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**Legal Status of an Arbitrator in International Arbitration**  
Thesis

Olomouc 2014

I hereby declare that I have elaborated the thesis *Legal Status of an Arbitrator in International Arbitration* on my own and that all used sources have been quoted.

Olomouc, 28 November 2014

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*“For an arbitrator goes by the equity of a case, a judge by the law, and arbitration was invented with the express purpose of securing full power for equity.”*

Aristotle

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## List of Abbreviations

<b>ADR</b>	Alternative dispute resolution
<b>Art.</b>	Article
<b>Arts.</b>	Articles
<b>CIETAC</b>	China International Economic and Trade Arbitration
<b>Co.</b>	Company
<b>Czech Arbitration Act</b>	Czech Law on Arbitration and Enforcement of Arbitral Awards No. 216/1994
<b>e.g.</b>	Exemplum gratia
<b>et al.</b>	Et alii
<b>HKIAC</b>	Hong Kong International Arbitration Centre
<b>IBA Guidelines</b>	IBA Guidelines on Conflict of Interest in International Arbitration
<b>IBA</b>	International Bar Association
<b>Ibid.</b>	Ibidem
<b>ICC</b>	International Chamber of Commerce
<b>Inc.</b>	Incorporated
<b>LCIA</b>	London Court of International Arbitration
<b>Ltd.</b>	Limited
<b>Model Law</b>	UNCITRAL Model Law on International Commercial
<b>New York Convention</b>	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
<b>No.</b>	Number
<b>p.</b>	Page
<b>pp.</b>	Pages
<b>Spanish Arbitration Act</b>	Ley 60/2003 de 23 de diciembre, de Arbitraje
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>v</b>	Versus
<b>Vol.</b>	Volume

## Introduction

Contracts play an essential role in everyday life of every person. Nonetheless, not all of the agreements concluded between individuals have “happy ending”, and sometimes a dispute arises. Traditionally, national courts are in charge of dispute settlement. Nonetheless, the growing popularity of alternative dispute resolution (the “ADR”) can be observed recently. In the international environment, arbitration is definitely the most popular ADR method. In particular, it plays a significant role in the sphere of international business. Therefore, my thesis focuses on the international commercial arbitration as a key method of dispute settlement.

The main reason why the parties involved in international trade prefer arbitration to litigation is, besides the speed of the proceedings and the duty to keep the matter of dispute confidential, the possibility of increased participation of the parties in the arbitration proceedings. Most importantly, the parties are free to choose the arbitral tribunal which enables them to select “their own judge”. This is a manifestation of the principle of party autonomy which is the fundamental standard in the arbitration. The selection of arbitral tribunal is a crucial issue in the arbitration as “the arbitrator is *the sine qua non* of the arbitral process,”<sup>1</sup> and plays a vital role in international arbitration. The parties who decide to have their dispute resolved in international commercial arbitration should carefully consider their choice of an arbitrator or arbitrators constituting the arbitral tribunal because “it is, above all, the quality of the arbitral tribunal that makes or breaks the arbitration.”<sup>2</sup>

For the above reasons, I have decided to elaborate the topic of the *Legal Status of an Arbitrator in International Arbitration* in my thesis focused on the sphere of international trade, i.e. international commercial arbitration. Moreover, it is a highly discussed issue in the world of international commercial arbitration and thus many publications and numerous articles have been published on this subject. Accordingly, a large amount of resources allows one to examine the status of an arbitrator from various points of view and to compare opinions of respected authorities, which should prove significantly helpful during the elaboration of my thesis.

The aim of my thesis is to analyse important issues of the status of an arbitrator in the international commercial arbitration. In this respect, the thesis is divided into two principal parts. The first part represents the general theoretical ground of the discussed topic, whereas

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<sup>1</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 223.

<sup>2</sup> *Ibid.*, 224.



the second part analyses three crucial questions of the legal status of the arbitrator in international arbitration in full detail.

The first part is comprised of two chapters. The first one clarifies the notion of the international arbitration with special focus on international commercial arbitration. The differences between the *ad hoc* and institutional arbitration are mentioned as well. The second chapter sums up important issues of the legal status of the arbitrator in the international commercial arbitration “from beginning to end”. Therefore, it commences with the analysis of various appointment procedures. Further the powers, duties and rights of an arbitrator are outlined with special attention to the right to remuneration. Also the question of the arbitrator’s liability is discussed. The whole chapter is concluded with the analysis of the possibilities how the arbitrator’s mandate can be terminated, particularly, the challenge, resignation and replacement of the arbitrator are studied.

Concerning the second, more extensive part, it further expands on three important issues of the status of the arbitrator which were outlined in the first part. In accordance with this fact, the second part is divided into three main chapters, i. e. *Arbitrator and the Arbitral Tribunal*, *Requirements for an Arbitrator* and *Arbitrator as an Impartial and Independent Body*.

The principal aim of the first chapter named *Arbitrator and the Arbitral Tribunal* is to find out if an ideal number of arbitrators in the arbitral tribunal exists and what happens if the parties do not agree on the number of arbitrators. For this purpose, advantages and disadvantages of different kinds of arbitral tribunal are examined. Furthermore, particular roles of arbitrators, together with their concrete powers, are analysed in every type of the arbitral tribunal. Last but not least, the final part describes the situation when an agreement on the number of arbitrators is not reached and thus various default provisions of both national law and international rules are compared.

The second chapter, *Requirements for an Arbitrator*, responds to the question what qualifications an arbitrator must comply with in order to be appointed. Thus, the particular requirements imposed by the parties and by national law or international rules are scrutinized.

In the last chapter, independence and impartiality of the arbitrator are in the spotlight. Independence and impartiality are assumed to be fundamental principles of the arbitration which are essential to the integrity of the arbitral proceedings. Accordingly, the main purpose of this chapter is to demonstrate why independence and impartiality play such an important role. I also analyse what could happen if the lack of independence and impartiality occurs. In this regard, the difference between impartiality, independence and neutrality are explained

and examples of various provisions of national law and arbitration rules in this respect are compared and also the IBA Guidelines are introduced. Special attention is paid to the comparison of the standard of impartiality and independence imposed on judges and arbitrators. In this regard, I concentrate on the question whether the same principles should be applied on both judges and the arbitrators. Finally, I deal with the arbitrator's duty to disclose circumstances that are capable of casting doubt on his impartiality and independence.

I have selected those three above issues intentionally because they have something in common. All of them must be considered with due care by the parties when they agree on arbitration to resolve their dispute as they are crucial points which are essential for the quality of the future arbitration proceedings. As the famous phrase states: "The arbitration process is only as good as the pool of arbitrators."<sup>3</sup>

To achieve the objectives and to verify or refute the stated hypotheses, I have especially worked with the leading international publications of respected authorities in the field of international commercial arbitration, such as *Born, Redfern, Hunter, Lew, Mistelis, Fouchard, Gaillard, Goldman*, etc. Regarding the domestic sources, I have based my analysis especially on the publications by *Bělohávek, Lisse* or *Raban*. In addition, in my thesis, numbers of international rules and national statutes are compared. Concerning the rules, I have worked especially with the rules of leading arbitration institutions, such as the UNCITRAL Rules, the ICC Rules, the LCIA Rules, etc. With respect to the national statutes, I have used both the law of the common law countries, for example, the English Arbitration Act, etc., and the civil law jurisdiction, such as the Czech Arbitration Act. Last but not least, my positions are supported by various case law.

The thesis draws primarily from foreign sources written in English; hence, I have opted for English as a language of my thesis to avoid truncation, ambiguities and inaccuracies which may occur as a result of the translation into Czech. The thesis is elaborated in the first-person narrative.

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<sup>3</sup> ASHLEY, Lau. *Who makes a good arbitrator?*[online].Reuters.com, 20.8.2012 [quoted 26.9.2014]. Available at:<<http://www.reuters.com/article/2012/08/20/us-finra-arbitrators-comply-idUSBRE87J0PB20120820> >.

## **Part I.**

# **Introduction to the Legal Status of an Arbitrator in International Arbitration**

# 1 International Arbitration

The importance of international arbitration is growing every year. Nowadays, “it has become the principal method of resolving disputes between states, individuals, and corporations in almost every aspect of international trade, commerce and investments.”<sup>4</sup> My thesis is focused particularly on the international commercial arbitration as it is favoured method of dispute settlement for international business disputes.

In the first part, I outline the definition of international commercial arbitration. Further I concentrate on *ad hoc* arbitration and institutional arbitration.

## 1.1 International Commercial Arbitration

Arbitration is a kind of ADR<sup>5</sup> and it could be defined as a “faster, simpler and less expensive alternative to litigation. Disputes are brought before a neutral third party (the arbitrator) who, after carefully reviewing all of the relevant information, issues a final decision in favour of one of the parties.”<sup>6</sup> The notion “international” denotes some “foreign” element, not purely domestic.<sup>7</sup> Finally, the term “commercial” should be explained. Nevertheless, there is no universally accepted definition and thus, the “term must be interpreted under the national law.”<sup>8</sup>

International commercial arbitration is governed by two main principles, i.e. the principle of party autonomy and the seat theory. Hence, firstly, there is an arbitration agreement and, secondly, the law of the state where arbitration takes place must be applied. Nonetheless, the majority of provisions of national statutes applicable pursuant to the seat theory are not mandatory; therefore, the arbitration is generally regulated by the provisions stipulated in the arbitration agreement. The parties are entitled to opt for law or rules which

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<sup>4</sup> BLACKABY, Nigel, PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009. p. 1.

<sup>5</sup> Apart from arbitration, other ADR methods, such as mediation, mini-trial, expertise, med/arb, last offer or baseball arbitration, exist. (See HRNČIŘÍKOVÁ, Miluše. *International Commercial Arbitration: handbook*. 1st ed. Olomouc: Palacký University, 2012. pp. 13-14).

<sup>6</sup> *Arbitration Overview* [online]. National Arbitration Forum [quoted 26. 9. 2014]. Available at: <<http://www.adrforum.com/main.aspx?itemID=324&hideBar=False&navID=178&news=3>>.

<sup>7</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012. p. 8.

<sup>8</sup> HRNČIŘÍKOVÁ, Miluše. *International Commercial Arbitration: handbook*. 1st ed. Olomouc: Palacký University, 2012. p. 34.

apply to the arbitration proceedings, nevertheless, these provisions must be in conformity with the *lex loci arbitri*.<sup>9</sup>

## 1.2 Ad hoc Arbitration and Institutional Arbitration

In *ad hoc* arbitration, the proceeding is governed by the *ad hoc* selected rules stipulated in the arbitration agreement by the parties or determined by the arbitral tribunal.<sup>10</sup> Winterová points out that *ad hoc* arbitration provides the parties with better possibilities of control over the arbitration and she emphasize the fact that the rules can be chosen in accordance with the nature of the dispute.<sup>11</sup> We also cannot neglect the fact that it is usually the cheaper way of resolving the dispute in international commercial arbitration in comparison with institutional arbitration.

Concerning institutional arbitration, as its denomination suggests, the main role is played by arbitral institution. This kind of arbitration is governed by the rules which are set by this institution.<sup>12</sup> Significant advantage proves to be the fact that institution is an authority and thus, the decisions are more respected in comparison with *ad hoc* arbitration. Nevertheless, such arbitration may be more expensive as the administrative fees must be paid also to the institution.

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<sup>9</sup> HRNČIŘÍKOVÁ, Miluše. *International Commercial Arbitration: handbook*. 1st ed. Olomouc: Palacký University, 2012. p. 26.

<sup>10</sup> *Ibid.*, p. 37.

<sup>11</sup> WINTEROVÁ, Alena et al. *Civilní právo procesní: vysokoškolská učebnice*. 6th. ed. Praha: Linde Praha, 2011. p. 648.

<sup>12</sup> HRNČIŘÍKOVÁ, Miluše. *International Commercial Arbitration: handbook*. 1st ed. Olomouc: Palacký University, 2012. pp. 37-38.

## 2 Arbitrator in International Commercial Arbitration

“The arbitration process is only as good as the pool of arbitrators.”<sup>13</sup> This phrase perfectly describes the fundamental position of an arbitrator in international commercial arbitration. Arbitrator is considered to be an essential element of arbitration as he or she is capable of determining a characteristic of the whole proceedings. Thus, the parties are recommended to be very careful in selecting a future arbitrator.

The principle aim of this chapter is to sum up basic issues concerning the legal status of an arbitrator in international arbitration. Hence it can be considered as a general theoretical ground for a second part where the three crucial questions about the legal status of an arbitrator in international arbitration are analysed in full detail.

Firstly, I focus on the appointment of an arbitrator. Further the powers, rights and duties of arbitrators are examined. Concerning the rights of arbitrator, I pay special attention to the right to remuneration. The next part is dedicated to the question of liability of an arbitrator where I outline general point of view at this issue. Finally, I study the various possibilities how arbitrator’s mandate could be terminated.

### 2.1 Appointment of Arbitrator

First of all, the difference between appointment and nomination of an arbitrator must be explained. “Simply because a person is nominated (or proposed) to act as arbitrator does not impose an obligation on him or her to accept the nomination. Much like an ordinary contract for services, the position hinges on the principles of offer and acceptance. The nomination only binds the arbitrator once accepted.”<sup>14</sup> Pursuant to some rules, the mere acceptance of the nomination is sufficient to be appointed as an arbitrator, however, some rules require more conditions to be fulfilled and hence the acceptance is only a “pre-condition” for appointment.<sup>15</sup> Both appointment and acceptance must be usually made in a written form.<sup>16</sup>

In general, the parties are free to agree both on arbitrators and the appointment procedure. This right of the parties is guaranteed by the principle of party autonomy which is

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<sup>13</sup> ASHLEY, Lau. *Who makes a good arbitrator?* [online]. Reuters.com, 20.8.2012 [quoted 26.9.2014]. Available at: <<http://www.reuters.com/article/2012/08/20/us-finra-arbitrators-comply-idUSBRE87J0PB20120820>>.

<sup>14</sup> GREENBERG, Simon, KEE, Christopher, WEERAMANTRY, J. Romesh. *International Commercial Arbitration: an Asia-Pacific Perspective*. Cambridge: Cambridge University Press, 2011. p. 266.

<sup>15</sup> Ibid.

<sup>16</sup> RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice*. 2nd rev. ed. The Hague: Kluwer Law International, 2001. p. 324.

essential in the international commercial arbitration. The freedom of the parties to choose the arbitral tribunal and the process of its appointment is usually respected by national statutes and arbitration rule; nevertheless, some restriction could be imposed.<sup>17</sup> The best example of such provision could be demonstrated on the Model Law which in Art. 11(2) provide that “the parties are free to agree on a procedure of appointing the arbitrator or arbitrators (...)”

The parties can execute this right in various ways. Firstly, they can specify the appointment procedure in the arbitration agreement. Secondly, the parties can make their choice indirectly, i.e. by incorporation of arbitration rules providing for the mechanism for the appointment of arbitrators into the arbitration agreement. Thirdly, in accordance with the *lex loci arbitri*, in case that the above agreements of the parties are absent, the appointment procedure will be governed by national statutes.<sup>18</sup>

Various methods of appointment procedure of the arbitral tribunal can be observed in international commercial arbitration. Mostly, the arbitrators are appointed by the:

- parties
- arbitral institution
- professional institution or trade association
- national court

The first above method is the appointment made by the parties. The tribunal formed this way will be respected the most by the parties as it will be constituted by the arbitrators pursuant to the parties’ agreement. Accordingly, this could guarantee better co-operation during the arbitration.<sup>19</sup> Most commonly, the parties nominate one arbitrator each, and those two co-arbitrators then agree on the chairman of the arbitral tribunal.<sup>20</sup>

The arbitration institution can also participate on the appointment procedure which is thus governed under its own rules. The participation of the arbitration institution is typical for institutional arbitration; nevertheless, the parties can agree to have their dispute decided by the arbitration institution even in *ad hoc* arbitration.<sup>21</sup> The parties can also stipulate to have their dispute resolved by the president or senior officer of a professional institution. Finally, “where the parties are unable to reach agreement upon the appointment of an arbitrator, and

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<sup>17</sup> See chapter Arbitrator and the Arbitral Tribunal.

<sup>18</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 237.

<sup>19</sup> Ibid.

<sup>20</sup> BLACKABY, Nigel, PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009.p. 251.

<sup>21</sup> Ibid., p. 252.

where no one is expressly empowered to make the appointment for them, it is necessary to consider whether there is any national court that has the jurisdiction and the power to make the necessary appointment.”<sup>22</sup> Pursuant to the *lex loci arbitri*, the national court will determine the appointment procedure.

## **2.2 Powers, Right and Duties of Arbitrator**

### **2.2.1 Rights of Arbitrator**

An arbitrator’s agreement encompasses reciprocal rights and duties. Pursuant to Born, an arbitrator has the right to remuneration together with the right to cooperation from the parties in the arbitration proceedings.<sup>23</sup> Following lines address the right to remuneration as it is considered the most important right of an arbitrator.

#### **2.2.1.1 Right to Remuneration**

“An arbitrator’s contract entitles the arbitrator to financial remuneration by the parties in return for the performance of his or her mandate.”<sup>24</sup> This arbitrator’s right is regulated by some national statutes<sup>25</sup> and by almost all arbitration rules,<sup>26</sup> however, even without such regulation, an arbitrator mostly enjoys the right to payment for the services which he or she performs in connection with the arbitration proceedings.<sup>27</sup> It is not very common that an arbitrator settle the dispute gratis.

Pursuant to Rubino-Sammartano, the arbitrator’s fees “includes the reimbursement of expenses reasonable incurred, and a compensation for the arbitrator’s activity, which is generally determined on the basis of the issues which have been raised, their complexity, the time spent and the amount in dispute.”<sup>28</sup>

There is difference in determination of the fees with respect to the *ad hoc* arbitration and institutional arbitration. In the case of *ad hoc* arbitration, the fees are usually fixed by the

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<sup>22</sup> Ibid., p. 255.

<sup>23</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012. p. 144.

<sup>24</sup> Ibid.

<sup>25</sup> See e.g. Art. 37(6) of the Spanish Arbitration Act.

<sup>26</sup> See e.g. the ICC Rules, the LCIA Rule, the UNCITRAL Rules, etc.

<sup>27</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012. p. 144.

<sup>28</sup> RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice*. 2nd rev. ed. The Hague: Kluwer Law International, 2001. p. 359.



arbitrators themselves as the arbitration agreement typically lacks such a provision.<sup>29</sup> In institutional arbitration, remuneration is frequently set by the arbitral institution.

In the international commercial arbitration, there are two ways how the arbitrators' remuneration can be calculated. Firstly, the fees can be based on the real time spent on the proceedings at a rate which may be stipulated either by the parties or by the institution. Secondly, remuneration is calculated *ad valorem*, i.e. from the amount in dispute.<sup>30</sup> Both mentioned methods entail advantages and disadvantages.

The first mentioned method could be found at *ad hoc* arbitration and it takes the actual work performed by an arbitrator into account. Whereas, the latter ignores the question of work and it focuses on the amount in dispute. This method is usually applied by the institutional rules which often contain a schedule of fees. Despite the fact that the fees stated by an institution may be higher, this way of calculation of the arbitrator's remuneration protect the parties from excessive fees, which may occur in the case of the calculation based on the actual work.<sup>31</sup> Accordingly, notwithstanding that *ad valorem* calculated fees does not permit negotiations between the arbitrator and the parties as they are set by the rules, they guarantee better predictability of the final amount of the fees.

In the case of replacement of the arbitrator, the agreement with the parties should respond to the question whether he or she is subject to remuneration or not.<sup>32</sup>

### 2.2.2 Duties of Arbitrator

Arbitrator in international commercial arbitration is also subject to some obligations. Arbitrators who are approached to be appointed should bear this fact in mind because "in accepting an appointment, arbitrators agree to the inherent duties of the case and diligence attached to their role. These duties may not be spelt out in arbitration rules but are nonetheless implied."<sup>33</sup> Unfortunately, not all the prospective arbitrators are aware of them, which could have a negative impact on the whole arbitration proceedings.

Generally, the duties arise from the arbitration agreement, national law or international rules. The principal duty based on the arbitration agreement is the *obligation to settle the*

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<sup>29</sup> RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice*. 2nd rev. ed. The Hague: Kluwer Law International, 2001. p. 359.

<sup>30</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 284.

<sup>31</sup> GAILLARD, Emmanuel, Savage, John, eds. *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999. p. 625.

<sup>32</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 286.

<sup>33</sup> GREENBERG, Simon, KEE, Christopher, WEERAMANTRY, J. Romesh. *International Commercial Arbitration: an Asia-Pacific Perspective*. Cambridge: Cambridge University Press, 2011. p. 268.

*dispute between the parties*. For this purpose, the arbitrator shall “conduct the arbitration in such a way that it leads to a valid award not open to challenge”<sup>34</sup> Further an arbitrator should comply with the duty to *remain independent and impartial* during the whole arbitration proceedings. Independence and impartiality of the arbitrator are a fundamental principle of arbitration and thus the special chapter is dedicated to it in my thesis.

Arbitrator is also subject to the duty to *complete the mandate*. This obligation is regulated by many arbitration rules and national laws. Under this duty, an arbitrator is prohibited to resign from his or her mandate without a “good cause.”<sup>35</sup> In addition an arbitrator is obliged to *conduct the arbitration fairly and without undue delay*. Last but not least, an arbitrator is subject to the duty of *confidentiality*. Particularly, this includes that an arbitrator should refrain from the communication of any details of arbitration unless the parties agree on that.<sup>36</sup> Keeping the arbitration confidential proves to be essential, as it is one of the main reasons why the parties opt for arbitration instead of litigation.

### **2.2.3 Powers of Arbitrator**

Powers can be bestowed upon an arbitrator by the parties or by operation law. Concerning the first option, the parties can confer the powers upon an arbitrator in two ways.

Firstly, they can expressly agree on them. Accordingly, the parties can specify that arbitrator has power to *appoint experts, hold hearings, etc.*<sup>37</sup> Further the parties can agree on arbitration rules which regulate the powers of arbitrators.<sup>38</sup>

Secondly, the powers may be bestowed upon an arbitrator by operation of law. “For instance, the Nigerian Arbitration Act confers on the arbitral tribunal powers to appoint an expert on issues relating to the proceedings.”<sup>39</sup>

Regarding the particular powers, arbitrators have the authority to *establish the procedure of the arbitration, to determine the applicable law and seat, to determine the*

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<sup>34</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003.p. 279.

<sup>35</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012.p. 144.

<sup>36</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p.283.

<sup>37</sup> BLACKABY, Nigel a PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009.p. 316.

<sup>38</sup> *Ibid.*

<sup>39</sup> OSADARE, Babatunde. *Jurisdiction and powers of arbitral tribunals:Who decides?*[online].academia.edu., [quoted 26.9.2014]. Available at: <[http://www.academia.edu/6876210/JURISDICTION\\_AND\\_POWERS\\_OF\\_ARBITRAL\\_TRIBUNALS\\_WHO\\_DECIDES](http://www.academia.edu/6876210/JURISDICTION_AND_POWERS_OF_ARBITRAL_TRIBUNALS_WHO_DECIDES)>.

*language of the arbitration, to examine the subject matter of the dispute, to appoint experts, to issue interim measures, etc.*<sup>40</sup>

### **2.3 Liability of Arbitrator**

The Liability of arbitrator is highly discussed topic regarding the status of an arbitrator. Nevertheless, the general opinion is that arbitrators' liability "is excluded except in the case of conscious and deliberate wrongdoing, also referred to in other rules or provisions as fraud or bad faith."<sup>41</sup> The reason for that solution is that greater limitation of liability of arbitrator could lead to the numbers of actions against him or her which could endanger the integrity of arbitration. Notwithstanding this approach against any liability of arbitrator's, Rubino-Sammartano assumes that certain limitation should be imposed but specific circumstances must be taken into account.<sup>42</sup>

### **2.4 Challenge, Resignation and Replacement of Arbitrator**

In international commercial arbitration, arbitrators usually hold their office for the entire duration of the arbitration. Nevertheless, sometimes the mandate of an arbitrator must be terminated. In this case, the parties are usually granted the possibility to remedy such situation and continue with the proceedings. "Therefore, nearly all arbitration laws and rules contain procedures to challenge or to seek the removal or replacement of an arbitrator."<sup>43</sup> Nonetheless, sometimes, it is the will of arbitrator to terminate his or her mandate. Generally, arbitrators are not allowed to resign from their function because they are obliged to complete their mandate; however, if the reason is justifiable, they are permitted to do so.

In the following lines, I outline the issue of challenge, resignation and replacement of an arbitrator.

#### **2.4.1 Challenge**

During the arbitration proceedings, an arbitrator could be subject to challenge. "The opportunity to challenge and disqualify an arbitrator is essential to the integrity of the international arbitration process. For the system to work the parties must believe that their dispute will be decided by a fair tribunal, and so there must be procedures either within the

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<sup>40</sup> BLACKABY, Nigel a PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009.p. 316.

<sup>41</sup> RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice*. 2nd rev. ed. The Hague: Kluwer Law International, 2001. p. 359.

<sup>42</sup> Ibid.

<sup>43</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 301.

arbitral regime or in the courts to determine whether in a particular case disqualification might be warranted.”<sup>44</sup>

The challenge may be determined by the appointing authority, arbitral institution, or by the arbitral tribunal. Particular approaches depend on the rules which govern the proceeding.<sup>45</sup> International commercial arbitration enables various grounds for challenge. The most common ground is definitely independence and impartiality. Hence, an arbitrator could be removed when he or she does not comply with the duty to remain independent and impartial during the proceeding.<sup>46</sup> Nonetheless, international rules or national law may regulate other grounds for challenge. Arbitrator may be challenge for misconduct “when they fail to perform their functions, or fail to perform them in good time.”<sup>47</sup> Further an arbitrator may be subject to challenge procedure when he or she does not comply with the special qualifications or nationality.<sup>48</sup>

#### **2.4.2 Resignation**

Sometimes, an arbitrator cannot continue in proceedings. Nevertheless, such result is undesirable in arbitration. Generally, an arbitrator is obliged to complete his mandate as it is a duty which arises from the arbitration agreement. However, this does not mean that an arbitrator is completely prohibited to terminate his or her mandate by resignation. “An arbitrator should only resign in circumstances where the integrity or efficiency of the arbitral process would be compromised by the arbitrator’s continued involvement.”<sup>49</sup> However, other situations could justify the resignation of an arbitrator, such as, for instance, serious illness, etc. Some rules stipulate strict measures in order to prevent an arbitrator from resignation. Under the ICC Rules, for example, the ICC Court is granted the power to refuse the resignation of the arbitrator.<sup>50</sup>

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<sup>44</sup> TUPMAN, Michael. *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*. The International and Comparative Law Quartely, Vol. 38, No. 1, p. 26.

<sup>45</sup> GREENBERG, Simon, KEE, Christopher, WEERAMANTRY, J. Romesh. *International Commercial Arbitration: an Asia-Pacific Perspective*. Cambridge: Cambridge University Press, 2011. p. 273.

<sup>46</sup> See chapter Arbitrator as an independent and impartial body.

<sup>47</sup> GREENBERG, Simon, KEE, Christopher, WEERAMANTRY, J. Romesh. *International Commercial Arbitration: an Asia-Pacific Perspective*. Cambridge: Cambridge University Press, 2011. p. 295.

<sup>48</sup> TUPMAN, Michael. *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*. The International and Comparative Law Quartely, Vol. 38, No. 1, p. 27.

<sup>49</sup> “For example, this might include situations where a conflict of interest arises, or the arbitrator is appointed as a judge or to some other public position which will demand significant time commitments.” (See GREENBERG, Simon, KEE, Christopher, WEERAMANTRY, J. Romesh. *International Commercial Arbitration: an Asia-Pacific Perspective*. Cambridge University Press, 2011 302-303).

<sup>50</sup> See Art. 15(1) of the ICC Rules.

### 2.4.3 Replacement

When an arbitrator resigns under justifiable reason or he or she is successfully challenged, the solution must be found so that the dispute could be settled in reasonable time. Majority of arbitration rules usually provides for the solution when such vacancy occurs. In this case, a new arbitrator is usually appointed the same way as the replaced one.<sup>51</sup> However, the appointment of the new arbitrator is not the only issue which should be considered during the process of replacement.

When a new arbitrator assumes his function, it is necessary to consider carefully whether the arbitration could proceed or some part of the proceedings must be repeated. “In some instances it may be necessary and appropriate to provide new arbitrator with an opportunity to hear witness testimony and oral submissions made prior to his or her appointment, in other instances, simply reading the transcript and submission may be sufficient, thus saving considerable time and expenses.”<sup>52</sup> Mostly, arbitration rules stipulate that it is upon the discretion of the arbitral tribunal whether the hearings must be repeated or the arbitration could continue.<sup>53</sup> It could be demonstrated on, for example, on the case of HKIAC Rules.<sup>54</sup>

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<sup>51</sup>See e.g. Art. 22 of the Japanese Arbitration Law (See GREENBERG, Simon, KEE, Christopher, WEERAMANTRY, J. Romesh. *International Commercial Arbitration: an Asia-Pacific Perspective*. Cambridge University Press, 2011. pp. 302-303).

<sup>52</sup> GREENBERG, Simon, KEE, Christopher, WEERAMANTRY, J. Romesh. *International Commercial Arbitration: an Asia-Pacific Perspective*. Cambridge: Cambridge University Press, 2011. pp. 302-303.

<sup>53</sup> This could be demonstrated on the Art. 12(3) of the HKIAC Rules which provides that “If an arbitrator is replaced, the arbitration shall resume at the stage where the arbitrator was replaced or ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.”

<sup>54</sup> See Art. 12. of the HKIAC Rules.

## **Part II.**

### **Selected Questions of the Legal Status of an Arbitrator in International Arbitration**

# **1 Arbitrator and the Arbitral Tribunal**

Selection of the type of the arbitral tribunal is a crucial point in the international commercial arbitration as it determines the character of arbitral proceedings. Therefore, the special attention should be paid when deciding on the number of arbitrators in the arbitral tribunal. In general, in accordance with the universally accepted principle of party autonomy, the parties are free to agree on the number of arbitrators, nevertheless, some limits could be imposed to preserve the integrity of the arbitration. In case that such an agreement is not reached, pursuant to the arbitration rules and national statutes, a national court or arbitration institution determines the default number of arbitrators. Selection of the arbitral tribunal influences also the role of arbitrators engaged in the arbitration proceedings.

On the basis of what was discussed above, this chapter is divided into two parts. The first part is focused on the situation when the parties agree on the type of tribunal, i.e. the number of arbitrators. In particular, I concentrate on the different types of arbitral tribunal and the roles of arbitrators in them. I also analyse the advantages and disadvantages of each kind of tribunal in the international commercial arbitration. The second part examines the situation when an agreement on the number of arbitrators is not reached and different provisions of national laws and international laws are compared in this regard.

## **1.1 Parties Have Agreed on the Arbitral Tribunal**

If the parties decide to execute their right to choose the type of the arbitral tribunal in accordance with their preferences, before the agreement on the number of arbitrators is concluded, they must consider diversity, speed, expertise, consistency and decisiveness.<sup>55</sup> Given this, this chapter outlines basic characteristics of the types of the arbitral tribunal in the international commercial arbitration on which parties may agree with special focus on particular roles of arbitrators in various tribunals. I will weigh both advantages and disadvantages to conclude if the optimal number of arbitrators exists.

Regarding the structure, I will commence with the analysis of odd number tribunals and then I will proceed to the tribunals comprised of the even number of arbitrators, in particular, the umpire system will be analysed.

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<sup>55</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012. p. 124.

## 1.1.1 Odd Number Tribunal

### 1.1.1.1 Sole Arbitrator

Despite the fact that it is just one person, we have to bear in mind that “a single arbitrator is a complete tribunal.”<sup>56</sup> It is indisputable that the single arbitrator tribunal is the cheapest way how to resolve the dispute in international commercial arbitration. Thus, it is recommendable in “small and medium cases”<sup>57</sup> where the three-person arbitration tribunal would be disproportionately expensive. It may also apply in arbitration where one party is economically stronger than the other and the costs for the three arbitrators (or more) could worsen the position of the weaker party significantly which could lead to deeper economic imbalance between the parties.<sup>58</sup>

With regard to the speed of arbitral procedure, the single-person tribunal can considerably “accelerate the pace” of the dispute solving. Sole arbitrator is “his/her own boss” regarding the conduct of arbitration proceedings. He/she does not have to take into account time options of his/hers colleagues; therefore, the scheduling of arbitrations is much easier. Moreover, there is no need to deliberate with other co-arbitrators because no majority must be reached when solving the dispute.<sup>59</sup> Notwithstanding the above advantages, the sole arbitrator system is still criticized frequently because it entails some potential risks.

Surprisingly, although the tribunal is comprised of one person only, the selection process may be more intricate and protracted as both parties must reach an agreement on the arbitrator, but “each party may be inherently suspicious of any candidate put forward by the other”.<sup>60</sup> Concerning the qualities of a sole arbitrator, the more complicated the disputes are, the more diverse knowledge, usually from different areas is required, and the number of such “Renaissance men or women” is very limited in the arbitration world. Last but not least, there could be jeopardy of an “aberrational decision”<sup>61</sup> due to the possible misunderstanding which could arise from the fact the arbitrator could come from different legal system or culture.

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<sup>56</sup> SUTTON, David St. John, GILL, Judith. *Russell on Arbitration*. 22nd ed. London: Sweet & Maxwell, 2003. p. 99.

<sup>57</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003.p. 226.

<sup>58</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012.p. 124.

<sup>59</sup> BLACKABY, Nigel, PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009.p. 249.

<sup>60</sup> BINDER, Peter. *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdiction*. 3rd ed. London: Sweet & Maxwell, 2010, p. 3.

<sup>61</sup> Ibid.



Regardless the disadvantages, favoured three-person arbitration tribunal in not always the best solution in all kinds of disputes. Concerning some cases, particularly the smaller ones, bigger tribunals are even inappropriate due to the high costs.

#### ***1.1.1.2 Three-Person Arbitral Tribunal***

Together with the sole arbitrator tribunal, three-person tribunal belongs to the most common solutions in the international commercial arbitration. The procedure of its establishment usually consists of the appointment of one arbitrator by each party and then these co-arbitrators are in charge of selecting the chairman of the tribunal. Hence this type of arbitral tribunal consists of two party-appointed arbitrators and the chairman.

Regarding co-arbitrators, they are members of a tribunal and have no specific rights and duties to perform in comparison with the chairman. The presiding arbitrator, i.e. the chairman or president plays a key role in the three-person arbitral tribunal. He/she is granted broader powers in comparison with the co-arbitrators. As his designation suggests, he/she is mainly in charge of the presiding over the arbitral proceedings.

The main advantage is that the parties are granted the possibility to influence to some extent the “shape” of the proceedings. The parties are therefore entitled to choose an arbitrator coming from the same legal, cultural and linguistic background, which may significantly reduce the risk of possible arbitrator`s misunderstanding during the dispute. Nonetheless, it is quite understandable that the parties tend to select an arbitrator who may decide the dispute in their favour. In this case, it is necessary to point out that even though “it may appear to be difficult in practice; it is quite possible for an arbitrator to fulfil a useful role in representing the interest of due process of the party who nominated him or her without stepping outside the bounds of independence and impartiality.”<sup>62</sup> Thus, the party-appointed arbitrator must remain impartial and independent during the whole proceedings.

Comparing to the single arbitrator, three arbitrators are granted the possibility to deliberate and discuss the case which may reduce potential mistakes in the decision making process caused by misunderstanding, neglect of important evidence or insufficient knowledge of law or facts, etc. This proves to be a significant advantage in arbitration where the arbitration award is the ultimate decision with limited appellate scrutiny.

In spite of the considerable number of advantages enumerated above, the three-arbitrator tribunal is often mentioned in connection with high expenses for the arbitration

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<sup>62</sup> BLACKABY, Nigel, PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009.p. 250.

proceedings and the delay produced by the deliberation of the tribunal. For that reason, it is not recommended for smaller cases where the parties may feel the effects of added costs significantly.<sup>63</sup>

Thus, it is an ideal solution in the case of larger arbitrations where three times higher expenses for three arbitrators are not considered so disproportionate with respect to the subject matter of the dispute.

### **1.1.1.3 Five-Person Arbitral Tribunal**

The parties very rarely opt for five arbitrators or more in the arbitration agreement in specific cases; the five-person arbitration tribunal could be set up in the appeal procedure.<sup>64</sup> The tribunal composed of five, seven or more members is applicable in the case of state-to-state arbitration where political reasons prevail rather than practical ones.<sup>65</sup>

Tribunals formed by more than three arbitrators are found inconvenient and very impractical. The parties' principal motivation to have their dispute settled in arbitration is the speed and effectiveness of the proceedings. Nonetheless, if five-person tribunal is appointed, the parties must count on an unnecessary delay in the decision-making process owing to the complicated scheduling of the hearings, possible long debates on the issue as it is more difficult to agree on a decision between five persons, etc. We also cannot neglect the financial reason as the bigger the tribunal is, the more parties have to pay. Therefore, the more members of the tribunal, the slower, the more expensive and thus less effective the arbitration proceedings will be.

### **1.1.2 Even Number Tribunal**

The even number tribunal is not as common as above odd number of tribunals in international commercial arbitration. The main reason of its unpopularity is the potential risk of deadlock produced when arbitrators disagree on the resolution of the case. This "thread" has led to the limitation of the principle of party autonomy in some jurisdictions in this respect.

I dedicate the following lines to the issue of party autonomy and its restriction regarding the even number of arbitrators and then I continue with the detailed analysis of an

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<sup>63</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012. p. 124.

<sup>64</sup> Art. 11(1) of the GAFTA Arbitration Rules states: "Where the first tier award was made by a tribunal of three arbitrators, then the board of appeal shall comprise of five members. GAFTA will notify the parties of the names of the members of the board of appeal."

<sup>65</sup> BLACKABY, Nigel a PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009.p. 251.

umpire system which is a very peculiar concept of the constitution of the even number tribunal.

### ***1.1.2.1 Limits of the Party Autonomy***

Parties' freedom to choose the number of arbitrators in the arbitration agreement is stipulated in the New York Convention and more expressly in the majority of the arbitration statutes.<sup>66</sup> The best example of party autonomy concerning the establishment of an arbitration tribunal can be demonstrated on Article 10 (1) of the Model Law, which provides that “*the parties are free to determine the number of arbitrators.*”<sup>67</sup> By this statement, the parties are given the “greatest possible freedom in the choice of the number of arbitrators”.<sup>68</sup> Pursuant to the Model Law, it is possible to choose any type of the tribunal, even the two-person tribunal (or any other even number). Nonetheless, owing to the danger of the deadlock, some countries put an explicit limitation on the principle of parties' autonomy to select an even-number tribunal.<sup>69</sup>

Strict approach can be observed in the Egyptian Arbitration Act where the odd-number tribunal is required under the sanction of nullity of the arbitration.<sup>70</sup> Some countries provide for a less radical solution and prefer the appointment of an additional arbitrator instead of the invalidation of the arbitration agreement.<sup>71</sup> The English Arbitration Act traditionally does not oppose to an even number of arbitrators, nevertheless nowadays the three-arbitrator system with a chairman becomes more preferable.

Concerning the ICC Rules, it “declined the jurisdiction in an arbitration of this sort as the two-arbitrator tribunal does not easily fit into the scheme of the ICC's rules, and parties are encouraged to agree to a tribunal of three arbitrators.”<sup>72</sup> Some countries, such as

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<sup>66</sup> See Art. V(1)(d) of the New York Convention.

<sup>67</sup> “The only disadvantage is the lack of any solution of the deadlock problem, which was quite obviously underestimated at the time of drafting and which, consequently, is left to the adopting states to correct to the parties to agree on.” (See ASSOCIATION FOR INTERNATIONAL ARBITRATION. *The UNCITRAL Model Law on International Commercial Arbitration: 25 years*. Antwerpen: Maklu Publishers, 2010. p. 169).

<sup>68</sup> ASSOCIATION FOR INTERNATIONAL ARBITRATION. *The UNCITRAL Model Law on International Commercial Arbitration: 25 years*. Antwerpen: Maklu Publishers, 2010. p. 162.

<sup>69</sup> See Art. 14. of the Spanish Arbitration Act: “Las partes podrán fijar libremente el número de árbitros, siempre que sea impar. A falta de acuerdo, se designará un solo árbitro.”

<sup>70</sup> See Art. 15(2) of the Egyptian Arbitration Act.

<sup>71</sup> The Netherlands Code of Civil Procedure can serve as an example as Art 1026(1)(3) stipulates that “the tribunal may be composed of a sole or of an uneven number of arbitrators. If the parties have agreed on an even number of arbitrators, the arbitrators shall appoint an additional arbitrator as chairman of the tribunal.”

<sup>72</sup> *Sumitomo Heavy Industries v. Oil and Natural Gas Commission* [1994] 1 LLoyd's Rep 45. (See SUTTON, David St. John, GILL, Judith. *Russell on Arbitration*. 22nd ed. London: Sweet & Maxwell, 2003. p. 99).

Indonesia, have changed its position as the even number of arbitrators was prohibited, but, nowadays, the parties are free to agree on the arbitral tribunal.<sup>73</sup>

In this case, I must agree with Born's opinion that invalidation of arbitration agreement due to the appointment of even number arbitration tribunal is "ill-considered an inappropriate" and it is unnecessarily big intervention to the parties' intention to arbitrate.<sup>74</sup> If the parties insist on the even number of arbitrators to solve their dispute, better option appears to be the umpire system which both puts no limits on party freedom to select even number of arbitrators and provides for the solution of possible deadlock by the umpire. Nevertheless, this system has also its disadvantage as will be described below.

### ***1.1.2.2 Umpire System***

So called "umpire system" is English peculiarity and it could be also found in other countries such as, for instance, New Zealand, Australia, Ireland, etc.<sup>75</sup> This system has its roots in history and it is typical for common law jurisdictions. Nonetheless, as mentioned above, in comparison with other common law states, the current English Arbitration Act 1996 favours the classic model of three-person tribunal with the chairman as a presiding body but it also preserves the traditional umpire system. It provides that an agreement on two or any other even number of arbitrators should be understood as parties' will to appoint an additional arbitrator, i.e. the chairman. The umpire system applies only if parties explicitly agree on that.<sup>76</sup> This agreement usually occurs in trade or commodities arbitrations settled in the City of London.<sup>77</sup>

In this system, two co-arbitrators are appointed, each by one party. If the co-arbitrators are unable to reach agreement on the resolution of the dispute, they are substituted by an "umpire" who, after that, is in charge of the decision-making process. However, the co-arbitrators often remain in the proceedings, their role customarily changes from "neutral judges" to "advocates" for their parties. As advocates, they are usually in charge of the

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<sup>73</sup> PRYLES, Michael. *Dispute Resolution in Asia*. 3rd ed. The Hague: Kluwer Law International, 2006. p. 185.

<sup>74</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012. p. 124.

<sup>75</sup> SUTTON, David St. John, GILL, Judith. *Russell on Arbitration*. 22nd ed. London: Sweet & Maxwell, 2003. p. 100.

<sup>76</sup> Art.15(2) of the English Arbitration Act, 1996 states that "unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal."

<sup>77</sup> SUTTON, David St. John, GILL, Judith. *Russell on Arbitration*. 22nd ed. London: Sweet & Maxwell, 2003. p. 99.

defence of the interest of the party who appointed them.<sup>78</sup> The arbitral award is thus issued only by an umpire as a complete tribunal and the party appointed co-arbitrator does not participate in the decision making process.

The position of an umpire can be compared to the role of the sole arbitrator. Contrasting the chairman of the three-person tribunal whose position does not differ very much from that of the co-arbitrator, the umpire is granted the same powers and duties as those of the sole arbitrator due to the fact that he or she decides the dispute when both arbitrators are not able to agree on the case.

Umpire system is very rare in international commercial arbitration. Even though that the risk of the deadlock is reduced by the existence of the umpire, it is not a very advisable composition of the arbitration tribunal. As Redfern assumes “it is important, particularly in a highly contentious dispute, that there should be someone who can take the lead within the arbitral tribunal. If there is only one arbitrator, there is no problem; a sole arbitrator is unmistakably in charge of the proceedings. The position is the same with the tribunal of three arbitrators, where the presiding arbitrator is plainly in charge”<sup>79</sup> However, the presiding position could be unclear in the umpire system. Therefore, it is more recommendable to opt for a classic model of three-member tribunal if parties decide to constitute the tribunal bigger than sole arbitrator. They could avoid both complications when deadlock occurs and the possible problems when the jurisdiction does not permit the even number of arbitrators.

## **1.2 Parties Have Not Agreed on the Arbitral Tribunal**

In absence of the parties’ agreement on the number of arbitrators, both national law and institutional rules stipulate “fall-back rules or presumptions” as they determine the default number of arbitrators in the arbitral tribunal which is executed by a “national court (in the case of ad hoc arbitration) or arbitral institution (in the case of institutional arbitration).”<sup>80</sup>

I dedicate this part to the comparison of various default provisions regarding the number of arbitrators in the arbitral tribunal. At first, I will mention examples of national law and then I will proceed to the international institutional arbitration rules.

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<sup>78</sup> SUTTON, David St. John, GILL, Judith. *Russell on Arbitration*. 22nd ed. London: Sweet & Maxwell, 2003.p. 100.

<sup>79</sup> BLACKABY, Nigel a PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009.p. 249.

<sup>80</sup> ASSOCIATION FOR INTERNATIONAL ARBITRATION. *The UNCITRAL Model Law on International Commercial Arbitration: 25 years*. Antwerpen: Maklu Publishers, 2010. p.164.

### 1.2.1 National Law and Institutional Rules

With respect to the national statutes, the difference between common law countries and civil law countries can be observed. The majority of civil law countries, together with the Model Law, stipulate that a three-number arbitral tribunal will be appointed when the parties' agreement is missing in this regard.<sup>81</sup> UNCITRAL Working Group defends this approach in the way that the three arbitrators are found "to be the most common in international arbitration" and that this type of tribunal "is more likely to guarantee equal treatment of both parties."<sup>82</sup> Unlike civil law countries, in the case of common law jurisdictions, there is an apparent tendency to prefer a sole arbitrator as a default solution.<sup>83</sup> Nevertheless, not all the national statutes stipulate the "classic" solution of sole arbitrator or three-person tribunal in the case when the parties do not agree on the number of arbitrators.

Born mentions, for example, very practical approach of the Netherlands, where the default number of arbitrators is determined upon the discretion of national court. He considers this solution "well-considered" as it allows a court to take into account all circumstances of the dispute when establishing a tribunal.<sup>84</sup> The unusual approach provides the Guatemalan Ley de Arbitraje which considers the amount of the dispute. "The higher the amount, the more complicated the case. The provision therefore subjects disputes up to an amount of 50,000 Guatemalan Quetzals to a single (default) arbitrator and beyond that amount to a tribunal of three."<sup>85</sup> Two-arbitrator solution used to be regulated in Japan; however, the New Arbitration Law stipulates the three-person tribunal.<sup>86</sup>

Likewise national statutes, institutional arbitration rules also provides for the default number of arbitrator in the arbitral tribunal. Majority of the rules opt for the sole arbitrator. This can be demonstrated, for instance, at ICC Rules, the LCIA Rules, etc. Surprisingly, the UNCITRAL Rules select three-arbitrator as a default solution. The same approach can be observed also at the SCC Rules.

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<sup>81</sup> Nevertheless, we can find some exceptions e. g. Spain, the Netherland, Malta, Mexiko, Thailand.

<sup>82</sup> ASSOCIATION FOR INTERNATIONAL ARBITRATION. *The UNCITRAL Model Law on International Commercial Arbitration: 25 years*. Antwerpen: Maklu Publishers, 2010. p. 164.

<sup>83</sup> See e.g. the English Arbitration Act.

<sup>84</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012. p. 124.

<sup>85</sup> See Art. 13.2 the Guatemalan Ley de Arbitraje (See ASSOCIATION FOR INTERNATIONAL ARBITRATION. *The UNCITRAL Model Law on International Commercial Arbitration: 25 years*. Antwerpen: Maklu Publishers, 2010. p. 165).

<sup>86</sup> "Under the Old Arbitration Law the number of arbitrators was two if the parties failed to determine it, but Article 16(2) of the New Arbitration Law provides that the number of arbitrators shall be three when there are two parties in arbitration and they failed to determine the number." (See PRYLES, Michael. *Dispute Resolution in Asia*. 3rd ed. The Hague: Kluwer Law International, 2006. p. 227).

## 2 Requirements for the Arbitrator

The quality of arbitration is directly derived from the quality of arbitrators who are involved in the arbitration proceeding.<sup>87</sup> In general, the parties usually do not specify the requirements for the arbitrator in the arbitration agreement in detail as they do not conclude contracts with the prospect of future dispute.<sup>88</sup> Nevertheless, some agreements incorporate such provision. Equally, no restriction with respect to the arbitrators' qualifications is frequently imposed by the institutional arbitration rules and hence, pursuant to the *lex loci arbitri*, the requirements for arbitrator are usually regulated by the national statutes.

Regarding the requirements for arbitrators, sometimes the terms qualities and qualification are used interchangeably. Nevertheless, their meaning is not the same. "Qualification should be given its natural meaning, which involves some kind of formal, recognised training. Qualities, on the other hand, are attributes. These may not be tangible or easily definable, as they may be something esoteric such as the manner in which an arbitrator approaches a problem."<sup>89</sup>

In the following lines, I deal with the particular requirements which are imposed by the national law and arbitration rules, together with the qualities often incorporated in the arbitration agreement.

### 2.1 Requirements Imposed by National Law or International Rules

Generally, institutional rules and national law do not provide for any special requirement and thus, the selection of the right arbitrator is mostly freely in "hands" of the parties. Nonetheless, we can find some exceptions in this regard.<sup>90</sup> Pursuant to Born<sup>91</sup>, the most common requirements imposed by applicable law and rules are:

#### 2.1.1 Independence and Impartiality

This fundamental requirement is scrutinized in the chapter Arbitrator as an Impartial and Independent Body.

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<sup>87</sup> RABAN, Přemysl. *Alternativní řešení sporů, arbitráž a rozhodci v České a Slovenské republice a zahraničí*. Vyd. 1. Praha: C.H. Beck, 2004.p. 88.

<sup>88</sup> RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice*. 2nd rev. ed. The Hague: Kluwer Law International, 2001. p. 318.

<sup>89</sup> GREENBERG, Simon, KEE, Christopher, WEERAMANTRY, J. Romesh. *International Commercial Arbitration: an Asia-Pacific Perspective*. Cambridge University Press, 2011.p. 260.

<sup>90</sup> See Art. 12. of the Indonesia Arbitration and Dispute Resolution Act.

<sup>91</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012. pp. 136-138.

### 2.1.2 Nationality

An ideal model of international commercial arbitration should not put any limitation with respect to the arbitrator's nationality. This model could be represented by the Model Law which in Art. 11(2) states that “*no person shall be precluded by reason on his nationality from acting as an arbitrator unless otherwise agreed by the parties.*” Nevertheless, the practice in international commercial arbitration is different.<sup>92</sup>

Numbers of arbitration rules prefer or even prohibit the appointment of the sole or presiding arbitrator whose nationality is different to the one of the parties. Nowadays, the common practice in international commercial arbitration is that the most of the institutional rules stipulate that the nationality of the sole arbitrator or the chairman should differ from the one of parties'.<sup>93</sup>

The reason of the limitation of nationality is to “provide an internationally-neutral means of resolving disputes between the parties from different countries”<sup>94</sup> Nevertheless, it does not mean that an arbitrator who complies with this limitation of nationality is always impartial and independent, however “the appearance is better and thus it is a practice that is generally followed.”<sup>95</sup>

### 2.1.3 Natural Person

An arbitrator is supposed to be a natural person. However, some opinions in favour of legal entities have appeared as well.<sup>96</sup> Nonetheless, “the general view still is that a legal entity may not act as an arbitrator.”<sup>97</sup> This approach is followed also by the Czech Arbitration Act.

### 2.1.4 Legal Capacity and Capability of Exercising Civil Rights

The legal capacity of arbitrators is required in many Continental European jurisdictions by its national arbitration statutes. This can be observed, for example, in the Netherlands.<sup>98</sup>

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<sup>92</sup> BLACKABY, Nigel a PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009. pp. 261-262.

<sup>93</sup> See e.g. Art 6.(1) LCIA.

<sup>94</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012. p. 136.

<sup>95</sup> BLACKABY, Nigel a PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009. p. 263.

<sup>96</sup> GAILLARD, Emmanuel, SAVAGE, John, eds. *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999. p. 560.

<sup>97</sup> RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice*. 2nd rev. ed. The Hague: Kluwer Law International, 2001. p. 329.

<sup>98</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012. pp. 136-137.



Under the jurisdiction of some countries, the full capability of exercising civil rights is demanded to be appointed as an arbitrator.<sup>99</sup>

### **2.1.5 Legal Education and Experience**

Some jurisdictions impose restriction regarding the legal education of arbitrator. This approach can be observed especially with respect to the presiding arbitrator.<sup>100</sup> This is the case of Spain, China<sup>101</sup> and Latin America.<sup>102</sup> Certain training is required, for instance, in Taiwan.<sup>103</sup>

### **2.1.6 Arbitrator Must Not Be National Court Judge**

Many states put a restriction that judges be appointed as arbitrators. This can be demonstrated on the Spanish Arbitration Act 12(4)<sup>104</sup>. In the Czech Republic, such limitation also exists, nonetheless, it is not expressly stipulated in the Czech Arbitration Act, but it arises from other national statutes. Notwithstanding, Bělohávek presumes, that there is no reason for such restrictions as judges with their wide experience could be very suitable candidates to be appointed as arbitrators.<sup>105</sup>

### **2.1.7 Sex and Religion**

I find it particularly interesting that in some countries, the Muslim ones above all, the restrictions on the sex and religious beliefs of arbitrators are still very strict. Under such provision, an arbitrator must be a male Muslim and must have knowledge of Sharia.<sup>106</sup>

## **2.2 Requirements Specified in the Agreement**

The parties are generally free to determine the special qualification of the possible future arbitrator. Such an agreement must be respected by the appointed authorities because if the arbitrator does not comply with the requirements stipulated in the contract, the consequences could have negative impact on the arbitration proceeding.

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<sup>99</sup> See e.g. the Czech Arbitration Act.

<sup>100</sup> BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012. p. 137.

<sup>101</sup> See Art. 15(1) of the Spanish Arbitration Act and the Art. 13. Chinese Arbitration Law.

<sup>102</sup> RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice*. 2nd rev. ed. The Hague: Kluwer Law International, 2001. p. 320.

<sup>103</sup> GREENBERG, Simon, KEE, Christopher, WEERAMANTRY, J. Romesh. *International Commercial Arbitration: an Asia-Pacific Perspective*. Cambridge: Cambridge University Press, 2011. p. 258.

<sup>104</sup> See Art. 12(4) of the Spanish Arbitration Act.

<sup>105</sup> BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a výkonu rozhodčích nálezů: komentář*. 1. vyd. Praha: C.H. Beck, 2004. p. 310.

<sup>106</sup> RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice*. 2nd rev. ed. The Hague: Kluwer Law International, 2001. pp. 326-327.

The parties are usually recommended not to stipulate strict requirements in mandatory terms as it could limit appointment procedure and thus unnecessarily burden the whole arbitration proceedings.

Sometimes a question arises whether to specify the requirements in the arbitration contract or address them when dispute arises. Generally, it is presumed that determination of the requirements in the arbitration agreement proves to be more objective and it could reduce strategic behaviour of the parties later in the proceedings.<sup>107</sup> In the arbitration agreement, the parties usually specify the following requirements:

### **2.2.1 Professional Qualification and Experience**

If the parties decide to determine the qualifications of the arbitrator in the arbitration agreement, they usually stipulate particular professional qualification and experience of the future arbitrator. As international commercial arbitration is a complex process and legal education is, therefore, essential, it is highly recommended to stipulate that at least one member of the arbitral tribunal should be a lawyer. This is particularly important in the case of sole arbitrator and the chairman as both are in charge of presiding over the proceedings.<sup>108</sup> Nevertheless, “sometimes, the parties agree that particular types of dispute are to be submitted to an expert who is not a lawyer. For example, they may agree to submit disputes about accounting issues to an accountant.”<sup>109</sup> Both the experts and the lawyers entail disadvantages and advantages.

Concerning technicians, their principal advantage consists of that fact that, without legal knowledge, they are “able to go straight to the issue without being hampered by legal arguments.”<sup>110</sup> However, their lack of experience in the field of dispute settlement could be very inconvenient as the parties opt for arbitration in order to have their disputed resolved.

In respect of lawyers, it proves to be a significant advantage to have a legal education; nonetheless, lawyers could “be indulge in slow and outdated proceedings, or may even try to imitate court proceedings.”<sup>111</sup> Thus, the parties should consider with due care circumstances of their dispute and they should weigh both the experience and the qualification of the future

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<sup>107</sup> BINDER, Peter. *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdiction*. 3rd ed. London: Sweet & Maxwell, 2010, p. 3.

<sup>108</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. pp. 234-235.

<sup>109</sup> BINDER, Peter. *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdiction*. 3rd ed. London: Sweet & Maxwell, 2010. p. 8.

<sup>110</sup> RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice*. 2nd rev. ed. The Hague: Kluwer Law International, 2001. pp. 326-327.

<sup>111</sup> Ibid.

arbitrator. Three-member tribunal proves to be an appropriate solution, as the legal and technical knowledge and experience could be combined. In this case, it is advisable that the chairman is a lawyer and the party-appointed arbitrators could be then experts in relevant fields.

### **2.2.2 Language Competence**

Beside an experience and professional background of a potential arbitrator, the parties should take also the language skills into account. It does not necessary mean that an arbitrator must be fluent in five languages, but he or she should be “able to follow the proceedings without the need for translations. The principal reason for this is to enable the arbitrator to understand the lawyers and the witnesses.”<sup>112</sup> Otherwise, the quality of the arbitration proceedings could be in danger due to the possible arbitrator’s misunderstanding

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<sup>112</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 235.

### **3 Arbitrator as an Impartial and Independent Body**

The standard that arbitrators must comply with the duty of independence and impartiality is an elementary principle of the international commercial arbitration. Hence “the independence and impartiality of the arbitrator is more than an obligation imposed upon the arbitrator, it is an essential element of the function and of arbitration in itself.”<sup>113</sup> It is generally recognised principle incorporated in many national laws, arbitration rules or international conventions with a large historical background.

In this chapter, I analyse the principle of impartiality and independence in detail and I demonstrate its key role it in international commercial arbitration. Firstly, I outline the reason why it is so essential to ensure this principle in the arbitration and what could happen if arbitrator`s impartiality and independence is impaired. Secondly, I deal with the concepts of both impartiality and independence and I will determine the difference between them. Thirdly, I examine standards of independence and impartiality applicable to arbitrators and judges. Fourthly, examples of the legal provisions of arbitration rules and national law are compared, with special focus on the IBA Guidelines. The last part is dedicated to the duty to disclose circumstances capable to cast doubt on arbitrator`s impartiality and independence.

#### **3.1 Why Is an Impartial and Independent Arbitrator so Important?**

Standard of independence and impartiality of an arbitrator represents an indispensable principle because it guarantees fairness and credibility of international commercial arbitration and that the final arbitral award will be a respected decision.<sup>114</sup>

The significance of independence and impartiality is usually emphasised because the potential risk of arbitrator bias is higher in international commercial arbitration in comparison with state court proceedings. Unlike judges, arbitrators usually do not dedicate their professional life only to arbitration. Frequently, they are lawyers from large international law firms which could lead to prior contact with the parties or their counsels. Arbitrators are selected by the parties, hence there is always a danger of arbitrator`s favour towards the party

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<sup>113</sup> VERBRUGGEN, Caroline. *The Arbitrator-As Neutral Third Party*. In: Colloquium CEPANI40. Walking a thin line. What an arbitrator can do, must do or must not do. Recent developments and trends. Bruxelles: Bruylant, 2010. pp. 37-75.

<sup>114</sup> MANZANARES BASTIDA, Bruno. The Independence and Impartiality of Arbitrators in International Commercial Arbitration. *Revista e-mercatoria*, Vol. 6, No. 1.p. 3.

who nominated him or her. Last but not least, an arbitral award is the final and binding decision which provides for limited appellate remedies; thus, its accuracy is essential.

For the above reason, special attention must be paid to the arbitrator's duty to be impartial and independent. Given this, universally recognised principle of party autonomy in the selection of arbitral tribunal must yield to the need to ensure fair and credible arbitration process. In this respect, impartial and independent arbitrators are considered "essential tools"<sup>115</sup> to guarantee such a fairness and quality of the arbitration.

Due to the importance of this principle, a majority of both international rules and national statutes provides for strict measures in situations when an arbitrator proves not to comply with the obligation of impartiality or independence. Parties' right to object to the arbitrator's lack of impartiality and independence is not limited only to the phase of the commencement of the arbitration proceedings when an arbitrator is selected, but lasts throughout the whole proceedings. Thus, apart from the rejection of prospective arbitrator, or his or her later challenge, lack of independence and impartiality is a reason for which an arbitral award could be set aside or its recognition denied.

To avoid such negative result of arbitration, an arbitrator is obliged to disclose any relevant facts that could cast doubt on his impartiality and independence immediately he or she learns about them. Nonetheless, this important obligation will be discussed in the last section of this chapter.

## **3.2 Independence v Impartiality**

Arbitration rules or national laws operate with the terms "impartiality and independence" frequently, however, they mostly do not include any definition. The meaning of those principles is therefore left to the legal theory. Habitually, they are used interchangeably; however, each encompasses a different concept. In this part, I would like to concentrate in detail on the concept of both independence and impartiality.

### **3.2.1 Independence and Its Concept**

Independence "requires that there should be no such actual or past dependant relationship between the parties and the arbitrators, which may or at least appear to affect the arbitrator's freedom of judgement"<sup>116</sup> The relationship which could impair arbitrator's

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<sup>115</sup> MANZANARES BASTIDA, Bruno. The Independence and Impartiality of Arbitrators in International Commercial Arbitration. *Revista e-mercatoria*, Vol. 6, No. 1, p. 3.

<sup>116</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 261.

independence could be professional (e.g. an arbitrator acted many times as a lawyer for one party<sup>117</sup>), business (e.g. an arbitrator is a major shareholder or director of the parties and is engaged financially in the result of the case<sup>118</sup>), familial (e.g. an arbitrator related to one of the parties as a spouse<sup>119</sup>) or personal (this could be based on, for example, long lasting circumstances, such as arbitrator's close friendship with one of the party or on a "solitary incident"<sup>120</sup>). Nevertheless, all the above circumstances do not always lead to the violation of the duty of independence.

Independence rests in a degree of such a relationship which may differ depending on the place, time and space.<sup>121</sup> Therefore, it is not possible to generalize the situations and it is necessary to take into consideration all the circumstances of the dispute and the context of the case in hand.

To determine the possible risk of arbitrator's "dependence", the objective test is applicable. This test provides that no "objectively justified doubts concerning the impartiality"<sup>122</sup> should be present. It is proved by "externally visible circumstances."<sup>123</sup> Hence, as we will see in following lines, the test for independence is easier, as, contrasting to the impartiality, no mental state is examined during the test. Only external circumstances are taken into account.

### 3.2.2 Impartiality and Its Concept

A M. Scott Donahey asserts that impartiality stands for "the test for the lack of permissible bias in the mind of the arbitrator toward a party or toward the subject-matter in

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<sup>117</sup> Arbitrators usually serve as lawyers in big law firms, therefore there always is a risk of possible "dependence" in this respect. Nevertheless, It depends on a degree of such relationship. (See LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 262).

<sup>118</sup> *AT&T Corporation and Lucent Technologies, Inc. v. Saudi Cable Company I All ER* ( See ASSOCIATION FOR INTERNATIONAL ARBITRATION. *The UNCITRAL Model Law on International Commercial Arbitration: 25 years*. Antwerpen: Maklu Publishers, 2010. p. 657 and TRAKMAN, Leon. The Impartiality and Independence of Arbitrators Reconsidered. In *International Arbitration Law Review*. London: Sweet & Maxwell, 2007).

<sup>119</sup> TRAKMAN, Leon. The Impartiality and Independence of Arbitrators Reconsidered. In *International Arbitration Law Review*. London: Sweet & Maxwell, 2007.

<sup>120</sup> A chairman of the tribunal was successfully challenged when it was revealed that he shared a room in hotel with a female counsel for a party who was successful in a dispute. (See TRAKMAN, Leon. The Impartiality and Independence of Arbitrators Reconsidered. In *International Arbitration Law Review*. London: Sweet & Maxwell, 2007).

<sup>121</sup> TRAKMAN, Leon. The Impartiality and Independence of Arbitrators Reconsidered. In *International Arbitration Law Review*. London: Sweet & Maxwell, 2007).

<sup>122</sup> KURKELA, Matti S. and TURUNEN, Santtu. *Due Process in International Commercial Arbitration*. 2nd ed. Oxford: Oxford University Press, 2010. p. 114.

<sup>123</sup> *Ibid.*

dispute.”<sup>124</sup> Unlike independence where “visible measures” are analysed, the “mental state”<sup>125</sup> is in the spotlight.

Thus, a subjective test is applicable to examine arbitrator’s possible “partiality” in the dispute. Subjective test scrutinizes arbitrator’s mental attitude towards the dispute and the parties and “if he or she is in fact not willing to promote the success of one of the parties in the case at hand.”<sup>126</sup> Given this, it is clear that a “pure” subjective test is impossible as we cannot get into the arbitrator’s mind. Therefore, the test must be “objective in the need to determine by some external measure whether a reasonable person would consider that state of mind as constituting partiality, or would have a reasonable apprehension of it being so.”<sup>127</sup>

A case can serve as an example of arbitrator’s partiality. During the arbitration proceedings, the arbitrator was heard to claim that “Portuguese people were liars”.<sup>128</sup> This shows his negative mental attitude towards the nationality of one of the party, i.e. his “partiality” which could definitely influence the decision-making process.

Impartiality is sometimes wrongly interchanged for neutrality. This is regulated in the AAA Code of Ethics, which permits party-appointed arbitrators to be “non-neutral”, i.e. they “may be predisposed towards the party who appointed them.”<sup>129</sup> Nonetheless, this does not mean that arbitrators are not subject to the duty of impartiality. It implies that “from the legal, social and cultural background they may be favourably disposed towards the appointing party which may even be necessary to fulfil the special function of a party appointed arbitrator in arbitration with parties from different countries.”<sup>130</sup> However, the principle of non-neutrality of party-appointed arbitrators does not apply in a European context.

### 3.3 Judges v Arbitrators

An authority of an arbitrator is often likened to an authority of a judge. Despite the fact that certain similarities could be observed, their roles differ in some respect. Nevertheless, it is

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<sup>124</sup> KURKELA, Matti S. and TURUNEN, Santtu. *Due Process in International Commercial Arbitration*. 2nd ed. Oxford: Oxford University Press, 2010. p. 113.

<sup>125</sup> GAILLARD, Emmanuel, SAVAGE, John, eds. *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999. p. 564.

<sup>126</sup> KURKELA, Matti S. and TURUNEN, Santtu. *Due Process in International Commercial Arbitration*. 2nd ed. Oxford: Oxford University Press, 2010. p. 114.

<sup>127</sup> TRAKMAN, Leon. The Impartiality and Independence of Arbitrators Reconsidered. In *International Arbitration Law Review*. London: Sweet & Maxwell, 2007. p. 999.

<sup>128</sup> *The Owners of the Steamship “Catalina” and Others and The Owners of the Motor Vessel “Norma”* [1938] 61 Ll.L.Rep. 360. (See TRAKMAN, Leon. The Impartiality and Independence of Arbitrators Reconsidered. In *International Arbitration Law Review*. London: Sweet & Maxwell, 2007. p. 999).

<sup>129</sup> TUPMAN, Michael. *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*. The International and Comparative Law Quarterly, Vol. 38, No. 1, pp. 29.

<sup>130</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. pp. 259-259.

a highly discussed topic whether an arbitrator is subject to the same obligation of impartiality and independence as a judge. Pursuant to Born, following tendencies in the international commercial arbitration can be observed.

Firstly, in accordance with the practice of many U.S. Courts, the requirement of impartiality and independence of arbitrator should be less strict than in the case of national court judges.<sup>131</sup> This opinion stems from the very nature of the international commercial arbitration where there has always been a certain degree of arbitrator's partiality and dependence, therefore stricter standards applicable to judges can make arbitration impossible.

Second tendency consists of the equating arbitrator's duty to be impartial and independent with the judge's. The English Court of Appeal rules in *AT&T v Saudi Cable* that the same requirements apply to both and to the same extent.<sup>132</sup> Numbers of national arbitration statutes provide for the same standard of independence and impartiality for both arbitrators and judges.<sup>133</sup> This trend could be observed in the Czech Republic as well.<sup>134</sup> The main reason for this approach is that "unlike national court judges, arbitrators are not subject to appellate review, governmental disclosure obligations, institutional training and oversight, governmental appointment or confirmation and promotion, or other related aspects of institutional control."<sup>135</sup> Hence it is assumed that arbitrators should be subject to the same standards of impartiality and independence as judges, or even stricter.

To conclude this issue, we must bear in mind that arbitration is not litigation and that is the main reason why the parties opt for this means of alternative dispute resolution, i.e. as it differs from the standard court proceedings. Given this, I must agree with the solution that Born proposes, i.e. an equal standard cannot be applied both for national judges and the international arbitrators as "the difficulty is that the former standards are designated for, and applied in, defined and comprehensively-regulated domestic context, while the latter apply in an international context which is defined principally by the parties' agreement and expectations in particular cases."<sup>136</sup> These are therefore "two separate worlds", where

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<sup>131</sup> BORN, Gary. *International Commercial Arbitration: [commentary and materials]*. 3rd ed. The Hague: Kluwer Law International, 2009. 2. vol. pp. 1461-1552.

<sup>132</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 267.

<sup>133</sup> Apart from England, we can find the similar approach in France, Switzerland, etc. (See BORN, Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012. pp. 124-129).

<sup>134</sup> LISSE, Luděk. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů s komentářem*. Praha: Linde Praha, 2012. p. 251.

<sup>135</sup> BORN, Gary. *International Commercial Arbitration: [commentary and materials]*. 3rd ed. The Hague: Kluwer Law International, 2009. 2 vol. pp. 1461-1552.

<sup>136</sup> Ibid.



different principles apply and such unification is against the basis of the international commercial arbitration. Thus, I support his opinion that “better approach is to look to, and develop, international standards of impartiality and independence.”<sup>137</sup>

### 3.4 Legal Regulation of Impartiality and Independence

Despite the fact that the standard of impartiality and independence are generally recognised principle, arbitration rules and national laws vary in its regulation. To demonstrate this issue, I have chosen the examples from both national laws and the arbitration rules to show different approaches concerning the regulation of the principle of impartiality and independence. The final part is dedicated to the IBA Guidelines which play an important role in the unification of the standards of impartiality and independence of arbitrators in international commercial arbitration.

The Model Law stipulates both principles of independence and impartiality. Article 12(1) provides that “*when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.*” Both above principles are mentioned in connection with the term “justifiable doubt”. Pursuant to Petrochilos „doubts are justifiable if a reasonable and informed party would reach the conclusion that there was likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision“<sup>138</sup> This expression can be found in many national laws and arbitration rules as well.

I will continue with ICC Rules. The former version of the ICC Rules imposed only the obligation of independence. Nonetheless, new ICC Rules, effective from 1 January 2012, incorporates both principles as Article 11 stipulates that “*every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.*” Despite the new wording of the provision, it was presumed that the standard of impartiality applied to arbitrators as well pursuant to the previous version of the ICC Rules.

A different approach can be demonstrated in the English Arbitration Act. It concentrates only on the standard of impartiality. Article 1(a) states that “*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.*” Furthermore, Article 33 Para 1(a) regulates that “*the tribunal*

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<sup>137</sup> BORN, Gary. *International Commercial Arbitration: [commentary and materials]*.3rd ed. The Hague: Kluwer Law International, 2009. 2 vol. pp. 1461-1552.

<sup>138</sup> PETROCHILLOS, Georgios.*Procedural law in international arbitration*.Oxford : Oxford University Press, 2004. p. 138.

*shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent (...)*” Verbruggen asserts that the reason why the English Arbitration Act omits the duty of independence is that “what really matters is the impartiality of the arbitrator(s), and that the requirement for independence that it often provided for is just a tool to achieve impartiality.”<sup>139</sup>

Obligation of impartiality is also guaranteed by the Czech Arbitration Act as Article 8 states that “*the person destined to be appointed arbitrator shall disclose forthwith all circumstances to the parties or to the Courts of law likely to give rise to serious doubts as to his (her) impartiality which would disqualify him (her) as arbitrator.*” Although the duty of independence is not included in this provision, Bělohávek assumes that an arbitrator must be independent as well pursuant to Article 1 of the Czech Arbitration Act.<sup>140</sup>

Although many rules and national laws regulate the standards of impartiality and independence, their wording, as we can see above, is usually very abstract. Hence it is the arbitration agreement which could show the way how those standards should be interpreted. Nevertheless, there are certain efforts to change this situation, as we can see in the case of IBA Guidelines.

### **3.4.1 IBA Guidelines**

The IBA Guidelines are a significant “instrument” in respect to the unification of the standards of arbitrator’s impartiality and independence in the international commercial arbitration.

Its main contribution to the world of international commercial arbitration is that the IBA Guidelines contain “a common set of principles that would address concrete situations and thus avoid the risk of arbitrators from different cultures applying a radically different standard of disclosure of appointment.”<sup>141</sup> Nevertheless, as its title “Guidelines” suggests, they are not binding. The IBA Guidelines itself provide that they “are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties.”<sup>142</sup>

The IBA Guidelines are divided into three parts; Introduction, General Standards Regarding Impartiality, Independence and Disclosure and the Practical Application of the

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<sup>139</sup> VERBRUGGEN, Caroline. *The Arbitrator-As Neutral Third Party*. In: Colloquium CEPANI40. Walking a thin line. What an arbitrator can do, must do or must not do. Recent developments and trends. Bruxelles: Bruylant, 2010. p. 37-75.

<sup>140</sup> BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a výkonu rozhodčích nálezů: komentář*. 1. vyd. Praha: C.H. Beck, 2004. p. 409.

<sup>141</sup> BLACKABY, Nigel a PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009. p. 270.

<sup>142</sup> See Art. 6, Introduction, IBA Guidelines.

General Standards. The last part is the reason why the IBA Guidelines are often criticised. This part “divides a non exhaustive list of circumstances into four separate colour groups; Red, Orange and Green.” The Red List encompasses situations which, in the case of the Non-Waivable Red List lead (or, concerning the Waivable Red List, could lead without agreement of the parties) to the disqualification of an arbitrator. The Orange List, the most controversial one,<sup>143</sup> contains non-exhaustive examples of situations which parties may consider as casting justifiable doubts on the arbitrator’s impartiality and independence. When the circumstances occur, they should be disclosed. The Green List enumerates situation where there is no lack of impartiality or independence, therefore an arbitrator is not obliged to disclose them.

Notwithstanding the criticism, the IBA Guidelines represent generally accepted “clue” on what falls within the scope of arbitrator’s impartiality and independence and how to proceed when he risk of potential bias occurs.

### 3.5 Duty to Disclose

Arbitrators are subject to the obligation to disclose to the parties all the facts that could “cast a shadow” over their impartiality and independence. The importance of this obligation lies in the fact that if an arbitrator fulfils the duty to disclose and the parties do not object in this respect, subsequently, the parties cannot succeed in challenging him or her later.<sup>144</sup>

This obligation remains for the entire duration of the arbitration, i.e. "it arises whenever a prospective arbitrator is approached for appointment and continues until the arbitration is terminated."<sup>145</sup> Thus, when arbitrator learns about relevant facts that could form ground for the challenge of his or hers impartiality or independence during the arbitral proceedings, they should be communicated to the parties immediately. It is presumed that special attention should be paid to the disclosure at the time of appointment of an arbitrator and duty become less strict when the arbitration terminates.<sup>146</sup>

An arbitrator is supposed to disclose information relevant to cast doubt on his impartiality and independence. The question is what information can be determined as

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<sup>143</sup> The criticism lies in the problem that “ IBA Guidelines fail to provide any substantive guidance on what, if any, conflicts of interest falling within the scope of the Orange List ought to result in disqualification.”( See BLACKABY, Nigel and PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009.p. 268).

<sup>144</sup> BLACKABY, Nigel a PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009.p. 268.

<sup>145</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 265.

<sup>146</sup> BLACKABY, Nigel and PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009.p. 269.

“relevant”.<sup>147</sup> The response can be found in the IBA Guidelines which enumerates particular situations where there is a duty to disclose<sup>148</sup> but, as mentioned above, they are not binding and thus they can serve only as a clue.

The obligation is provided expressly in majority of the arbitration rules and national provisions.<sup>149</sup> Nevertheless, English Arbitration Act, for instance, lacks this provision. Sometimes a special form is required. “To ensure compliance with this duty many institutions have a standard form which must be signed before appointment by the parties.”<sup>150</sup> For example, pursuant to the ICC Rules, an arbitrator who is nominated shall sign “a statement of acceptance, availability, impartiality and independence” in writing to the Secretariat which shall include “any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator’s impartiality.”

To conclude this issue, I would like to point out that the final decision what to disclose to the parties is always up to an arbitrator himself/herself and he/she “should use common sense to disclose those factors which objectively could be relevant, rather than remote or distant factor.”<sup>151</sup> We have to bear in mind that in the arbitration, there always is a certain relationship between arbitrators, counsels, case, etc. therefore, not all situations are under the disclosure requirement. On the contrary, their disclosure could delay arbitration and could unnecessarily cast a shadow on arbitrator’s impartiality and independence.

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<sup>147</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 266.

<sup>148</sup> See chapter Legal regulation of impartiality and independence, IBA Guideline, "Orange list".

<sup>149</sup> See Art. 8 of the Czech Arbitration Act; Art. 12 of the Model Law Article, Art. 5(3) of the LCIA Rules.

<sup>150</sup> LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003.p. 269.

<sup>151</sup> Ibid.

## Conclusion

The aim of my thesis was to analyse the status of arbitrator in the international commercial arbitration. Arbitrator is assumed to be an indispensable element of arbitration as he or she determines the character of the proceedings. My thesis has put the issues of great importance in this regard, which may have significant impact on the conduct of the whole arbitral proceedings, under the looking glass. In the following lines, I sum up the most important outputs which I have encountered during the elaboration of my thesis.

First part of my thesis has dealt with the status of an arbitrator in general. Apart from the definition of the international commercial arbitration, advantages and disadvantages of *ad hoc* and institutional arbitration have been examined in the first chapter. In the second chapter, the most important questions of the status of an arbitrator in international commercial arbitration have been outlined. Concerning the matter of appointment of arbitrator, various methods of appointment procedures have been compared. The analysis determined the appointment by parties to be the most suitable method for the international commercial arbitration since the arbitral tribunal formed this way will be respected by the parties the most due to the fact that it is established in accordance with their will.

Further rights, duties and powers of arbitrators have been scrutinized. Regarding the rights of an arbitrator, the right to remuneration was put in spotlight because of its significance. Special attention has been paid to the calculation of the fees. Arbitrator in the international commercial arbitration is also subject to obligations arising from his or her mandate, such as, for example the obligation *to settle the dispute between the parties, remain independent and impartial during the proceedings, conduct the arbitration fairly and without undue delay*, etc. Last but not least, I have examined powers of an arbitrator, which may be bestowed upon an arbitrator by the parties directly, i. e. expressly by the arbitration agreement, or indirectly, that is by the rules which govern the arbitration. Above all, an arbitrator has the authority to *establish the procedure of the arbitration, to determine applicable law and seat, to determine language of the arbitration, to examine the subject matter of the dispute, to appoint experts, to issue interim measures*, etc.

I have also concentrated on the issue of possible liability of arbitrator. In this respect, I have found out that, in general, it is presumed that arbitrator is not subject to liability excluding the cases of fraud, deliberate and conscious wrongdoing, etc. The reason for that solution is that greater limitation of liability of arbitrator could lead to numbers of actions

against him or her which could endanger integrity of arbitration. Nevertheless, the opinions differ with this regard.

Last part of the second chapter has been dedicated to the possibilities of how the mandate of an arbitrator could be terminated. Accordingly, the challenge, resignation and replacement of arbitrators are discussed in more detail.

Second, the more extensive, part of my thesis has dealt with three selected crucial issues with regard to the status of an arbitrator. All of them must be considered carefully during the selection of the arbitral tribunal and thus they have been analysed in depth from different points of view.

Regarding the first issue, I have revealed that there is no ideal number of the arbitral tribunal members as each type of the tribunal encompasses various advantages and disadvantages and thus, it proves to be suitable in different circumstances. Sole arbitrator, for instance, is recommended in smaller disputes where the three-person arbitration tribunal would be disproportionately expensive. On the other hand, three-person arbitral tribunal is presumed to be the best guarantee for the neutral tribunal from the legal, cultural and linguistic point of view, particularly when the arbitrators in the tribunal come from countries with different cultural, historical and legal backgrounds. Moreover, it enables the parties to participate in the appointment process as each party usually selects one arbitrator. Five-member or even bigger tribunals are not recommended as the more members of the tribunal, the slower, the more expensive and thus less effective the arbitration proceedings will be.

In this regard, I have also concentrated on the matter of even number tribunal with special focus on the umpire system for its peculiarity in the field of international commercial arbitration. Even number tribunal is a very controversial issue in the world of international commercial arbitration because the disagreement of arbitrators on the dispute could lead to a deadlock. To avoid this obstacle, many countries put a restriction on the principle of party autonomy with this regard. Some countries, such as Egypt, provide for very strict measures, i.e. the nullity of the arbitration; some prefer less radical solutions, such as an appointment of an additional arbitrator.

The aim of this chapter was also to analyse what happens if the agreement on the number is not reached. In this case, both national statutes and international rules determine a default number of tribunal members. Interesting finding has been that majority of civil law countries, together with the Model Law, opt for a three-number tribunal, meanwhile the common law countries provide for the sole arbitrator as a default solution.

The following chapter has been dedicated to examination of the requirements for arbitrator in international commercial arbitration. Firstly, I have focused on the requirements imposed by national law or international rules. The requirements are usually provided by the national law as *lex loci arbitri* rather than international rules. Generally, an arbitrator is required to be impartial and independent and he or she is supposed to be a natural person. Under provision of some international rules, single arbitrator and the chairman are required to be of the different nationality than one of the parties. In continental European countries, an arbitrator is usually required to have legal capacity. Moreover, sometimes the full capacity of exercising civil rights is demanded, together with legal education and certain experience. I found it particularly interesting that in some countries, the Moslem ones above all, the restrictions on the sex and religious beliefs of arbitrators are still very strict.

In respect to the parties' agreement on the qualifications of arbitrators, the parties are generally free to specify requirements for arbitrators in the arbitration agreement. Nevertheless, it is recommended not to stipulate strict requirements in mandatory terms. It could limit the appointment procedure and thus, unnecessarily burden the whole arbitration proceeding. Mostly, the parties usually provide for particular language skills of an arbitrator as well as certain professional qualification and experience. In this regard, I have analysed whether a lawyer or a technician is a more suitable candidate to settle a dispute in international commercial arbitration.

The last chapter of my thesis is dedicated to the issue of independence and impartiality of an arbitrator. High significance of this fundamental principle has been proven as its lack could lead to rejection or challenge of the arbitrator. In addition it is a ground for which an arbitral award could be set aside or its recognition denied. To avoid such negative results of arbitration, an arbitrator is obliged to disclose any relevant facts that could cast shadow over his or her impartiality and independence as soon as he or she learns about them. My thesis has also shown, that although the terms "impartiality" and "independence" are often used interchangeably, their concepts differ from each other. I have also scrutinized whether arbitrator is subject to the same standard of independence and impartiality as judge of the national court. In this respect, my thesis revealed that different standard should be applied on judges than on arbitrators as arbitration is based on a different principle than litigation.

To conclude, my thesis has demonstrated the crucial role of arbitrators in international commercial arbitration. Accordingly, selection of an unsuitable person could ruin the whole arbitration proceeding. Hence, the parties who agree to have their dispute settled in arbitration

are recommended to bear this fact in mind and to chose the prospective arbitrator with due care.



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## Abstrakt

Rozhodce je považován za nepostradatelný prvek rozhodčího řízení, protože je to právě osoba rozhodce, která určuje povahu celého rozhodčího řízení. Cílem mé práce je analýza postavení rozhodce v mezinárodní rozhodčí arbitráži.

Za tímto účelem je má práce rozdělena do dvou hlavních částí. První část představuje teoretický základ dané problematiky, zatímco druhá část podrobně analyzuje tři klíčové otázky postavení rozhodce v mezinárodní arbitráži.

První část se skládá ze dvou samostatných kapitol. První kapitola objasňuje termín mezinárodní arbitráže a zaměřuje se především na definici mezinárodní obchodní arbitráže. Dále je zde také vymezen základní rozdíl mezi rozhodčím řízením ad hoc a institucionálním rozhodčím řízením.

Druhá kapitola první části shrnuje důležité otázky právního postavení rozhodce v mezinárodním rozhodčím řízení "od jeho počátku, po ukončení funkce". Kapitola tedy začíná analýzou jednotlivých způsobů jmenování rozhodce do funkce. Dále jsou rozebrány jednotlivá práva a povinnosti rozhodce a jeho pravomoci. V části věnující se právům rozhodce se zaměřuji především na právo rozhodce na odměnu. V další části je nastíněna problematika odpovědnosti rozhodce. Celá kapitola je pak zakončena analýzou jednotlivých způsobů ukončení funkce rozhodce, konkrétně je zde tedy vymezena otázka možnosti zpochybnění statutu rozhodce, vzdání se funkce a náhrada rozhodce.

Druhá, o poznání rozsáhlejší část, dále rozvíjí tři zásadní otázky postavení rozhodce, které byly nastíněny v první části. Na základě toho je pak rozdělena do tří hlavních kapitol.

V první kapitole nazvané Rozhodce a rozhodčí tribunál jsou zkoumány výhody a nevýhody různých typů rozhodčích tribunálů určenými počtem rozhodců. Dále jsou analyzovány jednotlivé role rozhodců spolu s jejich pravomocemi u každého druhu rozhodčího tribunálu. Poslední část je pak věnována situaci, kdy nedošlo k dohodě na počtu rozhodců a je zde tedy srovnávána úprava vnitrostátního práva a mezinárodních pravidel rozhodčích institucí.

Druhá kapitola s názvem Požadavky na osobu rozhodce odpovídá na otázku, jaké požadavky musí osoba rozhodce splňovat, aby mohla být jmenována. Jsou zde tedy zkoumány jednotlivé požadavky, které si vymezí strany samy spolu s požadavky stanovenými zákony a mezinárodními rozhodčími pravidly.

Poslední kapitola je věnována problematice nestrannosti a nepodjatosti rozhodce. V této souvislosti je vymezen rozdíl mezi pojmy nestrannost a nepodjatost a jsou zde uvedeny také

příklady jednotlivých ustanovení národních úprav spolu s úpravou obsaženou v mezinárodních rozhodčích pravidlech. Zvláštní pozornost je pak věnována IBA Guidelines. V kapitole se věnuji podrobně problematice uplatnění stejných principů nestrannosti a nepodjatosti pro soudce i rozhodce. Na závěr se zabírám problematikou povinnosti oznámit skutečnosti, které jsou způsobilé vrhnout pochybnost na nestrannost a nepodjatost rozhodce.

Závěr práce je pak věnován shrnutí jednotlivých závěrů, ke kterým jsem došla během psaní práce.

## Summary

Arbitrator is assumed to be an indispensable element of arbitration as he or she determines the character of the proceedings. The aim of my thesis is to analyse the legal status of arbitrator in the international commercial arbitration.

In this respect, the thesis is divided into two principal parts. The first part represents the general theoretical ground of the discussed topic, whereas the second part analyses three crucial questions of the legal status of the arbitrator in international arbitration in full detail.

The first part is comprised of two chapters. The first one clarifies the notion of the international arbitration with special focus on international commercial arbitration. The differences between the *ad hoc* and institutional arbitration are mentioned as well.

The second chapter sums up important issues of the legal status of the arbitrator in the international commercial arbitration “from beginning to end”. Therefore, it commences with the analysis of various appointment procedures. Further powers, duties and rights of an arbitrator are outlined with special attention to the right to remuneration. Also the question of the arbitrator’s liability is discussed. The whole chapter is concluded with the analysis of the possibilities how the arbitrator’s mandate can be terminated, particularly, the challenge, resignation and replacement of the arbitrator are studied.

Concerning the second part, the bigger one, it further develops three important issues of the status of the arbitrator which were outlined in the first part.

In the first chapter named *Arbitrator and Arbitral Tribunal* advantages and disadvantages of different kinds of arbitral tribunal are examined. Furthermore, particular roles of arbitrators together with their concrete powers are analysed in every type of the arbitral tribunal. Last but not least, the final part describes the situation when parties omit to agree on the number of arbitrators and thus various default provisions of both national law and international rules are compared.

The second chapter, *Requirements for an Arbitrator*, responds to the question what qualifications an arbitrator must comply with in order to be appointed. Thus, the particular requirements imposed by the parties and by national law or international rules are scrutinized. In this respect, special attention is paid to the requirements under the arbitration law of the Czech Republic.

In the last chapter, independence and impartiality of the arbitrator are in the spotlight. In this regard, the difference between impartiality, independence and neutrality are explained and examples of various provisions of national law and arbitration rules in this respect are



compared and also the IBA Guidelines are introduced. Special attention is paid to the comparison of the standard of impartiality and independence imposed on judges and arbitrators. In this regard, I concentrate on the question if the same principles should be applied on both judges and the arbitrators. Finally, I deal with the arbitrator's duty to disclose circumstances that are capable of casting doubt on his impartiality and independence.

The conclusion is dedicated to a summary of each of the outputs which I have encountered during the elaboration of my thesis.

## Key Words

**Key words:** international commercial arbitration, ad hoc arbitration, institutional arbitration, arbitrator, arbitral tribunal, requirements for arbitrator, independence, impartiality.

**Klíčová slova:** mezinárodní obchodní arbitráž, rozhodčí řízení ad hoc, institucionální rozhodčí řízení, rozhodce, rozhodčí tribunál, požadavky na rozhodce, nestrannost, nezávislost.