

Palacký University Olomouc
Faculty of Law

Ivo Heger

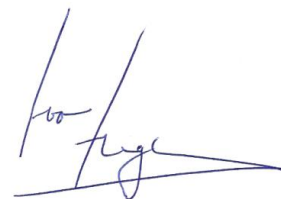
Arbitrator:
The Determining Aspect of International Commercial Arbitration

Thesis

Olomouc 2012

I hereby declare that the thesis *Arbitrator: The Determining Aspect of International Commercial Arbitration* is my own work and effort. All sources and information, which I have used to create this thesis, have been acknowledged, noted in footnotes and listed in the index of sources.

Olomouc, 15 May 2012

A handwritten signature in blue ink, appearing to read 'Ivo Heger', written over a horizontal line.

I v o H e g e r

I would like to cordially thank JUDr. Miluše Hrnčířiková, Ph.D. for her patience, valuable input, cooperation and methodical guidance during my work on this thesis.

Furthermore, I want to thank my family for the continuous support and trust that has accompanied me throughout the entire studies. I value their help and commitment greatly.

"Doing what is right may still result in unfairness if it is done in the wrong way."

Right Honourable Sir Frederick Horace Lawton, QC

Maxwell v. Department of Trade and Industry [1974] 1 QB 523

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List of Abbreviations

AAA	American Arbitration Association
ABA	American Bar Association
AAA/ABA Code of Ethics	The Code of Ethics for Arbitrators in Commercial Disputes approved by AAA/ABA
ACICA	Australian Centre for International Commercial Arbitration
ADR	Alternative dispute resolution
AIDA	Association Internationale de Droit des Assurances
ARIAS	AIDA Reinsurance and Insurance Arbitration Society
Art.	Article
Arts.	Articles
cf.	Confront
CIETAC	China International Economic and Trade Arbitration Commission
Co.	Company
Corp.	Corporation
ECHR	European Court of Human Rights

e.g.	<i>Exemplum gratia</i>
et al.	<i>Et alii</i>
IBA	International Bar Association
IBA Ethics	IBA Rules of Ethics for International Arbitrators
IBA Guidelines	IBA Guidelines on Conflict of Interest in International Arbitration
Ibid.	<i>Ibidem</i>
ICA	International Court of Arbitration
ICC	International Chamber of Commerce
i.e.	<i>Id est</i>
Inc.	Incorporated
LCIA	London Court of International Arbitration
Ltd.	Limited
Med-Arb	Mediation arbitration
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985 with the 2006 amendments)
n.	Note
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

No.	Number
p.	Page
pp.	Pages
para	Paragraph
paras	Paragraphs
S.a.r.l	Société à responsabilité limitée
Sec.	Section
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States
v.	Versus
VIAC	Vienna International Arbitral Centre
Vol.	Volume

Introduction

Disputes are practically inevitable components of international transactions. Different expectations, political, cultural and geographic backgrounds and many other factors are sources of disagreements, conflicts and disputes. Parties undertake to perform contracts where performance is impossible or simply external influences or human error disable a party from fulfilment of obligations and a dispute is born. Where disputes arise and they cannot be resolved amicably by negotiation, they need to be resolved in accordance with a legal process. Such procedure should have the confidence of all the parties to the dispute or at least be in such forum that is acceptable to the parties.

The most apparent *fora* for disputes are national courts. States found and maintain these institutions to provide an arena for a dispute settlement and to dispense justice. In the eyes of a foreign merchant or businessman, however, a national court of the counter-party is not usually the most viable ground for resolution of dispute as potential favouritism may occur. Similarly, a foreign businessman is not, in general, familiar with the legal system of the country of the counterpart and thus the entrepreneur might find himself entering an uncharted territory. Under these circumstances, parties to international commercial contracts frequently look to arbitration as to a private, independent and neutral system. Through the arbitration parties are allowed to exclude a dispute arising or connected to their relationship from national courts' jurisdiction and seek a resolution through the mechanism that works in accordance with procedures, structures and substantive standards chosen directly or indirectly by the parties. The arbitration keeps gaining on importance in the area of dispute resolution and it has become so employed that it can be considered a true competitor to the regular court procedure.

The topic of this thesis concerns the central figure of the arbitral process - the person of arbitrator. The author bases the work on the hypothesis that the arbitrator is the determining aspect and factor of international commercial arbitration. As such, arbitrator empowers and influences the entire arbitral proceedings.

In accordance to the aforementioned premise, the author uses empirically-analytic and comparative methods to elaborate the covered issues. With respect to individual issues and topics covered in the thesis, the author seeks to provide a comparison of various approaches in national legislation worldwide whereas the emphasis is added to the divergence of common law and civil law jurisdictions. Accordingly, the topics are also elaborated from the perspective of *ad hoc* and institutional arbitrations

The thesis draws from various electronic sources as well as numerous bibliographical sources, while the peak importance is placed upon the case law of national courts and arbitral tribunals in order to grant a practical perspective of individual subjects.

On the first several pages, the author offers basic excursion to the area of ADR and the arbitration as legal institute and focuses on the international arbitration, i.e. exceptionality of arbitrations with foreign aspects. This chapter of the thesis is intended to provide basic overview of arbitration - especially from historical standpoint as genesis of arbitration naturally influenced evolution and development of the position of arbitrators. Furthermore, the chapter provides basic introduction to the characteristics and differences of *ad hoc* and institutional arbitrations as the following chapters evaluate and compare position of arbitrator from the perspective of *ad hoc* and institutional arbitral proceedings.

Subsequent chapters are arranged in order of conduct of arbitration. The second chapter is thus dedicated to the phase when parties choose to submit their dispute or a potential one to arbitration in arbitral agreement or arbitral clause. Even at this early stage, the parties are capable of influencing the nature of arbitral proceedings and the position of arbitrators tremendously.

When a dispute rises and parties undertake to submit it to arbitration, arbitral tribunal must be constituted. The procedures of selection and appointment of arbitrators are, therefore, the main subject of the third chapter. Various processes of appointment, influence of appointing authorities and nuances of judicial appointment - all these features are covered in the chapter with respect to differences in institutional and *ad hoc* arbitrations. Similarly, varieties throughout legislation in diverse jurisdictions are observed. Finally, the chapter also mentions specific requirements that may be conferred upon arbitrators as pre-requisite for appointment.

The fourth chapter deals with particularly important issue of arbitrators' duties, responsibilities and general right to be compensated for service. The dominant place is granted to the independence and impartiality of arbitrators as this feature represents probably the most important demand. The author hence unfolds different criteria and standards that have been developed by the national legislators and arbitral institutions as well as those created by case law. Diverse mechanisms of arbitrators' compensations are also briefly depicted.

The fifth and final chapter seeks to provide information on the processes contravening those mentioned in Chapter 3. The spotlight is thus set on the removal processes, especially procedures governing challenges to arbitrators by parties to the dispute and judicial removals.

The ways, via which the challenged arbitrators are replaced and the gaps in arbitral tribunals are filled, are also enumerated in this section of the thesis. Finally, last sections of the text deal with question of liability of arbitrators and different standards of immunity that arbitrators are awarded under various legal systems.

1 Arbitration as a method of alternative dispute resolution

While there is no universally accepted definition of alternative dispute resolution,¹ ADR is usually considered to be a term encompassing the entire range of methods designed to resolve disputes excluding litigation.² A dispute is then defined as a lack of compromise between the parties.³ ADR thus *inter alia* covers procedures of negotiation, mediation, conciliation and arbitration.

Litigation is not very effective form of dispute resolution as it can be very costly, time consuming and above all it is usually public. On the other hand, ADR provides parties with private, flexible, speedy and effective resolution of dispute. With regard to the international aspect, ADR is also more viable way as it allows parties to create neutral ground for dispute settlement instead of having the differences decided by a national court.

Among ADR techniques we may distinguish two categories. First, there are methods that are intended to lead parties to amicable settlement by a compromise solution (e.g. mediation, conciliation). Second category provides parties with a decision and determines issues definitively (e.g. arbitration).

Several scholars, notwithstanding, construe that the term "alternative" emphasizes the absence of potential enforceability by state power and thus exclude also arbitration from ADR.⁴ On the other hand, national courts have interpreted and extended arbitration statutes *per analogiam* to other ADR methods and permitted enforcement of settlements as awards in numerous cases.⁵ The separation of arbitration and ADR based on the aspect of enforcement by state power thus loses its relevance, especially in these jurisdictions. The author hence supports and works with the opinion that arbitration represents an alternative, litigation-free method of resolving business disputes and as such it constitutes integral part of ADR.

¹ TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of commercial disputes*. New York: Oxford University Press, 2005. Supra n. 1. Discussions arose also as to what the term "ADR" should resemble. While it originated as a reference to alternative dispute resolution, sometimes the term "alternative" was substituted with terms "appropriate" or "amicable". For further reference see PLANT, David. ADR and arbitration. In NEWMAN, Lawrence, HILL, Richard (eds.). *The leading arbitrators' guide to international arbitration*. 2nd edition. New York: Juris Publishing, 2008. p. 242.

² LEW, Julian et al. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 3.

³ FOSKETT, David. *The Law and Practice of Compromise*. 4th edition. London: Sweet & Maxwell, 1996. p. 5. *Nuttall v. RG Carter* [2002] BLR 312.

⁴ See e.g. ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Prague: ASPI Publishing, 2002. p. 13. REDFERN, Alan, HUNTER, Martin et al. *Redfern and Hunter on International Arbitration*. Oxford: Oxford University Press, 2009. pp. 21-23.

⁵ *AMF Inc. v. Brunswick Corp.* 621 F. Supp. 456 (1985). Similarly see CARTER, James. Issues Arising from Integrated Dispute Resolution Clauses. In VAN DEN BERG, Albert (ed.). *New Horizons in International Commercial Arbitration and Beyond*. The Hague: Kluwer Law International, 2005. p. 469.

1.1 International commercial arbitration

Arbitration represents a dispute resolution method where parties through an agreement submit their existing or future disputes for final and binding resolution by an appointed arbitrator or arbitrators.⁶

Problems start to rise in defining the "international" feature due to different national attitudes towards the threshold between domestic and international arbitrations. While a transaction is considered as international under one legal system, it must not be necessarily considered so under another. There is no universal nor obvious test that might be of assistance here. Some systems define internationality through the notion of residence,⁷ others focus on the character of the business transaction that must be of international character or in the interest of international trade.⁸ The Model Law incorporates both these standards in the Art. 1 para 3.

Identical difficulties arise in defining the "commerciality". A footnote to Art. 1 of the Model Law contains a rather wide definition. It states "[t]he term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of commercial nature, whether contractual or not" and provides *demonstrandi causa* several examples of such relationships. Notwithstanding, national legislation of a number of countries provides more narrow definition of commercial matters.⁹ Especially with regard to the states that took a reservation to the Art. I para 3 of the New York Convention, national descriptions of commercial matters must be observed - particularly for the practical purposes of future recognition and enforcement of the award.¹⁰

⁶ GARNETT, Richard et al. *A practical guide to international commercial arbitration*. New York: Oceana Publications, 2000. p. 1.

⁷ E.g. Sec. 85 (2) of the English Arbitration Act (1996).

⁸ Sec. 1492 of the Code de procédure civile (1975).

⁹ GARNETT et al.: *A practical guide...*, p. 9.

¹⁰ Approximately one-third of the states ratifying the Convention have deposited a reservation with regard to the commercial nature of relationships (including the United States, Greece, Philippines, Canada, Argentina, Ecuador or Venezuela). The "commercial" relationships requirement of the New York Convention was thus developed by corresponding national courts. The US courts, notably, generated wide range of case law on this topic. In *Island Territory of Curacao v. Solitron Devices, Inc.* 489 F.2d 1313 (1973) the 2nd circuit court held that "[w]e may logically speculate that [the purpose of the commercial limitation] was to exclude matrimonial and other domestic relations awards, political awards, and the like." In *Bautista v. Star Cruises*, 396 F.3d 1289 (2005) the scope of the New York Convention was extended to employment contracts. Moreover, in *Francisco v. Stolt Achievement MT* 293 F.3d 270 (2002) it was held that "doubts as to whether a contract falls under the Convention Act should be resolved in favor of arbitration."

1.2 History of arbitration

Shape of arbitration changed throughout time and so did the position of arbitrators. A brief excursion to the history of arbitration is of paramount importance as it provides us with guidance to understand contemporary issues of the institution and current approaches to the role of arbitrators.

From historical point of view, the arbitration is no novel institution at all. After all, even mythological stories provide us with examples of arbitration proceedings conducted before a sole arbitrator - the most notorious of those represents the judgment of Paris.¹¹ Similarly, early instances of dispute resolution involved disputes between the Greek gods, e.g. disputes of Helios and Poseidon over the ownership of Corinth (solved a split of the territory by Briareus)¹², Athena and Poseidon over the ownership of Aegina (awarded condominium by Zeus)¹³ or Hera and Poseidon over the possession of Argolis (award in favour of Hera by Inachus)¹⁴. But even if we abandon mythology, the roots of arbitration may be found in ancient states. Above all, the arbitration was an instrument of solving state-to-state disputes (or disputes of entities attributable to states)¹⁵. To quote authority's words: "[...] arbitration was used throughout the Hellenic world for five hundred years."¹⁶ In the Roman era, the use of arbitration somewhat declined from Hellenic practice but it was not abandoned.¹⁷ Territorial units of Rome, vassals and allies still appealed to the Roman Senate, proconsuls and other Roman magistrates for arbitral decisions or the appointment of arbitrators to resolve territorial and other disputes.¹⁸ Regarding the resolution of commercial disputes, earliest reports of commercial arbitration are from the Middle East. Archaeological findings have provided us with a clay tablet depicting an oldest dispute between neighbours over water

¹¹ "There is also Hermes bringing to [Paris] the son of Priamos the goddesses of whose beauty he is to judge, the inscription on them being: 'Here is Hermes, who is showing to Alexandros, that he may arbitrate concerning their beauty, Hera, Athena and Aphrodite.'" - PAUSANIAS. *Description of Greece* [online]. perseus.tufts.edu [quoted 4.10.2011]. Available at: <<http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0160%3Abook%3D5%3Achapter%3D19%3Asection%3D5>>. para 5.19.5.

¹² RALSTON, Jackson. *International Arbitration from Athens to Locarno*. Stanford University Press, 1929. p. 153.

¹³ PHILLIPSON, Coleman. *The international law and custom of ancient Greece and Rome*. Vol. 2. London: Macmillan & Co., 1911. p. 129.

¹⁴ RALSTON: *International Arbitration*,..., p. 153.

¹⁵ E.g. case of *Ur v. Lagash* settled by the King of Uruk who ordered to return a territory seized by force. For further reference see LAFONT, Sophie. L'arbitrage en Mésopotamie. *Revue d'Arbitrage*, 2000, No. 4, pp. 568-569.

¹⁶ FRASER, Henry. A sketch of the history of international arbitration. *Cornell law quarterly*, 1926, Vol. XI, No. 2, p. 188.

¹⁷ *Ibid.*, p. 190.

¹⁸ RALSTON: *International Arbitration*,..., pp. 171-172.

rights in a village near Kirkuk, Iraq which was resolved by arbitration.¹⁹ Similarly, arbitration was also well-known in Egypt, where we may find even convincing examples of agreements to arbitrate future disputes.²⁰ Arbitration for the resolution of private disputes followed the tradition of state-to-state arbitrations also in ancient Greece.²¹ Arbitral procedures in ancient Greece appear to have been quite sophisticated and largely subject to the parties' control, including with regard to the subject matter of the arbitration, the arbitrators, the choice of law, etc.²² Regardless the stagnation of Roman international arbitration, commercial arbitration in Rome was far more common, in part due to evident lack of judicial system of litigation we have in contemporary legal structures.²³ Roman arbitral procedures were not dissimilar to those in more modern eras. An arbitrator's jurisdiction was strictly limited to "the terms of the agreement for arbitration (*compromissum*), and, therefore, he cannot decide anything he pleases, nor with reference to any matter that he pleases, but only what was set forth in the agreement for arbitration, and in compliance with the terms of the same."²⁴

After a period of limited usage under Roman practice, international arbitration in Europe experienced a revival during the Middle Ages. Scholars conclude that international arbitration "existed on a widespread scale [and that] it is surprising to learn of the great number of arbitral decisions, of their importance and of the prevalence of the clause *compromissoire*."²⁵ One of the most famous arbitrations of the age represents Pope Alexander VI.'s division of the discoveries of the New World.²⁶ Arbitration of international disputes became also the preferred way for resolution of commercial matters especially due to increasing inadequacy of local courts or decision-making bodies that had to deal with the special jurisdictional and enforcement obstacles presented by foreign or cross-border litigation. The guilds and fairs thus eventually developed their respective arbitral mechanisms with substantial independence from local court systems.²⁷

¹⁹ WILNER, Gabriel. In DOMKE, Martin, EDMONSON, Larry, WILNER, Gabriel (eds.). *Domke on Commercial Arbitration*. Vol. I. St. Paul: Thomson/West, 2006. para 2.01.

²⁰ MANTICA, Margit. Arbitration in Ancient Egypt. *Arbitration Journal*, 1957, No. 12, pp. 158-60.

²¹ ROEBUCK, Derek. *Ancient Greek Arbitration*. Oxford: Holo Books, 2001. pp. 45-46.

²² *Ibid.*, pp. 347-348.

²³ ROEBUCK, Derek, DE LOYNES DE FUMICHON, Bruno. *Roman arbitration*. Oxford: Holo Books, The Arbitration Press, 2004. p. 94.

²⁴ STEIN, Peter. Labeo's Reasoning on Arbitration. *South African Law Journal*, 1974, No. 91, pp. 135.

²⁵ FRASER: *A sketch...*, pp. 190-191. Cf. RALSTON: *International Arbitration...*, pp. 177-178.

²⁶ BOURNE, Edward. *Essays in Historical Criticism*. New York, C. Scribner's Sons, 1901. pp. 193-216.

²⁷ WOLAVER, Earl S. The Historical Background of Commercial Arbitration. *University of Pennsylvania Law Review*, 1934, No. 83, pp. 136.

French royal edict of Francis II issued in August 1560 made arbitration compulsory for all merchants in disputes arising from their commercial activity.²⁸ This edict eventually came to be ignored, however, arbitration came back into favour as the most reasonable device for the termination of disputes arising between citizens during the French Revolution. Hence, French judges were abolished and replaced by public arbitrators in 1791. Finally, this step proved to be too harsh and the French Code of Civil Procedure of 1806, transformed the arbitration into the first stage of procedure which would lead to the court's judgment.²⁹

The first English statute was the Arbitration Act of 1698.³⁰ The Italian Code of Procedure of 1865 significantly treated arbitration in a preliminary chapter "On Conciliation and Arbitration."³¹ The United States followed the example of European powers and throughout the 18th century, arbitration was widely used to resolve commercial and other private disputes as well as interstate disputes. Nevertheless, growing judicial and legislative hostility to arbitration agreements emerged, as American courts developed a radical interpretation of historic English common law authority.³² This antagonism was eventually overcome in the early 20th century with enactment of the Federal Arbitration Act (1925) and similar state arbitration legislation.³³

1.3 International commercial arbitration today

The arbitration became even more used way of dispute resolution in connection to foundation of International Chamber of Commerce in 1919. In 1923, ICC formed International Court of Arbitration as an effective system to solve international commercial disputes. At a congress held in London in 1921, Owen Young, Chairman of the Commercial Arbitration Committee of the US Chamber of Commerce and a well-known businessman,

²⁸ BORN, Gary. *International arbitration. Cases and materials*. Alphen aan den Rijn: Kluwer Law International, 2011. p. 18.

²⁹ Code de procédure civile (1806), Chapter 24. This standard was modified in connection with the "Prunier rule" nullifying all arbitration clauses concluded before the dispute in order to protect a weaker party. See Judgment of the Cour de cassation of 10 July 1843 in the case of *Compagnie l'Alliance v. Prunier*.

³⁰ Although already in *Vynior's Case* [1609] 8 Co. Rep. 80a, 81b) the court held the parties' agreement to arbitrate any dispute to be valid and defendant was thus ordered to pay the agreed penalty for refusing to submit to arbitration. See MOORE, John, PAYNE, Joseph. *Reports of cases argued and determined in the Courts of Common Pleas and Exchequer Chamber with tables of the names of the cases and principal matters. Vol I*. Dublin: Milliken & Son, 1828. p. 166.

³¹ DAVID, René. *Arbitration in International Trade*. Deventer: Kluwer Law and Taxation Publishers, 1985. p.29.

³² BENSON, Bruce. An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States. *Journal of Law, Economics, and Organization*, 1995, Vol. 11, No. 2, pp. 481-82.

³³ BORN: *International arbitration. Cases...*, p. 20.

urged that it was important to create effective solutions "outside the law".³⁴ This concept, however, has two problems. First, there is always a possibility of abuse of power by arbitrators and second, it may prove uneasy to make up for mistakes or faults made by arbitrators. Despite these facts, arbitrations held before the ICA, other arbitral institutions and *ad hoc* arbitrators started to be considered a normal way of international commercial disputes settlement since early 1960s.³⁵

Finally, it is important to emphasize certain abnormalities of arbitration that nowadays occur in certain commercially important areas throughout the world.

In Islamic countries governed by Shari'a law, no woman is generally allowed to serve as arbitrator. Moreover, some Islamic countries (e.g. Saudi Arabia) prohibit persons other than Muslim to serve as arbitrator. Moreover, character of the Shari'a law creates often difficulties on its own and thus arbitration in these countries is not usually sought.³⁶

As for Japan, a seat of numerous major enterprises, dispute resolution through litigation or arbitration is not pursued on regular basis. Japanese culture is generally based on social harmony and duty to the community and thus any dispute resolution represents a disruption of this harmonious state. A contract is not considered a mere document but an engagement of mutual trust. As a result, Japanese society also consists of very small number of lawyers.³⁷

Rather peculiar problem has risen with regard to commercial arbitration when India adopted a new statute on arbitration. While India represent a major market, it is a country of various customs and cultural differences as well. The Arbitration and Conciliation Act (1996) of the Republic of India did not adopt any interpretation of matters that are to be considered

³⁴ Taking into account different approaches to various commercial aspects under diverse national legislation, Young approached the conference with bold statement that the ICC's success in the field of international commercial arbitration "...will depend on the recognition by the Chamber and by its individual members of the inherent difficulties and complexities of the situation. The most important of these difficulties lies in the fact that, generally speaking, the business men of continental Europe rely upon a legal sanction for the carrying out of arbitral decisions, whereas in the United States, as well as in England and the South American countries, a moral sanction has been shown to be, certainly for the present, more effective than a legal sanction. To ensure the cooperation of these countries, therefore, some system of arbitration outside the law must be provided." See PAULSON, Jan. *Arbitration in Three Dimensions*. London: London School of Economics Working Papers, 2010. p. 22.

³⁵ PAULSON: *Arbitration in Three Dimensions*. p. 21. As of 1999, however, ICA receives around 500-700 requests for arbitration per year. See *Facts and figures on ICC arbitration: Statistical Reports* [online]. iccwbo.org [quoted 4.10.2011]. Available from: <<http://www.iccwbo.org/court/arbitration/id5531/index.html>>.

³⁶ In case of *Petroleum Development (Trucial Coast) Limited v. Sheikh of Abu Dhabi* [1951] the Arbitral Tribunal *inter alia* found the Shari'a law too primitive to settle the dispute. For further reference see ASQUITH OF BISHOPSTONE. Award of Lord Asquith of Bishopstone. *International and Comparative Law Quarterly*, 1982, No. 1, pp. 247-261. See also Chapter 3.2.4 hereof.

³⁷ For every 285 Americans there is a lawyer, hence USA possesses the highest proportion of lawyers per capita in the world. In England, there are 477 Englishmen per lawyer, in France 1,363 Frenchmen per lawyer and in Japan 5,518 Japanese per lawyer. See KAMIYA, Setsuko. *Scales of justice: Legal system looks for right balance of lawyers* [online]. The Japan Times Online, 18.3.2008 [quoted 4.10.2011] Available from: <<http://search.japantimes.co.jp/cgi-bin/nn20080318i1.html>>.

commercial disputes. Consequently, it became unclear which matters should fall under the scope of the Act.³⁸

1.4 *Ad hoc* arbitrations and institutional arbitrations

Once parties agree to submit their dispute to the arbitration instead of a national court, a further selection is placed upon them concerning the system of arbitration they want to refer to in their agreement. Basically, there are two models available – *ad hoc* arbitration and institutional arbitration.³⁹ Both these forms carry distinct characteristics and differences. Parties have an option to set the rules that will govern the potential arbitration in the actual arbitral agreement or in a separate agreement after the dispute arises (i.e. "submission agreement") or to have them set forth by arbitrators.⁴⁰ Where no reference to an arbitral institution is made in the agreement, we are dealing with *ad hoc* arbitration model. On the contrary, institutional arbitrations occur where parties stipulate the rules of arbitration indirectly, particularly by reference to a set of rules issued by an arbitral institution.⁴¹ Arbitral institutions are entities whose main activity lies within administration and organization of arbitral proceedings. Although today the appeal of *ad hoc* proceedings is still remarkable, the importance of arbitral institutions and proceedings held under their aegis has recently come to the fore.⁴²

Ad hoc arbitration is thus based on the rules agreed upon by the parties which may be supplemented by the rules applied by the arbitrators during the procedure and arbitrators' discretion is limited only by principle of public policy and constitutional guarantees in the seat of arbitration.⁴³ Various aspects of arbitral proceedings may be set forth in the most convenient way in order to fit the case without any need of intervention by a permanent institution. This system is therefore theoretically the best, notwithstanding it shows two basic drawbacks.

³⁸ Case law eventually used as a guiding light decisions of courts given under earlier law in order to create a proper perspective on the meaning of the term "commercial dispute". In sight of cases *Kamani Engg. Corp. Ltd v. Societe De Traction Et. D'Electricity Societe Anonyme* [1965] AIR 114, *Josef Meisaner Gmbr & Co. v. Kanoria Chemicals & Industries Ltd* [1986] AIR Cal 45 and *R M Investment v. Boeing Company* [1994] Suppl CLA 75 (Sc) circumstances of the actual case must be taken into account in order to make valid decision whether the dispute is commercial in nature or not.

³⁹ The institutional arbitration is also often referred to as administered or pre-organized arbitration. For further reference see AZZALI, Stefano. "*Ad hoc*" and "*Institutional*" (*Administered*) Arbitration: a fundamental choice for the organization of arbitration procedure. Milan: Chamber of National and International Arbitration of Milan, 2011. p. 1.

⁴⁰ BORN, Gary. *International arbitration*. Alphen aan den Rijn: Kluwer Law International, 2009. pp. 150-151.

⁴¹ *Ibid.*, pp. 148-149.

⁴² AZZALI: "*Ad hoc*" and..., p. 2.

⁴³ *Ibid.*

First, set of rules provided in the agreement often lack certain provisions or they are otherwise incomplete. This problem may form an obstacle that usually means a delay of the entire proceeding or its complete seizure in extreme cases. In default of agreement, parties may find difficult to reach a compromise on procedural rules for such reasons as obstructive and/or dilatory behaviour of a party or lack of co-operation. In these situations, an external interference is needed to overcome the crisis. At that point, the rules may be furnished by new provisions by a national court in the seat of arbitration that is competent to supervise the arbitral process and its conformity with applicable procedural law.⁴⁴ Alternatively, the arbitrators themselves may fill the gap.⁴⁵ The former solution, however, is not favourable to the parties due to time extension and loss of privacy, one of the fundamental features of arbitration.

Second, *ad hoc* system mostly does not allow parties to know in advance entire rules of procedure. For this reason, in *ad hoc* solutions arbitration agreement or arbitral clause should be as exhaustive as possible in sake of uninterrupted proceedings. Nevertheless, under certain circumstances, e.g. when parties remain well-related, the *ad hoc* arbitration still represents a valid dispute resolution method.

Institutional arbitration stands for the second pole of arbitration. In this system, a permanent institution organizes and conducts the proceedings under the rules of this entity. These rules cover all necessary points of arbitration and the institution offers any necessary assistance throughout the proceedings, supervises the process and co-ordinates activities of arbitrators and parties. If the level of co-operation does not suffice or proceedings are obstructed, the institution shall take necessary steps to guarantee continuance.

Abovementioned does not by any means indicate that parties are not allowed to handle the proceedings directly in the institutional system. Parties still retain the option to derogate the rules - the parties thus may modify aspects like way of appointment of arbitrators, number of arbitrators, seat of arbitration, time limit for rendering the award, etc. It is vital to emphasize that arbitral institutions do not act as arbitrators by any standard. The Institutions' task is not to settle disputes but to organize and supervise the dispute settlement that is held under their aegis.

⁴⁴ This principle is derived from Art. 2 of the Geneva Protocol on Arbitration Clauses of 1923 that states: "*the arbitral procedure including the constitution of the arbitral tribunal shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.*" The choice of *situs* is therefore a matter of great importance in order to ensure continuous and incident-free proceedings.

⁴⁵ AZZALI: "*Ad hoc*" and..., p. 3.

2 Arbitral agreement as a mechanism of preliminary selection of arbitrators

Any arbitration must be based "on the consent of all the parties thereto and the consent must be recognized as such by law."⁴⁶ This represents the fundamental principle of every international commercial arbitration.⁴⁷ Particularly characteristic feature of international commercial arbitration is that there is no pre-established international forum such as International Court Justice but the arbitral tribunals are separately constituted by the parties in accordance with the terms of arbitral agreement/clause and applicable law.⁴⁸

The character of every arbitration may be shaped from its entire beginning, i.e. from the very point when parties agree to submit their dispute to arbitration.

Above all, parties should agree on a number of arbitrators that will decide the case. The number of arbitrators has an impact not only on the cost of proceedings, but it may affect the duration and sometimes even the quality of arbitration. IBA Guidelines for Drafting International Arbitration Clauses advise parties to submit their disputes to sole arbitrator or a panel of three arbitrators and, in any case, to an odd-number tribunal.⁴⁹ Similar approach is generally accepted in rules of various arbitral institution that provide in case parties agreement is silent on number of arbitrators, then the matter shall be heard by a tribunal of one/three arbitrators.⁵⁰

The principle of party autonomy is central to the selection of the number of arbitrators. The general principle, recognized by the Art. V para 1 (d) of the New York Convention is that the parties' agreement concerning selection of the arbitrators must be given effect. National arbitration legislation even more explicitly recognize the parties' autonomy in regulating the number of arbitrators through the arbitral agreement. The Art. 10 para 1 of the Model Law, which is representative, provides that "parties are free to determine the number of arbitrators." Legislation and case law whether based on the Model Law or not uniformly comes to the same conclusion.⁵¹ In spite of this standard, some nations impose limitations prohibiting

⁴⁶ Final Award in *ICC Case No. 7453 of 1994*.

⁴⁷ *Ibid.*

⁴⁸ BORN: *International arbitration. Cases...*, p. 609.

⁴⁹ IBA Guidelines for Drafting International Arbitration Clauses approved by IBA Council on 7 October 2010, p. 14.

⁵⁰ See e.g. Art. 12 of the ICC Arbitration Rules (2012), Art. 13 of the Arbitration Rules of the Chamber of Arbitration of Milan (2010), Art. 7 of UNCITRAL Arbitration Rules (2010), Art. 6 of Arbitration Rules of the Singapore International Arbitration Centre (2010) or Section II para 8 of ACICA Arbitration Rules (2005).

⁵¹ Sec. 15 para 1 of the English Arbitration Act (1996), Art. 179 para 1 of the Swiss Law on Private International Law (1987), Art. 1026 para 2 of the Netherlands Code of Civil Procedure (1986), Sec. 7 para 1 of the Czech Law on Arbitration and Enforcement of Arbitral Awards (1994).

arbitration by an even number of arbitrators.⁵² Numerous national legislation or judicial authorities go even further by automatically converting agreements on even numbers of arbitrators into agreements on odd numbers of arbitrators, by providing for the appointment of an additional arbitrator.⁵³ Other countries' legislation invalidates any arbitration agreement that would provide an even number of arbitrators.⁵⁴ It should be noted traditional law restrictions on the number of arbitrators are in significant tension with Arts. II para 3 and V para 1(d) of the New York Convention, which generally require giving effect to the parties' agreement concerning the composition of the arbitral tribunal.

Certain countries, including the United States and England, permit even-numbered tribunals and even though these tribunals are unusual, there have been instances where the tribunals have functioned adequately and produced effective dispute resolution of the dispute.⁵⁵ Such tribunals offer a particular mode of dispute resolution which may favour compromise and negotiation, however the risk of possible deadlock is utmost obvious.

Proceedings before three arbitrators will almost inevitably be lengthier and more expensive than those before a sole arbitrator. On the other hand, the tribunal of three may be better equipped to address complex issues and may also effectively reduce the risk of irrational or unfair results. If the parties do not specify the number of arbitrators (and cannot agree on this once a dispute has arisen), the arbitral institution, if there is one, will make the decision for them.

Parties are advised to agree on the number of arbitrators either in their arbitration agreement or afterwards. If parties do not consent on this topic in any way, the determination of the number of arbitrators will be made by either a national court (in *ad hoc* arbitrations) or an arbitral institution (in institutional arbitrations) as national law and institutional rules provide substitute provisions or presumptions regarding the number of arbitrators for these situations. Civil law jurisdictions and arbitral institutions tend to apply the concept laid down in the Model Law providing that, absent agreement by the parties, "the number of arbitrators

⁵² E.g. Art. 1026 para 1 of the Netherlands Code of Civil Procedure (1986), Art. 55 para 1 of the Tunisian Arbitration Code (1993).

⁵³ See Art. 5 para 2 of the Uniform Law on Arbitration (1966), Art. 1454 of the Code de procédure civile (1975). *MMTC Ltd. v. Sterlite Indus.(India) Ltd.* 1996 IXAD SC 25.

⁵⁴ See e.g. Art. 15 para 2 of the Omani Arbitration Law in Civil and Commercial Disputes.

⁵⁵ Typical example was the IBM-Fujitsu arbitration in the 1990s, where two arbitrators conducted and resolved a multi-billion dollar intellectual property dispute between the two enterprises. Although the arbitration agreement actually provided for three arbitrators the parties eventually chose to proceed with only the co-arbitrators. See BÜHRING-UHLE, Christian. The IBM-Fujitsu Arbitration: A Landmark in Innovative Dispute Resolution, *American Review of International Arbitration*, 1991, No. 2, 113.

shall be three."⁵⁶ In comparison, many common law jurisdictions provide for a sole arbitrator in such situation. Under both Sec. 5 of the Federal Arbitration Act and Sec. 15 para 3 of the English Arbitration Act (1996) we may find a provision that the tribunal shall consist of a single arbitrator in cases where parties failed to designate number of arbitrators. Legislation in other common law jurisdictions is similar.⁵⁷

When parties reached an agreement on the number of deciders, then it is important to set forth rules for individual appointment of arbitrators, meaning who may be appointed as a member of the tribunal. Parties thus may namely mention arbitrator/s who will decide a dispute. This solution, however, brings an issue of possible non-invokability as designated arbitrator/s may die prior to a dispute and, hence, the clause might not be effectively exercised. If parties are determined to namely mention their arbitrator/s in the agreement or clause, they should do so by providing a catalogue of potential arbitrators at least. Accordingly, they should designate an appointing authority (if arbitrator/s should be picked from the list)⁵⁸ or agree that arbitrators shall be selected from such list by the order of precedence or other specified mechanism. The distinguishing aspects of diverse methods of selection of arbitrators will be discussed further in the succeeding chapter.

⁵⁶ See Art. 10 para 2 of the Model Law. Comparable standards may be found in Art. 5 para 3 of the Uniform Law on Arbitration (1966), Art. 16 para 2 of the Japanese Arbitration Law (2003), Sec. 7 para 2 of the Czech Law on Arbitration and Enforcement of Arbitral Awards (1994), Art. 23 para 2 of the CIETAC Arbitration Rules.

⁵⁷ See e.g. Art. 10 para 2 of the New Zealand Arbitration Act (1996), Art. 8 of the Hong Kong Arbitration Ordinance (1963); Sec. 9 of the Singapore International Arbitration Act (2001).

⁵⁸ An appointing authority may be for example head of local Bar Association, Chamber of Commerce etc.

3 Selection of arbitrators

The free hand as well as the responsibility for selecting an arbitrator or arbitral tribunal specifically for every case is one of the characteristic features of arbitration. As it was pointed out in the previous chapter, the basic criteria for selection of arbitrators and constitution of arbitral tribunal are regularly defined at the moment parties undertake to submit their dispute to the arbitration. Exercising this freedom of selection wisely is considerably one of the most important responsibilities of the parties.⁵⁹

There is nothing like a perfect and ideal arbitrator for every international dispute and specific nuances of the dispute must be observed. Some disputes may require particular expertise, language skills, legal qualification or personal pre-dispositions, such as ability to comprehend complex issues. An arbitrator who is well-suited for one case may very well make no sense in another case. Accordingly, the process of selecting arbitrators is both imperative and, unfortunately, potentially time-consuming. It may require substantial effort and attention, for both the selection of co-arbitrators and the selection of sole or presiding arbitrators.⁶⁰

3.1 Nomination and appointment of arbitrators

There is clear distinction between the "nomination" and "appointment" of an arbitrator. The nomination of a prospective arbitrator is the first tier in the appointment and it requires parties to nominate a candidate for the position of arbitrator. Candidates are then requested to either accept or refuse the nomination. Upon acceptance, the arbitrator becomes formally appointed. In case of institutional arbitration, the procedural rules may usually require also confirmation made by the institution. This confirmation then constitutes the formal appointment.⁶¹

The procedure of appointment should not be, on the other hand, mixed with the constitution of arbitral tribunal. The term "constitution" of the tribunal represents the actual

⁵⁹ BORN: *International Commercial Arbitration*, p. 1386.

⁶⁰ Ibid., p. 1387. The finesses of the process of selecting arbitrators are illustratively described in WEBSTER, Thomas. Selection of Arbitrators in a Nutshell. *Journal of International Arbitration*, 2002, Vol. 19, No. 3, pp. 261-274.

⁶¹ BERGER, Klaus Peter. *Private dispute resolution in international business. Vol. II*. The Hague: Kluwer Law International, 2006. p. 370.

final point of the entire appointment process signifying that the entire tribunal is ready to commence the conduct of proceedings.⁶²

The mechanics of the arbitrator nomination process vary and depend on terms of the arbitration agreement, eventually the applicable national arbitral law or institutional rules.⁶³

3.1.1 Selection by the parties

As was indicated in the Chapter 1, an agreement on the identity of the arbitrators can be reached either in the original arbitration agreement or in post-dispute negotiations during the course of the arbitral proceedings. It is recommended to name a specific individual as an arbitrator in an arbitration clause prior to a dispute as parties may find it difficult to agree on anything after the dispute has arisen. This may be of particular importance if parties chose to submit their dispute to a sole arbitrator.⁶⁴ Between the time at which the parties enter into their arbitration agreement, and a dispute arises, the parties' chosen arbitrator can become conflicted, unavailable or incapacitated rendering the parties' agreement practically non-executable. As one Swiss court explained: "It is not forbidden to appoint the arbitrator(s) already in the arbitration clause. This is, however, a risky practice."⁶⁵

If parties did not choose to name designate arbitrators in arbitral agreement and they undertook to appoint arbitrators on their own accord, a formal written notice to the opposing party of its designation of a specified individual as an arbitrator will be usually issued. Upon receipt of the notice, the arbitrator's nomination is in effect.⁶⁶ As was indicated earlier some institutional rules may submit the designated arbitrators to the confirmation procedure. This approval would then amount to a valid appointment.

If a party fails to nominate, the consequences of this failure differ. When parties chose to adopt institutional rules, then these will generally cover the issue. When no procedural rules were incorporated, national law will be applied. Rules of procedure of major arbitral institutions contain provision designed to help in these situations. These provisions will regularly entitle the non-failing party to request the appointing authority to appoint an arbitrator.⁶⁷ Arbitration agreement may also provide that, if a party fails to nominate an

⁶² Ibid., p. 371.

⁶³ BORN: *International arbitration*, p. 1543.

⁶⁴ Ibid., p. 1401.

⁶⁵ Judgment of the Affoltern am Albis District Court of 26 May 1994.

⁶⁶ Ibid., p. 1544.

⁶⁷ See e.g. the Art. 7 para 2 of the LCIA Arbitration Rules (1998) or the Art. 7 para 2 of the UNCITRAL Arbitration Rules.

arbitrator, the other party may make the nomination itself. This is very serious consequence the default party would thus effectively lose the right to appoint an arbitrator of its choice. Notwithstanding, this concept became widely accepted especially in common law jurisdictions. The rationale in these cases was that while such arbitrator/s selected by one party might, on the first sight, favour this party, the arbitrator/s' primary duty and obligation remains to be and stay independent and impartial.⁶⁸

Failure of either arbitral agreement or procedural rules to address this issue will necessarily result in the application of relevant national law that can impose serious consequences when a party fails to nominate an arbitrator, incl. the forfeiture of the right to select an arbitrator.

English Arbitration Act (1996), for instance, imposes particular hardship providing that if a party fails to nominate a co-arbitrator within the agreed time limits, then its counter-party may elect to treat its nominated co-arbitrator as a sole arbitrator.⁶⁹ Such consequence even more overcomes the possible imbalance of arbitral tribunal in comparison to the arbitration agreements permitting a party to nominate a defaulting party's arbitrator as it in fact allows one party directly to select the entire arbitral tribunal. In most jurisdictions, on the contrary, a party's failure to appoint an arbitrator in accordance with an *ad hoc* arbitration agreement allow the counter-party to file a request for judicial appointment of the arbitrator.⁷⁰ This process appears to grant parties both possibility to conduct the actual arbitral proceedings and keep the obvious integrity of the tribunal intact.

3.1.2 Selection of arbitrators by appointing authority

Although an agreement on a sole or presiding arbitrator involves often extensive and delicate negotiations, it is the simplest and usually most efficient mean of selecting an arbitrator.⁷¹ The parties are aware of relevant circumstances of the case and they are so more competent to select such arbitrator that will possess skills, traits and characteristics necessary to administer the proceedings in the best possible way. Many cases, nevertheless, rely on the

⁶⁸ *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571 (7th Cir. 2007). *Universal Reins. Corp. v. Allstate Ins. Co.*, 16 F.3d 125 (1994). *Ancon Ins. Co. v. GE Reins. Corp.*, 480 F.Supp.2d 1278 (2007). *Evanston Ins. Co. v. Gerling Global Reins. Corp.-U.S. Branch*, 1990 WL 141442 (1990).

⁶⁹ Sec. 17 of the English Arbitration Act (1996). Sec. 17 may be excluded or modified by contrary agreement - see *Minermet SpA Milan v. Luckyfield Shipping Corp. SA* [2004] EWHC 729 Q.B. (Comm.).

⁷⁰ Sec. 5 of the Federal Arbitration Act (1925), Art. 11 para 4 of the Model Law, Art. 179 para 2 of the Swiss Law on Private International Law (1987), Art 17 para 2 of the Japanese Arbitration Law (2003), Sec. 9 para 1 of the Czech Law on Arbitration and Enforcement of Arbitral Awards (1994).

⁷¹ BORN: *International Commercial Arbitration*, p. 1400.

mechanism of appointment of either the sole arbitrator, presiding arbitrator or the entire arbitral tribunal by independent authority.

Parties usually do agree to the use of a particular appointing authority by humble reference to a set of procedural rules of arbitral institution as all leading institutional rules provide for such a role by the institution when parties agree to arbitrate under the institution's rules.⁷² Inclusion of the rules thus de facto means inclusion of the appointing authority as well. Additionally, parties may only designate a certain institution as the appointing authority without any other reliance on the particular rules.⁷³ Parties are not limited by choosing an arbitral institution as the appointing authority, but it is a general practice.⁷⁴ Nevertheless, parties may pick any specific individual or organization as the appointing entity (e.g. Bar Association, Chamber of Commerce, etc.).

3.1.3 Selection of arbitrators by national court

Modern arbitration statutes permit the judicial appointment of arbitrators by a national court in international arbitrations. This authority is limited to cases the parties failed to agree upon the frameworks of selection or where the agreed mechanism failed to function. The judicial appointment thus serve as a safety measure that arbitration will be pursued. On the other hand, the availability of appointment by national court in the seat of arbitration generates potential risks of disregarding the parties' procedural agreement.⁷⁵

Judicial appointments may also lead to unintended parochialism or other predispositions on the part of national courts and thus contravening the fundamental reason why parties choose the international arbitration.⁷⁶ The necessity of the safety measure in form of judicial

⁷² Ibid., p. 1408. See e.g. Arts. 5-9 of the LCIA Arbitration Rules, Art. 6 of the UNCITRAL Arbitration Rules.

⁷³ Major arbitral institutions are prepared to act as appointing authority they have provisions established in this regard. Such service is generally charged but the fees remain relatively modest. See e.g. Art. 3 of the Appendix III of ICC Arbitration Rules.

⁷⁴ BORN: *International Commercial Arbitration*, p. 1409-1410.

⁷⁵ BORN: *International Commercial Arbitration*, p. 1417-1418. National courts also tend to entertain jurisdictional objections to the existence or scope of an arbitration agreement prior to the appointment. See *SBP v. Patel Eng'g Ltd.* (2005) 8 SCC 618. Judgment of the Bavarian Oberstes Landesgericht of 23 February 2001, 2001 NJOZ 734. Compare *Acequip Ltd v. Am. Eng'g Corp.*, 315 F.3d 151 (2003).

⁷⁶ Particularly interesting example of these difficulties is visible in case *Nippon Steel Corp. v. Quintette Coal Ltd.*, [1988] B.C.J. 492, where a Canadian court appointed a Canadian national as presiding arbitrator in a dispute between Canadian and Japanese parties even over the protest of Japanese party. Or similarly, in a case involving French and Mexican parties, where the court insisted on selecting a French national, rejecting arguments by the non-French party that the presiding arbitration should have a neutral nationality. See Judgments of the Paris Tribunal de grande instance of 22 May 1987 and 23 June 1987 in the case of *Transportacion Maritima Mexicana SA v. Société Alsthom*. At last, English court in *XL Ins. Ltd v. Toyota Motor Sales USA Inc.* [1999] Q.B. rejected both the US and Canadian prospective arbitrators and selected English arbitrator.

appointing authority still outweighs the possible disadvantages. The judicial appointment shall thus find its place especially in cases where:

- an agreement on appointment of arbitrator/s is missing,
- parties failed to appoint arbitrator/s,
- arbitrator designated in the arbitral agreement will not or cannot serve,
- appointing authority designated by the parties will not or cannot act or it does not act promptly,
- parties' agreement suggests judicial appointment.

3.2 Arbitrators' identities and restrictions imposed upon them

The concept of party autonomy remains a central guiding principle of international arbitration. Notwithstanding, parties may be either contractually or legally limited in their choice of arbitrators. These restrictions usually concern the aspects of nationality, qualification, skill and experience. While the contractual limitations as well as restrictions of institutional rules are an effective result of agreement by the parties who selected such rules, the national laws imposing nationality requirements represent an unacceptable interference with the parties' freedom to select the members of the arbitral tribunal.⁷⁷

3.2.1 Nationality of an arbitrator and the "neutrality" concept

Limitations regarding the nationality of arbitrators may be imposed by institutional arbitration rules and statutory provisions of national law.⁷⁸ Many current arbitration statutes expressly guarantee the right to appoint arbitrators of any foreign nationality. Art. 11 para 1 of the Model Law also provides in this regard that no one shall be precluded by reason of his nationality from acting as an arbitrator unless parties agree otherwise.

Together with the issue of nationality of arbitrators, it is also important to mention a so-called concept of "neutrality". The institute of neutrality of arbitrators developed aside from impartiality and independence that will be discussed hereinafter.⁷⁹ It is not an easy task to distinguish bias and neutrality on the first sight.

⁷⁷ Art. II and V para 1 (d) of the New York Convention .

⁷⁸ See e.g. Art. 13 para 5 of the ICC Arbitration Rules, Sec. 3 of the Saudi Arabian Arbitration Regulations (1983).

⁷⁹ See Chapter 4.1.1 hereof.

As was indicated, the notion of neutrality is linked to the nationality of the arbitrator. Entrepreneurs from various legal cultures may feel that foreign court is unlikely to treat them in a fair way compared to the domestic party and thus, they chose to submit the case to arbitration where it is possible to select neutral third country arbitrators.

In pursue of neutrality, parties are advised and requested to select a sole-arbitrator who will be of a different nationality than parties to the dispute. In case of arbitral tribunals, parties should select a chairman who would fulfil the condition.⁸⁰ This concept is reflected strictly and expressly in Art. 13 para 5 of the ICC Arbitration Rules (2012) that requires "[t]he sole arbitrator or the chairman of an arbitral tribunal shall be of a nationality other than those of the parties."⁸¹ This requirement may be nonetheless waived by the parties in "suitable circumstances". This possibility and the term "suitable circumstances" was originally added to the clause during the 1975 revision of the ICC Arbitration Rules. Jean Robert, the rapporteur of the ICC Commission, then explained that there are circumstances when having a fellow national as a sole-arbitrator or presiding arbitrator might be advantageous to the parties.⁸²

The concept of neutrality also implies a subjective requirement as well. Arbitrators must be open minded, aware of cultural issues and absent of any prejudice towards them. Only under these circumstances, it is possible to produce "good arbitral tribunals" both in the reality and in the eyes of the parties.

The neutrality concept, however, represents primarily a psychological measure in reality. It is designed to provide the parties the conviction that the arbitral tribunal is fair and absent of any bias.⁸³

3.2.2 Qualification

Arbitration agreements commonly impose requirements that arbitrators are required to possess certain expertise, experience, or qualifications in specific fields.⁸⁴ Unless the parties

⁸⁰ REDFERN, HUNTER: *Law and Practice...*, p. 212.

⁸¹ This requirement is not limited to the ICC Arbitration Rules but may be found in several other institutional rules - see e.g. Art. 6 para 1 of the LCIA Arbitration Rules (1998).

⁸² E.g. in case both parties are of the same nationality. See DERAÏNS, Yves, SCHWARTZ, Eric. *A Guide to the ICC Rules of Arbitration*. The Hague: Kluwer Law International, 2005. p. 172.

⁸³ BOND, Stephen. SYMPOSIUM: Current Issues in International Commercial Arbitration: The International Arbitrator: From the Perspective of the ICC International Court of Arbitration. *Northwestern Journal of International Law and Business*, 1991, Vol. 12, No. 1, p. 68.

⁸⁴ BORN, Gary. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. 2nd edition. Alpeen aan den Rijn: Kluwer Law International, 2006. pp. 71-72.

have so agreed in their arbitration clause, however, there is no general requirement under most developed arbitration statutes that the arbitrators be experts in any particular field.⁸⁵

These requirements are generally intended to facilitate the core objectives of international arbitration, i.e. to provide a tribunal that has particular commercial and other expertise, useful in resolving the parties' dispute efficiently and timely.⁸⁶

In drafting such restrictions in an agreement, it is generally recommended to define them through objectively-verifiable criteria (such as "a certified public accountant") rather than to subjective formulae (e.g. "having material accounting experience").⁸⁷ Such approach will effectively reduce a risk of potential conflicts as to whether a prospective arbitrator satisfies the requirements. On the other hand, parties should not include requirements that might eventually prove to be too restrictive and limiting the pool of potential arbitrators (e.g. a Somali national with a 10 years continuous practice in the area of estate development).

Model clauses and procedural rules imposing these requirements may be found in the area of specialized industries - e.g. insurance and reinsurance,⁸⁸ maritime,⁸⁹ or commodities.⁹⁰

It is also common for arbitration agreements to impose requirements on the linguistic capabilities of the arbitrators. This issue is further elaborated in the Chapter 4.⁹¹

3.2.3 Independence and impartiality

The independence and impartiality of the international arbitrator is a primary requirement of most developed national laws, also recognized by the New York Convention.⁹²

The reason this limitation, overriding the parties' freedom to select their "own" arbitrators, is imposed upon the parties in this manner is to ensure the integrity of the arbitral process. The entire concept of impartiality and independence is thoroughly discussed hereinafter.⁹³

⁸⁵ See *Petition of Dover SS Co.*, 143 F.Supp. 738, 740 (SDNY 1956).

⁸⁶ BORN, Gary. *International Commercial Arbitration*, p. 1455.

⁸⁷ *Ibid.*

⁸⁸ Rule 6.2 of the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (April 2004), Art. 6.3 of the ARIAS-UK Arbitration Rules (1997).

⁸⁹ Rule 7 para g), Maritime Arbitration Association of the United States Arbitration Rules (2008), Art. 9 para 5 of the International Court of Arbitration for Marine and Inland Navigation at Gdynia Rules (1959).

⁹⁰ Sec. 4 of the National Grain and Feed Association Arbitration Rules (2009).

⁹¹ See Chapter 4.1 hereof.

⁹² See Arts. Art. V paras 1(d) and 2(b) of the New York Convention.

⁹³ The topic of impartiality and independence is elaborated in the Chapter 4.1 hereof.

3.2.4 Other limitations

States also impose various other restrictions. Situations, where arbitrators must be natural persons,⁹⁴ legally qualified⁹⁵ or even be capable of exercising civil rights⁹⁶ are not unheard of.

The most disputed limitation nowadays is the gender restriction imposed upon women under Shari'a law. Shari'a law requires an arbitrator to be a man. Any appointment of a woman as an arbitrator is considered null and void.⁹⁷ Islamic culture finds grounds for this sort of disqualification in Quran that mentions: "Two men shall serve as witnesses; if not two men, then a man and two women whose testimony is acceptable to all. Thus, if one woman becomes biased, the other will remind them."⁹⁸ Under this verse, women are not regarded as competent as men in certain roles (e.g. judges or arbitrators) in Islamic countries. Nonetheless, such restriction not only represents a clear discord with New York Convention, but it also represents a severe violation in the sphere of human rights.⁹⁹ While such practice may be acceptable in Islamic countries, such discriminative measures might render an award unenforceable in other countries and eventual arbitral agreements imposing discriminatory criteria on arbitrators might be found entirely void.¹⁰⁰

⁹⁴ See Art. 1451 of the Code de procédure civile (1975). Most of the developed countries and jurisdiction, however, accept also legal persons as arbitrators. Common instances of such entities serving as arbitrators involve accounting firms, typically in specialized accounting disputes. For further reference see BORN, Gary. *International Commercial Arbitration*, p. 1448.

⁹⁵ Art. 13 of the Chinese Arbitration Law (1994) , Art. 225 of the Chilean Code Concerning Organization of Tribunal (1943), Art. 1170 of the Polish Code of Civil Procedure (1964), Sec. 35b para 1 of the Czech Law on Arbitration and Enforcement of Arbitral Awards (1994).

⁹⁶ Art. 1451 of the Code de procédure civile (1975), Art. 10 of the Tunisian Arbitration Code (1993), Art. 16 para 1 of the Omani Law of Arbitration in Civil and Commercial Disputes (1997).

⁹⁷ BAAMIR, Abdulrahman Yahya. *Shari'a Law in Commercial and Banking Arbitration*. Farnham: Ashgate, 2010. p. 80.

⁹⁸ Quran, 1:282.

⁹⁹ The policy endorsed in Shari'a law countries contravenes provisions of major documents of international human rights law such as Universal Declaration of Human Rights (1948), Convention on the Elimination of All Forms of Discrimination against Women (1979), etc.

¹⁰⁰ See *Nuridin Jivraj v. Sadruddin Hashwani* [2010] EWCA Civ 712 where the Court of Appeal considered that the arbitration clause restricted the offer of employment as arbitrator purely on religious grounds. It was void as it contravened anti-discrimination norms.

4 General duties and rights of arbitrators

During the arbitral proceedings, arbitrators are bound by various range of general duties. The starting point for assessment of individual duties and responsibilities of arbitrator usually represents the arbitral clause and applicable set of arbitral rules. These provisions will generally cover the aspects as to the time allocated for the proceedings, language of the arbitration or particular way the proceedings shall be administered. Further duties may be also found in applicable arbitral law, the *lex arbitri*. Ideally, all of these sources should be considered before undertaking to be an arbitrator.¹⁰¹

While the duties vary on case from case basis, in general, we may first identify duties the breach of which may lead to potential problems in the area of recognition and enforcement of arbitral award (e.g. impartiality and independence). These obligations usually relate to the fair resolution of the dispute and are accepted in all countries as they may be found basically in all modern arbitration legislation. They embody the principles of natural justice.¹⁰² Secondly, there are rules that may have other legal consequences if breached, depending on the rules of immunity of arbitrators (e.g. confidentiality). Finally, there may be rules of moral, ethical character or rules requiring certain degree of qualification of arbitrators. The breach of these rules will not have effect on the award itself but it may eventually lead to depriving the arbitrator any future appointments or to his/her replacement in the present case.¹⁰³

4.1 Independence and impartiality

Practically all the arbitral rules and arbitral laws contain provisions on impartiality and independence of arbitrators. Either under express rules or indirect norms dealing with challenges of arbitrators, every arbitrator is hence required to hear and decide the case without any dependence on a party and to hear and decide it in an unbiased manner. It is "of fundamental importance that justice not only be done, but should manifestly and undoubtedly be seen to be done".¹⁰⁴ Hence, the principles of impartiality and independence are, accordingly, universally accepted in international arbitration.¹⁰⁵

¹⁰¹ PHILIP, Allan. The duties of an arbitrator. In NEWMAN, Lawrence, HILL, Richard (eds.). *The leading arbitrators' guide to international arbitration*. 2nd edition. New York: Juris Publishing, 2008. p. 68.

¹⁰² TWEEDDALE: *Arbitration...*, p. 148.

¹⁰³ PHILIP: *The duties...*, p. 68.

¹⁰⁴ *R. v. Sussex Justices ex parte McCarthy* [1924] 1 K.B. 256.

¹⁰⁵ See Art. 12 para 2 of the Model Law. Also see HORVARTH, Gunther. The Selection of Arbitrators. *International Construction Law and Dispute Resolution*, June 1998, p. 35.

From an accurate point of view, we must precisely distinguish what we may catalogue under the label "impartiality" and what, on the other hand, we can label as "independence". While these two terms represent two different concepts, they are constantly and incorrectly being used interchangeably.

As indicated hereinbefore, the terms "independence" and "impartiality" are commonly used synonymously to indicate absence of bias on the part of arbitrators.

Independence is an objective notion signifying absence of any connections of social, personal, financial or other relevant nature between the arbitrator and a party to the dispute or its counsel.¹⁰⁶ The stronger these ties are, the less independent the arbitrator is. Correspondingly, an arbitrator may not be considered independent if a party to the dispute reserved the right to appoint the arbitrator in the arbitral agreement.¹⁰⁷ A rather peculiar situation occurs when an arbitrator served as a mediator or conciliator in previous step of the dispute resolution. Arbitrators should articulate their opinion on the case based on the submission of the parties and the evidence and they should not be compromised in any way by statements made in prior mediation or conciliation. Notwithstanding, such participation of arbitrator in prior proceedings may not unequivocally constitute a justifiable doubt as to the person of arbitrator.¹⁰⁸

It may be argued that even a dependent arbitrator may conduct the proceedings in a unbiased manner and render an impartial award, however, it is paramount that justice is not merely done but it should be also be seen as done.¹⁰⁹ Therefore, the criterion of independence should be observed at all times.

The independence of an arbitrator is, quite surprisingly, not considered to be a requirement in several common law jurisdictions.¹¹⁰ On the other hand, as profound arbitration institutions as ICC did not pose impartiality as an obligation upon the arbitrators

¹⁰⁶ REDFERN, Alan, HUNTER, Martin. *Law and Practice of International Commercial Arbitration*. London: Sweet & Maxwell, 2003. pp. 212-213.

¹⁰⁷ ROZEHNALOVÁ: *Rozhodčí řízení...*, p. 107.

¹⁰⁸ BĚLOHLÁVEK, Alexander. Náhradní způsoby řešení sporů. In MELECKÝ, Lukáš et al. *Vybrané aspekty vývoje české ekonomiky: sborník vydaný u příležitosti 65. narozenin prof. Ing. Jiřího Kerna, CSc.* Ostrava: VŠB-TU, 2004. p. 12.

¹⁰⁹ KING, Ronnie, GIARETTA, Ben. Independence, Impartiality and Challenging the Appointment of an Arbitrator. *International Comparative Legal Guide to International Arbitration*, 2005, p. 27.

¹¹⁰ Art. 24 (1) (a) of the English Arbitration Act (1996) refers only to the impartiality of an arbitrator. Similarly, in *Transocean Shipping Agency v. Black Sea Shipping* 1998 (2) SCC, para 281 et seq., the Indian Court of Appeal held the lack of independence "does not *ipso facto* make the arbitration or the award contrary to any public policy ". Identical opinion was held by the Hong Kong Court of Appeal in *Logy Enterprises Ltd v. Haikou City Bonded Area Wansen Product Trading Co.* (1997), Case No. CACV000065/1997 .

and relied solely on the independence of arbitrators prior to the re-codification of the rules.¹¹¹ This difference in approaches is based on the understanding that both notions overlap and that one can be subsumed within the other accordingly.¹¹² It may not be thus construed the previous ICC Rules entitled arbitrators to be partial. The inclusion of the term "independence" was decided to be used as the independence may be measured objectively and the notion of impartiality as a state of mind tends to be more difficult to prove.¹¹³

The impartiality of an arbitrator may be simply determined from the fact whether an arbitrator is capable of resolving the dispute objectively.¹¹⁴ More precisely, any arbitrator is impartial if he or she is absent of any bias in the mind of the arbitrator towards a party, its counsel and/or the matter in dispute.¹¹⁵

Courts, in this respect, held the partiality will be found where "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."¹¹⁶ Generally, there is also a requirement of personal interest on the side of the arbitrator which might lead to a biased conduct. If such pre-requisite is met, then we may conclude the arbitrator is biased.¹¹⁷

Arbitration rules of major arbitral institutions as well as UNCITRAL Arbitration Rules practically uniformly provide that arbitrators shall perform their duties in both independent and impartial way.¹¹⁸ Potential absence of these notions might not only lead to possible difficulties in the phase of recognition and enforcement of the award¹¹⁹ but it might also constitute a violation of rights guaranteed by international human rights law.¹²⁰

¹¹¹ ICC Arbitration Rules (2010) Art. 7 para 1 reads as follows: "Every arbitrator must be and remain independent of the parties involved in the arbitration." ICC Arbitration Rules (2012) provide under Art. 11 para 1: "Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration."

¹¹² PARTASIDES, Constantine. The Selection, Appointment and Challenge of Arbitrators. *Vindobona Journal of International Commercial Law and Arbitration*, 2001, Vol. 5, p. 217.

¹¹³ HORVARTH: *The Selection of Arbitrators*, pp. 36-37.

¹¹⁴ TWEEDDALE: *Arbitration...*, p. 150.

¹¹⁵ Similarly in BASTIDA, Bruno Manzanares. The independence and impartiality of arbitrators in international commercial arbitration. *REVIST@ e-Mercatoria*, 2007, Vol. 6, No. 1.

¹¹⁶ *P.T. Reasuransi Umum Indonesia v. Evanston Insurance Company*, 1992 WL 400733 (SDNY, 1992). Similarly in *Morelite Construction Corp. v. New York City Dist. Council Carpenters Benefits Funds*, 748 F.2d 79, 84 (1984).

¹¹⁷ *Sidarma Societa Italiana di Armamento Spa v. Holt Marine Industrie Inc.* 515 F Supp 1302 (SDNY, 1981) cf. *Szilad v. Szaz* (1955) SCR 3, para 4.

¹¹⁸ See e.g. Art. 10 para 1 of the UNCITRAL Arbitration Rules, Art. 5 para 2 of the LCIA Arbitration Rules (1998), Art. 16 para 1 of the VIAC Rules of Arbitration and Conciliation (2006).

¹¹⁹ Award render by a biased arbitral tribunal may be refuse recognition and enforcement under Art. 36 of the Model Law, Art. V of the New York Convention.

¹²⁰ See ECHR Judgment of 28 June 1984 in the case of *Campbell and Fell v. The United Kingdom*, Application No. 7819/77, 7878/77. p. 29.

4.1.1 Independence and impartiality standards

Independence and impartiality have become an escalating problem due to the phenomenon of globalisation. As both business enterprises and law firms have become more global, amount of potential conflicts has increased.¹²¹ Arbitrators thus find themselves facing parties or subject matter they have already dealt with in the past. Arbitrators are given an opportunity to evaluate on their own whether they have any doubt as their impartiality or independence.¹²²

On one hand, an arbitrator is a quasi-judicial officer and therefore impartiality, independence and freedom from undue influence must be protected.¹²³ Issues on potential conflicts of interest should not be subject to mere arbitrators' subjective evaluation and objective criteria must be put in place. On the other, standards for arbitrators should be set forth in the way they would not significantly diminish the pool of arbitrators with the necessary credentials to hear cases. Similarly, such standards should not allow parties to use challenges of arbitrators as a delaying tactics or efforts to evade the finality of an unfavourable award.¹²⁴

4.1.1.1 "Justifiable doubts" standard

"Justifiable doubts" test is a standard adopted commonly by arbitral institutions' rules¹²⁵ and national legislation.¹²⁶ Nonetheless, Art. 7 paras 2 and 3 of the ICC Rules (2010), instead obligate a prospective arbitrator to disclose "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." This is arguably a broader obligation than "justifiable doubts", as the ICC provision also expressly identifies the parties' view as the determining factor for evaluation of possible lack of independence.¹²⁷ New ICC Rules in effect as of January 1, 2012 supplemented the abovementioned provision with prospective arbitrator's obligation to also disclose in writing "any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality."¹²⁸

¹²¹ YU, Hong-Lin, SHORE, Laurence. Independence, Impartiality, and Immunity of Arbitrators: US and English Perspectives. *The International and Comparative Law Quarterly*, 2003, Vol. 52, No. 4, p. 936.

¹²² Cf. subjective test set forth in General Standard 2 para 1 of the IBA Guidelines.

¹²³ *Hoosac Tunnel Dock and Elevator Co. v. James W. O'Brian* [1884] 137 Mass. 424.

¹²⁴ YU, SHORE: *Independence, Impartiality, ...*, p. 937.

¹²⁵ Art. 10 para 3 of the LCIA Arbitration Rules (1998), Art. 30 CIETAC Arbitration Rules (2012), Arts. 9 and 10 of the UNCITRAL Arbitration Rules.

¹²⁶ E.g. Sec. 588 para 2 of the Austrian Arbitration Law (2006), Sec. 1036 para 2 of the German Code of Civil Procedure (1877 with amendments), Sec. 24 para 1 (a) of the English Arbitration Act (1996).

¹²⁷ YU, SHORE: *Independence, Impartiality, ...*, p. 938.

¹²⁸ ICC Arbitration Rules (2012), Art. 11 para 2.

The "justifiable doubts" standard is a sensible test, however, inevitably variable as well. Accordingly, a clear line must be drawn in dividing doubts that are "justifiable" from "unjustifiable" ones. Similarly, it is unclear whether "justifiable doubts" should be in any way distinguished from "reasonable doubts".¹²⁹ IBA Guidelines on Conflict of Interest in International Arbitration fortunately provide certain assistance in this regard. General Standard 2 para 3 of the IBA Guidelines sets forth the "doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a 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." Under the scope of this provision, the independence and impartiality is determined from the perspective of an objective observer. The same provision of IBA Guidelines also suggests that "justifiable" doubt is comparable to "reasonable" doubt as nature of doubts is established by "*reasonable* and informed third party".¹³⁰

If parties will suggests usage of certain arbitral rules, then a "justifiable doubts" standard adopted by most arbitral institutions' rules as well as national arbitration laws must be generally respected.¹³¹ However, the question of independence and impartiality is not and should not be left to the parties and the arbitral institutions to determine, therefore, the State's concessionary power controls this question too. As was pointed out by Justice Black in *Commonwealth Coatings Corp. v. Continental Casualty Co.* "if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review".¹³² For these reason case law created more strict standards to identify and eliminate potential partiality of arbitrators.

4.1.1.2 "Real danger of bias" standard

This standard was originally developed by the English judiciary and was approved by the United Kingdom House of Lords in landmark criminal case of *R. v Gough*.¹³³ In *R.*

¹²⁹ TRAKMAN, Leon. The Impartiality and Independence of Arbitrators Reconsidered. *University of New South Wales Faculty of Law Research Series*, 2007, Paper 25, p. 13.

¹³⁰ General Standard 2 para 3 of the IBA Guidelines. Cf. TRAKMAN: *The Impartiality*, ..., supra n. 51.

¹³¹ Simultaneously, the test is not limited to procedural rules of arbitral institutions. Provisions constituting "justifiable doubts" standard may be found in several national arbitral acts (e.g. Law of the Russian Federation on International Commercial Arbitration) and also in Art. 12 of the Model Law. This test is also respected by the case law. For further reference see e.g. Decision of the Supreme Arbitrazh Court of 10 December 2007, No. 14955/07, *OAO NK Rosneft v. Yukos Capital S.a.r.l.*

¹³² *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 US 145 (1968).

¹³³ *R. v Gough* [1993] 2 All E.R. 724. In the case a juror in a murder trial was neighbour of the brother of the accused. However, she had been unaware of this fact at the time of trial and subsequently gave an affidavit to the same effect. The court applied the real danger of bias test and concluded that the test was not satisfied in this

v Gough, the House of Lords reviewed previous rulings and identified two main tests applied by English courts – first, whether there was a real danger of bias ("real danger of bias test" or "reasonable likelihood of bias test") and second, whether a reasonable person might reasonably suspect bias ("real suspicion test" or "real apprehension of bias test").

The House of Lords eventually chose to endorse the first of these two tests and laid down two basic conditions that must be fulfilled in order to satisfy the test. First, the court should evaluate relevant circumstances and knowledge which may not be available to the observer and then assess if there is a real possibility of bias.

The real danger test was later applied to arbitrators in *Laker Airways Inc. v. FLS Aerospace Ltd.*¹³⁴ where an arbitrator appointed by one party and the counsel for the opposing party were barristers from the same barristers' chambers. The court held that the test of bias was not satisfied in this case given the peculiar functioning of barristers' chambers, where even though the barristers may share certain resources like libraries and staff, they are essentially self-employed and work independently.¹³⁵ This approach is not limited solely to the English jurisdiction.¹³⁶

Laker Airways Inc. v. FLS Aerospace Ltd. became the target of criticism due to the fact the court viewed the matter from the perspective of a reasonable Englishman and not a reasonable person in general.¹³⁷ The court took into account the peculiar functioning of barristers' chambers and concluded that though the barristers may share certain resources like libraries and staff, they are in essence self-employed and work independently. An American party to the dispute which was not accustomed to the English practices hence disputed the decision. The mutual link between barristers of identical chambers was considered to be of such importance that it was eventually expressly included in the IBA Guidelines.¹³⁸ During the procedure of drafting of IBA Guidelines, numerous barristers as well as LCIA expressed their

case since she had not known the fact at that time of the trial and there was no question of her having been influenced by it.

¹³⁴ *Laker Airways Inc. v. FLS Aerospace Ltd.* [1999] 2 Lloyd's Rep. 45.

¹³⁵ In sake of completeness, it is important to emphasize the court also relied on Sec. 24 of the Arbitration Act (1996) which, according to the court, reflected the real danger test. The sec. 24 merely requires the arbitrator to be "impartial" and not necessarily independent, unless the lack of independence gives rise to justifiable doubts as to impartiality.

¹³⁶ Correspondingly, in the Judgment of May 30, 2001 Regional Court in Ostrava ruled that mere fact arbitrator chosen by the plaintiff is registered listed on the same list of arbitrators as plaintiff's counsel does not *per se* give rise to possible bias of the arbitrator even if the arbitral institution comprises of a limited number of arbitrators. See Judgment of the Regional Court in Ostrava, Olomouc branch of 30 May 2001, Case No. 22 Cm 18/2001-90. The Judgment was subsequently upheld by the High Court in Olomouc by the Decision of October 10, 2001.

¹³⁷ SHEPPARD, Alan. Whether a Party Appointing their Counsel and their Arbitrator From the Same Barristers' Chambers Contravenes the Requirement of Impartiality. *International Arbitration Law Review*, 1999, Vol. 2, No. 4, p. 45.

¹³⁸ See Orange List, Sec. 3.3.2 of the IBA Guidelines.

concern over the provision as relationship of barristers was treated in the same way as link between partners of the same law firm. The Working Group that prepared the IBA Guidelines eventually considered the specific character of barristers' chambers is recognized and accepted in England, however, many who are not familiar with this concept are of understandable perception that the barristers' chambers should be regarded in the same way as law firms. Due to this perception the Working Group decided to keep the relationship between barristers the barristers' chambers in the Orange List together with the connection of partners of same law firm.¹³⁹ The mentioned criticism of the decision *Laker Airways Inc. v. FLS Aerospace Ltd.* found also support in *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* where the court was of the opinion that a court, in personifying the reasonable man, should assume an approach which is based on broad common sense. Placing too much reliance on any sort of special knowledge, would counter the means the "real danger of bias test" is to be applied under the conclusions made in *R. v. Gough*.¹⁴⁰

The broad common sense interpretation in terms of personification of a reasonable man may be also found in notorious case *AT&T Corp. v. Saudi Cable Co.*¹⁴¹ that also dealt with applicability of "real danger of bias" standard. The presiding arbitrator was a non-executive director and a minor shareholder of a competitor of AT&T Corp. The competitor company also had been a disappointed bidder for the contract that was subject to the arbitration. AT&T Corp. filed a challenge with the ICC that was subsequently rejected. Since the seat of arbitration was London, AT&T Corp. therefore petitioned English court to revoke chairman's appointment and set aside issued awards. Trial judge dismissed the petition applying the "real danger of bias" test. AT&T Corp. appealed and argued *inter alia* that the "real danger of bias" test should not be applied to arbitrators. Instead, a "reasonable apprehension of bias" test should be applied. Taking into account relevant case law, the Court of Appeal held that "there is no principle on which it would be right in general to distinguish international arbitrations".¹⁴² According to the Court of Appeal the indirect interest of the arbitrator was not likely to influence him in the discharge of his responsibilities. Lord Justice May shared the same conclusion on taking into account the cumulative circumstances,¹⁴³ yet he felt that the

¹³⁹ DE WITT WIJNEN, Otto et al. Background information on the IBA Guidelines on Conflict of Interest in International Arbitration. *Business Law International*, 2004, Vol. 5, No. 3, p. 455.

¹⁴⁰ *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] Q.B. 451.

¹⁴¹ *AT&T Corp. v. Saudi Cable Co.* [2000] 2 All ER 625 (Comm). Lord Woolf gave the principal judgment. Lord Justice Potter and Lord Justice May wrote the concurring judgments

¹⁴² *Ibid.*

¹⁴³ These other factors which tilted the balance against disqualification included also the fact the award had been rendered unanimously by the tribunal. Lord Justice May hence did conclude AT&T Corp. did not have sufficient grounds to corroborate the application.

non-executive directorship of the arbitrator could have called into question his independence in the eyes of one the parties.¹⁴⁴

4.1.1.3 "Real possibility of bias" standard

With the incorporation of the European Convention of Human Rights via the Human Rights Act 1998 made the "real danger of bias" test obsolete and insufficient. Art. 6 of the European Convention of Human Rights guarantees everyone right to a fair hearing by an independent and impartial tribunal established by law. In *Medicaments and Related Classes of Goods, Re* case therefore the Court of Appeal evaluated the test formulated in *R. v. Gough* and found it no longer satisfactory.¹⁴⁵ The court suggested a slight modification to the standard set in *R. v. Gough* - the test to be applied is whether "fair minded and informed observer" would conclude that there was a "real possibility" that an arbitrator was biased under the circumstances as ascertained by the court. This test was upheld by the House of Lords in *Porter v. Magill*.¹⁴⁶ Some authors expressed doubts over the applicability of the test proposed in this case to arbitrators.¹⁴⁷ Accordingly, case law later clearly established the matching standard must be applied to arbitrators too.¹⁴⁸

It is generally considered that the court in *Medicaments and Related Classes of Goods, Re* case did not correctly interpret the "real danger of bias" test and the newly proposed test constitutes a mere restatement of the standard suggested earlier. While the court in *R. v. Gough* formulated the test as "real danger of bias", it actually meant the expression to be understood in terms of real possibility of bias.¹⁴⁹

"Real possibility of bias" standard also requires fair-minded observer to determine possible partiality. Moreover, this observer must be an "informed" person. However, it does not explain further what degree of information is to be imputed to the hypothetical observer.¹⁵⁰ The question thus remains whether level of information available to a layman should prevail or whether more technical or nuance knowledge may also be acknowledged.

¹⁴⁴ *AT&T Corp. V. Saudi Cable Co.* [2000] 2 All ER 625 (Comm). Lord Justice May used the term "in the eyes of the parties" in reference to the Art. 2.7 of the ICC Arbitration Rules (1988).

¹⁴⁵ *Medicaments and Related Classes of Goods, Re* [2001] 1 W.L.R. 700.

¹⁴⁶ *Porter v. Magill* [2001] UKHL 67; [2002] H.R.L.R. 16.

¹⁴⁷ See CRAIG, Paul. *Administrative Law*. 5th edition. London: Sweet & Maxwell, 2003, p.463. HOLLANDER, Charles et al. *Conflicts of Interests and Chinese Walls*. 2nd edition. London: Sweet & Maxwell, 2004. p.186.

¹⁴⁸ *ASM Shipping Ltd. of India v. TTMI Ltd. of England* [2006] 2 All E.R. 122.

¹⁴⁹ Lord Goff explicitly mentions in the ruling the following: "...for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias." See *R. v Gough* [1993] 2 All E.R. 724.

¹⁵⁰ Unlike Australian judiciary, English courts failed to unify definitely the position as to how the level of knowledge is to be determined. Australian High Court, on the other hand, observed that under this standard, "it is the court's view of the public's view, not the court's own view, which is determinative." See *R. v. Webb* (1994) 181 C.L.R. 41.

The former would suggest no change of approach from *R. v. Gough*. The latter would be contrary to the conclusions made in *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* the court categorically held that in personifying the reasonable man, for the purposes of the "real danger of bias" test, the court should take an approach based on broad common sense, without placing inappropriate reliance on special knowledge whatsoever.¹⁵¹

With regard to the above mentioned conclusions, it is obvious the "real possibility of bias" test in terms of a fair minded and informed observer has not led to any noteworthy recourse of the courts in their approach to the issue of bias.¹⁵² The emphasis on the fair-minded and informed observer, instead of that of a reasonable man was probably placed so the courts employing this standard would reflect the reaction of the ordinary member of the general public to the irregularity in question and correspondingly, would maintain public confidence in the administration of justice.¹⁵³ Despite this reformulation, cases indicate that courts still tend to wrongly attribute specialised knowledge to the objective observers. While the test is formulated correctly, courts often interpret and apply it in incorrect way.¹⁵⁴

4.1.1.4 From the "appearance of bias" to the "reasonable person would consider the arbitrator partial" standard

The concept developed by American jurisprudence reflects Sec. 10 of the Federal Arbitration Act providing that an arbitral award may be vacated by a court in case "evident partiality" on the part of the arbitrator occurs.

The United States Supreme Court formulated in *Commonwealth Coatings Corp. v. Continental Casualty Co.* the standard requiring any tribunal permitted by law to try cases and resolve disputes not only to be unbiased but also to avoid even the "appearance of bias".¹⁵⁵

The case concerned a party to the dispute happened to be a regular client of the challenged arbitrator. The arbitrator failed to disclose this fact to the parties. Justice Black concluded that the Federal Arbitration Act did not intend to authorise arbitration where the tribunal "might reasonably be thought biased against one litigant and favourable to another".¹⁵⁶ Justice Black further noted that arbitrators should not be asked to sever all ties

¹⁵¹ *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] Q.B. 451.

¹⁵² FIELD, Andrew. Confirming the Parting of Ways: The Law of Bias and the Automatic Disqualification Rule in England and Australia. *Singapore Journal of Legal Studies*, December 2001, p. 388.

¹⁵³ Cf. *R. v. Webb* (1994) 181 C.L.R. 41. *Medicaments and Related Classes of Goods, Re* [2001] 1 W.L.R. 700.

¹⁵⁴ In *Taylor v. Lawrence* [2002] 2 All E.R. 353 the court held that an informed observer would be aware of English legal traditions and culture. For further reference see also ATRILL, Simon. Who is the 'fair-minded and informed observer'? Bias after Magill. *The Cambridge Law Journal*, 2003, Vol. 62, No. 2, pp. 279, 282.

¹⁵⁵ *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 US 145 (1968).

¹⁵⁶ *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 US 145 (1968). Justice Black was only able to form a majority by virtue of a concurring opinion by Justice White and Justice Marshall. Courts, however,

with business world as it may not be expected their entire income would come from deciding cases. Arbitrators are, notwithstanding, required to disclose to parties "any dealings that might create an impression of possible bias".¹⁵⁷

Justices White and Marshall were concerned this concept might effectively exclude the best informed and most capable arbitrators. They further noted the arbitrators may not be expected to provide complete and exhausting business biographies. In this regard, they limited the court judgment holding that arbitrators are not "automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial".¹⁵⁸

The standard for disqualification of an arbitrator was moreover narrowed in *Cook Industries, Inc. v. C Itoh & Co. (America) Inc.* where the challenged arbitrator's employer had ongoing business relations with both parties to the dispute.¹⁵⁹ The arbitrator did not, however, disclose this fact to the parties. Second Circuit Court dismissed the application due to the fact employees of the challenging party were aware of the connections between the opposing party and arbitrator's employer. In its decision, the court thus *inter alia* concluded that the obligation to disclose any dealings that might create an impression of possible bias must be interpreted in the manner that requires arbitrators to disclose relations that the parties cannot be reasonably expected to be aware of.

The "appearance of bias" standard became subject of question in *Morelite Construction Corp v. New York DC Carpenters Benefit Funds* where the Court of the Second Circuit expressed doubts whether such standard suffices the requirement of "evident partiality" provided by the Federal Arbitration Act.¹⁶⁰ Here, the court concluded "evident impartiality" required something more than mere "appearance of bias", on the other hand, it clarified that this "something more" still could not be stretched to proving of actual bias. The standard however was more precisely re-defined to whether a "reasonable person would consider the arbitrator partial" as humble "appearance of bias" test might render arbitration ineffective in several commercial settings. In addition, the court observed an existence of certain trade off between expertise and impartiality that goes with arbitrations.

have given this concurrence particular weight - see *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F 3d 493,499 (1999), n. 3.

¹⁵⁷ *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 US 145 (1968).

¹⁵⁸ *Ibid.*

¹⁵⁹ *Cook Industries, Inc. v. C Itoh & Co. (America) Inc.*, 449 F 2d 106, 107-8 (1971).

¹⁶⁰ *Morelite Construction Corp. v. New York City Dist. Council Carpenters Benefits Funds*, 748 F.2d 79, 84 (1984).

The Fourth Circuit Court in *ANR Coal Co. v. Cogentrix of North Carolina, Inc.* also adopted the reasonable man's standpoint in determining "evident partiality".¹⁶¹ More importantly, it also set forth four criteria the court must consider in such cases. First, the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding. Second, the directness of the relationship between the arbitrator and the party allegedly favoured. Third, the connection of that relationship to the arbitration and finally, the proximity in time between the relationship and the arbitration proceeding.

Most of the US courts have eventually chosen the middle path and the standard of "whether a reasonable man would consider the arbitrator impartial" became dominant in the US court practice.¹⁶²

4.1.1.5 "Actual bias" standard and "trade-off" theory

The trade-off theory was vigorously defended and endorsed by Judge Posner in *Merit Insurance Co. v. Leatherby Insurance Co.*¹⁶³ Judge Posner disregarded line of argument of Justice Black¹⁶⁴ and instead applied literal interpretation of Sec. 10 of the Federal Arbitration Act. From this point of view, he held that "evident partiality" would require a proof or evidence of actual bias. He also recognized that proving actual partiality might be extremely difficult and thus he endorsed a new test that required the alleged relationship between the arbitrator and one of the parties to be so intimate (either personally, socially, professionally, or financially) that it would "cast serious doubts" on the arbitrator's impartiality. Cumulatively, the circumstances forming the basis of the challenge must be "powerfully suggestive of bias".¹⁶⁵

Judge Posner stated there is a fundamental difference between adjudication by arbitrators and adjudication by judges and jurors. "No one is forced to arbitrate a commercial dispute unless he has consented by contract to arbitrate. The voluntary nature of commercial arbitration is an important safeguard for the parties that is missing in the case of the courts. Courts are coercive, not voluntary, agencies, and the American people's traditional fear of government oppression has resulted in a judicial system in which impartiality is prized above

¹⁶¹ *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F 3d 493, 499 (1999).

¹⁶² Cf. recent case *Scandinavian Reins Co. v. St. Paul Fire & Marine Ins Co.*, 732 F Supp 2d 293, 307-09 (SDNY 2010).

¹⁶³ *Merit Insurance Co. v. Leatherby Insurance Co.* 714 F 2d 673 (1983).

¹⁶⁴ Justice Black held the opinion the standard to safeguard the impartiality of arbitrators should be more scrupulous than the one applied to judges since the arbitrators have free rein to decide the law as well as the facts and are not subject to appellate review. See *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 US 145 (1968).

¹⁶⁵ *Merit Insurance Co. v. Leatherby Insurance Co.* 714 F 2d 673 (1983).

expertise."¹⁶⁶ Subjects that choose to submit the dispute to the arbitration rather than to the court trial do so due to the preference of a tribunal knowledgeable about the subject matter to a court with stern impartiality but limited knowledge of subject matter. Therefore, a trade-off occurs between impartiality and expertise.

As was mentioned hereinbefore, Judge Kaufman in *Morelite Construction Corp v. New York DC Carpenters Benefit Funds* also observed a trade-off between impartiality and expertise of arbitrators reflecting on the findings of Justice White made in *Commonwealth Coatings Corp. v. Continental Casualty Co.*¹⁶⁷ However, unwilling to adopt the "actual bias" standard he simply modified the Justice Black's standard.¹⁶⁸

Judge Posner's argumentation found certain defenders among scholars¹⁶⁹ as well as courts.¹⁷⁰ Still, such approach relies more on the contractual point of view leaving behind the fact arbitration concerns adjudication of a specific matter. Therefore, there is a certain flaw in Judge Posner's opinion as he considers the contracting parties to arbitration prefer a hearing that is more a form of private self-government rather than a form of private adjudication. Under this rationale, parties to the arbitration would be merely searching for the rules of the game, and as a result economic regulation instead of morality should be the primary concern. Such theory, nonetheless, has no empirical foundation.¹⁷¹ On the contrary, the conduct of parties pursuing the challenge of arbitral independence in the cases discussed above certainly concludes that the parties did not believe that they had contracted out certain basic protections by consenting to arbitration.

Being independent and impartial vis-à-vis the parties is the most important requirement imposed on arbitrators. As was demonstrated hereinbefore, international practice remains very much in favour of the system that enables each party to appoint its own arbitrator.¹⁷² However, unmitigated independence on the part of all arbitrators is favoured in international arbitrations and there should be no compromise over this issue due to the arbitrator's quasi-judicial role. Any potential derivations from the applicable standards of independence

¹⁶⁶ Ibid.

¹⁶⁷ *Morelite Construction Corp. v. New York City Dist. Council Carpenters Benefits Funds*, 748 F.2d 79, 84 (1984). *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 US 145 (1968).

¹⁶⁸ See Chapter 4.1.1.4 hereof.

¹⁶⁹ RAU, Alan. On Integrity of Private Judging. *Arbitration International*, 1998, No. 14, p. 157.

¹⁷⁰ *Sphere Drake Insurance Ltd. v. All American Life Insurance Co.* 307 F 3d 617 (2002). *J. Schmitz v. C.J. Zilveti* 20 F 3d 1043 (1994).

¹⁷¹ YU, SHORE: *Independence, Impartiality, ...*, p. 948.

¹⁷² See Chapters 2 and 3 hereof.

or impartiality hence usually result in removal of compromised arbitrator or troubles in recognition and enforcement of award rendered by biased arbitrator.¹⁷³

4.1.2 Codes of ethical conduct and soft-law norms

Several efforts were undertaken recently to draft and implement codes of ethics for arbitrators. Arbitral institutions, for instance, have started publishing guidelines and ethical codes for arbitrators serving under the institutions' rules.¹⁷⁴ Other major efforts in this field represent documents issued by institutions such as IBA or AAA/ABA. All these documents are of relevance to the selection of arbitrators as they provide norms regarding conflict of interest and disclosure and should thus serve as a guidance for arbitrators facing possible conflict of interests.¹⁷⁵

From the international perspective, documents drafted and endorsed by IBA and AAA/ABA are of importance as they reflect and articulate shared values of international arbitration community and although they are not generally binding, they can be influential with both national courts and arbitral institutions.¹⁷⁶

4.1.2.1 IBA Guidelines and IBA Ethics

IBA first took up the challenge to create model ethical rules for arbitrators in 1987 when it published the "Rules of Ethics for International Arbitrators". Sec. 1 of the IBA Ethics identified absence of bias as fundamental rule and principle of international arbitration in order to provide just resolution of the dispute.¹⁷⁷ Sec. 2 of the IBA Ethics moreover requires a prospective arbitrator to accept the appointment only he/she is able to fulfil the duties without bias.

¹⁷³ Cf. FOUCHARD, Philippe. In GAILLARD, Emmanuel, SAVAGE, John (eds.). *Fouchard Gaillard Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999. pp. 572-574.

¹⁷⁴ E.g. CIETAC Code for Arbitrators (1993 with the 1994 revisions), Code of Ethics of Arbitrators included in Arbitration Rules of the Chamber of Arbitration of Milan (2010), Code of Ethics For An Arbitrator of the Singapore International Arbitration Centre (2009).

¹⁷⁵ In case of absence of express agreement, only a few arbitral institutions rules refer to the code of ethics as to binding document and those thus are of mere consultative nature. From major arbitral institutions, the Chamber of Arbitration of Milan assumed the most direct approach by including the Code of Ethics in the arbitral rules themselves. Art. 13 of the Code of Ethics expressly commands arbitrators to obey its provisions. Any non-compliance shall be sanctioned by replacement of the disobedient arbitrator and such arbitrator may be also refused confirmation in future proceedings.

¹⁷⁶ CARON, David et al. *The UNCITRAL Arbitration Rules: A Commentary*. Oxford: Oxford University Press, 2006. p. 216.

¹⁷⁷ Sec. 1 of the IBA Ethics states: "Arbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias."

The IBA Ethics also provided that "bias" consists of two basic elements - partiality and dependence. Sec. 3 of the IBA Ethics thus elaborate that partiality occurs when an arbitrator favours one of the parties or is in any way prejudiced to the subject matter and the arbitrator is dependent if there is a connection between the arbitrator and a party to the arbitration or someone closely linked to the party. In assessing potential bias, the test set forth in *Morelite Construction Corp v. New York DC Carpenters Benefit Funds* should be applied, i.e. the impartiality and independence is evaluated from the point of a reasonable person and the decisive factor is whether such person would conclude bias.¹⁷⁸ Arbitrators are also indulged to disclose any information that could give rise to "justifiable doubts" as to their impartiality and independence. Failure to do so might result in disqualification of the arbitrator.¹⁷⁹

Consequently, IBA deemed the issue of arbitrators' independence and impartiality so pressing it adopted another document, the IBA Guidelines on Conflict of Interest in International Arbitration. the first draft if the IBA Guidelines was introduced at the IBA Conference in Durban in October 2002. The second draft was discussed at the session of Arbitration and ADR Committee of the IBA in San Francisco in September 2003. The IBA Guidelines were eventually finalized in January 2004 and adopted by the IBA Council in May 2004. Throughout the preparation of the document, the Working Group consulted numerous leading arbitral institutions and conducted a careful scrutiny of national legal systems in order to enumerate credible, just and efficient guidance in resolution of conflict issues impacting arbitrators, parties, states and their national courts as well as international organizations.¹⁸⁰

The IBA Guidelines develops criteria for arbitrators' impartiality and independence by setting general standards as well as specific situations of potential conflicts of interest. General Standard 2 para 2 of the IBA Guidelines lays down subjective test through which an arbitrator should assess whether he/she is absent of any doubts as to the impartiality or independence. However, as the subjective standard may not suffice in sake of fair resolution of the dispute, objective criterion is also implemented.¹⁸¹ To this end, para 2 the IBA Guidelines' General Standard 2 any arbitrator must decline an appointment or refuse to

¹⁷⁸ Sec. 3.2 of the IBA Ethics.

¹⁷⁹ Sec. 4.1 of the IBA Ethics.

¹⁸⁰ TRAKMAN, Leon. The Impartiality and Independence of Arbitrators Reconsidered. *University of New South Wales Faculty of Law Research Series*, 2007, Paper 25, p. 9.

¹⁸¹ The justice not only must be done, but it must also be seen to be done. See *R. v. Sussex Justices ex parte McCarthy* [1924] 1 K.B. 256.

continue to act as an arbitrator if a reasonable third person would construe from the relevant circumstances justifiable doubts as to the impartiality or independence.¹⁸²

The detailed areas of conflicts are divided into categories containing forbidden ("Red List"), permitted ("Green List") and other ("Orange List") lists of arguable conflicts. The Red List is represented by the situations that *per se* give rise to doubt as to the arbitrator's independence and impartiality. This list is divided into circumstances that cannot be waived by the parties and those that can be waived.¹⁸³ The Orange List contains situations which may give rise to justifiable doubts in the eyes of the parties in the meaning of General Standard 3 of the IBA Guidelines. Arbitrators are obliged to disclose such circumstances and if parties fail to file a proper and timely objection, than the parties are deemed to have accepted the arbitrator. Finally, the Green List consists of specific situations where no actual appearance or risk of actual bias exists. The arbitrator is left with an option to provide a disclosure, however, he/she is not bound to disclose these circumstances.

Neither the IBA Ethics nor the IBA Guidelines unfortunately possess the force of law. They were intended to provide consultation and guidance to arbitrators, parties and courts in identifying and resolving potential conflicts of interests by codifying existing arbitral practice. However, both these instruments hold a valuable information on the matter of independence and impartiality and parties that intend to submit their dispute to an arbitration are welcomed to incorporate these rules to the arbitral agreement making them contractually-binding for the arbitrators.

4.1.2.2 AAA/ABA Code of Ethics

The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003. The revisions have been approved and recommended by both organizations in 2004. The AAA/ABA Code of Ethics was actually the first major effort to regulate ethical norms for arbitrators and provide basic approaches towards questions of impartiality and independence of arbitrators.

Even the original 1977 text of the AAA/ABA Code of Ethics acknowledged that the use of arbitration to resolve a variety of disputes has expanded and it forms a significant part of

¹⁸² Cf. Chapter 4.1.1 hereof.

¹⁸³ The non-waivable Red List reflects the principle *nemo iudex in sua causa*. Thus, nothing may cure a potential conflict situation. Waivable Red List covers situation less severe, yet still requiring a proper disclosure and express statement of the parties willing to have such person as an arbitrator. Cf. IBA Guidelines, p. 17.

the system of justice. While there are differences between judges and arbitrators, both these groups exercise the same "power to decide cases".¹⁸⁴

The aim of the AAA/ABA Code of Ethics is to recognize generally accepted standards of ethical conduct and hence provide arbitrators and parties with guidance in commercial disputes, all in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

Pursuant to the AAA/ABA Code of Ethics, a potential arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also possess special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration.

Similar to IBA Guidelines, arbitrators are first asked to consider whether they are capable of hearing and deciding the case impartially and independently from the subjective point of view.¹⁸⁵ The objective criterion provided under para C of the Canon I of the AAA/ABA Code of Ethics, notwithstanding, differs from IBA Guidelines and requires arbitrators to also take into account such circumstances that "might reasonably create the appearance of partiality". The objective standard of assessment of arbitrators' impartiality and independence therefore follows the *ratio decidendi* of *Morelite Construction Corp v. New York DC Carpenters Benefit Funds*.

The AAA/ABA Code of Ethics still does not form a part of arbitral rules of any arbitral organization *per se*. In the context of arbitrations seated in the United States, nonetheless, AAA/ABA Code of Ethics remains particularly important.¹⁸⁶

4.1.3 Disclosure

As was indicated in the hereinbefore, an essential aspect during the process of constituting an arbitral tribunal is the disclosure to the parties made by prospective arbitrators. All of the institutional rules and most national laws contain requirements for an arbitrator to reveal any relationships which could have an impact upon his independence. The purpose of this measure is to remove any potential problems with an arbitrator at the outset of proceedings as that is regularly the moment when disclosure is made.

¹⁸⁴ Preamble of the AAA/ABA Code of Ethics (1977).

¹⁸⁵ Canon I para B of the AAA/ABA Code of Ethics (2004).

¹⁸⁶ GUSY, Martin. *A Guide to the ICDR International Arbitration Rules*. Oxford: Oxford University Press, 2011. p. 88.

All the relevant norms moreover oblige arbitrators to provide disclosures also during the course of the arbitration in case . The timely and entire performance of this disclosure obligation is vital to the integrity of the arbitral process.¹⁸⁷ The content of the disclosure should comply with applicable standard of independence and impartiality founded not only by applicable procedural rules and national law but it should be also conformant to the standards developed by the case law.¹⁸⁸

In addition, however, the arbitrator's disclosure obligations have a contractual aspect, owed by the arbitrator to the parties under the terms of the arbitrator's contract.¹⁸⁹ A failure to comply with applicable disclosure obligations can potentially subject an arbitrator to civil liability (subject to available immunities),¹⁹⁰ as well as challenge and removal.¹⁹¹

4.2 Confidentiality

The privacy and confidentiality have traditionally been perceived as paramount characteristics of arbitration law.¹⁹²

While privacy and confidentiality are regarded as two sides of the same coin,¹⁹³ it is still necessary to make distinction of these terms. The concept of private arbitrations is based on the fact parties agree to submit to arbitration a dispute arising between them and only between them. It is hence implicit the parties intend to exclude strangers from the hearings and conduct of proceedings.¹⁹⁴ The privacy became a generally accepted feature of arbitration

¹⁸⁷ BORN, Gary. *International arbitration*. Alphen aan den Rijn: Kluwer Law International, 2009. p. 1543.

¹⁸⁸ See Chapter 4.1.1 hereof.

¹⁸⁹ BORN: *International arbitration*, p. 1620.

¹⁹⁰ Some national courts have imposed liability on arbitrators for failing to disclose conflicts of interest. See also Chapter 6 hereof. In the Judgment of the Paris Tribunal de grande instance of 12 May 1993 the court held “the relationship between the arbitrator and the parties, which is contractual in nature, justifies his liability being assessed in the light of the ordinary legal conditions” for breach of contract. Lack of disclosure was considered to constitute a breach of contractual obligations and entitled parties to claim damages. Similarly in *Du Toit v. Vale* (1993) 9 WAR 138 the Australian court held the arbitrator is obliged to repay received fee and is partly liable for costs of arbitration for failing to disclose conflict of interests.

¹⁹¹ See Chapter 5 hereof.

¹⁹² BAGNER, Hans. Confidentiality: A Fundamental Principle in International Arbitration? *Journal of International Arbitration*, 2001, Vol. 18, No. 2, p. 243. Cf. Lew, Mistelis and Kröll point out that arbitration is not considered to be *per se* confidential but rather private. See LEW et al.: *Comparative International Commercial Arbitration*, p. 660.

¹⁹³ *Esso Australia Resources Limited v. Plowman* (1995) 183 CLR 10.

¹⁹⁴ *Oxford Shipping v. Nippon Yusen Kaisha* [1984] 2 Lloyd's Rep. 373. The wording "strangers" might create a very narrow definition, in this regard, the court supplemented that it is parties' implicit agreement to admit persons necessary to the proceedings, i.e. witnesses, representatives, etc.

law and major arbitral institutions expressly incorporated in their rules provisions on privacy.¹⁹⁵

The confidentiality, nevertheless, has become the subject of discussion and academic debates. England, France and most common law jurisdictions contend there is an implied duty of confidentiality.¹⁹⁶ Australia, the United States and Sweden, however, severely question such assumption.¹⁹⁷

In *Esso Australia Resources Limited v. Plowman*, the court obtained expert witnesses' testimonies on this matter, including the one given by Dr. Julian Lew, who stated *inter alia*: "[T]here is no general binding rule that arbitration proceedings are [...] confidential [...] The extent to which arbitration proceedings, the content, the nature of the dispute, and all aspects of the arbitration remain confidential is, in my view, a matter of agreement by the parties."¹⁹⁸ A number of jurists, on the other hand, maintains opposing view claiming the arbitral award as well as existence of the proceedings is confidential. The confidentiality of both proceedings and award constitutes one of the main attractions in eyes of the arbitration users.¹⁹⁹

The pallet of arbitrators' obligations thus may also include duties of confidentiality, applicable to different aspects of the arbitral process. A general obligation of confidentiality with regard to the arbitral process is nowadays set forth expressly in some institutional rules.²⁰⁰ On rare occasions, it may be also found in national arbitration laws.²⁰¹ Additionally, as discussed above, in some jurisdictions, general obligations of confidentiality with regard to non-public information regarding the arbitration are implied, for the arbitrators as well as the parties, even in the absence of express agreement by the parties. Furthermore, the parties' arbitration agreement may impose different and/or additional confidentiality obligations.²⁰²

¹⁹⁵ Art. 19 para 4 of the LCIA Arbitration Rules (1998), Art. 25 para of the UNCITRAL Arbitration Rules, Art. 36 para 1 CIETAC Arbitration Rules (2012).

¹⁹⁶ TWEEDDALE: *Arbitration...*, p. 353. Judgment of the Court of Appeal of Paris of 18 February 1986 in case of *G. Aita v. A. Ojjeh*.

¹⁹⁷ TWEEDDALE: *Arbitration...*, p. 353.

¹⁹⁸ Expert Report of Dr. Julian Lew in *Esso Australia Resources Limited v. Plowman*. *Arbitration International*, 1995, Vol. 11, No. 3, p. 283.

¹⁹⁹ FOUCHARD, Philippe. In GAILLARD, Emmanuel, SAVAGE, John (eds.). *Fouchard Gaillard Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999. p. 773.

²⁰⁰ Art. 30 para 2 of the LCIA Arbitration Rules (1998), Art. 8 of the Arbitration Rules of the Chamber of Arbitration of Milan (2010), Art. 36 para 2 CIETAC Arbitration Rules (2012).

²⁰¹ Art. 1469 of the Code de procédure civile (1975), Sec. 6 of the Czech Law on Arbitration and Enforcement of Arbitral Awards (1994), Art. 353 of the Romanian Code of Civil Procedure (1865).

²⁰² See BORN: *International arbitration*, pp. 1610-1611, 2255-2258, 2265-2269.

Where parties are not bound by the duty of confidentiality, arbitrators still may be obligated to respect such duty as ethical guidelines or codes applicable to international arbitrators address this issue.²⁰³

4.3 Other duties of an arbitrator

Beside legal duties, there are also duties of rather moral character that must an arbitrator especially at the time of acceptance of the appointment. The main duty, in this regard, is the duty not to accept appointment unless the arbitrator has the time and qualification essential for serving as arbitrator in the particular matter.²⁰⁴

The aspect of time does not need thorough explanation. Arbitrators should be able to arrange and attend a preparatory meeting within two months, to hold oral hearing within the next six to ten months and deliver an award in a reasonable time required for deliberation and consideration.²⁰⁵ Arbitrators should also take into account specific time limitations imposed by the arbitral agreement of the parties or such limitations that have their foundation in arbitral rules parties opted for.²⁰⁶

The requirement of qualification is more abstract. There is no general pre-requisite with respect to profession, i.e. the arbitrator does not have to be a legal practitioner or lawyer of any kind. On the contrary, parties often prefer arbitrators from different field, e.g. bankers, engineers, businessmen, as they are more capable to comprehend and evaluate the subject matter and nuances of the dispute.²⁰⁷ However, it is preferable for at least chairman to be a skilled arbitrator or a lawyer as it is regularly the chairman who is tasked with drafting the award.²⁰⁸ Arbitrators should, prior to the acceptance of the appointment, examine whether they are capable of administering the arbitration in a proper manner especially if they are laymen or they lack certain knowledge in the particular field. Regarding the qualification, arbitrators should not also miss the factor of language in which the arbitration is to be conducted following the agreement of the parties. The arbitrator must understand the language proficiently and speak it with fluency. This requirement may be, of course, lifted by an

²⁰³ Art. 9 of the IBA Ethics and Canon VI para B of the AAA/ABA Code of Ethics requires arbitrators to keep confidential matters relating to the arbitration proceedings and decision.

²⁰⁴ PHILIP: *The duties of an arbitrator*, p. 71.

²⁰⁵ Ibid.

²⁰⁶ For example Art. 46 of the CIETAC Arbitration Rules expressly obliges arbitrators to deliver arbitral award in the period of 6 month from the date of constitution of the tribunal.

²⁰⁷ See also Chapter 3.2.2 hereof.

²⁰⁸ PHILIP: *The duties of an arbitrator*, p. 71.

explicit accord of the parties that will declare they accept the conduct of proceedings and award in different language.²⁰⁹

The duty of an arbitrator to observe potential requirements regarding specific qualification and to conduct the proceedings may be also found in ethical codes or ethical guidelines and is considered to be a cornerstone of arbitrator's duties.²¹⁰

One of the arbitrator's most significant obligations is to render an award that is enforceable. This duty is an implicit duty of arbitrators²¹¹ frequently expressed in institutional rules.²¹²

As was mentioned, ethics in the arbitration remains a never-ending issue as the "[i]nternational arbitration dwells in an ethical no-man's land".²¹³ It is undisputed that arbitration can work only if the parties have faith in the integrity of the system in its entirety. Unethical actions by decision makers in a dispute may severely violate this integrity and can severely damage the parties' faith in the arbitration process.²¹⁴ The internationally binding standards for differentiating ethical and unethical behaviour of arbitrators are practically missing as was indicated hereinbefore.²¹⁵

For many legal practitioners who assume positions of arbitrators, the national rules for professional conduct should serve as a starting point on the first sight. This approach has repeatedly been identified as incorrect due to several reasons.²¹⁶

First, the national norms are not generally focused on satisfying and/or developing international standards and an international system in which the number of nationalities determines the number of diverse rules may not constitute a system at all.²¹⁷ And second, quite considerable number of arbitrations does not involve arbitrators who are either attorneys or other similar practitioners bound by a national code of ethics.

²⁰⁹ Alan Philip mentions he had the opportunity to preside a Swedish language arbitration, where letters, orders and even the award were issued in Danish with consent of the parties. See PHILIP: *The duties of an arbitrator*, p. 72.

²¹⁰ See Sec. 2 of the IBA Ethics.

²¹¹ MERKIN, Robert. *Arbitration Law*. London: Informa Law, 2004. 1200 pp. para 10.53.

²¹² See e.g. Art. 32 para 2 of the LCIA Arbitration Rules (1998), Art. 1 of the IBA Ethics.

²¹³ ROGERS, Catherine. Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration. *Michigan Journal of International Law*, Winter 2002, Vol. 23, p. 341.

²¹⁴ PETERS, Philipp. *Can I do this? – Arbitrator's Ethics* [online]. kluwerarbitrationblog.com, 9.11.2010 [quoted 23.3.2012]. Available at: < <http://kluwerarbitrationblog.com/blog/2010/11/09/can-i-do-this-E2%80%93-arbitrator%E2%80%99s-ethics/>>.

²¹⁵ See Chapter 4.1.2 hereof.

²¹⁶ PETERS: *Can I do this?...*

²¹⁷ Ibid.

The rising dilemma has been hence approached by international initiatives.²¹⁸ These projects, however, mostly lack the necessary binding character and only time will show whether they will develop into attempts to set down commonly accepted and endorsed standards of professional conduct.²¹⁹

4.4 Arbitrators' fees

Arbitrators are bound by numerous duties during their service in arbitrations. On the other hand, they also possess general right to be compensated for their services. Some systems consider the arbitrators to conduct their duties on an unpaid basis.²²⁰ This concept is not, however, typical for the international commercial arbitration where arbitrators are properly compensated for their service and the fees may be rather extensive.

The process of determination of the fees depends mainly on the fact whether parties submitted their case to institutional or *ad hoc* arbitration. If the arbitration is administered by an institution, the organization itself will manage the fees, usually through a schedule of fees.²²¹ In *ad hoc* arbitrations, the amount of fees will be subject of negotiation of parties and the prospective arbitrator. It is generally accepted that the fees should be agreed upon at the outset of proceedings and the negotiations should take place in presence of all parties to the dispute in order to avoid any allegations of impropriety.²²²

The fees may be calculated in various ways. Notwithstanding, there are three main techniques of calculation used in the international commercial arbitrations, namely the *ad valorem* method, time-based method and fixed-fee method.

4.4.1 *Ad valorem* method of calculation

This method is commonly used by arbitral institutions such as ICC, CIETAC or Milan Chamber of Arbitration.²²³ Under *ad valorem* method the fees are based on the amount of

²¹⁸ See Chapter 4.1.2 hereof.

²¹⁹ Similar for example to the Model Law that effectively created standard for arbitration laws worldwide.

²²⁰ GOTANDA, John. Setting Arbitrators' Fees: An International Survey. *Vanderbilt Journal of Transnational Law*, 2000, Vol. 33, No. 4. p. 782.

²²¹ For illustration see Appendix III of the ICC Arbitration Rules (2012).

²²² REDFERN, HUNTER: *Law and Practice...*, p. 239.

²²³ Appendix III of the ICC Arbitration Rules (2012). *Schedule of Fees of the Milan Chamber of Arbitration* [online]. www.camera-arbitrale.it [quoted 14.4.2012]. Available at: <http://www.camera-arbitrale.it/risolvi.php?sez_id=76&lng_id=14>. *CIETAC Arbitration Fee Schedule* [online]. <http://www.cietac.org> [quoted 14.4.2012]. Available at: <<http://www.cietac.org/index/applicationForArbitration/47601fd5a0e7e87f001.cms>>.

specific dispute and typically the fees are represented as a percentage of the amount of dispute.

This method gives parties a reasonable lead and a degree of certainty as to the final sum of the fees. The potential disadvantage, however, is that if fees are fixed by a number for disputes in certain value range. Similarly, the *ad valorem* method usually does not address the time spent by arbitrators on the case. These factors may eventually create situations where fees set *ad valorem* may be perceived as too high or, on the other hand, too low.²²⁴

4.4.2 Time-based method of calculation

Even the title suggests that, under this method, fees are calculated in respect to the time spent by arbitrator on the case. This technique reflects day or hours arbitrator spent on arbitration and thus compensated the arbitrator for actual work done on the case. The negative side effect of this method is the arbitrators may lack the incentive to work efficiently in order to generate higher fees.

This method is normally used in *ad hoc* arbitrations but it is not uncommon even in institutional arbitration.²²⁵ In *ad hoc* arbitrations, lacking any schedule of hour-rates imposed by arbitral institution, the hour-rates will naturally vary depending the status of arbitrator, qualification, residence etc. While the rates may be around USD 85.00 per hour in the South Africa, in the US, the rates will be usually around USD 450.00 per hour.²²⁶

4.4.3 Fixed-fee method of calculation

Under the last method, the sum of fees is defined by a certain amount. This compensation will cover all the expenses of arbitrator including their loss of time and travel.

The main advantage is the parties are from the outset of proceedings aware about the cost of arbitration. The main drawback to the method is the total sum may not adequately represent the actual expenses and effort the arbitrator expended throughout the proceedings.

The method is less common in comparison to the preceding two and it is used especially in case of great importance involving arbitrators of high international credit.²²⁷

²²⁴ GOTANDA: *Setting Arbitrators' Fees...*, p. 784.

²²⁵ E.g. LCIA uses this method in order to calculate arbitrators' fees. See *LCIA Schedule of Arbitration Costs effective 8 July 2011* [online]. www.lcia.org [quoted 15.4.2012]. Available at: <http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Costs.aspx>.

²²⁶ GOTANDA: *Setting Arbitrators' Fees...*, p. 787.

²²⁷ REDFERN, HUNTER: *Law and Practice...*, p. 241.

5 Disqualification of arbitrators and liability of arbitrators

A party may become dissatisfied with the conduct of an arbitrator during the course of arbitral proceedings, typically due to doubts about the arbitrator's impartiality and independence, necessary qualification, diligent and careful administration of the proceedings or due to breach of any other obligation. If these doubts reach the required standard, then such party may seek to challenge and effectively remove and replace the arbitrator in case the arbitrator does not resign on his or her own accord. Any potential deviation from arbitrators' duties may also result in liability of such arbitrator/s.

5.1 Removal of arbitrator

Challenges are admissible against any arbitrator, no matter if the arbitrator was selected by one of the party, by consent, by an appointing authority or by court. Challenges are submitted then in accordance to the relevant arbitral rules or national law. From more practical perspective, challenges to arbitrators have become more and more common lately and major arbitral institutions in their statistics usually note that approximately 30 challenges per year are filed.²²⁸ Despite these recent developments, challenges to arbitrators still take place only in a minority of cases and are upheld in significantly less.²²⁹

Relevant grounds for such challenges commonly cover issues of arbitrators' impartiality and independence, but other bases for removal may be prescribed or applied in practice. These include incapacity, failure to conduct the arbitral proceedings in appropriate manner, lack of necessary qualification, lack of due care and diligence, etc.

5.1.1 Removal of arbitrator under institutional rules

If parties chose to make the arbitration subject to a set of institutional rules, the applicable rules will generally provide autonomous means for resolving challenges to arbitrators. These mechanisms are preferable to lengthy proceedings on challenges held before a national court.

²²⁸ BORN: *International Commercial Arbitration*, pp. 1553-1554.

²²⁹ *Ibid.*

All major institutional rules contain provisions on challenges to arbitrators.²³⁰ Under these provision, parties are commonly required to file a challenge within a specified period of time following the appointment of the challenged arbitrator or the moment a party became aware about grounds for challenge. In general, challenges must be made in writing, addressed ordinarily to the institution as well as the tribunal and opposing parties. The non-challenging party is permitted to respond to the challenge and the institution will also take into account the challenged arbitrators position towards the challenge.²³¹

Usually, the institution has rather limited options to obtain evidence or oral submissions to the matter. It is hence bound to review relevant submissions of the parties and the challenged arbitrator and deliver a decision on the challenge. This process is swift and, in general, the challenges are resolved in matter of days or weeks.²³² The decision is subject to no further recourse, and it may not be appealed or objected. Notwithstanding, parties may be able to seek a remedy in form of judicial review of such decision in some legal systems.²³³

As was noted, parties are required to file a challenge promptly upon being informed about relevant circumstances constituting grounds for challenge. The justification for such measure is non-controversial. Parties should not be permitted to proceed with an arbitration while retaining secret grounds for objection to the decision-makers especially in sake of certainty. If a party does not promptly raise a challenge, then the party will be regarded as it have waived its right of challenge.²³⁴ This concept is upheld both by arbitral institutions²³⁵ and national courts.²³⁶

5.1.2 Removal of arbitrator under national law

Aside of the institutional challenges, there is a system of challenges founded in national legislation. Hence, it is also generally possible to pursue an judicial challenge to an arbitrator

²³⁰ See e.g. Art. 13 of the UNCITRAL Arbitration Rules, Art. 30 of the CIETAC Arbitration Rules, Art. 14 of the ICC Arbitration Rules (2012).

²³¹ BORN: *International Commercial Arbitration*, p. 1554.

²³² *Ibid.*, p. 1555.

²³³ See Chapter 5.2 hereof.

²³⁴ BORN: *International Commercial Arbitration*, p. 1558.

²³⁵ CRAIG, Lawrence et al. *International Chamber of Commerce Arbitration*. 3rd edition. New York: Oceana Publications, 2000. para 13.01.

²³⁶ See *AAOT Foreign Econ. Ass 'n (VO) Technostroyexport v. Int'l Dev. and Trade Serv., Inc.*, 139 F.3d 980 (1999). *ASM Shipping Ltd. of India v. TTMI Ltd. of England* [2006] 2 All E.R. 122. Judgment of the Swiss Federal Tribunal of 4 August 2006, DFT 4P.105/2006. Judgment of the Cour de cassation of 24 March 1998 in the case of *Excelsior Film v. UGC-PH*. Judgment of the Oberlandesgericht Cologne of 14 September 2000, 9 SchH 30/00.

in a national court, both in *ad hoc* and institutional arbitrations. National legislation on this issue is rather diverse nevertheless.

The Model Law entitles parties to seek an interlocutory judicial removal of arbitrators in both *ad hoc* and institutional arbitrations. Art. 13 of the Model Law provides that parties are free to agree upon procedures for challenging and removing arbitrators. In case no procedure is agreed upon, Art. 13 para 2 of the Model Law provides that the challenging party must submit a written statement of reasons for challenge with the arbitral tribunal and the tribunal decides on the challenge.

In case any of these procedures fails, than the challenging party may petition the court or comparable authority under Art. 13 para 3 of the Model Law. This provision may not be opted-out by the parties' agreement.²³⁷ Judicial challenges must be submitted in a period of 30 day and decisions on the challenges are not subject to appeal in order to prevent potential prolonged litigation. Arbitrators are granted discretion to continue with arbitral proceedings notwithstanding the pendency of a judicial challenge to an arbitrator.²³⁸

These provisions of the Model Law were adopted by many countries, including Germany, England, or Japan.²³⁹

Other jurisdictions assume a different position to the judicial removals of arbitrators. French or Swiss legislation, for instance, allows judicial removals exclusively in situations where parties failed to set forth a procedure for challenge or rely on institution rules. National courts retain, however, the right to consider issues of impartiality and independence in actions to annul or deny recognition to an award.²⁴⁰

The third main approach regarding the removal of arbitrator by national courts corresponds with jurisdictions that prohibit or seriously limit interlocutory judicial challenges. The typical representative of such jurisdiction would be the United States where the courts' scrutiny of arbitrators is reserved for procedures on setting aside, recognition and enforcement

²³⁷ HOLTZMANN, Howard. NEUHAUS, Joseph. *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*. The Hague: Kluwer Law International, 1989. p. 407. *Pac. China Holdings Ltd. v. Grand Pac. Holdings Ltd.* [2007] 3 HKLRD 741.

²³⁸ Courts have generally affirmed this concept. See the Judgment of the Paris Cour d'appel of 24 February 1994 in the case of *Ministry of Public Works v. Société Bec Frères*. Judgment of the Swiss Federal Tribunal of 10 May 1982, DFT 108 Ia 197. *Mitsui Eng'g & Shipbuilding Co. Ltd v. Easton Graham Rush* [2004] 2 SLR 14.

²³⁹ Sec. 1037 of the German Code of Civil Procedure (1877), Sec. 24 of the English Arbitration Act (1996), Art. 19 of the Japanese Arbitration Law (2003). English courts have also on several occasions held that unsuccessful removal of arbitrator under institutional rules does not preclude parties from seeking a judicial removal. See *AT&T Corp. v. Saudi Cable Co.* [2000] 2 Lloyd's Rep. 127.

²⁴⁰ Art. 1463 para 2 of the Code de procédure civile (1975), Arts. 179 and 180 of the Swiss Law on Private International Law (1987).

of awards.²⁴¹ This concept finds its rationale in the prevention of possible intrusions into the arbitral process by judiciary.²⁴²

Similar to challenges under institutional rules, most national laws on arbitration contain clauses that challenges must be raised promptly upon a party becomes aware of ground for challenge and the principle of timely challenges was also upheld by courts.²⁴³ A party failing to comply with these time deadlines will be deemed to have waived its right to challenge the arbitrator.²⁴⁴

5.2 Replacement of arbitrator upon the removal or resignation

Arbitration agreements may provide rules regarding vacancies that may occur on the tribunal. Typically, gaps in arbitral tribunal will be filled in the same way the former arbitrator was selected. All leading institutional rules as well as most national laws assume this approach towards filling any vacancies.²⁴⁵

In some instance of institutional arbitration, the arbitral institution may be granted a discretionary power to intervene into the replacement in order to prevent the risk that a party will repeatedly nominate inappropriate arbitrators.²⁴⁶ This discretion, however, is not adopted by national legislation.²⁴⁷

The removal and replacement of an arbitrator during the arbitral proceedings also raises the query whether the arbitral process must be partially or wholly repeated. The answer to this question differs throughout the institutional rules and national statutes.

The Art. 15 para 4 of the ICC Arbitration Rules (2012) entitles the reconstituted arbitral tribunal to determine whether or what extent of prior proceedings shall be repeated. Art. 15 of the UNCITRAL Arbitration Rules (2010) commands the re-constituted tribunal to

²⁴¹ In *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.* 304 F.3d 476 (2002) the fifth circuit court held that: "Even where arbitrator bias is at issue, the FAA does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award." Similarly in *Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.* 264 F.Supp.2d 926 (2003) or *Petition of Dover SS Co.* 143 F.Supp. 738 (1956).

²⁴² *Dewart v. Northeastern Gas Transmission Co.* 101 A.2d 299 (1953).

²⁴³ See e.g. Sec. 1037 para 2 of the German Code of Civil Procedure (1877), Sec. 1035 para 2 of the Netherlands Code of Civil Procedure (1986), Art. 19 para 3 of the Japanese Arbitration Law (2003). See also *Fidelity Fed. Bank, FSB v. Durga Ma Corp.* 386 F.3d 1306 (2004) or *JCI Comm., Inc. v. Int'l Bhd. of Elec. Workers, Local 103* 324 F.3d 42 (2003) where the court retained the opinion that: "Absent exceptional circumstances, a court will not entertain a claim of personal bias where it could have been raised at the arbitration proceedings but was not."

²⁴⁴ BORN: *International Commercial Arbitration*, p. 1580.

²⁴⁵ *Ibid.*, p. 1582.

²⁴⁶ Typical example of such provision is Art. 15 para 4 of the ICC Arbitration Rules (2012).

²⁴⁷ One exception is Sweden. See BORN: *International Commercial Arbitration*, p. 1583.

automatically resume the proceedings at the stage where the replaced arbitrator ceased to exercise the function, unless the tribunal decides otherwise.

Similar to the Model Law, some arbitration acts are silent on this matter, "thereby presumptively leaving to the arbitral tribunal's discretion whether or not to repeat previous proceedings."²⁴⁸ Other jurisdictions leave decisions about repeating previous proceedings to the parties' agreement and/or the tribunal's discretion,²⁴⁹ require mandatorily repetition of all prior arbitral proceedings,²⁵⁰ or forbid repeating the proceedings.²⁵¹

The process of rehearing evidence and submissions may be costly and time-consuming and thus contradicting the basic features of arbitration. On the other hand, a new member of the tribunal should be entitled to pose questions to the witnesses that provided their testimony prior to the replacement as well as to repeat the relevant portions of the proceedings, all in sake of procedural fairness. The character, extent and technicalities of such repetition should by all means lie within the arbitrators' discretion.²⁵²

5.3 Liability and immunity of arbitrators

Similarly to other ADR methods, international commercial arbitrators enter into private contractual relationship with the parties by expressly or tacitly accepting their mandate (*receptum arbitri*).²⁵³ This contract may be best defined as a mandate with service elements or quasi-mandate.²⁵⁴ Arbitration laws and procedural rules of arbitral institutions regulate the procedural powers of the arbitrators while they do not specifically identify this contractual relationship. Notwithstanding, these norms also reflect main features of this contract as they set forth the procedures for appointment and removal of arbitrators and also provide catalogues of arbitrators' duties and responsibilities.

Theoretically, any breach of arbitrator's contractual obligations under the *receptum arbitri* might thus result in the liability vis-à-vis the parties. Arbitrators are almost never sued in practice as they usually possess a far-reaching immunity from liability for all acts in

²⁴⁸ Ibid., p. 1585.

²⁴⁹ E.g. Sec. 27 para 4 of the English Arbitration Act (1996), Art. 37 of the Chinese Arbitration Law (1994), Sec. 15 para 3 of the Arbitration and Conciliation Act of the Republic of India (1996).

²⁵⁰ See e.g. Art. 19 para 4 of the Omani Law of Arbitration in Civil and Commercial Disputes (Royal Decree No. 47/97) or Art. 26 para 4 of the Indonesian Law No. 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution.

²⁵¹ E.g. Sec. 1030 para 3 of the Netherlands Code of Civil Procedure (1986).

²⁵² BORN: *International Commercial Arbitration*, p. 1586.

²⁵³ BERGER: *Private Dispute Resolution...*, p. 372.

²⁵⁴ FOUCHARD, Philippe. In GAILLARD, Emmanuel, SAVAGE, John (eds.). *Fouchard Gaillard Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999. p. 604.

connection with performance of their arbitrator mandate.²⁵⁵ In this regard, many institutional arbitration rules contain express clauses on waiver of liability in sake of arbitrator free, independent and uninterrupted decision-making process.²⁵⁶

Nonetheless, there is still no coherent and uniform international law regulating this field. The statutory provisions regulating the immunity of arbitrators are therefore mainly depended upon the different legal systems.

Common law jurisdictions support the exclusion of liability for the arbitrators on the ground that arbitrators should be treated in the same manner as judges.²⁵⁷

It has further been concluded that absence of such immunity might compromise their integrity in such a way that they would be inclined to make an award in favour of a party who is more likely to sue them.²⁵⁸ The concept of judicial immunity was originally developed in the case of *Garnett v. Ferrand* where court declared that judicial officers should not be subject to civil liability as they should be able to exercise their duties free of any fear of lawsuit.²⁵⁹ This reasoning was fully upheld in later cases.²⁶⁰ In case of *Arenson v. Casson Beckman Rutley & Co.*, the court upheld the previous decisions, notwithstanding, Lord Kilbrandon also raised the question whether the arbitrators should be exempted from liability.²⁶¹ Nowadays, this immunity does not go without boundaries. Lord Kilbrandon doubts about the character of arbitrator's immunity commenced a wave of debates in the House of Lords especially during the period of drafting the English Arbitration Act (1996).²⁶² Eventually, the standard for arbitrators' immunity was defined in Sec. 29 para 1 of the English Arbitration Act (1996) as follows: "An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is known to have been in bad faith."²⁶³

²⁵⁵ LEW, Julian. In LEW, Julian (ed.). *The Immunity of Arbitrators*. London: LLP Professional Publishing, 1990. p. 1 et seq.

²⁵⁶ e.g. Art. 40 of the ICC Arbitration Rules (2012), Art. 31 para 1 of the LCIA Arbitration Rules (1998).

²⁵⁷ See the case of *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation* [1981] 1 AC 909, where the court considered that "Courts and arbitrators are in the same business, namely the administration of justice." The immunity granted to state judges should thus be extended to arbitrators as well.

²⁵⁸ YU, SHORE: *Independence, Impartiality, ...*, p. 951.

²⁵⁹ *Garnett v. Ferrand* (1827) 6 B & C 611.

²⁶⁰ *Sirros v. Moore* [1975] QB 118. *Sutcliffe v. Thackrah* [1974] AC 727.

²⁶¹ "I have come to be of opinion that it is a necessary conclusion to be drawn from *Sutcliffe v. Thackrah* and from the instant decision that an arbitrator at common law or under the Acts is indeed a person selected by the parties for his expertise, whether technical or intellectual, that he pledges skills in the exercise thereof, and that if he is negligent in that exercise he will be liable in damages." See *Arenson v. Casson Beckman Rutley & Co.* [1977] AC 405.

²⁶² YU, SHORE: *Independence, Impartiality, ...*, pp. 955-956.

²⁶³ The Act does not mention by itself what constitute "bad faith" under Sec. 29. The case law however developed a dishonesty or "malice in the sense of personal spite or a desire to injure for improper reasons or [...]"

The US approach towards the arbitrators' immunity goes beyond the standard of UK jurisprudence as it is governed by the principle of absolute immunity of arbitrators. The US courts first recognized the principle of exemption of judiciary from civil liability in sake of judicial independence in the case of *Bradley v. Fisher*.²⁶⁴ The immunity established was also applied to arbitrators as early as in 1884 when in the court in *Hoosac Tunnel Dock and Elevator Co. v. James W. O'Brian* held that both "judges and others engaged in the administration of justice" should act free of influence - the same level of immunity that applies to judges thus have to apply to arbitrators as well.²⁶⁵ Identical opinion prevailed in the later courts decisions.²⁶⁶

In other jurisdictions, there is no such presumed analogy between the arbitrators and judges. This is visible especially in civil law countries, where the relationship between the arbitrator and the parties is mostly based on the contractual theory rather than jurisdictional theory. Judges are public officials, on the other hand, arbitrators are solely private entities selected to resolve the dispute among parties. Such entities may be held liable in damages for their wrongful conduct.²⁶⁷

This approach is assumed in France, Germany, Austria and similarly in Switzerland where the relationship is considered to be of a contractual nature, although in practice arbitrators are granted a large degree of immunity.²⁶⁸ Regarding the case law, the Paris Tribunal de grande instance held "the relationship between the arbitrator and the parties, which is contractual in nature, justifies [arbitrator's] liability" for breach of contract.²⁶⁹ Similarly conclusion was reached by Australian court in *Du Toit v. Vale* when the court held the arbitrator is obliged to repay received fee and is partly liable for costs of arbitration for failing to fulfil their obligations.²⁷⁰

In conclusion, the most reasonable and attractive attitude towards the arbitrator's liability seems to lie neither in between the absolute and restrictive immunity. It remains clear that arbitrators should be granted a certain degree of immunity in order to be capable of

knowledge of absence of power to make the decision in question." See *Melton Medes Ltd. v. Securities and Investment Board* [1995] Ch 137.

²⁶⁴ *Bradley v. Fisher* 20 L Ed 646 (1872).

²⁶⁵ *Hoosac Tunnel Dock and Elevator Co. v. James W. O'Brian* [1884] 137 Mass. 424.

²⁶⁶ *Corbin v. Washington Fire and Marine Insurance Company* 278 F Supp 393 (1968). *Frank Calzarano v. Jonathan E Liebowitz* 550 F Supp 1389 (1982).

²⁶⁷ TSAKATOURA, Anastasia. *The Immunity of Arbitrators* [online]. inter-lawyer.com, 20.6.2002 [quoted 26.3.2012]. Available at: < <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm>>.

²⁶⁸ Ibid.

²⁶⁹ Judgment of the Paris Tribunal de grande instance of 12 May 1993.

²⁷⁰ *Du Toit v. Vale* (1993) 9 WAR 138.

performing the duties without undue influence. However, their rein should not be absolute. Arbitrators should be hence held liable in cases of fraud and negligence.

Conclusions

The international trade and business community is choosing more and more frequently international commercial arbitration as a system to resolve their disputes due to its suitability, in comparison with litigation before national courts, to resolve disputes in a neutral, confidential, rapid, flexible and less expensive manner. "The arbitrator is the *sine qua non* of the arbitral process."²⁷¹ The thesis was based on the major idea that arbitrator is the determining factor of every international commercial arbitration and as the former statement indicates, arbitrator plays the key role in every arbitration. In the beginning of the thesis, two basic premises were formulated alike. First, the person of arbitrator is fundamental aspect that empowers and influences the entire arbitral proceedings. Second, the arbitrator has also critical impact on the facultative stages of the period after the award was rendered.

To a great extent the realisation of the benefits of arbitration depends on the person appointed as arbitrator.²⁷² Since the arbitration is based on contract and party autonomy, the parties are technically free to choose their arbitrator/s and adjust the proceedings to fit the individual nature of dispute.

This freedom to submit the case to a arbitrator or arbitral tribunal of choice represents truly an advantage, as parties are entitled to choose such persons in whom they have confidence, and who have the necessary expertise, skills and traits for the determination of the particular dispute. Nonetheless, parties may also try to misuse the freedom of appointment to gain the upper hand by appointing a biased arbitrator or they may decline the co-operation in the appointment process and try to prevent the constitution of the tribunal or to cause, at least, delay the proceedings.

Arbitrators are bound by numerous during their service. Most important ones include the duty to conduct the proceedings with care and diligence, to apply the law, to render an enforceable award and most significantly to be restrain of any bias or favouritism. As was mentioned throughout the thesis, the requirement of independence and impartiality are of paramount significance and tests of any potential bias must be applied utmost carefully as the trust of parties in international arbitration is above all linked with their expectations of neutral and unbiased forum for dispute resolution.

Once established, arbitration tribunal usually remains in place until it has either rendered an award or the parties have settled their dispute. Nevertheless, arbitrator's service in

²⁷¹ LEW et al.: *Comparative International Commercial Arbitration*, p. 223.

²⁷² DEZALAY, Yves, GARTH, Bryant. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago: University Of Chicago Press, 1998. p. 8.

the proceedings may be terminated for various reasons. These reasons will generally cover situations where an arbitrator failed to perform duties and responsibilities properly or where an arbitrator is not capable to perform them from the moment on. In such cases, arbitrator may resign or, alternatively, he or she may be subject to a challenge. To this end, nearly all arbitration laws and institutional rules contain procedures to challenge or removal and replacement of an arbitrator. Similarly, parties may set their own frameworks for such replacement as well. These provisions are built-in insurance to safeguard the integrity of arbitration. Any breach of arbitrator's duties may eventually also lead to potential liability for such misconduct, depending on the standard of immunity arbitrator possess in the particular case.

A prospective misconduct and misbehaviour of an arbitrator may have also material and grave consequences in respect of the actual goal of the arbitral process - the arbitral award. The Model Law, the New York Convention as well as many national statutory provision contain rules furnishing ground for refusal of recognition and enforcement of the award in cases where the arbitral tribunal was not composed in compliance with agreement of the parties or the tribunal's independence or impartiality might have been impaired.²⁷³ Identical reasons may also lead to a recourse against the award in form of an application for setting aside of the award.²⁷⁴

To conclude, arbitrator is the central figure of international commercial arbitration. As arbitrators are given a relatively free reign within the informal arbitral process, they may significantly shape the character of the proceedings. But the role and conduct is not solely limited to the arbitral process and arbitrator's quality has even more profound importance in the stages after the award was issued as it may, in extreme cases, create such obstructions that are not likely to overcome for the party seeking enforcement of the award.

²⁷³ Art. 36 of the Model Law, Art. V of the New York Convention.

²⁷⁴ See Art. 34 of the Model Law.

Résumé

Disputes are unavoidable components of international transactions. Various factors and differences are sources of disagreements, conflicts and disputes. Where disputes occur and they cannot be settled by negotiation, they need to be resolved in accordance with a legal process. The apparent *fora* for disputes are thus national courts which are maintained to provide arenas for a dispute settlement and to dispense justice. National courts are not generally perceived as the most viable ground for resolution of dispute by foreign businessmen due to potential favouritism and obvious unfamiliarity with the legal system of the country of the counterpart. Under these circumstances, parties to international commercial contracts frequently look to arbitration as to a mechanism that provides them a private, independent and neutral ground for resolution of disputes.

The topic of this thesis concerns the central figure of the arbitral process - the person of arbitrator. The author bases the work on fundamental idea the arbitrator is the determining aspect of international arbitration. The author hence analyzes the position and role of arbitrator in individual phases of arbitration and seeks to provide a comparison of various approaches in national legislation worldwide whereas the emphasis is added to the divergence of common law and civil law jurisdictions. Accordingly, the topics are also elaborated from the point of *ad hoc* and institutional arbitrations. The thesis draws from various electronic sources as well as numerous bibliographical sources, while the peak importance is placed upon the case law of national courts and arbitral tribunals in order to grant a practical perspective of individual matters.

First few pages of the text cover elementary introduction to the area of ADR and the arbitration as legal institute and focus on the development of international commercial arbitration that influenced the role and position of contemporary arbitrators. Following chapters elaborate position of arbitrators in different stages of arbitration and mention how parties may control and regulate the proceedings in these phases. First, options conveyed upon the parties at the time they agree to submit their dispute or potential disputes to the arbitration by means of arbitral agreement/clause are discussed as parties may influence the shape of arbitration greatly even at this early period. Second, the procedures of selection of arbitrators, influence of appointing authorities and specific features of judicial appointment are also covered. Particularly emphasis is placed upon important issue of arbitrators' duties and responsibilities where the dominant position is granted to the questions of independence and impartiality of arbitrators. As arbitrator may become incompatible with the arbitration

during the proceedings, the removal processes, especially procedures governing challenges to arbitrators by parties to the dispute and judicial removals are described alike. Supplemental coverage is provided also to issues of liability of arbitrators, standards of immunity and mechanisms of arbitrators' compensations.

Shrnutí

Spory představují nevyhnutelnou součást sféry mezinárodního obchodu. Nejrůznější faktory a zvyklosti, rozdílnost přístupů a názorů přirozeně mohou snadno vést ke vzniku nedorozumění, konfliktů a sporů. Když dojde ke vzniku sporu, který není možné urovnat smírnou cestou, pak je nutno obrátit se na orgán, který bude spor stran schopn definitivně a závazně vyřešit. Obvyklé fórum pro řešení sporů představují národní soudy, které jsou zřízeny státy, aby poskytovaly arénu pro řešení sporů a prováděly výkon spravedlnosti. Národní soudy však zpravidla nebudou pro zahraniční obchodníky ideální volbou. Předně se takoví obchodníci budou zpravidla obávat možného zvýhodňování žalovaného "domácími" soudy a současně takový obchodník by byl podroben právnímu řádu, s nímž není dostatečně či vůbec seznámen. S ohledem na tyto okolnosti tak subjekty v mezinárodním obchodu stále více volí možnost předložit své spory k vyřešení neutrálním, nezávislým a nestranným tribunálem v rámci rozhodčího řízení.

S ohledem na aktuálnost tématu arbitráží se tato diplomová práce zabývá problematikou ústřední postavy mezinárodního rozhodčího řízení, tj. problematikou osoby rozhodce, přičemž čerpá z poznatků národní i mezinárodní odborné literatury a současné judikatury zahraničních soudů.

Pro lepší pochopení otázky role arbitra v rámci rozhodčího řízení autor v úvodní kapitole čtenáři nabízí teoretický exkurs do obecné problematiky a geneze mezinárodního rozhodčího řízení. Prostor je také věnován odlišnostem *ad hoc* a institucionální arbitráže. V následujících kapitolách autor postupně rozebírá smluvní základ arbitráže a faktory, které ovlivňují proces selekce arbitrů. Autor tak zejména analyzuje proces jmenování rozhodců a požadavky, které mohou být na potencionální arbitry kladeny, povinnosti rozhodců v rámci řízení či konkrétní možnosti zbavení rozhodce funkce pro porušení povinností, problematiku odměňování rozhodců, odpovědnosti a imunity rozhodců.

Jednotlivé pasáže jsou rozebírány z hlediska specifik rozhodování jedním rozhodcem, rozhodčím tribunálem, jakož i z hlediska rozhodování v institucionálním rozhodčím řízení a *ad hoc* řízení. Současně jsou srovnávány náhledy na jednotlivá témata z pohledu judikatury soudů *civil law* a *common law* jurisdikcí.

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