

**Translation of the Article published in French in the**  
**ã Revue de l'arbitrage, 2006, page 591**

**The Powers of the Arbitrator and of the ICC Court of Arbitration  
in Relation to their Jurisdiction**

**By Mirèze Philippe,  
Special Counsel at the Secretariat of the  
ICC International Court of Arbitration**

**Translated by Shirley Wei,  
Graduate from McGill Faculty of Law**

The distribution of powers between the International Court of Arbitration (the Court) of the International Chamber of Commerce (ICC) and the arbitral tribunal, in relation with the examination of arbitration clauses is sometimes misunderstood. It therefore seemed useful to explore this distinction, the topic of which is the focus of Article 6(2) of the ICC Rules of Arbitration (hereinafter referred to as the Rules).

Recourse to ICC arbitration is preceded by an agreement to this effect between the parties. In general, parties record such agreement in a clause inserted into their contract. Even though most clauses don't seem to pose a problem at first glance, they are sometimes laden with ambiguities or even serious pathologies. Some contract drafters copy arbitration clauses word for word without bothering to adapt them to the context or caring to know if the terms apply to the contract, the interests at stake, or the parties concerned. Others may work from memory without checking model clauses proposed by different arbitration systems and end up drafting a clause riddled with lacunae. Approximation constitutes the majority of ambiguous clauses.

A badly drafted arbitration clause is likely to provoke a conflict between parties pertaining to its interpretation, or even its existence, shortly after the signing of the contract (in 2005, 62% of disputes submitted to the ICC arose from contracts signed less than five years before). In this type of situation, the arbitration clause must be examined in order to determine if there is sufficient ground to initiate arbitral proceedings. Such is also the case when a respondent files no answer to an arbitration request. By virtue of Article 6(2) of the Rules, it is the Court who conducts this first examination before entrusting the arbitral tribunal with the decision on its jurisdiction. Among the arbitration cases submitted to the ICC over the past few years, more than half were examined by the Court in conformity with Article 6(2), of which two-thirds originated from jurisdictional exception and one-third from the lack of answer to the arbitration request.

The present study on the power to examine the arbitration clause is divided into two parts. The first part is devoted to the evolution and recognition of the Court's power to examine the arbitration clause, and the second part addresses the distinction between the administrative power of the Court and the jurisdictional power of arbitrators.

## **I. The Evolution and Recognition of the Court's Power to Examine the Arbitration Clause**

Before exploring the reason of the existence of the Court's power to determine the setting in motion of the procedure (2), one should first trace the evolution of this power through the successive versions of the Rules (1).

### **1) A History of the Court's Power**

#### **a) The ICC Rules of Arbitration from 1922 to 1988**

The role of the Court in the examination of the arbitration clause evolved from simply establishing the existence of a clause binding upon the parties, to determining the setting in motion of the procedure in conformity with the Rules.

The question of the Court's power was envisioned in the first version of the Rules dating from 1922.<sup>1</sup> In this version, Section B, Article VIII and Section C, Article XXVIII provide:

Whenever the parties have agreed to arbitration by the International Chamber of Commerce, the jurisdiction of the Court of Arbitration is obligatory upon the contracting parties, and upon the refusal or failure of one of the parties to present his case before the arbitrators, an award by default may be made, as hereinafter provided.

Henceforth, as soon as there was an existing agreement to turn to ICC arbitration, the jurisdiction of the Court was recognized *ipso facto* without previous examination of the clause by the Court even where a party did not participate. The arbitrators were the sole empowered to address this issue.

Subsequent versions of the Rules did not require the parties to submit themselves to the jurisdiction of the Court, but to the Rules. This logical change opened the door to the evolution which followed.

In the second version of the Rules in 1927, a distinction was made between cases where arbitration cannot take place and cases where arbitration takes place by default with respect to one of the parties. In the former scenario, Article 9 provided for the first time the impossibility to proceed with arbitration in the absence of an arbitration clause or in the presence of a clause which did not specify the ICC:

When the parties are not bound by an arbitration clause, or bound by an arbitration clause in which the Court of Arbitration of the International Chamber of Commerce is not specified, and in either case the defendant allows one month to elapse without replying to the notification of the request for arbitration, or declines arbitration by the Court of Arbitration of the International Chamber of Commerce, the applicant shall be informed that the case cannot be arbitrated.

---

<sup>1</sup> Contrary to the versions of the Rules which followed, this version did not contain any title of articles and did not distinguish situations of absence of a clause from its effect. Sections B and C distinguished between arbitration which at the time was subject to legal sanction and arbitration which was not.

In the latter scenario, Article 10 provided for the possibility of proceeding with arbitration even when faced with a non-participating party, as long as the arbitration clause in question specified the ICC:

- 1) When the parties have already agreed to submit their case to arbitration under these Rules, the defendant shall be bound to submit to arbitration.
- 2) Should the defendant refuse or fail to submit to arbitration, the Court of Arbitration shall order that the arbitration be proceeded with in the absence of the defaulting party.
- 3) No award by default shall be made by the arbitrators unless notification to appear before them has been served upon the defendant in accordance with Article 8, Paragraph 3, above.

Henceforth, the jurisdiction of the Court no longer needed express mentioning but became implicit, since it could order that the arbitration take place by default with respect to a respondent who refused to submit or abstained from submitting to the Rules.

The experience of 463 cases submitted to the ICC between 1921 and 1931<sup>2</sup> pushed it to envisage another manner of exercising its role. The Court was indeed confronted with cases where one party claimed not to be bound by the arbitration clause because it did not expressly accept it. Such was the case when the clause appeared in business letters of the Claimant, sometimes even drafted in a foreign language. The question became who, among the arbitrator, the judge, and the Court of Arbitration, was competent to decide on the jurisdictional exception. An ICC committee in charge of the practical aspects of the proceedings studied these three hypothetical situations. The first possibility, the arbitrator, was dismissed immediately because the issue dealt with admissibility of the arbitration before the arbitrator is even appointed. Members of the committee who considered that the issue should be submitted to the judge pointed out that if such judge refused to execute the award, the Court's decision to affirm the validity of such a clause would be null and void. Whereas, it was precisely up to the Court to ensure that the award conformed to the legal requirements for its execution, in which lied the conditions regulating the validity of the clause in the country(ies) in which the award was to be executed.

This analysis led to the modification in 1931 of Article 10, which inserted a sentence between the second and third paragraphs:

In case the parties are in disagreement as to whether or not they are bound by an arbitration clause, the Court of Arbitration shall decide the issue.

The origin of the Court's role in determining the existence, and not merely the absence, of an arbitration clause is thus found in this 1931 amendment.<sup>3</sup>

Article 9 of the 1927 Rules also saw a slight modification in 1939, where the reference to the clause "in which the International Chamber of Commerce is not specified" was replaced with "in which the I.C.C. is not specified".

---

<sup>2</sup> Five cases were submitted in 1921 before the entry into force of the 1922 Rules and the creation of the Court in 1923. For the number of cases handled under each version of the Rules, see M. Philippe, "Révision du règlement d'arbitrage de la CCI," *D. Affaires*, 1998.1426.

<sup>3</sup> Y. Derains & E.A. Schwartz, *A Guide to the ICC Rules of Arbitration*, Kluwer Law International, 2005, p. 77.

The third version of the Rules in 1955 maintained the distinction introduced in 1927 but changed the wording of the Articles. Article 9 became Article 12, entitled “Absence of arbitration clause”:

When there is no arbitration clause between the parties or when there is an arbitration clause in which the International Chamber of Commerce is not specified, if the defendant does not reply within the period laid down in Article 9, 1° above, or declines arbitration by the International Chamber of Commerce, the applicant shall be informed that the case cannot be referred to arbitration by the Chamber.

Article 10 became Article 13, entitled “Effect of the Arbitral Agreement”:

1. When the parties agree to submit their case to arbitration by the International Chamber of Commerce, they shall be deemed to submit to arbitration in accordance with the present Rules.
2. Should one of the parties refuse or fail to submit to arbitration, the arbitration shall be proceeded with, such refusal or absence notwithstanding.
3. If one of the parties raises one or more pleas as to the existence or validity of the arbitration clause, and the Court of Arbitration has satisfied itself of the *prima facie* existence of such a clause, the Court may, without prejudice to the admissibility or the merits of such pleas, order that the arbitration shall proceed. In this case, any decision as to the arbitrator's jurisdiction shall lie with the arbitrator himself.
4. Unless otherwise stipulated, the arbitrators shall not cease to have jurisdiction by reason of an allegation that the contract is null and void or non-existent. If he upholds the validity of the arbitration clause, he shall continue to have jurisdiction to determine the respective rights of the parties and to make declarations relative to their claims and pleas even though the contract should be null and void or non-existent.
5. The parties may, in case of urgency, whether prior to or during the proceedings before the arbitrator, apply to any competent judicial authority for interim measures of protection, without thereby contravening the arbitration clause binding them. Any such application, and any measures taken by the judicial authority shall be brought without delay to the notice of the Court of Arbitration or, when necessary, of the arbitrator.

In paragraph three, while the French text called for a material existence of the arbitration clause (“*constater l’existence matérielle de la clause*”), the English text called for a “*prima facie* existence of such a clause”. It was not specified which of the two texts was the official version.

The text of Article 13 contained several new elements compared to the preceding version and seemed to serve as a guide for the effect of the clause. It introduced the notion of a *prima facie* examination of the arbitration clause. This is a moderation of the role of the Court, whose decision was subject to the *prima facie* finding of the existence of an arbitration clause. The notion of the validity of the clause was added to that of the existence of the clause, already implicit in the preceding versions of the Rules. Finally, the power of the arbitrator to rule on his or her own jurisdiction was recognized, in addition to and independently from the Court’s power to decide the material existence of the arbitration clause. It was the first international arbitration rules that recognized the principle of the autonomy of the arbitration clause.<sup>4</sup> Since then, the roles of the Court and the arbitrators have been clearly distinguished.

---

<sup>4</sup> Ph. Fouchard, E. Gaillard, B. Goldman, *Traité de l’arbitrage commercial international*, Litec, 1996, n° 394.

Finally, we note that Article 13 on the effect of the arbitration clause also addressed provisional or conservatory measures; this was maintained until the 1998 revision.

The fourth version of the Rules in 1975 copied the provisions of the preceding Article 12 and modified it slightly, which became Article 7:

Where there is no prima facie agreement between the parties to arbitrate or where there is an agreement but it does not specify the International Chamber of Commerce, and if the Defendant does not file an Answer within the period of 30 days provided by paragraph 1 of Article 4 or refuses arbitration by the International Chamber of Commerce, the Claimant shall be informed that the arbitration cannot proceed.

The former Article 13 on the effect of the arbitration agreement became Article 8, as follows:

- 1) Where the parties have agreed to submit to arbitration by the International Chamber of Commerce, they shall be deemed thereby to have submitted *ipso facto* to the present Rules.
  - 2) If one of the parties refuses or fails to take part in the arbitration, the arbitration shall proceed notwithstanding such refusal or failure.
  - 3) Should one of the parties raise one or more pleas concerning the existence or validity of the agreement to arbitrate, and should the Court be satisfied of the prima facie existence of such an agreement, the Court may, without prejudice to the admissibility or merits of the plea or pleas, decide that the arbitration shall proceed. In such a case any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself.
  - 4) Unless otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas.
  - 5) Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator.
- Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat of the Court of Arbitration. The Secretariat shall inform the arbitrator thereof.

Although this version remained close to the 1955 version, we note a certain evolution in its terminology. For example, it was no longer a matter of “submitting” to arbitration where one party refused or abstained, but of “taking part” in it. The reference to an arbitration “par les soins” of the ICC (in the English version “shall be deemed thereby to have submitted *ipso facto*”) was deleted. Also, it is no longer referred to “moyens d’exception” (in the English version “pleas as to the existence”), but simply to “moyens relatifs à l’existence ou à la validité” (in the English version “pleas concerning the existence”) of the arbitration clause. In the French text, *prima facie* is used for the first time. Last but not least, the power of the arbitrator to determine his or her own jurisdiction was reaffirmed.

In 1980, the internal rules of the Court were added as an appendix to the 1975 Rules.<sup>5</sup> This appendix contained in its Article 12 a sort of *addendum* to Article 7 of the Rules, in the following words:

Absence of an arbitration agreement

Where there is no *prima facie* arbitration agreement between the parties or where there is an agreement but it does not specify the ICC, the Secretariat draws the attention of the Claimant to the provisions laid down in Article 7 of the Rules of Arbitration. The Claimant is entitled to require the decision to be taken by the International Court of Arbitration.

This decision is of an administrative nature. If the Court decides that the arbitration solicited by the Claimant cannot proceed, the parties retain the right to ask the competent jurisdiction whether or not they are bound by an arbitration agreement in the light of the law applicable.

If the Court considers *prima facie* that the proceedings may take place, the arbitrator appointed has the duty to decide as to his own jurisdiction and, where such jurisdiction exists, as to the merits of the dispute.

This text consecrated a practical change, permitting the General Secretariat to draw the claimant's attention to the absence of an arbitration agreement and to the consequences of such an absence. It was nevertheless specified that the claimant may solicit a decision from the Court on this subject. We note that for the first time, it was spelled out that this decision has an administrative character and that in case of a negative finding by the Court, the parties have the right to ask the competent jurisdiction to decide if they are bound by the arbitration convention.

The fifth, 1988 version of the Rules took up Articles 7 and 8 without modifying or renumbering them. At the conclusion of an evolution nourished by experience acquired over many years, it was thus established that the Court renders an administrative decision on the existence or validity of an arbitration clause, and entrusts the arbitrator with the mission of determining his or her own jurisdiction as well as the merits of the dispute.

### **b) The 1998 ICC Arbitration Rules**

The 1998 Rules combines in one single Article 6 the provisions which until now had been the focus of two separate articles (7 and 8 of the Rules, and Article 12 of the Appendix). This Article, entitled "Effect of the Arbitration Agreement", covers the absence of an arbitration convention as well as the effects of such convention:

- 1) Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of the commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.
- 2) If the Respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or

---

<sup>5</sup> It became Appendix II, in addition to the existing appendices to the 1955 Rules pertaining to the Statutes of the Court and the scale of expenses, then called annexes.

merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.

3) If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.

4) Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent, provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract may be non-existent or null and void.

Among the changes introduced by this text,<sup>6</sup> we note that the double examination, first by the Secretariat and then by the Court, provided for in Article 12 of Appendix II of the anterior version of the Rules, has been abandoned. The examination by the Secretariat proved indeed to be useless, on the one hand because claimants almost systematically requested a decision from the Court on the existence of the clause<sup>7</sup>, and on the other hand because in both cases it turned on the same question: whether the arbitration could take place.<sup>8</sup> Nor was it necessary to preserve the reference to the administrative nature of the Court's decision, for it was a provisional appreciation which could bind neither the arbitrator nor the judge.<sup>9</sup> Moreover, it was largely recognized that the decisions of the Court were not imposed in the same way as judicial decisions are. As for the exceptions that the parties may raise to oppose an arbitration clause, the 1998 text adds to the articles relating to the existence (implicit from 1922) and the validity of the clause (added in 1955) those relating to its scope. Indeed, oftentimes the exception raised by a party is based on the fact that the claim is not covered by the arbitration clause.

Furthermore, it is no longer referred to ICC arbitration but to arbitration under the Rules, nor to a clause designating the ICC but to a clause designating the Rules. An extremely useful precision specifies that the current version of the Rules applies to all arbitration requests unless the parties agree otherwise in their clause.

From this brief history, we see that the power of the Court in the examination of the arbitration clause has been moderated throughout the successive versions of the Rules. From the simple affirmation of the jurisdiction of the Court in 1922, the Rules has allowed for the possibility that the parties may not be bound by a clause designating the ICC (1927), and has then given the Court the power to decide on the existence of a clause in case of disagreement between the parties (1931). This moderation was furthered by parties' recognition of their ability to raise exceptions and by the Court's recognition of its power to set arbitral proceedings in motion upon finding the material existence of an arbitration clause (1955). This recognition was put into perspective (1975) by the substitution of "material" with "*prima*

---

<sup>6</sup> For a more exhaustive discussion of the changes brought by Article 6 of the 1998 *Rules*, see Y. Derains and E.A. Schwartz, *supra* note 3, p. 78.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> See Paris Court of Appeal, February 7, 2002, *Alfac c. Irmac Importacao, comercia e industria*, Rev. arb., 2002.419 (note Ph. Fouchard).

*facie*” and even more so in 1998 by the formulation “if [the Court] is *prima facie* satisfied that an arbitration agreement under the Rules may exist.” Continuously fulfilling its gatekeeper role, the Court nevertheless strives, within the bounds permitted by arbitration clauses and parties’ arguments *prima facie*, to transmit cases to arbitrators. Only the arbitrators can analyze the arguments of the parties and decide if there is a binding clause, if it is valid, and if it applies to the dispute at hand.

## **2) The Purpose of the Court’s Power**

### **a) Arguments in Favor of the Court’s Jurisdiction**

On the textual level, there are two immediate arguments in favor of the setting in motion of proceedings in spite of certain ambiguities or objections concerning the arbitration agreement.<sup>10</sup> First, Article 6(2) of the Rules contain the very principle of the arbitrator’s power to determine his or her own jurisdiction if the Court finds that a *prima facie* existence of an arbitration clause is possible. Second, thanks to the principle of the autonomy of the clause, this power stays intact even if it is alleged that the contract containing the arbitration clause is null or inexistent.

Beyond the texts, the motivating factor behind the institution’s desire to retain its power even in the presence of ambiguities or objections is the desire to respect the will of the parties, which is to avoid state tribunals. We must also emphasize that the negative effect of the competence-competence<sup>11</sup> principle of an arbitration clause, even an ambiguous one, generally prohibits any state tribunal to declare itself competent, unless the clause is struck with a pathology which excludes any recourse to arbitration. If such a tribunal declares that it has no jurisdiction, and if the institution seized by the ambiguous clause also declares itself incompetent, a denial of justice may result. Of course, parties may return before the judge, but this would cost additional money and time, and may even permit the defendant to escape. This is what happened in a case in which a party raised the incompetence first of the state court and then of the arbitration institution, which could not retain jurisdiction because of the pathological clause. The claimant returned to the judge, but the defendant had meanwhile disappeared.

As one author noted,<sup>12</sup> if the ambiguity of the arbitration clause renders it impossible to identify the institution envisaged by the parties, the institution first seized may consider itself competent, unless of course a party claims that another institution was intended despite the imprecise wording of the clause. In the absence of such an objection, nothing stops the first institution from retaining its jurisdiction, at least for constituting an arbitral tribunal and for conferring to it the care of examining the clause as well as its own jurisdiction. It thus seems proper for the Court to accept the torch and to pass it on to the arbitrator whose task it is to

---

<sup>10</sup> W.L. Craig, W.W. Park & J. Paulsson, *International Chamber of Commerce Arbitration*, Oceana Publications/ICC Publishing, 3<sup>rd</sup> edition, 2000, p.161.

<sup>11</sup> E. Gaillard, “L’effet négatif de la compétence-compétence”, *Etudes en l’honneur de Jean-François Poudret*, Editions Université de Lausanne, 1999, p. 387.

<sup>12</sup> Paris Court of Appeal, 1<sup>st</sup> civ. Ch., 28 October 1999, *Middle East Agricultural and Trading Cy Ltd. v. Avicola Bucuresti*, Rev. arb. 2002.175 (note T. Clay).



examine the file and to establish the existence, validity, or scope of the arbitration clause, and to show caution before refusing to set into motion the proceedings.<sup>13</sup>

A decision from the Grenoble Court of Appeal<sup>14</sup> illustrates the reasoning in favor of the retention of the competence of the institution. The decision first affirms the incompetence of the state jurisdictions when confronted with an arbitration clause, even a pathological one. It then gives a utility effect to such a clause by stating that it is not manifestly null. It notes that the designated moral person has no role other than to organize the arbitration, and finally, it confirms that only the arbitrator has the power to interpret the scope of the clause. Moreover, a decision from the Paris Court of Appeal<sup>15</sup> has declared that in the presence of an ambiguous clause, the ICC is one of the institutions capable of organizing an international arbitration by application of its Rules. It is worth nevertheless noting, that the solution remains valid as long as the clause is not manifestly null or inapplicable, preventing any recourse to an arbitration mechanism.

One United States court, confronted with a contract containing two clauses, one attributing jurisdiction to the arbitrator and the other to the judge, went as far as giving prevalence to the former over the latter.<sup>16</sup> The French supreme court also made a similar finding.<sup>17</sup>

#### **b) Recognition by the Judge of the Court's Jurisdiction**

Arbitration as we know it today is the end result of a progression which spanned over several decades, particularly the last four.<sup>18</sup> Judicial tribunals played an important role in this evolution, notably in France, Switzerland, England, and North America.<sup>19</sup> For example, we saw a tendency towards the recognition of a coherent ensemble of material regulations on the subject of arbitration.<sup>20</sup> Such was the case with the principle of the autonomy of the arbitration clause, affirmed in a decision by the Paris Court of Appeal in 1991.<sup>21</sup> The judge has played a supporting role in the presence of ambiguous clauses. Generally, the judge will aim to give effect to the common will of the parties to arbitrate in spite of the ambiguity in their clause.<sup>22</sup> Only manifest nullity of the clause would prevent the application of the competence-competence principle, according to which it is for the arbitrator to rule on its own jurisdiction.<sup>23</sup>

---

<sup>13</sup> We would be wrong to reproach the Court for retaining too easily its competence in the presence of ambiguous clauses. This would not be in the interest of anyone: an erroneous appreciation would () harm not only the institution and its arbitrators, but the arbitration system itself.

<sup>14</sup> Grenoble, ch. Com, 26 April 1995, *Delattre ès-qual. et Weisrock Construction c. Ascinter Otis*, Rev. arb. 1996.452 (note Ph. Fouchard).

<sup>15</sup> Paris, *Alfac v. Irmac*, supra note 9, p. 414.

<sup>16</sup> United States District Court N.D. California, 11 décembre 1995, *Lapine Technology corp c. Kyocera corp*, *Les Petites Affiches* (31 janvier 1997) 8 (note A. Levasseur).

<sup>17</sup> Cass. Civ. 2<sup>e</sup>, 18 décembre 2003, *Société La Chartreuse*, somm. In Rev. arb., 2004.442.

<sup>18</sup> Several factors contributed to the evolution and success of arbitration, notably the international instruments which facilitated arbitration, such as the New York Convention and the UNCITRAL Model Law, and the adoption by many countries of arbitration laws often inspired by the Model Law.

<sup>19</sup> M. Bühler and T. Webster, *Handbook of ICC Arbitration*, Sweet & Maxwell, 2005, n° 0-6.

<sup>20</sup> See for example D. Vidal, *Droit français de l'arbitrage commercial international*, Gualino, 2004, n° 31.

<sup>21</sup> Paris, 1<sup>re</sup> ch. suppl., 17 décembre 1991, *Gatoil c. National Iranian Oil*, Rev. arb. 1993.281 (note H. Synvet).

<sup>22</sup> Cass. civ. 2<sup>e</sup>, 14 mai 1997, *Promodès et Prodim c. Consorts Papin* ; Cass. civ. 1<sup>re</sup>, 15 octobre 1996, *Calberson international c. Schenker* ; Paris, 1<sup>re</sup> ch. D, 30 avril 1997, *Vilmount international c. Oberthur Fiduciaire*, Rev. arb. 1997.409 (note C. Malinvaud and L. Kiffer).

<sup>23</sup> Cass. Civ. 1<sup>re</sup>, 1 December 1999, *Métu System France et autre c. Sulzer Infra*, Rev. arb. 2000.97 (note P. Fouchard).

In a number of decisions, judges have shown themselves favorable to the parties' choice to go before an arbitration institution, in this case the ICC. The French supreme court has, for example, recognized that from the moment the parties choose to submit their disputes to ICC arbitration, their choice becomes integrated into their agreement and they must consequently accept it.<sup>24</sup> French judges have also recognized the powers conferred to the International Court of Arbitration of the ICC by its Rules and the non-interference of tribunals with this power. The judge has indeed distinguished "clearly the jurisdictional powers of the arbitrators from the organizational powers of the institutions" in "shielding as much as possible the administrative acts from recourse before the judicial tribunals, at least during the period of arbitration."<sup>25</sup> A commentator rightly summarized the nature of the role of the Court and has underlined that "one must not attach too much importance to the words '*prima facie*', found in Article 8 [of the 1975 Rules]. They do not mean that the examination is hasty and superficial. In reality, the discussion can be, like a summary judgment, long and difficult and this signifies that the decision of the Court is provisional."<sup>26</sup>

On several occasions, judges have found that the jurisdiction of an arbitration institution should be determined solely by the institution. In a case where the Court decided in conformity with Article 7 of the 1975 Rules that the arbitration in question could not take place,<sup>27</sup> the judge declared: "if, after two adversarial debates and two exchanges of replies, the institution determined that the arbitration could not take place, and that there is nothing which supports the finding that the proceedings were conducted in violation of the Rules and that no fault is alleged on this point, the liability out of contract of the institution cannot result from its decision." A federal court in New York recognized, by virtue of Article 6(2) of the Rules, the Court's power to handle questions related to its jurisdiction, as expressly provided for by the Rules.<sup>28</sup> The exercise of this power by the Court takes upon an administrative character, distinguishable from the jurisdictional power of the arbitrator.<sup>29</sup>

## **II. The Administrative Role Of The Court And The Jurisdictional Role Of The Arbitrator In The Examination Of The Arbitration Clause**

The respective powers of the Court and the arbitrator in the examination of the arbitration clause are fundamentally different. The Court has an administrative function (1), while the arbitral tribunal is vested with a jurisdictional mission (2).

### **1) Administrative power conferred to the Court by its Rules**

---

<sup>24</sup> Cass. civ. 2<sup>e</sup>, 7 octobre 1987, *Opinter c. Dacomex*, Rev. arb. 1987.479 (note E. Mezger).

<sup>25</sup> Trib. gr. inst. Paris (référé), 13 juillet 1988, *R.E.D.E.C. et Pharaon c. Société Uzinexport Import et Chambre de commerce Internationale*, Rev. arb. 1989.97 (note P. Bellet).

<sup>26</sup> *Ibid* (my translation).

<sup>27</sup> Trib. gr. inst. Paris, 1<sup>re</sup> ch. 1<sup>re</sup> sect., 8 octobre 1986, *Ceskolovenska Obchodni Banka A.S. (cekobanka) c. Chambre de commerce internationale*, Rev. arb. 1987.367.

<sup>28</sup> *Shaw Group and Stone Webster v. Triplefine*, 322 F.3d 115 (2<sup>d</sup> Cir.2003).

<sup>29</sup> The power of the Court to rule in conformity with the *Rules* was likewise recognized in other areas, such as in challenges (Paris, 1<sup>re</sup> ch. A, 15 mai 1985, *Raffineries de pétrole d'Homs et de Baniyas c. Chambre de commerce internationale*, Rev. arb. 1985.141), or in preliminary scrutiny of awards (Paris, 1<sup>re</sup> Ch. A., 15 septembre 1998, *Cubic Defense Systems Inc. c. Chambre de commerce Internationale*, Rev. arb. 1999.103 (note P. Lalive)).

Article 6, section 2 of the Rules, which authorizes the Court to examine the arbitration clause, confers to it the power to decide upon its own jurisdiction. The Court may either permit or refuse the setting into motion of the procedure. In the former instance (positive application of Article 6(2)), the proceeding takes place; it is then be the task of the arbitral tribunal, once seized with the case, to rule on its jurisdiction. In the second instance (negative application of Article 6(2)), the parties are informed that the arbitration shall not take place.

#### a) The Application of Article 6(2) by the Court

The examination of the arbitration clause by the Court and not by judicial tribunals is among the advantages specific to ICC arbitration and constitutes an important service. Compared with bringing a jurisdictional exception before a judge, this service proves several advantages. First, the examination of the arbitration clause takes place shortly following the receipt of respondent's answer to the request for arbitration or, in the absence of an answer, at the expiry of the time limit accorded to respondent for the answer. Second, it avoids duplication of procedures. It is indeed sufficient to seize one sole body, the International Court of Arbitration of the ICC, which, before transmitting the file to the arbitrators, examines the clause in the absence of an answer or when respondent contests the existence, validity, or scope of the arbitration agreement. Furthermore, when the Court decides that the arbitration can take place, it proceeds at the same time with the constitution of the arbitral tribunal. The claimant's work is thus facilitated, when a respondent might refuse to participate, raise a jurisdictional exception, or employ dilatory tactics.<sup>30</sup> Abuse of the proceeding can thus be limited at the outset.<sup>31</sup>

When the jurisdictional exception is not raised by abuse, it may be based on the ambiguity of the clause whose terms do not refer to the ICC or refers to it in an equivocal manner, or on the relationship of the parties with the clause.<sup>32</sup> Among the grounds raised by respondents behind invoking a jurisdictional objection are: the claimant's right to act, the fact that the respondent is not a signatory to the disputed contract, the expiration or invalidity of the contract, the substitution of the clause by another providing for a different arbitration mechanism, the requirement of an amicable negotiation prior to arbitration, the fact that the dispute is not covered by the clause, or the signatory's lack of power to involve the enterprise (this allegation is more frequent when a state-party is involved).

In any case, the Court conducts a meticulous examination of the documents and the parties' arguments to determine if the objection is well-founded and if the proceeding should take place. Its decision is of a provisional character: the Court must be *prima facie* satisfied that (i) an ICC arbitration agreement may exist, (ii) the agreement may apply to the parties named in

---

<sup>30</sup> See especially M. Philippe et P. Blondeau, "Comment se manifestent certaines tactiques dilatoires dans l'arbitrage", *Dalloz Affaires* 1999.1097.

<sup>31</sup> E. Schäfer, H. Verbist, C. Imhoos, *L'arbitrage de la Chambre de Commerce Internationale (CCI) en pratique*, Staempfli, 2002, p. 54.

<sup>32</sup> Examples of pathological clauses examined by the Court have been subjects of several articles. See for example the analyses of Y. Takla, "Clauses d'arbitrage non CCI et clauses dérogatoires au Règlement CCI" (1996) 7 :2 Bull. CI Arb. CCI 7 ; J. Benglia, "La désignation défectueuse de la CCI" (1996) 7 :2 Bull. CI Arb. CCI 11 ; A. Dimolitsa, "Contestations sur l'existence, la validité et l'efficacité de la convention d'arbitrage" (1996) 7 :2 Bull. CI Arb. CCI 14. Although these articles were published under the 1988 *Rules*, the typology of the listed clauses and the cases studied is still pertinent. At the time, the question of the Court's examination of its competence was the subject of Articles 7 and 8 of the *Rules* and of Article 12 of the internal regulations (see Section I(A)(1) above).

the arbitration request, and (iii) the claims may be founded on the contract to which the arbitration agreement applies. The Court may encounter several possible situations:

*(i) Existence of a clause referring explicitly to the Rules*

In this case, the Court decides that the proceeding will take place in accordance with Article 6(2). It will be then up to the arbitral tribunal, once constituted, to decide first upon its jurisdiction and second upon the disputed issues submitted by the parties. The Court thus makes a positive application of Article 6(2).

*(ii) Possible existence of a clause referring sufficiently to the ICC, despite ambiguous terminology*

When the name of an institution designated in the clause does not correspond exactly to the Court's name, the Court makes sure that there are no other institutions using the indicated name. If there is no other institution and the name mentioned resembles the Court's name, it will assume that the parties probably had the intention of referring to the ICC International Court of Arbitration, but that they had made an approximate designation of the institution they had in mind. For example, the Court, whose headquarters are located in Paris, can retain its jurisdiction when confronted with a name such as the "Paris Court of Arbitration". It may decide that the arbitration can take place, making by such a positive application of Article 6(2).

*(iii) Absence of any possible reference to the ICC or any possible connection with the Rules*

When the Court does not consider possible that a clause referring to the ICC exists, or considers that the wording of the clause does not leave room for possible connection with the ICC, the parties are informed that the case shall not proceed. They retain the right to ask any court having jurisdiction whether or not they are bound by an arbitration agreement. In this situation, the Court makes a negative application of Article 6(2).

*(iv) Absence of any relationship between certain parties and the clause*

The Court may decide that one or more parties designated in the arbitration request (this applies more generally to respondents, rarely to claimants) can not be part of the procedure and that the procedure would take place only between the other parties. This is a partially negative application of Article 6(2).<sup>33</sup>

When the Court makes a positive application of Article 6(2), it considers *prima facie* possible that an arbitrator deciding the question of his or her jurisdiction would find that a clause designating the ICC Rules exists.<sup>34</sup> Otherwise, it may refuse to set in motion the procedure, avoiding thus a procedure which would only have resulted in a decision on the lack of jurisdiction. One author recalls the importance of this role which serves to "prevent an ICC arbitral proceeding where the parties have not agreed on one, and on the contrary, to protect

---

<sup>33</sup> See A-M. Whitesell and E. Silva-Romero, "L'arbitrage à pluralité de parties ou de contrats : l'expérience récente de la Chambre de commerce internationale", *L'arbitrage complexe*, Bull. IC Arb. ICC, Special Supplement 2003, 7.

<sup>34</sup> E. Schäfer, H. Verbist, C. Imhoos, *supra* note 29, p. 37.

ICC arbitration as well as the party of good faith in carrying out the proceeding when ICC arbitration has been clearly agreed upon.<sup>35</sup>

### **b) The Positive Application of Article 6(2)**

Some examples from recent cases serve as illustrations of ambiguous clauses which did not prevent the Court from initiating proceedings.

In one case, the respondent tried to argue the invalidity of the clause because it referred to inexistent rules or one which did not refer to the ICC Rules. The claimant pointed out that no other arbitration institution contained the acronym “ICC” or the word “commercial” in its wording. In interpreting the intention of the parties, the Court considered that in referring to the “*ICC Commercial Arbitration Rules*”, the parties probably meant the ICC Arbitration Rules. It found that there was no other body or rules which used both “ICC” and “Commercial” in its name, and that the words of the clause seemed sufficiently clear to permit the Court to be *prima facie* satisfied that a clause designating the ICC Rules of Arbitration may exist.

Similarly, in a case in which the respondent did not respond to the arbitration request, the Court found that “International Court of Arbitration within the International Trade Chamber in Paris according to the Regulation of this Arbitration” did not designate any institution other than the ICC, in spite of the incorrect terminology. In this case, “International Court of Arbitration” and “Paris” were the clues which showed that the parties were probably referring to the ICC.

In another case between a party from Cameroon and another from Equatorial Guinea, in which the respondent once again did not reply, the clause provided that the dispute would be brought before an “international commercial tribunal (Geneva, La Haye)”. Since such a tribunal did not exist in either of the cities, the Court authorized the proceeding by concluding that the parties had wanted to submit their dispute to an international arbitration institution located in a place other than their respective countries of origin.

### **c) The Negative Application of Article 6(2)**

From the adoption of the 1998 Rules to the end of 2005, the Court has refused to initiate proceedings in twenty-six cases. In thirty-four others it made a partially negative application of Article 6(2) in authorizing the setting in motion of the proceedings solely with respect to certain parties. In the following, we shall study a few cases among the twenty-six negative application of Article 6(2) as examples which will confirm the preceding analysis.

An example of a clause which clearly did not designate the ICC is one referring to the “Rules of conciliation and arbitration of the United States Chamber of Commerce », an existing institution, even though it does not offer arbitration services. Likewise, clauses which refer simply to the “Court of Arbitration” or to “arbitration in London subject to the applicable law in this place” have been considered too vague to indicate the ICC International Court of Arbitration.

---

<sup>35</sup> A. Dimolitsa, *supra* note 32 (my translation).

Certain claimants have attempted to invoke clauses which were not even arbitration clauses to support their choice of the ICC as arbitration institution. For example, one case referred to the “International Brokers Commission Contract”. In another case, it was provided that if the vendor and buyer did not reach an agreement within 120 days, they would turn to an arbitral tribunal in a neutral country to be selected by joint agreement.

In a case where the state tribunals were clearly indicated in the arbitration clause, the claimant presented as evidence a letter sent to the respondent in which claimant noted that the parties had agreed to submit all disputes to ICC arbitration. The respondent denied having reached such an agreement. In another case, the arbitration clause provided that when the entrepreneur was from a country within the European Union, the dispute would be submitted to the ICC. In this case, the entrepreneur was not of European origin, and could not utilize this clause to designate the ICC as the arbitral institution.

The following are examples of where the negative application of Article 6(2) was made for the reason of the identity of the persons involved: where the state entity against whom the arbitral proceeding is initiated is not the same one bound by the contract, the circumstances having indeed not allowed to consider possible the setting in motion of the procedure with such state entity; where the claimant was not a party to the contract; where the arbitration clause, though identifying the ICC, did not bind any of the parties cited in the arbitration request, and where a contract was unsigned.

Lastly, in a multi-party case in which the ICC was identified as the arbitral institution, the claimants invoked three contracts, one of which contained a clause contradicting the two other contracts. One of the respondents argued that the case could not proceed in light of the fact that not all respondents were party to all three contracts. They argued that the differences among the clauses were voluntary and reflected different legal relations and different goals. Hence, it was impossible to carry out a single proceeding which involved all the parties.

## **2) Jurisdictional power conferred to the arbitrators by the arbitration clause**

After the initial screening by the Court, the second step consists for the arbitrator to rule on his or her jurisdiction in rendering a decision which, unlike the Court’s decision, is supported with reasoning and has a jurisdictional character. The positive application of Article 6(2) by the Court does not affect the decision which will be made by the arbitrator concerning his or her own jurisdiction. In some cases arbitrators have retained jurisdiction while in others they have rejected jurisdiction.

### **a) The purpose of the arbitrator’s power**

From 1955 onwards, the Rules have explicitly provided for the power of the arbitrator to decide upon his or her own jurisdiction. The ICC was a pioneer in this matter. Among the texts which were inspired by it include the 1961 *European Convention on International Commercial Arbitration* (Article 5.3), the 1985 *UNCITRAL Model Law on International Commercial Arbitration* (Article 16.1), and the 1976 *UNCITRAL Rules of Arbitration* (Article 21). Slowly, this power became recognized by most states’ legislation as well.<sup>36</sup>

---

<sup>36</sup> Y. Derains and E.A. Schwartz, *supra* note 3, p. 80.

The arbitration agreement, or any other agreement made by parties to submit their dispute to arbitration is the source of the arbitrator's power to determine his or her own jurisdiction. The arbitrator's jurisdiction is founded upon the parties' agreement, and the extent of this jurisdiction is defined by the task conferred to the arbitrator, formulated in the Terms of Reference, in conformity with Article 18 of the Rules.

The arbitrator's power to determine his/her own jurisdiction is justified by the desire to facilitate due administration of justice. This power generally prevents the judge from determining the arbitrator's jurisdiction prior to the arbitrator, although this priority is not exclusive. In general, the non-interference in the arbitrator's task is respected by tribunals.<sup>37</sup> It thus avoids slowing down proceedings while waiting for a decision regarding jurisdiction, to disgorge state tribunals, and to prevent dilatory tactics. It is also logical that the arbitrator determines this issue, for it often requires examination of the very submissions and evidence upon which the arbitrator would rely to rule on the merits in case he or she finds jurisdiction. This is one of the reasons why arbitrators sometimes decide on their jurisdiction as well as on the merits of the case in a single arbitral award. Such is even more true when the arbitrator is required to decide if certain claims are within the arbitrator's field of jurisdiction; in such cases, dealing with the merits seem inevitable.

#### **b) When arbitrators retain jurisdiction**

When ruling on its jurisdiction, an arbitrator must determine what was the intention of the parties. When confronted with an ambiguous clause which nevertheless reflects a clear desire to exclude judicial tribunals, an arbitrator will generally read the clause in accordance with the principle that agreements should be interpreted in a way which gives effect to all provisions rather than to only some. In spite of the ambiguity of certain clauses, the terms used may leave a range of possible interpretation, allowing the arbitrator to retain his or her jurisdiction.

On several occasions, as in the case with the French supreme court,<sup>38</sup> tribunals have validated the interpretation of arbitrators during the control conducted by a judge in charge of the enforcements of awards (*juge de l'exécution*) or their annulment (*juge de l'annulation*), since the power of competence-competence can not lead to a sovereign decision of the arbitrator's own jurisdiction. For example, the Paris Court of Appeal rejected a request for annulment of a decision in which the arbitral tribunal retained its jurisdiction despite the arbitration clause which referred to a nonexistent institution, the "International Association of Arbitration". The Court decided that the parties' intent must be interpreted in light of: (i) "good faith interpretation which entails finding the real desire of the parties beyond the literal meaning of the terms and not permitting one party to escape from obligations that were voluntarily agreed to but clumsily expressed"; (ii) "useful effect according to which we must presume that when parties insert an arbitration clause into their contract, their intent was to establish an efficient

---

<sup>37</sup> *Tribunal de grande instance de Paris, Ordonnance de référé rendue le 24 juin 2004, LV Finance group c/ Cour d'arbitrage de la CCI, non publiée.* There are nevertheless countries who do not respect this principle and judges can sometimes paralyze proceedings or enjoin an arbitrator from participating in a proceeding. See for example. M. Philippe, « Difficultés procédurales causées par les clauses compromissoires paritaires et les tribunaux arbitraux tronqués » in « Les cahiers de l'arbitrage », Gaz. Pal., 5-6 novembre 2003, p. 21.

<sup>38</sup> Cour de Cassation, 6 janvier 1987, 1. *Southern Pacific Properties Ltd* 2. *Southern Pacific Ltd c/ République arabe d'Égypte (Plateau des Pyramides)*, Rev. arb. 1987.469 (note Ph. Leboulanger).

mechanism for the resolution of the disputes under the arbitration clause”; and (iii) “interpretation against he who drafted the obscure or ambiguous clause.”<sup>39</sup>

Hence, arbitrators have repeatedly retained their jurisdiction in spite of defective clauses. One arbitral tribunal found that even if arbitration clauses may seem defective in several aspects, their ambiguities are so badly defective; such clauses still reflect clearly the common intention of the parties to have recourse to arbitration rather than to state tribunals, and it is the duty of the arbitral tribunal to honor this common intention.<sup>40</sup> In a case where the clause referred to “the international section of the Chamber of Commerce of Paris”, a nonexistent institution, the arbitral tribunal decided that the clause should be interpreted as validly designating the ICC and retained its jurisdiction.<sup>41</sup>

On rare occasions, awards rendered by arbitral tribunals retaining their jurisdiction following the application of a positive Article 6(2) of the rules have been annulled by state tribunals. In one case,<sup>42</sup> the arbitrator extended the effects of the arbitration clause to all the claims related to the contract, while the clause limited its effects to a certain type of dispute only. In another case,<sup>43</sup> the Paris Court of Appeal annulled an award in which the arbitrator wrongly extended the effects of the clause to the statutory director of a company.

### **c) When arbitrators decline jurisdiction**

There are few cases in which arbitrators decided their lack of jurisdiction with regard to the entire case. It sometimes happens that arbitrators decide that some claims do not enter into their field of jurisdiction, or that they lack jurisdiction with respect to certain parties only<sup>44</sup>.

For example, an arbitral tribunal has, in an unpublished case, declined its jurisdiction when faced with a contract in which the national jurisdictions were clearly designated for disputes under the contract. The claimant argued that the general conditions of a clause attributing jurisdiction to the ICC applied, but the tribunal found in its award that the contract had priority over the general conditions in case of divergence. Because the claimant could not prove its allegations of fraud and of fundamental mistake in the contract, the arbitral tribunal found the contract to be valid and noted that the claimant could only blame itself for not having correctly read the documents.

In another unpublished case, an arbitral tribunal declined jurisdiction when such jurisdiction was contingent upon fulfilling a condition. In this case, the defendant’s state constitution required authorization before recourse to arbitration could be had. In spite of the defendant’s efforts in obtaining authorization, it did not succeed. As per the arbitration clause, such unauthorized disputes must be submitted to local tribunals.

---

<sup>39</sup> Paris, *Alfac c. Irmac*, *supra* note 9, p. 413

<sup>40</sup> CCI case n° 6515, *Recueil des sentences arbitrales de la CCI 1996-2000*, Kluwer Law and Taxation, 1994, 241, p. 259.

<sup>41</sup> CCI case n° 5103, *Recueil des sentences arbitrales de la CCI 1986-1990*, Kluwer International Law, p. 361.

<sup>42</sup> Paris, 1<sup>re</sup> ch. civ., 22 mai 2003, *SA Ess Food c. Caviartrade*, Rev. arb. 2003.1252, p. 1263 (note F.-X. Train).

<sup>43</sup> Paris, 1<sup>ère</sup> ch. C, 26 juin 2003, *Ahmed Baba Ould Ahmed Miske c. A.V.C. Shipping* Rev. arb. 2004.137.

<sup>44</sup> See for other examples E. Jolivet « L’incompétence de l’arbitre », *Les cahiers de l’arbitrage*, *Gaz. Pal.*, 21-22 avril 2006, p. 38.



In yet another unpublished case based on the model arbitration clause for FIDIC contracts, the respondent objected that the engineer did not render a decision in conformity with the clause. The arbitral tribunal thus found the arbitration to be premature and declared that it lacks jurisdiction.

In another unpublished case in which the respondent did not participate in the proceeding, the majority of the tribunal found that it did not have jurisdiction, not so much because of missing signatures from different agreements containing an arbitration clause, but because claimants did not succeed in demonstrating to the tribunal that there was a “meeting of the minds” between the parties to arbitrate. In reaching this conclusion, the majority considered that the generally accepted separability doctrine could not apply in this case, given that the very existence of the arbitration clause was contested.

Giving meaning to an ambiguous clause is not an easy task. The arbitral tribunal must not add terms which were not meant in the agreement, for the purpose of giving effect to the clause. This is the reason why in one unpublished case, the tribunal held that the absence of express reference to arbitration in a clause indicating that “the agreement is subject to English law and the disputes which arise from it will be submitted to the ICC”. The tribunal emphasized that the interpretation of a contract must have as its purpose to establish the parties’ intention by referring to words used and adopting an objective approach excluding all subjectivity. According to English law applicable in this case, evidence of pre-contractual negotiations are excluded, since the position of the parties can change up until the reaching of a final agreement. The tribunal nevertheless examined the pre-contractual documents to determine whether a possible agreement to submit disputes to ICC arbitration existed. It found that the parties had never reached a consensus on the matter of resolving their conflicts, evidenced by the confusing and badly drafted formulations. The tribunal concluded that at the moment the parties signed the contract, an agreement for the manner of resolving their disputes was still not reached, and that there was no evidence that the parties agreed to submit all disputes to ICC arbitration. It should be noted that this is an isolated case; it is not certain that other arbitrators would share this decision.

In some instances, the arbitral tribunal declared to lack jurisdiction in the absence of facts or circumstances which would justify extending the clause to the defendant, or when the defendant did not have the necessary authority to engage its company.

## **Conclusion**

The ICC Rules confers to the Court the power to examine the arbitration clause on the ground of which an arbitration request is filed, and to determine the possible existence *prima facie* of an arbitration clause in order to set in motion the procedure; in such a case the Court retains its jurisdiction. Scrutiny of the clause is often necessary, mostly because of badly drafted arbitration clauses. This prior examination, during which the Court can decide in favor of setting in motion the procedure, allows in this case to transfer the file to the arbitrators who must then rule on their jurisdiction as well as on the merits. Above all, it allows parties to avoid judicial tribunals and to save the time and money generated by two separate proceedings. In conclusion, the administrative power of the Court permits it, after determining the possible existence, validity, or scope of an arbitration clause, to pass the torch to the arbitrators whose power is jurisdictional in nature.