



**Neutrality of arbitrators**  
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## **Abstract:**

The neutrality of the arbitral tribunal is one of the key elements of fair arbitration proceedings. It is the mandatory requirement of all arbitration rules that the members of the tribunal should be and remain independent, impartial and neutral thought-out the whole arbitration proceedings Nevertheless neither of the arbitration rules set up the precise standards according to which the mental attitude and the level of dependence of the challenged arbitrator should be judged. In this paper the analyzes of the scholar works and the relevant case law will be made in order to establish the meaning and the distinguishing features of the notions of independence, impartiality and neutrality of arbitrators. The thesis will also contain the discussion of the nature and advantage characteristics of arbitrators' duty to disclose any facts and circumstances which could cause the doubts in his ability to act in unbiased and justified manner.



## Introduction

The main features of arbitration proceedings are flexibility, promptness and confidentiality. The mentioned advantages of the arbitration make it the most attractive mean of the dispute resolution in international commercial relationships. This tendency is well described in the article of Henry Gabriel and Anjanette H. Raymond, where it is stated: "Arbitration, which was once a relatively small part of the dispute resolution system, has become a large institution in its own right"<sup>1</sup>.

The increasing significance of arbitration as a leading resource of the dispute resolution results in the growth of requirements for fairness and reliability of the arbitral proceedings. Therefore institutional and national laws introduce detailed procedural rules and guidelines on how arbitration should be conducted. All major arbitration rules contain relevant provisions which address the issue of neutrality of the arbitrators and provide procedural mechanisms in order to ensure objectivity of the arbitral proceedings<sup>2</sup>.

Neutrality of the arbitrators is a crucial element of the just and effective arbitral proceedings. The right of the parties to present the case in front of the unbiased tribunal constitutes the basis of fair litigation. Being the procedural in its nature the right to neutral tribunal is realized through the fulfillment of the mandatory

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<sup>1</sup> Henry Gabriel and Anjanette H. Raymond *Ethics for commercial arbitrators: basic principles and emerging standards in* Symposium on Professional Responsibility and Professionalism 5 Wyoming Law Review

<sup>2</sup> Uncitral Model Law on International Commercial Arbitration (2006), articles 16(3), 17, 18; Rules of Arbitration of International Chamber of Commerce, articles 7(2), 7(3), 11; American Arbitration Association International Rules (2003), article 7, 8; Arbitration Rules of the London Court of International Arbitration (1998), articles 5.2, 5.3, 6, German Arbitration Law (1998), section 1036

requirements during the formation and conduct of the arbitral proceeding<sup>3</sup>.

Infringement of these requirements would lead to the disruption of the confidential and cooperative climate during the arbitral proceedings, grounding the possibilities to challenge either arbitrator or the validity of rendered award. The result of such defect in arbitration will be considerable loss of the time and means suffered by the participants of proceedings and no achievement in a course of resolution of the dispute.

Although major institutional arbitration rules and national arbitration law set up requirements that the arbitrators should be neutral, impartial and independent neither of them incorporates the definite standards for these three notions. Consequently, the absolute discretion on what constitutes the neutrality of arbitrators and which cases should be recognized as the infringement of the fundamental principle of fair proceedings belongs to the scholars, arbitration institutions and national courts. It should be noted that many of the offered theories on neutrality of arbitrators present different, even contradicting approaches. Thus the main purpose of the present thesis is the analysis of the relevant scholar, legislative and practical materials in order to deduct the common standard which should be applied during and after the arbitration proceeding in order to guarantee the independent and fair decision of the arbitral tribunal.

As a preliminary matter it should be noted that the term neutrality of arbitrators could be applied in two dimensions. Being used in general meaning the term neutrality encompasses the notions of impartiality, independence, neutrality in

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<sup>3</sup> Johannes Trappe, *The Arbitration Proceedings: Fundamental Principles and Rights of the Parties* Journal of International Arbitration, Vol. 15 No. 3 (1998)

specific sense and the concept of duty to disclose Neutrality in its specific dimension is related to the national and cultural inheritance of the arbitrators

The significance of the subject matter and its complicated character led to the fact that the issue of neutrality of arbitrators has been constantly discussed by leading experts on international commercial arbitration. Thus writing the present thesis such authorities as Alan Redfern and Martin Hunter, Klaus Peter Berger, Georgio Bernini, Albert Jan Van den Berg, Tibor Varady and Mark Blessing were used.

Moreover the analysis of the relevant provisions of arbitration rules of leading international arbitration institutions, model law and case law is indispensable element to understand the nature and basic element of the concept of neutrality of arbitrators. Being more precise, the Uncitral Model Law on International Commercial Arbitration;; Rules of Arbitration of International Chamber of Commerce, American Arbitration Association International Rules (2003), Arbitration Rules of the London Court of International Arbitration (1998), German Arbitration Law (1998), American Arbitration Association and American Bar Association Code of Ethics for Arbitrators in Commercial Disputes, International Bar Association Rules if Ethics for International Arbitrators and International Bar Association Guidelines on Conflict of Interest in International Arbitration have been examined while writing the thesis.

The thesis touches upon the main concepts of the neutrality. Thus the first chapter will address the standards and key elements of the impartiality, neutrality and independence of the arbitrators, different concepts on the possible level of the predisposition on the side of the party-appointed arbitrators. The nature and the benefits of arbitrators' duty to disclose any facts and circumstances that could cause the doubt in the arbitrators' neutrality are covered in the second chapter.

# I. Neutrality of the arbitrator

## 1. Definition of the terms neutrality, impartiality and independence of the arbitrators

As it has already been mentioned neutrality, impartiality and independence of arbitrators are the basic requirements provided in all arbitration rules<sup>4</sup>. However, neither of arbitration rules does elaborate on the meaning of these terms. Therefore, it would be reasonable to confer the explanations and distinguishing features of each of the terms before proceeding to the core part of the discussion.

Uncertainty in the terminology of the mentioned notions resulted in the fact that the whole discretion in definitional analysis of the notions was left to the commentators and arbitrators themselves. Even though some contradictions exist in the approaches formed by the experts of the commercial arbitration, nevertheless the common perception could be followed.

While analyzing the concept of neutrality of the arbitrators, the several approaches in defining its meaning could be outlined. Thus, Professor Giorgio Bernini proposes that neutrality implies "likelihood for the arbitrator to be, and remain, wholly equidistant in thought and action throughout the arbitral proceedings"<sup>5</sup>. Whereas according to the Redfern and Hunter, neutrality is a mere predisposition of the arbitrator either personally to the party or to the position taken

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<sup>4</sup> footnote 2

<sup>5</sup> Giorgio Bernini, *report on The conduct of the Arbitral Proceedings: Standards of Behavior of Arbitrators, in The Arbitral Process and the Independence of the Arbitrators*, 31-32, ICC Publishing S.A., 1992

by it in the dispute<sup>6</sup>. It is widely accepted that the reason of such kind of predisposition tend to be the common national and cultural identity of the arbitrator and one of the parties. Thus, it has been stated by M. Scott Dohaney the arbitrator “might be inclined toward the position of a party who shares with him the same language, culture, and general value system”<sup>7</sup>

The conceptual explanation of the meaning of impartiality could be formulated as the ability of the arbitrator to be and remain free of significant level of bias towards one of the parties or towards the subject-matter of the dispute. The same approach was upheld in the International Bar Association Rules of Ethics for International Arbitrators, where the impartiality is addressed as one of the elements of bias. The provision 3 of the rules, states that: “Partiality arises where arbitrator favors one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute.”<sup>8</sup>

Proceeding with the notion of independence, it could be concluded that the term independence names the absence of any kind of relationship between the arbitrator and the parties to arbitration whether personal, social, or financial. This approach is conforming to the International Bar Association Rules of Ethics. In addition to this, Rules also admit the possibility that the arbitrator could be recognized dependent, when he has any kind of relationship with someone closely connected to the party to arbitration<sup>9</sup>. The best description of the notion of independence was given by Professor Pierre Lalive, which addresses it in the

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<sup>6</sup> Alan Redfern & Martin Hunter *Law and practice of international commercial arbitration* 4-58, London : Sweet & Maxwell, 2003

<sup>7</sup> M. Scott Donahey *The Independence and Neutrality of Arbitrators* Journal of International Arbitration, Vol. 9 No. 4 (1992)

<sup>8</sup> International Bar Association Rules of Ethics for International Arbitrators, general standard 3

<sup>9</sup> Footnote 7



following manner: "Independence implies the courage to displease, the absence of any desire, especially for the arbitrator appointed by a party, to be appointed once again as an arbitrator."<sup>10</sup>

Concluding on the correlation between these terms, it should be noted that although the approaches exist, which structure the notions in various schemes of subordination<sup>11</sup> or treating them as synonyms, the notions should be identified as absolutely separate from each other. However, some level of similarities could be identified among them.

Hence, it should be stated that both impartiality and neutrality are abstract categories which identify the mental attitude of the arbitrator towards one of the parties and contain the element of bias. The main distinction between the neutrality and impartiality can be made by the level of exercised bias. The distinguishing line could be drawn in following manner: the neutrality addresses the mere sympathy of the arbitrator towards one of the parties or the case presented by him, whereas partial attitude differs by the existence of apparent and enormous prejudice. The notion of independence, in contrast refer to the factual state of matters. Consequently, it generally could be easily established though the degree of personal, business, financial or social relations to what an arbitrator and party to arbitration are involved.

The major similarity that is characteristic for all three notions is that all of them require the test of appearance bias, rather its actual existence. Since, the arbitrator might be able to conduct fair arbitral proceedings and remain competent to render

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<sup>10</sup> P. Lalive, *Conclusions in The Arbitral Process and the Independence of Arbitrators*, ICC Publishing, S.A., Paris, June 1991

<sup>11</sup> Giorgio Bernini report in *The Conduct of the Arbitral Proceedings: Standards of Behavior of Arbitrator in the Arbitral Process and The Independence of Arbitrators*, ICC Publishing S.A 1991; Alan Redfern & Martin Hunter *Law and practice of international commercial arbitration* London : Sweet & Maxwell, 2003

the justifiable award in spite of the close relationship, or common cultural background shared with either party to arbitration proceedings.

## **2. Lack of impartiality or independence as a ground for challenge.**

The right of the parties to fair and impartial arbitration proceedings is ensured by the opportunity to challenge an arbitrator or to dispute the validity of the arbitral award on the ground that the arbitrator failed to conduct the arbitration in independent and impartial manner. In both cases the only guideline which the authorities deciding on challenge could apply is the existence of facts and circumstances which give rise to justifiable doubts on arbitrator's impartiality and independence.<sup>12</sup>

Even though some of the national arbitration law set up the interesting provisions providing the circumstances when arbitrators should be disqualified<sup>13</sup>, in international commercial arbitration there are no standards evidencing the bias and prejudiced attitude on the side of arbitrator towards one of the parties. The lack of

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<sup>12</sup> Uncitral Model Law on International Commercial Arbitration ( 2006), article 12 (2); Swiss Private International Law Act 1987, chapter 12, article 180 (c); English Arbitration Act (1996), article 24 (1) (a); German Arbitration Law (1998), section 1036 (2); Rules of Arbitration of the International Chamber of Commerce, article 11 (1); American Arbitration association International Rules (2003), article 8 (1); Arbitration Rules of the London Court of International Arbitration (1998), article 10 (3)

<sup>13</sup> Under the Swedish Arbitration Act of 1929 (amended on 1 January 1982), Section 5 an arbitrator should not be: (1) a minor; (2) one who has previously tried the dispute submitted to arbitration; (3) one who has given evidence on the dispute; (4) one who is related to a party in such a way that if he were a judge, he would be disqualified. The Uruguay Code of Civil Procedure (1970), Article 580 provides that the arbitrator should not be in "family relationship to any party within the fourth degree of consanguinity or the second degree of affinity". Code of Civil Procedure of Greece, Book Seven (Law No. 44 of 21 June 1967, amended on 15 September 1971) Article 871, para. 1. prohibits to act as an arbitrator to the persons who was convicted for the crime and was deprived from its civic rights

such an imperative provisions leads to the case by case analysis. Thus the respective authority, whether institutional organ or national courts should consider all materials and facts of the case in order to establish whether the actions of the arbitrator or the links between him and the party to arbitration are substantial enough to amount to failure to comply with the requirement of impartiality and independence.

The main test which usually applied by the challenging authorities<sup>14</sup> when analyzing the character and the significance of the materials of the case is set up in the IBA Guidelines on Conflict of Interest in which it is stated that the objective test should be applied when deciding on disqualification of the arbitrators<sup>15</sup>. The essence of this test was well explained in *Flaherty v National Greyhound Racing Club Ltd*:

The test for apparent bias involves a two-stage process: the court must first ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Then it must ask itself whether the circumstance would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased.<sup>16</sup>

It should be noted that challenge claims should be decided on the basis of factual state of matters, without trying to examine the actual mental attitude of the arbitrator towards the case or the party to the arbitration. Thus in order to establish the partiality and dependence of the arbitrator the appearance of bias on the side of arbitrator is enough.

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<sup>14</sup> International Chamber of Commerce Arbitration Rules name Secretariat; London Court of International Arbitration refer to the Court; American Arbitration Association Rules refer to the Administrator. The parties could also apply the national courts with the challenge claim. However most of them require that the party should first apply to the respective institutional organs: English Arbitration Act (1996), article 24 (2); German Arbitration Act (1998), section 1037 (3)

<sup>15</sup> International Bar Association Guidelines on Conflict of Interest in International Arbitration, standard 1 (2) (b)

<sup>16</sup> *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117

Each challenge case on the impartiality and independence of the arbitrators are unique. Thus deciding on the challenges the respective authorities should take into consideration all the information and facts of the case and try to examine them individually. Nevertheless the common categories of circumstances which could cause the doubts on the arbitrator's impartiality and independence could be grouped in the general categories.

Thus, three categories of the circumstances might be the basis for accusation of the arbitrator in partial behavior: when arbitrator had previous connection with the dispute; when arbitrator has made previous professional statements on the subject-matter; when the actions of the arbitrators which took place during the arbitral proceedings raise doubts in his impartiality

The reasoning of the challenges on the basis of the fact that the arbitrator had previously dealt with the dispute or expressed his opinion about the same or similar topic on the scholar level is quite similar. Thus, in boss cases the party to arbitration might presume that the arbitrator has already fixed his opinion on the subject-matter of the dispute and will not be able to admit the new position in concern with the dispute.

Nevertheless it should be stated that the challenge of the impartiality of the arbitrator will not be accepted on the basis of his opinion on the similar or same topic as one of the dispute. In contrast, the challenge brought on the basis of the previous knowledge of the arbitrator about the factual circumstances of the specific case usually would be recognized.

The rationale of the admission of the challenges on the basis of previous familiarity with the subject-matter of the case is that the previous connection with the

dispute could influence the arbitrator in such manner as he will not be able to decide in impartial and fair manner.<sup>17</sup> In the Ben Nasser case the court held:

Where a decision has been made in the other proceedings by that arbitrator which can be seen as prejudice, particularly if, in the first proceeding, the arbitrator has participated in an award which will logically have certain repercussions on the issue to be decided in the second proceeding.

Nevertheless in the same decision the court also held that: “However the earlier decision must have a bearing in indivisible set of factual and circumstances which characterize the second dispute submitted to the arbitrator.” Consequently, the arbitrator should not be treated suspiciously if he had already decided on the case with the similar factual background, but not connected enough to the dispute at hand.

Thus in the Swiss case, decided by the court of first instance, the arbitrator who acted as a lawyer of both parties to the arbitration had drafted the contract which was the subject-matter of the arbitration. The court accepted the challenge grounding its decision in the following way: ““The person who draws up a contract and advises the parties on the contents thereof will be inclined, when he subsequently interprets it as arbitrator, to read it as he meant it and how he explained it to the parties when advising them”.<sup>18</sup>.

Third category of the cases refers to the events and actions of the arbitrators which took place during the arbitral proceedings. As an example, the phrases told by the arbitrator carelessly could be accepted by the party as an evidence of the

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<sup>17</sup> Ben Nasser v. BNP, CA Paris, October 14, 1993, 121 J.D.I 446(1994)

<sup>18</sup> . Bezirksgericht Affoltern am Albis, 26 May 1994; Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXIII (1998)

partiality on the side of the arbitrator. However in these cases the challenging authority tends to decline the challenges rather than admit them.

One of the most debated is the challenge of the remaining two arbitrators after replacement of the third arbitrator. The identical claim on challenge was raised in ASM Shipping Ltd, where the challenge was based on presumption that if one of the members of arbitral tribunal proved to be or appear bias, then each member of that tribunal is tainted. Deciding judge rejected the application and based his decision on the rule formed by the case law, that the re-hearing of the dispute before the newly formed tribunal would be appropriate only in the case the previous tribunal has already reached the decision on the dispute or on the particular issue of the dispute.<sup>19</sup>

The independence of the arbitrator might be challenged on the ground of a range of facts. Because of the abundant variety of the coincidence of circumstances, it is actually impossible to predict all of them and try to group them into definite categories. However it could be observed that the major number of the challenges is brought on the basis of lack of independence of arbitrator refer to:

- ✓ Continuing financial interest of the arbitrator involved
- ✓ Close professional relationship with one of the parties

In both cases the level of the ties should be of significant character. Thus in

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<sup>19</sup> 28 June 2007 High Court (Queen's Bench Division) Commercial Court EWHC 1513 Comm. (2007)

Schmitz v. Zilveti<sup>20</sup> the Circuit refused the challenge of the arbitral award, where one of the arbitrators was from the law firm which had represented the party to arbitration in at least nineteen cases during a 35-year period, and the most recent representation ended approximately 21 months before arbitration. court held that "Membership in a professional organization does not provide a credible basis for inferring an impression of bias...Moreover, to create an impression of possible bias that therefore requires disclosure, a business relationship must be substantial and involve financial consideration."

While analyzing the relationship between an arbitrator and the party the attention should also be paid to the duration and time limits of the relationship. Thus in Merit Ins<sup>21</sup> the court refused to grant vacatur; when direct employment relationship between the arbitrator and the president and principal stockholder of one of the parties continued for three years and resigned fourteen years prior to the arbitration. Thus the Seventh Circuit explaining its decision noted that "[t]ime cools emotions, whether of gratitude or resentment".

In contrast, substantial interest on the side of the arbitrator in the association with one of the parties to arbitration resulted in the approval of the challenge in Commonwealth Coatings case.<sup>22</sup> The examination of the facts of the case revealed that business relationship between arbitrator and party was "repeated and significant" and the arbitrator's company rendered the services to the party in connection with the project which were involved in the dispute. The same approach was

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<sup>20</sup> Schmitz v. Zilveti, III, 20 F.3d 1043 (9th Cir.1994)

<sup>21</sup> Merit Ins., 714 F.2d at 677, 680

<sup>22</sup> Commonwealth Coatings, 393 U.S. at 146, 89 S.Ct. at 338

taken in *Fenner & Smith, Inc.*<sup>23</sup>, where arbitrator had an evident material interest in favoring the party to arbitration which had a substantial ongoing business relationship with the company in which an arbitrator had a post of a high-ranking officer.

In conclusion, it should be stated that even though the arbitration rules fails to provide the common standard applicable when deciding on the challenges of the arbitrators or of the arbitral awards rendered by them, the internationally accepted practice has been established. Thus, in order to settle on the challenge the respective authorities should take into consideration all the material and circumstances of the case at hand and analyze them from the point of view of the reasonable third person.

### 3. Neutrality of party-appointed arbitrator

As it has already been noted the term neutrality addresses the “geographic or national equidistance” of the arbitrators.<sup>24</sup> Thus neutral arbitrator is one who is not the same nationality as either of the parties to arbitration. Pierre Lalive in his work gave following detailed explanation on how the absolutely neutral arbitrator should be able to think and behave:

More than a national lawyer, someone who is internationally-minded, trained in comparative law and inclined to adapt to a comparative and truly "international outlook." In this way, he will really be neutral in relation to the legal systems and methods, whether procedural or substantive, of both parties--systems and methods which, whatever may be the law chosen to govern the subject-matter in dispute, are

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<sup>23</sup> *Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir.1995)

<sup>24</sup> Ilhyung Lee *Practice and predicament: the nationality of the international arbitrator* Fordham International Law Journal, February, 2008



bound to influence to some extent the parties' attitudes and presentations, consciously or not, as arbitration practice frequently reveals<sup>25</sup>.

The standard of neutral arbitrator is applied by a majority of the arbitration rules. However, it should be noted that most of the arbitration rules name the “nationality” of the arbitrators, rather the neutrality. The various arbitration rules require that the nationality of the arbitrators should be taken into consideration during the appointment stage.<sup>26</sup> Thus it is more preferable that the nationality of the arbitrators should be other than the nationality of either party, but not mandatory.

The distinct standard applies to the sole or presiding arbitrators. Thus it is a compulsory rule to appoint on the post of sole or third arbitrator a person who is the representative of other nation than the parties to arbitration. The only possibility of the waiver of this requirement is the parties' agreement or the existence of a “suitable” or “special circumstances”<sup>27</sup>. In this context, it should be noted that under the Arbitration Rules of London Court of International Arbitration the agreement of “the parties who are not the same nationality as proposed appointee....all agree in writing otherwise “

More loyal approach is admitted for the party-appointed arbitrator. Thus, under the American Arbitration Association and American Bar Association Rules of

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<sup>25</sup> Pierre Lalive, *On the Neutrality of the Arbitrator and of the Place for Arbitration*, Swiss Essays on International Arbitration, Claude Reymond and Eugène Bucher, Eds., Schulthess Polygraphischer Verlag, Zürich, Switzerland (1984)

<sup>26</sup> Arbitration Rules of International Chamber of Commerce, article 9 (1); Arbitration Rules of the London Court of International Arbitration, article 5.5; American Arbitration Association International Rules, article 6 (4); Uncitral Arbitration Rules, article 6 (4)

<sup>27</sup> Arbitration Rules of International Chamber of Commerce, article 9 (3); World Intellectual Property Organisation Arbitration and Mediation Rules, art. 20(b), Publication No. 446(E) (effective from Oct. 1, 2002) )Arbitration Rules of the London Court of International Arbitration, article 6(1)

Ethics the neutral arbitrator is the third arbitrator which should remain absolutely equidistant from the parties, whereas the party-appointed arbitrator might be predisposed towards the party appointed him. Moreover, it is undeniable that in some instances the neutrality of the arbitrator is directly linked to the appointment mechanism. Thus the Glossary of Arbitration and ADR Terms and Abbreviations explains the meaning of term “neutral” as “not party-appointed arbitrator.”<sup>28</sup>

The justification of mentioned approach lies in the fact that party-appointed arbitrator fulfills some additional functions except the obligation to analyze and judge the case:

1. Raise confidence in the party who appointed the arbitrator that at least one of the members of the arbitral tribunal will carefully study the case presented by the party and thereby will urge other arbitrators to examine the evidences and testimonies of the party as carefully.
2. Arbitrator also serves as the translator of “legal culture” and “law itself” for the party appointed him in front of the other member of the panel.<sup>29</sup>

In this sense being the representatives of different countries international arbitrators are from: “a national framework of law, culture, economic and social circumstances, political and/or religious values and convictions, providing them with a cultural baggage which largely colors their way of thinking and reasoning”<sup>30</sup>. The

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<sup>28</sup> Pierre A. Karrer ed. *Glossary of Arbitration and ADR Terms and Abbreviations*, Swiss Arbitration Association, ASA Special Series No 30, August 2008

<sup>29</sup> Andreas F. Lowenfeld *The party-appointed Arbitrator in International Controversies: some reflections* Texas International Law Journal Vol. 30, No 59 (1995)

parties to arbitration proceedings usually tend to appoint the arbitrators originated from their countries with the hope that this person will be able to act as a “cultural intermediary” of the party who appointed him. This approach seems to be more justified in the light of the cultural diversity of the international arbitration nowadays.

The party might nominate as arbitrator a person from its own country which would be familiar with the party’s language, culture and legal system. Arbitrator appointed by the party in fact being the same nationality as appointing party, with the identical economic and social environment might display predisposition to the argumentation and legal concepts represented by the respective party.<sup>31</sup> The advantage of the practice is well explained by M. Scott Dohaney:

If, during deliberations, the presiding arbitrator is confused, whether as the result of language, cultural differences, differences in legal systems, or unfamiliarity with trade practices, the party arbitrator can set him straight<sup>32</sup>.

Even though the party arbitrator “may be predisposed to the party who appointed him, but in all other respects is obligated to act in good faith and with integrity and fairness”.<sup>33</sup> Moreover the general standards exist which the party appointed arbitrator should consider throughout the arbitral proceedings in order not to go too far with the function of explaining the true meaning of the evidences presented by the respective party.. It is allowed under the various arbitration rules

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30 Rosabel E. Goodman Everard *Cultural Diversity in International Arbitration - A Challenge for Decision-Makers and Decision-Making* Arbitration International, Vol. 7 No. 2 (1991)

<sup>31</sup> Rosabel E. Goodman Everard *Cultural Diversity in International Arbitration - A Challenge for Decision-Makers and Decision-Making* Arbitration International, Vol. 7 No. 2 (1991)

<sup>32</sup> M. Scott Donahey *The Independence and Neutrality of Arbitrators* Journal of International Arbitration, Vol. 9 No. 4 (1992)

<sup>33</sup> American Arbitration Association and American Bar Association Code of Ethics, Canon VII, para. A(1)

that the party appointed arbitrator is might discuss with the party to arbitration the issue of appointment of the third arbitrator or to inform the arbitrator about the subject-matter of the dispute. However such type of discussion should not mount to such level when arbitrator shares his position and gives advices to the party. Thus, in the decision of the Federal Court of the United States <sup>34</sup> an arbitrator had discussed in the office of the party to arbitration the merits of the dispute, the defense tactics, examined documentary evidence presented by the party and invited the arbitrator of the other party to discuss the merits of the case prior to the selection of the presiding arbitrator. Such type of action on the side of the arbitrator is severely criticized. The limit of the preliminary discussion of the presiding arbitrator with the appointing party should be observed. Thus the arbitrator is advised to reveal the information and facts of the case which would guide him in his decision whether to accept the appointment or not.

The experts in the area of the International Commercial Arbitration have divergent opinions on the issue of the ex-parte communication between the arbitrator and the party who appointed him after the ending of the first phase when the appointment had been made and the third arbitrator had been selected. Some commentators strictly prohibit such practice, others seems to be more loyal, when the intention to communicate privately with the party was beforehand advised to all the participants of the arbitration proceedings<sup>35</sup> However, it is clear that absent

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<sup>34</sup> *Metropolitan Property and Casualty Ins. Co. v. J. C. Penney Casualty Ins. Co.*, 780 F. Supp. 885, 888 and 893 (D. Conn. 1991)

<sup>35</sup> G. A. Alvarez *The Challenge of Arbitrators*, (1990) Vol. 6, No. 3, *Arbitration International* 203, 217.; M. L. Smith *Impartiality of the Party-Appointed Arbitrator*, (1990) Vol. 6, No. 4, *Arbitration International* 320, 327; A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, London, 1st Edition, 1986; Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, , Oceana Publications, Inc., Paris (2nd

agreement or pre-announced intention, ex parte communication between a party and its appointed arbitrator is clearly improper, and such secret communication would constitute a clear violation of an arbitrator's duty of "independence" and "impartiality".

## II. Duty to Disclose

### 1. Disclosure as evidence of the arbitrators' neutrality

The mandatory obligation of the arbitrator to disclose any information which could raise reasonable doubts in his neutrality is provided by the relevant provisions in all major international arbitration rules and national laws. Thus, under the UNCITRAL Rules and American Arbitration Association International Rules arbitrators have to disclose “any circumstances likely to give rise to justifiable doubts as to his impartiality or independence”.<sup>36</sup> The same approach was taken by the authors of the Arbitration Rules of London Court of International Arbitration, which however distinguished by the procedural aspects of the disclosure.<sup>37</sup> Whereas the Arbitration Rules of International Chamber of Commerce set up the requirement that arbitrator should consider the circumstances from the point of view of the parties to the arbitration: “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.”<sup>38</sup>

Disclosure requirement is also a fundamental element of national arbitration laws. Thus Swiss law demands the mandatory disclosure of “circumstances that could give rise to doubts on his independence”<sup>39</sup> Under the French Code of Civil Procedure an arbitrator should disclose the facts that could be a reason for his

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<sup>37</sup> Arbitration Rules of London Court of International Arbitration, Article 3.3.1

<sup>38</sup> Arbitration Rules of International Chamber of Commerce, Article 2 (7).

<sup>39</sup> G. R. Delaume, New Swiss Arbitration Statute Emphasizes Party Autonomy and Restricts Judicial Review, in *The New Swiss Law on International Arbitration* 21, 31, Swiss Arbitration Association, Basle, 1990

disqualification<sup>40</sup>. The arbitrator in the United States should consider disclosing of “any dealings that might create an impression of possible bias”.<sup>41</sup>

The obligation to disclose neutrality arises as soon as arbitrator is approached with the invitation to be appointed and should be fulfilled before the appointment or confirmation would be made. This duty of the arbitrator continues throughout the arbitral proceedings. Accordingly the arbitrator has a responsibility to inform the parties and the Institutional Authorities about the facts that could impact his or her impartiality in the eyes of the parties, which arose after the commencement of the arbitral proceedings.

. A leading Arbitration Institutions in their arbitration rules requires the minimal amount of action on the part of the arbitrator. Thus the arbitrators should make a disclosure to the Institutional authorities, which in its turn would inform the parties about the facts advised by the arbitrator (Arbitration Rules of International Chamber of Commerce; American Arbitration Association Arbitration Rules; Arbitration Rules of London Court of International Arbitration). Quite different approach was taken by the authors of the UNCITRAL Model Law which states no definitions to whom the disclosure should be made, presumably implying that it can be any person who approached the arbitrator.

The formal requirement for the disclosure under the most arbitral legislation is that the disclosure should be made in a written form. The distinguished procedure is prescribed by the Arbitration Rules of International Chamber of Commerce and Arbitration Rules of London Court of International Arbitration require the prospective arbitrator to sign the formal document, which would certify his or her independence.

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<sup>40</sup> French Code of Civil Procedure, Book 4 (Arbitration Legislation of 1981), article

<sup>41</sup> *Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145, 149, 89 S. Ct. 337, 339, 21 L.Ed.2d 301 (1968)

Under the Uncitral Model Law disclosure could be made orally, as the relevant provision does not contain the mandatory formal requirements.

The analysis of the relevant legal provisions reveals the fact that the absolute discretion on which facts should be disclosed to the parties and institutional organs is left with the arbitrators themselves.

The only standards on which information have to be disclosed is that the circumstances should be of such nature as to appear to be suspicious in relevance to the impartiality and independence. Most of the arbitration rules require the test to be applied from the objective point of view, meaning that the arbitrator should question whether the information he supposes to disclose would raise any doubts in the mind of the reasonable person. However the approach of the Arbitration Rules of International Chamber of Commerce<sup>42</sup> seems to be more reasonable. Because in the international dispute settlement the parties ordinarily represent different countries with different legal and cultural background, more critical assessment of factual state of affairs should be applied by the arbitrator. Consequently, it is more preferable for the arbitrator to be able to “stretch beyond a purely national and domestic perspective and make a special effort and to consider the facts and circumstances as the parties might view and construe them”<sup>43</sup>

The same approach is used in the IBA Guideline on Conflict of Interests in International Arbitration of 2004<sup>44</sup>. It is recommended in deciding the issue of

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<sup>42</sup> The Arbitration Rules of International Chamber of Commerce, article 7(2)

<sup>43</sup> Stephen R. Bond, *The Experience of the ICC in the Confirmation/Appointment stage of an Arbitration in The Arbitral Process and the Independence of arbitrator*, ICC Publication S.A, 1991, page 12

<sup>44</sup> General Standard 3(a): ‘if facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any,



disclosure to take into consideration the whole knowledge arbitrator possesses with concerns to the parties, as well as the traditional and cultural backgrounds of the parties, in order to establish whether the state of affairs he meditates to disclose could seem suspicious to the parties or not<sup>45</sup>. Thus, it was rightfully noted by Anne K. Hoffman that:

The necessity to imagine what information might be considered relevant in the eyes of the parties emphasizes the need for any arbitrator to be prepared to disclose information even though he was convinced not only that he was independent but that objectively the circumstances and facts at issue would not raise a question of his independence. He must be able to warrant that he is in fact impartial and must also reveal all relevant information which might be seen as carrying the appearance of bias as it is this appearance which will be judged in the eyes of the parties.<sup>46</sup>

In order to provide the further assistance to the arbitrators the guidelines proceed with the list of circumstances which in respect of their relevance could or could not amount to the non-neutrality of the arbitrators thereby fixing the standards for disclosure. The list consists of 4 parts. First part is a Non-waivable Red list containing situation where the apparent conflict of interests exists, therefore the disclosure in any way will not prevent the conflict. This list includes but is not restricted to the cases, when the arbitrator and one of the parties have overlapping legal identity, or the arbitrator is a legal representative of the party, when the arbitrator has any type of controlling influence or significant financial interest in the party, as well as

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and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them”

<sup>45</sup> IBA Guideline on Conflict of Interests in International Arbitration of 2004, standard 3

<sup>46</sup> Anne K. Hoffmann, Duty of Disclosure and Challenge of Arbitrators: The Standard Applicable Under the New IBA Guidelines on Conflicts of Interest and the German Approach, Source: Arbitration International, Vol. 21 No. 3 (2005), pp. 427 – 436, page 430

when arbitrator get the financial benefit by advising or affiliating the appointing party. The Waivable Red List and the Orange List includes non-exhaustive list of situations where the considerable conflict of interest exist and where the parties could be reasonable doubted in the arbitrators' neutrality correspondingly. These circumstances should be disclosed by the arbitrators, which will be able to proceed if the parties have expressly agrees to it in the first case and if they did not raise objection in the second situation. The last green list enumerates situations which can not raise suspects on the arbitrators' neutrality therefore they could not be disclosed by the arbitrators.

In the case arbitrator still has hesitations whether to disclose relevant information to the parties or not, in such situation the main trade is formulated in the official disclosure form used by the ICC Court of Arbitration: "Any doubt should be resolved in favor of disclosure".

Eventually, if the challenge was brought by the parties on the basis of failure of arbitrator to disclose the relevant information, the deciding authority should take into consideration all the circumstances and character of the conflict: the intention of the arbitrator, the importance and character of the non-disclosed facts in relevance with the dispute. It was stressed by Howard Holtzmann that failure to disclose could be recognized as a ground for disqualification in spite of the fact that the non-disclosed information itself would not cause the doubts in the capability of the arbitrator to decide in impartial and independent way is appropriate only if the arbitrator "consciously attempted to cover up a fact or circumstance, and not where

the arbitrator merely exercised his judgment in the manner which is contemplated by the Code".<sup>47</sup>

Nevertheless in most case, those types of challenges could be successful even though the factual circumstances of the relationship between the arbitrator and the party would not be evaluated as evidence of partiality or dependence on the side of the arbitrator. Thus, in *Consorts Ury v. Galeries Lafayette, Orbisating and Commonwealth Continental Coating Corp. v. Continental Causality Co* <sup>48</sup>, the courts deciding on the denied the validity of the arbitral award being more concerned with the fact of non-disclosure of the relevant fact than the reality of non-neutral attitude of the arbitrators. For instance, in *Commonwealth Continental Coating Corp. v. Continental Causality Co* respondent was a "regular customer" of the engineering consulting company of one of the arbitrators. The dispute involved the common projects which involved the payment of fees of approximately \$ 12 000. The claimant challenged the arbitration award after he had learned about the undisclosed relationship, grounding the claim on arbitrator's failure to disclose. The U.S. Supreme Court in its decision held that failure to disclose a material relationship with one of the parties by the arbitrator constituted "evident partiality". The award was vacated. In its decision the court held that neutral arbitrator: "must be unbiased [and] also must avoid even the appearance of bias."

The conclusion could be drawn that before accepting the post the arbitrator should apply all his consciousness and knowledge in order to prevent any possible

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<sup>47</sup> Partner, Holtzmann in M. Scott Donahey, *The Independence and Neutrality of Arbitrators* *Journal of International Arbitration*, Vol. 9 No. 4 (1992),

<sup>48</sup> *Consorts Ury v. Galeries Lafayyet* case, Judgement of April 13, 1972, *Cour de Cassation*, 1975 *Rev. arb.* 235; *Orbis* case, Judgement of 26 October 1966 *Tribunal Federal*, ATF 92, 271; *Commonwealth Continental Coating Corp. v. Continental Causality Co*, 393 U.S. 145 (1968)

complication which could arise during or after the arbitral proceedings. Doing so the arbitrator should act in extremely cautious way, consider all possible reactions of the parties concerning the relevant facts and circumstances, and at last be able to tend to the option of disclosure in the case of any doubt arose.

## **2. Preventive nature of disclosure.**

Being the mandatory requirement under the all major arbitration rules, the duty to disclose is characterized by the significant positive impact on the arbitral proceedings. The early disclosure contributes the efficiency of the arbitral proceedings and precludes the possibility of disruptive actions on the side of the party to arbitration in future.

Thus, the disclosure of the any facts which could create the appearance of the bias made by the arbitrator in the beginning of the arbitral proceedings would effect in formation of more confident and transparent relationship among the participants of the proceedings. Such a cooperative environment reasonable will result in much more effective and beneficial proceedings<sup>49</sup>. Moreover, the early disclosure grants to the parties the possibility of early challenge, what actually will save much time and efforts for all participants to arbitration proceedings.

Furthermore, ensuring the awareness of the parties of the facts which could cause the doubts in the arbitrators' neutrality, impartiality or independence in the earliest stage of the arbitration proceedings serves the aim to eliminate any possible late challenge claims which would disrupt and extend the arbitration later on. The

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<sup>49</sup> Klaus Peter Berger, *International Economical Arbitration*, Deventer, Netherlands : Kluwer Law and Taxation Publishers, c1993; Alan Redfern and Martin Hunter *Law and practice of international commercial arbitration* London : Sweet & Maxwell, 2003

party who failed to challenge arbitrator on the ground of disclosed factor would not be allowed to do it on the same basis afterward.

The approach is widely upheld by the majority of courts and institutional authorities. As an example, the reference to the holding of the United States District Court could be made<sup>50</sup>. In this case, the failure of the party to “raise a claim of bias against an arbitrator”, who plaintiff in unrelated lawsuit against his former employer at time of arbitration, “until after an arbitration award has been made is deemed to have waived the objection”.

The justification of the approach was well explained in *Cook Industries, Inc. v. C. Itoh & Co. (America) Inc.* in which it is stated that party:

“cannot remain silent, raising no objection during the course of the proceeding, and when an award adverse to him has been handed down, complain of a situation of which he had knowledge from the first.... His silence constitutes a waiver of the objection.”<sup>51</sup>

The dilatory tactics are not welcomed according to the most arbitration rules as well. Thus, the general rule is that the challenges of the arbitrators should be made soon after the disclosure of the facts which raise doubts in the parties to arbitration with regard his independence or impartiality. The major arbitration rules fix the time limits within which the challenge could be brought.<sup>52</sup>

According to M. Scott Dohaney, the justification of such a strict approach could be viewed from two points of view. First, the decision not to disclose could be

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<sup>50</sup> United States District Court, D. Connecticut. *Larry E. WASHBURN v. James R. McMANUS*. 5:92CV00135(TFGD). Sept. 6, 1994.

<sup>51</sup> *Industries, Inc. v. C. Itoh & Co. (America) Inc.* 449 F.2d 106, 107-08 (2d Cir.1971)

<sup>52</sup> ICC Rules, Article 2, para. 8 (within 30 days); AAA International Rules (within 15 days); UNCITRAL Rules, Article 11 (within 15 days).

viewed as the waiver of the party's right to object. And second, it can be treated as “an implied admission that, in the first instance, the party did not regard the facts and circumstances as sufficiently.”<sup>53</sup> Thus, on the later stage of the arbitral proceedings the party to arbitration already is able to predict the results of the proceedings and it could be implied that the late decision of the party to arbitration to challenge is the resulted by desire to escape the award which will be unfavorable for it.

Additionally, it should stated that the failure on the side of arbitrator to disclose on due time the information concerning the connections between him and either party to arbitration will be judged differently on the final stage of the arbitration proceedings or after the award has been made. In deciding on the challenges on such a late stage the respective authorities consider two factors:

1. The actual conduct of the arbitrator during the proceedings should be recognized as the best evidence of the arbitrator's neutrality. Thus, even though the arbitrator failed to disclose the facts and circumstances which could give rise to justifiable doubts in his impartiality and independence the subsequent fair and equidistant behavior of the arbitrator during the whole proceedings might serve as the justification not grant the challenge.

- 2, Granting the challenge on such a late stage of the arbitration would have more disruptive and negative effect of the approval of challenge on the particular proceedings and on the “vaunted finality of the arbitral process”<sup>54</sup>.

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<sup>53</sup> M. Scott Donahey, *The Independence and Neutrality of Arbitrators*, Journal of International Arbitration, Vol. 9 No. 4 (1992),

<sup>54</sup> Alan Scott Rau *On Integrity in Private Judging Arbitration International*, Vol. 14 No. 2 (1998)

Consequently, in such cases when the failure to disclose was made in good faith. Thus the arbitrator was either unaware about the existence of links between himself and the party to arbitration or considered in a reasonable manner that the relevant facts and circumstances are not significant for the particular proceedings, the institution deciding on the challenge will tend to refuse the challenge in order to support the principle of finality of the arbitral proceedings<sup>55</sup>.

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<sup>55</sup> *John E. Reid & Assoc., Inc. v. Wicklander-Zulawski & Assoc.* (1993) 627 NE 2d 348 (Ill. App. Ct); *Turner v. Nicholson Properties, Inc.* (1986) 341 SE 2d 42, 44 (NC Ct App.); *Van Syoc v. Walter* (1992) 613 A. 2d 490 (NJ Super.)

## Conclusion:

The neutrality of the arbitrate tribunal is recognized to be the fundamental characteristic of the International Commercial Arbitration. Each time when parties to the contract choose the arbitration as a mean to resolve any disputes which could arise between them, pursue the aim to escape the “hostile jurisdiction of foreign state courts”.<sup>56</sup> This argument could be well accepted as the reason of recent development and expansion of the arbitration of the commercial disputes. In order to protect the integrity of the arbitral proceedings, various jurisdictions provide the basic procedural guarantees. The requirement of independence, impartiality and neutrality of arbitrators is recognized as one of the key element of the fair and reliable proceedings.

As it was discussed above in the thesis all major arbitration rules requires that the arbitrators should be and remain absolutely independent and impartial. The paradox of such kind of regulation is that neither of them provides the definite explanations of how the neutral arbitrator ought to be. Moreover different arbitration rules use distinct wording in order to address on and the same standards. This factors lead to the formation of a number independent and contradicting concepts on the neutrality of the arbitrators.

After the analysis of the relevant material on the subject-matter the following conclusion should be made: in spite of diversity of the approaches of what constitutes the neutrality, impartiality and independence in the context of the commercial arbitration, the common standards have been established.

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<sup>56</sup> Aleksandar Jaksic *Procedural Guarantees of Human Rights in Arbitration Proceedings – A still unsettled problem?* Journal of International Arbitration Vol. 24, No. 2, April 2007



Thus it could not be denied any more that all three terms address absolutely autonomous notions and cover the different circumstances. However all three terms requires application of one test in order to evaluate the attitude and behavior of the arbitrators. As it was mentioned the term neutrality of arbitrators refers to the national and cultural characteristics of the personality of the arbitrator. Impartiality also addresses the mental attitude of the arbitrator towards one of the parties, distinguishing from the neutrality by the requirement of apparent and substantial bias. Whereas, the notion of independence should be examined through the analysis of factual circumstances of the case, Independence is the lack of significant business, financial or personal relationships between the arbitrator and one of the parties. The facts of the each case on the challenge of the arbitrator or rendered award on the ground of lack of impartiality, independence and neutrality should be analyzed from the point of view of neutral reasonable third party.

The duty to disclose the facts and circumstances which could cause the doubts in the ability of the arbitrator to be impartial and independent from either of parties to arbitration constitutes the basic element of the concept of neutrality of arbitrators. So the fact of disclosure could be recognized as the evidence of impartiality and independence of the arbitrators. Moreover the early disclosure creates the confident climate during the proceedings and eliminates the possibilities of subsequent challenges on the basis of information revealed by the arbitrator, thus contributing much to the efficiency and integrity of the arbitration proceedings.

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