it is clear that *the existence of an exchange was required for a dispute to be under the scope of the arbitration agreement*. No exchange was however involved in the present matters. The trades were carried out through a clearing house, which is a different type of organisation. (emphasis added)[263]

In the view of the High Court, the *scope* of the arbitration agreement is thus limited to *disputes involving an "exchange,"* i.e., no jurisdictional allocation exists in respect of the dispute in question because no "exchange" was involved.[264] This interpretation is

[257] TMT Co., Ltd. v. The Royal Bank of Scotland plc., [2017] SGHC 21.
[258] *Id.*
[259] *Id.*
[260] *Id.* Under the FAA agreement, TMT (the plaintiff) traded in forward freight agreements and options ("FFAs"). *Id.* These trades were cleared by The Royal Bank of Scotland (defendant) via the London Clearing House, where RBS was "Clearing Member." *Id.* Initially, TMT had brought a breach of contract action before the English Commercial Court seeking compensation for loss in connection with these trades. *Id.* The litigation was settled by a "Settlement Agreement" according to which the English courts had jurisdiction. *Id.* Subsequently, TMT summoned RBS (and RBS' branch in Singapore and certain employees) before the Singaporean courts with new claims relating to the same FAA agreement and the same trades. *Id.*
[261] *Id.*
[262] *Id.*
[263] *Id.*
[264] *Id.* The High Court rejects the defendant's assertion that the arbitration agreement's reference to "exchange" should be broadly interpreted to also include "clearing house"—although this potentially implies the division of claims into multiple forums as this "is what the parties bargained for, and the Courts would be slow to override the plain words in the parties' agreement." *Id.*

strained. First, the "coupling" of the *scope* of the arbitration agreement and the *procedural rules* is worrying; the scope is clearly and broadly stated to be "[a]ny dispute arising from or relating to these terms or any Contract made hereunder."[265] Second, the court's interpretation apparently implies that *no* disputes under the FAA agreement are subject to the arbitration provision in that very agreement.[266] It does not improve matters when the High Court initially finds reason to note (*obiter*) that "[i]t may be also that the [arbitration] clause fails the third criteria, as it is inoperative or incapable of being performed. I do not think that the precise criteria matters here."[267]

The court's reference to the "third criteria" is a reference to the last of the three preconditions that must be fulfilled in order to obtain a successful *stay application* in Singapore: (i) "valid arbitration agreement", (ii) "dispute . . . falls within the scope of the arbitration agreement," and (iii) "the arbitration agreement is not null and void, inoperative or incapable of being performed."[268] It is clear that the court does not find reason to conduct a thorough analysis of the question, including considering existing case law, for the very reason that the case is resolved based on other circumstances and because the dispute also–in the court's opinion–does not fall under the scope of the arbitration agreement.

On the other hand, if by implication it is considered that the dispute falls under the scope of the arbitration agreement, a correct application of the law—see this respect in particular *Lucky-Goldstar*, *Insigma*, *HKL Group, KVC Rice,* and the principles in these rulings–with a wording corresponding to the one in *TMT*, all other things being equal, implies that the parties have agreed on the jurisdictional allocation, "[a]ny dispute shall be referred to arbitration," but have referred to procedural rules that in reality are non-existing and inaccessible to the parties. If there is no basis for interpreting "relevant exchange" to *also* include "clearing house" (*Solution 1,* which will not be pursued further here), the pathological procedural rule must be disregarded in the enforcement of the jurisdictional allocation (*Solution 2*), unless there are clear and specific indications supporting that the procedural rule was important for the jurisdictional allocation (*Solution 3*).

VII. SUMMARY AND CONCLUDING REMARKS

Non-existing and inaccessible elements constitute an interesting pathology. First, there is undeniably a comical aspect in commercial parties writing elements into a contract, which quite simply do not exist. Second, it is difficult to contest that the proce-

[265] *Id.*

[266] *See also id.* (where the Court notes that the arbitration agreement "does not on its face apply to the present dispute, or conceivably to most, if not all, possible disputes between the parties in this case").

[267] *Id.* at ¶ 64.

[268] Tomolugen Holdings Ltd and another v. Silica Investors Ltd and other appeals [2015] SGCA 57, ¶ 63.

dure agreed upon by the parties is de facto inoperable. Intuitively, it is therefore tempting to jump to the conclusion that an arbitration procedure cannot be carried through.

However, this assumption ignores the general contract law principles concerning *mistake* and *frustration* (US American law and English law)[269], which do not equate non-existence or inaccessibility with the deprivation of the entire agreement's binding effects, but, on the contrary, necessitate a specific evaluation of materiality. Also, the assumption overlooks the special nature of the arbitration agreement, the arbitration law gap-filling rules (the default mechanism), and not least the parties' typical intention and purpose of incorporating arbitration provisions in commercial contracts.

In compliance with this, case law across multiple jurisdictions takes an approach where non-existing and inaccessible elements as a main rule *do not "infect" the jurisdictional allocation*.[270] In other words, the arbitration agreement is not "null and void, inoperative or incapable of being performed" merely because the procedural rules are inoperable.[271]

In US American case law, it is decisive whether the parties' dominant purpose or primary intention, as expressed in the arbitration agreement, is the jurisdictional allocation ("settle disputes by arbitration") rather than the procedural rules ("the instrumentality," "the machinery").[272] Unless clear specific indications support that the inoperable procedural rule was material for the arbitration agreement,[273] it is assumed that the dominant purpose of incorporating the jurisdictional allocation in the contract was to ensure dispute resolution by arbitration, and the arbitration agreement is cured by severing the secondary or immaterial procedural rule. The remaining arbitration agreement is enforced and supplemented by the courts (*Solution 2*).

Correspondingly, the essence of case law from Hong Kong, Singapore, and England is the parties' *intention to arbitrate*[274] and the following distinction between a *pri-*

[269] *See supra* notes 103–04, 155 and accompanying text.

[270] *See supra* notes 9–10 and accompanying text.

[271] TMT Co., Ltd. v. The Royal Bank of Scotland plc., [2017] SGHC 21, ¶ 63.

[272] *See generally* Khan v. Dell Inc., 669 F.3d 350, 354 (3d Cir. 2012).

[273] *See id.* ("the parties must have unambiguously expressed their intent not to arbitrate their disputes in the event that the designated arbitral forum is unavailable", and references herein, internal quotation marks and square brackets omitted); Gar Energy & Assocs. v. Ivanhoe Energy Inc., No. 1:11–CV–00907 AWI JLT, 2011 WL 6780927, at *9 (E.D. Cal. Dec. 27, 2011) ("There is no evidence [that] the parties' agreement to arbitrate depended on the use of the [non-existent] rules, or that a material term of the arbitration agreement was the use of these rules."); Kwasny Company v. Acrylicon Int'l Ltd., No. 09-13357, 2010 WL 2474788, at *6 (E.D. Mich. June 11, 2010) ("Defendant has failed to identify any basis for the Court to conclude that the parties' mistaken reference to a non-existent arbitration body in their Agreement should be viewed as integral to, and not severable from, the parties' expressly stated intent to arbitrate".); Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1222 (11th Cir. 2000) ("Here there is no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate."); Stinson v. America's. Home Place, Inc., 108 F. Supp. 2d 1278, 1285 (M.D. Ala. 2000) ("[T]here is no indication that the choice of that particular arbitrator was central to the arbitration clause.").

[274] HKL Group Co. Ltd. v. Rizq Int'l Holding Pte. Ltd., [2013] SGHCR 5, ¶ 27 ("clearly evi[de]nces the intention of the parties to resolve any dispute by arbitration"); Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 1 H.K.C. 404, 408 (H.K.) ("[C]learly expressed the intention to arbitrate any dispute . . . ."); China Agri-

mary jurisdictional allocation and *secondary* procedural rules and where the latter is interpreted and supplemented in light of the concern for upholding the jurisdictional allocation.[275] As is the case under US American law, the arbitration agreement is cured by severing the inoperable procedural rule (*Solution 2*), unless clear and specific indications support that the procedural rule was material for the jurisdictional allocation (*Solution 3*).[276] If necessary, a party may subsequently request the courts assistance according to lex arbitri.[277] Even though certain cases emphasize that the jurisdictional allocation is *clearly expressed*,[278] case law does not suggest that this implies a special clarity requirement.[279]

Correspondingly, it does not appear to be a special element in the assessment whether the jurisdictional allocation is specifically worded as *a separate part* in relation to the pathological procedural rule—as is the case in *Travelport*[280] and *Warnes*,[281] but not in *HZI Research*[282] and *Astra Footwear*.[283] This is also corresponding in *Lucky-*

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business Development Corporation v. Balli Trading [1998] 2 Lloyd's Law Rep. 76, 79 (English High Court) ("the parties intended to and did agree that there was to be arbitration in China"); Guangdong Agriculture Company Ltd. v. Conagra International (Far East) Ltd., [1993] 1 H.K.L.R., at ¶ 9 (H.C.) ("[T]he parties plainly agreed to settle any dispute by arbitration.").

[275] *HKL Group Co. Ltd.* [2013] SGHCR. 5, ¶ 24 ("give primacy to the decision of the parties to arbitrate and will seek to resolve the various pathologies with the aid of the principle of effective interpretation."); *China Agribusiness Dev. Corp.*, [1998] 2 Lloyd's Law Rep. 76, at 79 ("a Court will try to avoid imputing to the parties an intention to do something which cannot be done."); *Lucky-Goldstar Int'l (H.K.) Ltd.*, [1993] 1 H.K.C. at 408 ("[S]o as to be able to give effect to the clear intention of the parties.").

[276] *See* cases cited *supra* note 89.

[277] *HKL Group Co. Ltd.* [2013] SGHCR. 5, ¶ 37 ("with liberty to apply should they fail to secure any such agreement"); Comtec Components Ltd. v. Interquip Ltd., [1998] HKCFI 803, ¶ 10 ("In the last resort, this court, I believe, has a residuary jurisdiction to make an appointment to implement the intention of the parties that their disputes should be resolved by arbitration."); *Lucky-Goldstar Int'l (H.K.) Ltd.*, [1993] 1 H.K.C. at 404 ("As there are no rules of this non-existent organization the arbitration has to be conducted under the law of the third country chosen by the plaintiffs."); *id.* at 406; *Guangdong Agriculture Company Ltd.*, [1993] 1 H.K.L.R., at ¶ 9 (H.C.) ("Should the parties be unable to agree the precise number of arbitrators or the rules to be followed, the Model Law will assist them.").

[278] Travelport Glob. Distrib. Sys. B.V. v. Bellview Airlines Ltd., 2012 WL 3925856, at *5 (S.D.N.Y. Sept. 12, 2012) ("The parties clearly expressed their intention to resolve this dispute through arbitration . . . ."); In re HZI Research Ctr. v. Sun Instruments Japan Co., 1995 WL 562181, at *3 (S.D.N.Y. Sept. 20, 1995) ("The dominant purpose of the parties, clearly expressed in their contract, was to resolve disputes by arbitration.").

[279] Also Control Screening LLC v. Technological Application & Prod. Co., 687 F.3d 163, 170 (3d Cir. 2012) ("[T]here is sufficient indication elsewhere in the contract of the parties' intent to arbitrate.").

[280] The arbitration agreement in *Travelport,* 2012 WL 3925856, at *1 ("[1] arbitration in the United States [2] in accordance with the UNCITRAL Arbitration rules in force at the date of reference. The Appointing Authority shall be the United States Council of Arbitration and such appointment will be in accordance with its 'Procedures for Arbitration.'").

[281] The arbitration agreement in Warnes S.A. v. Harvic Int'l, Ltd., 1993 WL 228028, at *1 (S.D.N.Y. June 22, 1993) ("[1] shall be finally settled by arbitration [2] in New York in accordance with the Commercial Arbitration Rules of the New York Commercial Arbitration Association.").

[282] The arbitration agreement in *HZI Research,* 1995 WL 562181, at *2 ("[E]ach party shall select an arbitrator and the two arbitrators shall select a third arbitrator, all of whom shall be Members of the American or Japanese Arbitrator Society, who will resolve the dispute.").

Goldstar[284] versus *HKL Group.*[285] This is consistent with the fact that a restrictive interpretation of an arbitration agreement is not justitied.[286] However, this may be taken into account as part of an overall assessment.[287] Add to this that institutions and rules, which do *not exist* and which the parties therefore cannot have had any meaningful knowledge of, cannot easily be presumed to constitute a principal condition for the jurisdictional allocation.

In general, US American courts are not reluctant to supplement the arbitration agreement with new procedural rules, either though the FAA's gap-filling rules or on a discretionary basis. This activist approach—which is supported by the purpose behind the FAA—is effective in terms of the enforcement of the prorogation agreement but differs substantially from the Model Law's safety valve default mechanism. Characteristic for case law from Singapore and Hong Kong is—in compliance with the Model Law system—that the gap-filling of the arbitration agreement is first left to the parties, who, if necessary, may proceed in accordance with the default mechanism. This *hands-off* approach to a greater extent respects the fundamental arbitration law principle about party autonomy in the procedure.

In conclusion, arbitration agreements containing non-existing and inaccessible elements are interpreted according to the following main principles:

(1) There is a basic distinction between the jurisdictional allocation (components I and II) and the procedural rules (component III).

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[283] The arbitration agreement in Astra Footwear Industy v. Harwyn International, Inc., 442 F.Supp. 907, 908 (S.D.N.Y. 1978) ("In the case that the buyer is accused, the Chamber of Commerce in New York is competent.").

[284] The arbitration agreement in *Lucky-Goldstar*: "[1] Any dispute […] shall be arbitrated […] [2] in accordance with the rules of procedure of the International Commercial Arbitration Association." Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 1 H.K.C. 404, 404 (H.K.).

[285] HKL Group Co. Ltd. v. Rizq Int'l Holding Pte. Ltd., [2013] SGHCR 5, ¶ 1 ("[A]ll disputes […] shall be settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce.").

[286] *See e.g.* BLACKABY ET AL., *supra* note 11, at ¶ 2.66; BORN, *supra* note 11, at 1343; STEINGRUBER, *supra* note 32, at ¶ 7.37 (Loukas Mistelis eds., 2012) ("A restrictive interpretation is, however, not justified in international arbitration"); Alok Jain, *Pathological Arbitration Clauses and Indian Courts,* 25 J. INT'L ARB. 433, 445 (2008) ("[T]he said view is archaic. Arbitration is now unanimously considered to be a normal means of settling disputes. It is no longer an exception but an accepted means of dispute resolution which is statutorily approved and widely resorted to, to resolve disputes."); JEAN-FRANÇOIS POUDRET & SÉBASTIEN BASSO, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 3.6.1 (2d ed. 2007) ("we believe that a restrictive interpretation is not justified in international arbitration"); FOUCHARD & GOLDMAN, *supra* note 12, at 260 ("However, this principle [of strict interpretation] is generally rejected in international arbitration. It is based on the idea that an arbitration agreement constitutes an exception to the principle of the jurisdiction of the courts, and that, as laws of exception are strictly interpreted, the same should apply to arbitration agreements. This view is not consistent with the fact that arbitration is now unanimously considered to be a normal means of settling international disputes.").

[287] Kwasny Company v. Acrylicon International Ltd, No. 09-13357, 2010 WL 2474788, at *6 (E.D. Mich. June 11, 2010) ("the parties' broad and overarching agreement to arbitrate any dispute arising out of or relating to the Agreement"); Gar Energy & Assocs. v. Ivanhoe Energy Inc., No. 1:11–CV–00907 AWI JLT, 2011 WL 6780927, at *9 (E.D. Cal. Dec. 27, 2011) ("[T]he material portion of the agreement is the commitment to arbitrate the claims.").

(2) As a main rule, the pathological procedural rule does not "infect" the jurisdictional allocation. The non-existing and inaccessible element is severed, and a party may, if necessary, request the courts' assistance in accordance with the default mechanism for supplementing the arbitration agreement (*Solution 2*).

(3) The main rule is deviated from if either (i) an interpretative basis for identifying an existing and accessible element exists (*Solution 1*); (ii) clear and specific indications support that the inoperable procedural rule was material for the jurisdictional allocation (*Solution 3*); or (iii) if the pathology directly undermines the existence of the jurisdictional allocation (*Solution 3*).

(4) *Re. (ii)* The fact alone that the arbitration agreement names specific persons, institutions, or rules is not sufficient to depart from the main rule. In principle it is not important whether the pathology is due to non-existence or inaccessibility, even though it is more difficult to establish importance having been placed on this by the parties in respect of the former.

(5) *Re. (iii)* Jurisdictional allocation does not presuppose that a derogation agreement, a prorogation agreement as well as (clear and operable) procedural rules can be separately identified. The decisive issue is whether a prorogation can still be identified (and thus also implicitly a derogation) – when disregarding the non-existing and inaccessible element.[288]

(6) Enforcement of the derogation agreement, through the courts' obligation to refer or stay, is not conditional upon clear and operable procedural rules, and pathological procedural rules do not inherently imply increased clarity requirements in the prorogation agreement.

In terms of drafting, non-existing elements may be avoided by duly checking the name of the choice of institution, including by being careful when using machine or automated translations. If it is necessary to translate the name of the institution, guidance may be provided on the institution's official website or articles of association. In cases of doubt, the institution's "original" name, physical address, website address or similar objectively identifiable element should be stated in brackets in the translation.

Classical examples are cases where the arbitration agreement refers to ICC *in a specific city*, for example "ICC of Geneva" or "ICC in London." Since only one ICC exists, which is domiciled in Paris, it may initially be argued that "ICC in London" is non-existent. However, it is generally assumed that such references be interpreted as a reference to ICC arbitration with the city in question as the *place of arbitration*.[289]

However, an *indication of place* is not sufficient to consider the well-known institution, which is domiciled in the place in question, as agreed upon if there is an obvious linguistic discrepancy between the pathological element of the agreement *with the spe-*

[288] *See supra* pp. 13, 18–19.

[289] *See e.g.* BORN, *supra* note 11, at 780–81; LEW ET AL., *supra* note 1, at ¶¶ 7-76; FOUCHARD & GOLDMAN, *supra* note 12, at 264–265; Jean Benglia, *Inaccurate Reference to the ICC*, 7 ICC COURT BULL. 11, 11–13 (1996); Davis, *supra* note 24.

cific characteristics and the institution's correct designation. For instance, SIAC has refused jurisdiction in cases where the arbitration agreement referred to "the International Chamber of Trade of Singapore" and "A.A.L.C.C. Regional Centre for Commercial Arbitration at Singapore."[290]

It is different, under the circumstances, if a pathological element *with generic characteristics* exists, which specifically points at institutional arbitration in a specific place, and no specific indications support that the parties aimed at another institution than the well-known institution in the place in question. Arbitration tribunals under the SCC have thus for example acknowledged jurisdiction in relation to arbitration provisions referring to "the Arbitration Court of Stockholm (Sweden)" and "the Arbitration Committee of Sweden," whereas the SCC has refused (prima facie) jurisdiction in respect of references such as "a court of arbitration in Stockholm"[291]

Inaccessible elements which were accessible at the time of entering into the contract, but which for other reasons are not any longer accessible to the parties, may be difficult to safeguard against. An institution's failure to accept jurisdiction may be due to many reasons that the parties do not necessarily control. The institution is not obliged to take the case unless the institution has provided a preliminary approval, which is hardly practically relevant for arbitration provisions concerning future disputes.

If parties go beyond the generally recognised arbitration institutions such as the ICC, LCIA, SIAC SCC, and DIA, the parties should ensure that the institution actually handles the type of dispute, which may arise out of the contract in question (IT, insurance, maritime issues, specific types of raw material, etc.). And if the parties go beyond the general procedural rules, such as the number of arbitrators, the place of arbitration, language, and choice of law, it may also be reasonable to examine whether the designated institution's rules of arbitration allow such changes and additions.

As a main rule it cannot, however, be recommended to state in the arbitration agreement that "Institution X's rejection of the case does not imply the lapse of the arbitration agreement," let alone adding an alternative institution Y. First, such designations are not strictly necessary in order for an operable arbitration agreement to exist. Second, proposals for such additions may open a "Pandora's box" and may lead to a deadlock in the negotiation. Third, additional parts and alternatives in an arbitration provision notoriously increase the risk of contradictions and ambiguity, which at a minimum, risks delaying the arbitration procedure or the enforcement of the arbitration award.

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[290] GREENBERG ET AL., *supra* note 1, at 188.

[291] *See* Felipe Mutiz Tellez, *Prima Facie Decisions on Jurisidictions of the Arbitration Institute of the Stockholm Chamber of Commerce: Towards Consolidation of a "Pro Arbitration" Approach*, SCC INST. (2012), https://sccinstitute.com/media/29996/felipe-mutis-tellez_paper-on-scc-challenges-on-jurisdiction.pdf; David Ramsjo & Siri Stromberg, *Manifest of Jurisdiction? A Selection of Decisisons of the Arbitration Institute of the Stockholm Chamber of Commerce Concerning the* Prima Facie *Existence of an Arbitration Agreement*, SCC INST. (2012), https://sccinstitute.com/media/61989/prima_facie_decisions_-by_the_scc.pdf.