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Čestné prohlášení

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Declaration

I hereby declare that this thesis represents my own work and effort and all sources and aids used for this thesis have been properly cited. I also declare that this thesis has not been submitted for this or any other degree.

In Prague on 10 December 2015 Ondřej Čech

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1. Introduction

In the past several decades arbitration has gained a significant popularity as a method of resolving international disputes.[1] The history of arbitration is of course much longer than several decades, but it has never been used as widely as it is now (especially in the field of international business disputes). One of the main reasons for this tendency seems to be that in arbitration parties have power over selection of the decision makers instead of relying on a public body as in litigation.

According to the 2013 survey of trends in arbitration by Queen Mary University, the top two benefits of arbitration over other methods of dispute resolution are expertise and neutrality of the decision maker.[2] The aversion of parties towards public institutions is further evidenced by a similar survey of 2012 which found that significant majority (76 %) of arbitration users prefer unilateral selection of the co-arbitrators in a three member tribunal over any other method.[3] This shows how important it is for the parties to be able to select arbitrators and retain control over the constitution of the tribunal.[4]

The right to select an arbitrator, however, is subject to limitations as it may clash with some basic legal maxims such as the right to a fair trial. The specific definition of the right to a fair trial varies from one jurisdiction to another, but its essentials remain the same. In the context of the selection of arbitrators, the right to a fair trial manifests itself in a

[1] See BORN, Gary. International Commercial Arbitration. Second Edition. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2014. ISBN 9789041152190. pp. 93-97.

[2] *Corporate choices in International Arbitration: Industry perspectives* [online], London: PwC and Queen Mary, University of London, 2013 [accessed on 8.12.2015]
available at: http://www.arbitration.qmul.ac.uk/docs/123282.pdf.

[3] For example selection of arbitrators by an institution or appointing authority was supported only by 7 % of the respondents.
See *2012 International Arbitration Survey: Current and Preferred Practices in Arbitral Process* [online], London: White & Case LLP and Queen Mary, University of London, 2012 [accessed on 8.12.2015]
available at: http://www.arbitration.qmul.ac.uk/docs/164483.pdf.

[4] In order to simplify terminology I use the term "arbitral tribunal" or "tribunal" for both actual tribunals and sole arbitrators. Unless explicitly stated otherwise, the thesis generally assumes arbitration proceedings with an arbitral tribunal consisting of three arbitrators. Statements in this thesis are applicable to arbitration proceedings with a sole Arbitrator analogically.

form of the principle that all arbitrators must be and remain independent and impartial. That means that a person deciding a dispute must not be influenced by matters outside of the proceedings which would result in a bias towards or against either of the parties. In order to achieve this virtually all the rules applicable to arbitration contain a procedure to remove an arbitrator who fails to meet these requirements from the tribunal. Such procedures are most often called challenges of the arbitrator, which is the main topic of this thesis.

I have decided to focus my master's thesis on international arbitration as I believe that this is the field of law in which I have gathered the most knowledge over the course of my studies. The international arbitration, however, is such a wide phenomenon it would be impossible to write a meaningful thesis without narrowing the topic down to a more specific issue. For this reason I chose to focus my thesis on challenge of arbitrators as that is the aspect of arbitration in which I have most practical experience.[5] In addition to the above, resolving situations where an arbitrator appears to be biased is also very appealing because it contains ethical aspect which is both interesting and important to address in law.

In choosing a method of structuring this thesis I have decided to use a deductive model which should serve the best for the purpose of the thesis. Therefore, I use the first two chapters to provide general introduction of the issue and comparison between approaches of different arbitration rules and laws to the procedure and substance of challenges of arbitrators. In third chapter, I apply findings from the general part to a specific type of a ground for a challenge. The fourth chapter contains the mandatory summary in Czech language.

As the specific ground for a challenge discussed in the third chapter, I have chosen the so called 'issue conflict'. Issue conflict is a

[5] Past the initial quasi-practical experience with challenges of arbitrators in Vis and FDI Moot Courts where I represented the Charles University, I was also engaged in several real cases during my internships at the International Court of Arbitration of the International Chamber of Commerce and Baker & McKenzie.

special type of bias which may arise from the connection between an arbitrator and the subject matter of a given case i.e. the legal and factual issues upon which the decision in a particular dispute depends.[6] For example, issue conflict may arise in cases where an arbitrator (i) was previously, or is currently engaged in a related dispute; (ii) has previously assumed opinions regarding the specific dispute; or even (iii) adopted general opinions about legal issues upon which the dispute depends. The borderline between an opinionated arbitrator and a biased one is, however, very blurred and parties often try to use it for their advantage.

The objective of this thesis is to identify elementary principles upon which challenge provisions across jurisdictions are built and use these findings in analysis of the issue conflict. In respect of the issue conflict the task is to study where the issue conflict stands within the matrix of grounds for challenge what are its decisive elements. The result should be a contribution to the ongoing debates regarding issue conflict in a form of comprehensive summary of patterns and trends in the contemporary jurisprudence.

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[6] See BRUBAKER, Joseph R. The Judge Who Knew Too Much: Issue Conflicts in International Adjudication, *Berkeley Journal of International Law* [online]. 2008, 26(1) 111 [accessed on 8.12.2015]. ISSN 1085-5718.
available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1350&context=bjil;
HWANG, Michael, LIM, Kevin, Issue Conflict in ICSID Arbitrations, *Transnational Dispute Management* [online]. 2011 8(5) [accessed on 8.12.2015]. ISSN 1875-4120, available at http://www.arbitration-icca.org/media/1/13579088941840/hwang_and_lim_-_issue_conflict_in_icsid_arbitrations_tdm.pdf;
ZIADE, Nassib G. How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?, *ICSID Review. Foreign Investment Law Journal* [online]. 2009 24(1) 49 [accessed on 8.12.2015], ISSN 0258-3690 available at http://icsidreview.oxfordjournals.org/content/24/1/49.extract.

2. Comparison of Procedure of Challenge Provisions

Arbitration is a private form of dispute resolution, hence, its basis lies in an agreement of parties. Such agreement may be in a form of either arbitration clause included in a contract to refer any potential future disputes related to such agreement to arbitration; or in a rarer form of arbitration agreement which is concluded by parties after a dispute has already arisen (both arbitration clause and arbitration agreement shall be hereafter referred to as 'arbitration agreement').[7]

In the arbitration agreement, the parties usually determine only several basic elements of the arbitration such as the place and the language of the proceedings, number of arbitrators and for the rest of the procedure refer to arbitration rules which become part of this arbitration agreement.[8] This forms the dichotomy of arbitration rules and arbitration laws as the proceedings are governed primarily by the arbitration rules i.e. agreement of parties, but arbitration law of the seat of arbitration (lex arbitri) [9] provides the mandatory provisions from which the arbitration agreement cannot depart. The arbitration law also provides subsidiary support where the rules are silent and governs the relationship between the arbitral tribunal and national courts. It is also possible to select no rules at all and let the entire procedure be governed by the arbitration law which, however, is often not as detailed as the rules.

Important distinction must also be made between the institutional arbitration and the so-called ad hoc arbitration which is closely connected to the issue of selection of the arbitration rules.[10] Most of the arbitration rules are connected to arbitration institutions, hence, by choosing arbitration rules the parties are also choosing the institution which will administer their potential dispute. In institutional arbitration, bodies of the selected institution replace the court in some of the

[7] See BORN, supra note 1, pp. 241 – 244.
[8] Ibid., pp. 203-204.
[9] See BELOHLAVEK, Alexander. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář. 2. vydání.* Praha: C. H. Beck, 2012, ISBN 978-80-7179-342-7, pp. 9 – 11.
[10] See BORN, supra note 1, pp. 169-171.

processes (subject to limitations of the mandatory provisions of applicable arbitration law) one of which are usually decisions upon challenges of arbitrators. In ad hoc arbitration no institution is selected and the arbitration is generally administered directly by the state courts. Therefore in order to perform a complex comparison of rules applicable to challenges of arbitrators it is necessary to include both arbitration rules and arbitration laws.

As any other legal process, challenge of an arbitrator consists of two elements: first of them is the procedure which describes how the challenge is administered and who renders the decision upon it; and second one is the substance which addresses circumstances, under which a challenge should be successful i.e. the grounds for challenge. As these two elements are entirely different in their nature, this thesis addresses them separately starting with the procedure which is more heterogeneous in this chapter and continuing with substance where the differences are more subtle in the next chapter. This scheme also allows for better connection with the third chapter which is closely related to the substance.

The arbitration rules and laws in the following comparison have been selected to include those which are most frequently selected by the parties while also having sufficiently diverse set of samples which would allow for demonstration of different approaches.[11] Therefore, for instance, none of the arbitration laws which were based upon the UNCITRAL Model Law such as Austria or Singapore[12] were selected as the thesis addresses the model law itself instead. The selection of compared examples is completed by adding arbitration rules and arbitration law from the Czech Republic to pay respect to my home jurisdiction.

[11] To determine which rules and jurisdictions are most popular I have used the data in the 2014 ICC Statistical Report [online], Paris: ICC, 2014 [accessed on 8.12.2015].
available at http://www.iccdrl.com/statisticalreports.aspx.

[12] See *Status of UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* [online], [accessed on 8.12.2015]. available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

2.1. Arbitration Rules

As explained above, the arbitration rules (once selected) form a part of the arbitration agreement which means that they generally have priority over the applicable arbitration law. In respect of challenges to arbitrators this means that parties may rely on largely autonomous means of resolving challenges and that the procedure should be more expeditious in comparison to the state courts.[13] Nonetheless, even once the institutional arbitration is selected, the state courts are not eliminated entirely from deciding on matters related to the composition of a tribunal. That is because an award rendered by an improperly constituted tribunal can be set aside by state courts.[14]

2.1.1. UNCITRAL Arbitration Rules

The UNCITRAL Arbitration Rules[15] are the only arbitration rules in this comparison which are not directly connected to any arbitration institution as they are meant to be used in the ad hoc arbitration. This, however, does not mean instant reliance on a state court as if parties did not select arbitration rules at all. Art. 6 of the UNCITRAL Arbitration Rules stipulates that parties may select an appointing authority which has a similar role to an arbitration institution in respect of issues related to the constitution of the arbitral tribunal.

Any person or institution upon which the parties agree may be selected as appointing authority and the rules explicitly state that these persons include Secretary-General of the Permanent Court of Arbitration at The Hague.[16] The Secretary-General is also the one who chooses the appointing authority in case the parties are unable to find agreement on this matter.[17] Various persons and institutions have rendered decision

[13] See BORN, supra note 1, pp. 1828-1829
[14] See Ibid., pp. 3276-3278.
[15] UNCITRAL. *UNCTRAL Arbitration Rules as revised in 2010* [online]. New York: United Nations, 2011 [accessed on 8.12.2015]. available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.
[16] Art 6 para 2 UNCITRAL Arbitration Rules.
[17] Art. 6 para 3 UNCITRAL Arbitration Rules.

upon challenges in the capacity of appointing authority including the Secretary-General of the ICSID, the Secretary General of the PCA, the LCIA or SCC.[18]

The UNCITRAL Arbitration Rules challenge procedure itself is actually relatively simple. The challenging party must file the challenge within fifteen days after the arbitrator has been appointed or within fifteen days after the party became aware of the grounds for challenge. [19] Following the submission of challenge there is a fifteen day period when the challenge may be resolved 'peacefully' either by all other parties agreeing with the challenge or by resignation of the challenged arbitrator. If neither of these occurs, the challenge is then decided by the appointing authority which has a thirty day period from the initial submission of the challenge to render its decision.

The UNCITRAL Arbitration Rules procedure is quite straightforward, but it provides a good introduction to some of the fundamental principles of challenge procedures which can be found in all other arbitration rules addressed below. First of these principles is that the challenging party can file the challenge only within a short period after it became aware of its grounds. This limitation aims to prevent tactical challenges by parties who have information of the arbitrator's bias but would submit the challenge only if they are about to lose the case. Second important aspect is the option for the parties to agree upon the challenge and the arbitrator to resign when challenged. These options prevent the loss of credibility of the appointing party, arbitrator and the proceedings which would be inevitable in case of a successful challenge. Finally, the short deadlines are also typical for challenge procedures as the right to submit a challenge is easily abused for disruption of proceedings in the so-called guerrilla tactics. [20]

[18] DAELE, Karel. Challenge and disqualification of arbitrators in international arbitration. Alphen aan den Rijn: Kluwer Law International, 2012. ISBN 978-90-411-3799-9, p 180.
[19] Art. 13 para 1 UNCITRAL Arbitration Rules.
[20] For more information on guerrilla tactics see HORVATH, Gunther J (ed.), WILSKE, Stephan. *Guerrilla Tactics in International Arbitration.* Alphen aan den Rijn: Kluwer Law International, 2013. ISBN 9789041140029.

2.1.2. ICC Arbitration Rules

The International Court of Arbitration of the International Chamber of Commerce ('ICC') is possibly the largest commercial arbitration institution in the world. Due to this the provisions of the ICC Arbitration Rules[21] are rather complex in providing safeguards which should prevent improper composition of an arbitral tribunal. The challenge procedure under the ICC Arbitration Rules is only one of three instruments uses to ensure that the dispute is decided by arbitrators who meet the requirements of the rules. The remaining two instruments are the confirmation procedure and the replacement procedure.

Chronologically the first of the three safeguards is the confirmation procedure which occurs prior to the constitution of a tribunal. In ICC arbitration the parties do not have the power to appoint arbitrators, instead, the parties nominate their candidates. These candidates must be subsequently confirmed by the ICC Court and only then become part of a tribunal.[22] Upon nomination, the nominee discloses any potential conflicts of interest and the opposing party has an opportunity to object to confirmation. If no party raises an objection, the Secretary General of the Secretariat[23] confirms the nominee unless there are reasons (e.g. problematic disclosure) for which the Secretary General considers that the arbitrator should not be confirmed. [24]

In such case the matter is referred to the Committee Meeting of the ICC Court.[25] The ICC Court (via Committee Meeting) therefore decides

[21] INTERNATIONAL COURT OF ARBITRATION, International Centre for ADR. *Arbitration Rules: mediation rules* [online]. 2013 [accessed on 8.12.2015]. ISBN 9789284202089. available at http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/.
[22] See Arts. 12 and 13 ICC Arbitration Rules.
[23] The Secretariat of the ICC Court is a supportive body of the ICC Court which administers the cases, provides assistance to the parties and arbitrators and prepares materials (the so-called "agendas") upon which the ICC Court bases its decisions.
[24] Art. 13 ICC Arbitration Rules.
[25] The ICC Court rules at weekly committee meetings and monthly plenary sessions. The Committee meetings consist of a panel of two regular members of the Court and the President or one of the Vice-Presidents of the Court who chairs the meeting. The composition of the committee meeting is based on a rotation principle. The plenary session is a gathering of unspecified number of members of the Court (minimum number is six) chaired by the President or one of the Vice-Presidents where decisions are

on confirmation if one of the parties raised an objection or if the Secretary General suggests that the nominee should not be confirmed. Thus, the main purpose of the objection is to give parties an opportunity to bring the ICC Court's attention to an issue which was not disclosed or was disclosed without the relevant context. If the ICC Court decides on non-confirmation, the party which nominated such arbitrator is usually given a time limit to provide a new nominee.[26]

The challenge procedure under the ICC Arbitration Rules described in Article 14 is relatively straightforward. Party must submit the challenge within 30 days from confirmation or appointment of the challenged arbitrator[27] or within 30 days after this party became aware of the facts and circumstances on which the challenge is based. Upon challenge submission, the Secretariat notifies the challenged arbitrator, the other party/parties and the rest of the tribunal where applicable and asks them to provide comments on the challenge.[28] The ICC Arbitration Rules do not set a specific period for the Court to render its decision upon challenge. After the period for comments elapses the challenge is evaluated by the Secretariat and then submitted either to the Committee Meeting in case of straightforward challenges or the Plenary Session if the challenge is more complex.[29] In result this means that obviously unsubstantiated challenges may be resolved in a matter of two weeks while challenges which are submitted to the plenary session may take even more than two months.

Last instrument dealing with improper composition of a tribunal is the procedure of replacement of an arbitrator pursuant to Article 15 of the ICC Arbitration Rules. The primary function of this procedure is to

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taken by a majority vote (See ICC Arbitration Rules, Appendix I – Statutes of the International Court of Arbitration).

[26] FRY, James, GREENBERG, Simon, MAZZA, Francesca. *Secretariat's Guide to ICC Arbitration* [online]. Paris: ICC, 2012 [accessed on 8.12.2015]. ISBN 9789284202430, available at http://www.iccdrl.com/secretariatguide.aspx, para 3-513.

[27] 'Appointment' is the term the ICC Arbitration Rules use when the arbitrator is selected by the ICC Court without prior nomination of a party. This procedure is used if parties agree to it, if a party is unable to present a nominee or if parties cannot agree on a joint nomination of a sole or presiding arbitrator (see FRY, supra note 26, paras 3-365 – 3-368).

[28] Art. 14 ICC Arbitration Rules.

[29] See FRY, supra note 26, para 3-590; DAELE, supra note 18, pp. 181 – 182.

react to a situation where an arbitrator may serve on a tribunal no longer either because of death, resignation, successful challenge or all parties agreeing with the replacement.[30] The secondary function is to remedy situations where a tribunal is disrupted by an issue which cannot be resolved by challenge or non-confirmation.[31] Such cases are very rare and as the Court must give the arbitrators and parties an opportunity to react, in case the Court considers application of this provision and most arbitrators rather resign if there is an issue than being replaced by the Court. The few cases where the Court has replaced an arbitrator of its own initiative usually regard arbitrators who caused unacceptable delays in proceedings, are nonresponsive or had a conflict with the remaining arbitrators on the tribunal.[32]

The statistics of the ICC [33] show that the number of non-confirmations is overwhelmingly greater than number of successful challenges and replacements. This shows that ICC's preventive measures represented by the confirmation mechanism efficiently manage to resolve most of potential issues with arbitrators at the outset of the proceedings where damage and delays are minimized. [34] On the other hand this brings a concern whether the ICC tends to go too far in the prevention as arbitrators are known to be non-confirmed on grounds which would hardy suffice for a challenge.

2.1.3. LCIA Arbitration Rules

The London Court of International Arbitration ('LCIA') is another large arbitration institution in Europe. In respect of challenges of arbitrators the composition of the provisions in the LCIA Arbitration Rules[35] is very similar to the ICC Arbitration Rules with few yet substantial differences. The constitution of a tribunal is essentially the same as under the ICC

[30] Art. 15 (1) ICC Arbitration Rules.
[31] Art. 15 (2) ICC Arbitration Rules.
[32] FRY, supra note 26, para 3-615.
[33] See 2014 ICC Statistical Report, supra note 11.
[34] FRY, supra note 26, para 3-572.
[35] *LCIA Arbitration Rules* [online]. [accessed on 8/12/2015].
available at http://www.lcia.org//Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

Arbitration Rules with the difference that instead of confirming nominations of the parties, the LCIA Court appoints all arbitrators itself, but takes regard to nominations of parties if they are entitled to them.[36]

The challenge procedure is described in Article 10 of the LCIA rules where challenges are construed as a proposal to revoke arbitrator's appointment. The period for submission of a challenge is set at 14 days from the formation of the tribunal or 14 days from the moment the challenging party became aware of the grounds for challenge. Upon submission, the challenged arbitrator, other parties and other arbitrator have an opportunity to provide their comments. Unless the arbitrator resigns or other parties agree with the challenge within another 14 days from the submission of the challenge, the Secretariat of the LCIA[37] suggests which composition of the LCIA Court should decide on the challenge and prepares the so-called dossier which contains all relevant documents necessary for rendering a decision upon the challenge.[38] The President of the LCIA decides who should address the challenge and subsequently the selected member or division of the LCIA Court then renders the decision.[39]

In addition to the above and unlike the ICC Arbitration Rules, Article 10 (1) of the LCIA Arbitration Rules provides a possibility to revoke an appointment of an arbitrator upon request by all remaining members of the tribunal. The LCIA unfortunately does not publish any statistical data regarding challenges, however, it may be assumed that the proportion of unsuccessful nominations and successful challenges will be very similar to the ICC.

[36] Art. 5 LCIA Arbitration Rules.
[37] Secretariat of the LCIA has a similar role to the Secretariat of the ICC Court.
[38] DAELE, supra note 18, pp. 182 – 183.
[39] Ibid.

2.1.4. ICSID Convention

The ICSID Convention [40] governs investment arbitration proceedings supplemented by the ICSID Arbitration Rules [41] which contain further specifics of the procedures defined in the ICSID Convention. Challenge of arbitrators is called disqualification in the ICSID system and is described in Articles 57 and 58 of the ICSID Convention and Rule 9 of the Arbitration Rules. Article 57 sets conditions of submitting a proposal to disqualify while Article 58 describes the disqualification itself.

Pursuant to Article 57 of the ICSID Convention, a party may propose disqualification of an arbitrator. The power to make such proposal is exclusive to parties, hence, no institutional body or the other arbitrators on the tribunal may initiate the disqualification procedure. [42] Rule 9 of the Arbitration Rules adds additional requirement that the proposal must be submitted promptly. This means that the submission must be made as soon as possible after such party learns of the reasons for disqualification otherwise the proposal may be declared inadmissible. [43]

The decision upon the disqualification of an arbitrator is taken by the other members of a tribunal, as described in Article 58 of the ICSID Convention. Only in case a sole arbitrator or a majority of a tribunal is challenged the decision is made by the Chairman. [44] This is rather unusual compared to other arbitration rules and has been subject to some criticism. Although the other members of the tribunal may have the most insight into the performance of the challenged arbitrator, they are also most vulnerable to be biased themselves in making this decision. This is a problem especially in investment arbitration as the pool of arbitrators

[40] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* [online]. [accessed on 8.12.2015].
available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm.
[41] Rules of Procedure for Arbitration Proceedings [online]. [accessed on 8.12.2015]. available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF.htm.
[42] SCHREUER, Christoph. *The ICSID convention: a commentary on the Convention on the settlement of investment disputes between states and nationals of other states*. New York: Cambridge University Press, 2001, ISBN 9780521803472. p. 1199.
[43] Ibid., pp 1200 – 1201.
[44] Chairman of the Administrative Council of ICSID.

is quite small and they are bound to meet on various occasions informally and develop friendships. As disqualification from tribunal can have a significant adverse impact on arbitrator's career, most arbitrators tend to be very generous towards the challenged colleague.[45] This may be the reason why the first ever disqualification decision rendered by members of the tribunal has been made in 2014.[46]

2.1.5. Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic

Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic ('Czech Arbitration Court')[47] is arbitration institution in Prague, Czech Republic which administers mainly domestic and local disputes.[48] The local focus of the Czech Arbitration Court is reflected throughout its rules ('Czech Arbitration Rules')[49] making them very different from others in this comparison.

The general process of selection of arbitrators is quite standard in allowing each party to appoint one arbitrator who together agree on the presiding arbitrator from a list. In case a party fails to select an arbitrator or if arbitrators are unable to agree on the presiding arbitrator, the arbitrator is appointed by the president of the Czech Arbitration Court. The president also appoints where a dispute should be decided by a sole arbitrator unless parties agreed otherwise.[50]

Special feature of the Czech Arbitration Rules is that in the event that the party-appointed arbitrators are unable to choose a presiding

[45] DAELE, supra note 18, pp. 169 – 174.
[46] See Caratube International Oil Company LLP v. The Republic of Kazakhstan, ICSID Case No. ARB/08/12.
[47] For further information on the Czech Arbitration Court see its website at www.soud.cz.
[48] See *Statistic of disputes and domain disputes* [online]. [accessed on 8.12.2015]. available at http://en.soud.cz/downloads/Statistika_sporu_web_20150611.pdf (in Czech only).
[49] *Rules of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic* [online]. [accessed on 8.12.2015]. available at http://en.soud.cz/rules/rules-consolidated-text-1st-october-2015.
[50] Art. 23 paras 1-4 Czech Arbitration Rules.

arbitrator, either of the parties may apply for 'Special Appointment'. The Special Appointment means that instead of simply appointing a presiding arbitrator from the list, the president presents ten candidates to the parties and each of them may select four arbitrators they reject. President then chooses the presiding arbitrators from the remaining candidates.[51]

Challenge provisions are contained in Article 24 of the Czech Arbitration Rules. Parties may challenge an arbitrator at any time prior to the first oral hearing. Later challenge is permissible only in case the late submission is caused by of reasons deserving special attention. In disputes arising out of consumer contracts, the parties may file the challenge at any time without any such restriction.[52] The decision upon the challenge is primarily taken by the other arbitrators on the tribunal similarly to the ICSID system[53]. If the other arbitrators are unable to reach an agreement or if two or all arbitrators are challenged (which also includes a situation where a sole arbitrator is challenged), the challenge is passed on the board of the Czech Arbitration Court[54] which renders the decision instead.[55] The board also decides if a challenge is made prior to the constitution of the tribunal. Similar procedure is also used for replacement of an arbitrator for inactivity.[56]

The difference between the Czech Arbitration Rules and their global counterparts discussed above is quite obvious. Firstly, there is no "speak now or forever hold your peace" rule, as the parties may submit the challenge at any time before the hearing, regardless of how long they were aware of the grounds for this challenge. This opens door for

[51] Art. 23 paras 4-5 Czech Arbitration Rules.
[52] Art. 24 para 1 Czech Arbitration Rules.
[53] See supra sub-chapter 2.1.4.
[54] The board of the Czech Arbitration Court is a body of thirteen members who are appointed by Chamber of Commerce of the Czech Republic and Agrarian Chamber of the Czech Republic from the Czech Arbitration Court's list of arbitrators (Art. III of the *Statute of the Czech Arbitration Court* [online]. [accessed on 8.12.2015]. available at http://www.soud.cz/ke-stazeni in Czech only). In order to be eligible for being put on the list, an arbitrator must have a clean criminal record and certain personal qualities. The decision on who is put on the list is made by the board (Art. IV of the Statute of the Czech Arbitration Court).
[55] Art. 24 para 2 Czech Arbitration Rules.
[56] Art. 24 para 4 Czech Arbitration Rules.

tactical challenges, which are considered to be undesirable as they delay and disrupt proceedings.[57] Secondly, there are no deadlines for the decision-makers which lowers the pressure to render decision on the challenge as soon as possible. Lastly, there is much power over the challenges as well as appointments vested in the board and especially the president. This might be a concern especially considering that members of the board are selected politically by public bodies and there are no internal safeguards which would limit this power.

[57] See BAKER, Mark, GREENWOOD, Lucy. Are Challenges Overused in International Arbitration?. *Journal of International Arbitration* [online]. 2013, 30 (2) pp. 101-112 [accessed on 8.12.2015]. ISSN 0255-8106. available at http://www.kluwerlawonline.com/abstract.php?area=Journals&id=JOIA2013008.

2.2. Arbitration Laws

In order to complete the overview of challenge procedures, it is necessary to examine also the arbitration laws which apply fully where no arbitration rules are selected and their mandatory provisions also have impact in institutional arbitration. While arbitration rules are stand-alone documents, arbitration laws are integral part of an entire legislative system. This makes the arbitration laws usually less detailed than the rules because laws have the option to refer to other legislation when necessary. Arbitration rules lack this benefit and, therefore, must include entire regulation for the proceedings. Due to this interconnection of the arbitration laws with the rest of legislation, the comparison of their challenge procedures could be stretched to an entire thesis. However, that is not the purpose of this chapter which is meant to merely briefly address this topic in order to complement the comparison of the arbitration rules above.

2.2.1. UNCITRAL Model Law Jurisdictions

Dominant place among the arbitration laws is held by the UNCITRAL Model Law[58] which ironically is not an arbitration law per se. As its name suggests, the UNCITRAL Model Law is a model arbitration law designed by the UNCITRAL to assist states in reforming and modernizing their arbitration laws by adopting or otherwise reflecting it in their legal system.[59] The measures to use the UNCITRAL Model Law for global harmonization of international arbitration laws were quite successful as there are currently 70 States where legislation based on UNCITRAL Model Law has been adopted.[60]

The challenge procedure is contained in Article 13 of the UNCITRAL Model Law where paragraph 1 allows the parties to agree on any procedure subject to provisions of paragraph 3; paragraph 2

[58] UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006 [online]. Vienna: United Nations, 2008 [accessed on 8.12.2015]. ISBN 9789211337730. available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html
[59] Ibid.
[60] See supra note 12.

describes the procedure if the parties have not agreed otherwise; and paragraph 3 allows for a mandatory court review of any unsuccessful challenge.

On first sight, the procedure itself as described in paragraph 2 is very similar to the one contained in UNCITRAL Arbitration Rules[61] as the challenging party must submit the challenge within 15 days after becoming aware of the constitution of the tribunal or the grounds for challenge. However, this is where the similarity ends. The challenge decision is not rendered by the appointing authority, but by the entire arbitral tribunal itself including the challenged arbitrator.

This system has been subject to some criticism as inclusion of the challenged arbitrator in the deliberation process can cause discord within the tribunal.[62] Possibly even more serious concern is the obvious bias of the challenged arbitrator in taking part in rendering decision on the challenge.

2.2.2. French Code of Civil Procedure

In French legal system the international arbitration regulation is contained in the second title of the fourth book of the French Code of Civil Procedure ('FCCP'); [63] Article 1506 of the FCCP, however, makes reference to the domestic arbitration provisions in the previous title for arbitration removal Pursuant to Article 1458 of the FCCP, an arbitrator shall be removed if all parties agree to it. Pursuant to Article 1456 of the FCCP, if an agreement on removal of arbitrator cannot be reached, the party wishing to make a challenge submits an application to the person administering the arbitration or respective court if no such person is selected. The application must be submitted within a month following disclosure or discovery of the fact upon which the application is based. The person administering the arbitration refers to institutional

[61] See supra sub-chapter 2.1.1.
[62] PODRET, Jean-Francois, BESSON, Sebastien. Comparative Law of International Arbitration. 2nd ed. updated and rev. London: Sweet & Maxwell, 2007. ISBN 978-0-421-93210-4. p 357.
[63] Code de procédure civile, enacted by Decree No. 81-500 of 12 May 1981.

arbitration; however, the parties may also appoint other entities to administer the proceedings.[64]

2.2.3. English Arbitration Act

In English jurisdiction, arbitration is governed by the English Arbitration Act ('EAA') [65] which applies to all arbitration proceedings with seat of arbitration in England, Wales or Northern Ireland regardless of whether the proceedings are domestic or international.[66] Pursuant to Section 23 of the EAA, arbitrator's authority may be revoked by parties acting jointly or by an institution in which an agreement of parties vested such power. None of these, however, may deprive the state court of the power to remove an arbitrator from tribunal under Section 24 of the EAA. The state court may remove an arbitrator following an application of a party which exhausted any available recourse under section 23 of the EAA. The deadline provision which is meant to prevent tactical challenges is contained in section 73 of the EAA which stipulates that a party which does not object to improper conduct of the proceedings either forthwith or within agreed time, cannot make any such objection later.[67]

2.2.4. Swiss Private International Law

Swiss Private International Law ('SPIL') [68] applies to international arbitration proceedings where parties have agreed on seat of arbitration in Switzerland. Challenge procedure, as described in Article 180 of the SPIL, is not particularly detailed as the provision focuses primarily on the grounds for challenge and gives explicit preference to any rules

[64] See *Arbitration in France* [online]. [accessed on 8.12.2015]. available at https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_FRANCE.pdf, Chapter 4.
[65] Arbitration Act 1996, in force since 31 January 1997.
[66] Section 2 of the English Arbitration Act; See: *Arbitration in England and Wales* [online]. [accessed on 8.12.2015]. available at https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_ENGLAND%20WALES.pdf, Chapter 5.
[67] PODRET, supra note 62, p 357.
[68] Federal Private International Law Act of 18 December 1987.

agreed by the parties.[69] Nevertheless, if the parties did not make any such agreement the challenge is decided by the judge at the seat of the arbitral tribunal. The ground for challenge must be notified to the arbitral tribunal and the other party without delay.

2.2.5. Czech Arbitration Act

Arbitration seated in the Czech Republic is governed by the Czech Arbitration Act ('CAA').[70] This act was very loosely based on the UNCITRAL Model Law in the 1994 when it was adopted,[71] but has been amended to the extent that the resemblance is almost gone. The Czech challenge provisions differ from the others in this comparison by putting an emphasis on the arbitrator's duty to resign if the grounds for challenge arise.

The structure of the challenge provisions in the CAA is as follows: Section 8 paragraph 1 of the CAA stipulates circumstances under which an arbitrator shall be excluded from the proceedings. Section 11 of the CAA continues by stating that the already appointed arbitrator shall be excluded if the circumstances under Section 8 are discovered subsequently. Finally Section 12 paragraph 1 of the CAA imposes a duty to resign upon appointed arbitrator where circumstances pursuant to Section 11 are discovered. The challenge itself is construed in Section 12 paragraph 2 of the CAA as an alternative solution in case the arbitrator does not resign. Pursuant to this paragraph, the parties may agree on a challenge procedure which, however, does not limit either of the parties to refer the matter to a court.

This very brief description of challenge procedure has been broadened by case law[72], which confirmed that the Czech Code of Civil Procedure[73] ('CCCP') should be applied to challenge procedure mutatis mutandis pursuant to the Section 30 of the CAA which determines its

[69] Article 180 (3) of the Swiss Private International Law.
[70] Act no. 216/1994 Coll., on Arbitration Proceedings and Enforcement of arbitral awards.
[71] Parliamentary report to the Act no. 216/1994 Coll. dated 29 June 1994.
[72] Judgment of the Supreme Court of the Czech Republic no. 23 Cdo 4476/2011 dated 21.11.2012.
[73] Act no. 99/1963 Coll., Code of Civil Procedure.

applicability to the arbitration proceedings in general. According to Section 15a of the CCCP, parties are entitled to raise an objection as to bias of a judge at the first hearing by latest; or within fifteen days if it became aware of the bias after the first hearing.

2.3. Conclusion

The challenge procedures differ across institutions and jurisdictions, but the above comparison has shown that their basic elements are very similar because they share common rudimental purpose. This purpose is to address the matter of biased arbitrators as efficiently and diligently as possible while remaining protected from abuse. Such goal is, however, hard to achieve as its components tend to clash. For instance, if the rules focus on very diligent approach by allowing many instances of appellate review, the system would not be very efficient and could be easily abused. Similarly, strict system concentrating on expeditiousness of proceedings could overlook a biased arbitrator only because a party made some small procedural error.

I do not think that there is an ideal challenge procedure hiding somewhere to be discovered. Any set of rules is a result of a compromise which attempts to react to current status of the affairs it should apply to. In my opinion, the key to achieving the best possible rules is open-mindedness and willingness to learn from the others. In this respect much work has been done by the UNCITRAL's Working Group II which is responsible for both the UNCITRAL Arbitration Rules and the Model Law which are meant to represent these global best practices.

3. Comparison of Substance of Challenge Provisions

The substance of a challenge consists of an examination whether the challenged arbitrator should be removed from the proceedings i.e. consideration of whether the grounds for challenge are present.

Challenge of an arbitrator is a very serious matter which, if successful, may significantly distort the proceedings, detriment arbitrator's career or even affect credibility of an arbitral institution. For this reason the grounds for challenge are construed as a compromise between the interest of the challenging party to have its case heard by a proper arbitrator and the other party's interest to enjoy expeditious and uninterrupted proceedings. [74]

Neither of these interests should prevail over the other. Setting the threshold for disqualification of an arbitrator too low would cause never-ending proceedings where no arbitrator would last very long. At the same time setting this threshold too high would result in irremovable arbitrators rendering unjust awards. The desired outcome is balance between the two approaches where challenge is a good tool to ensure fairness of the proceedings which, however, cannot be used as a weapon in their disruption.

[74] DAELE, supra note 18, p 217.

3.1. Overview of Rules regarding Substance of a Challenge

Different arbitration rules and laws offer seemingly different provisions regarding substance of a challenge. Nevertheless many aspects are the same and even some terms are repeated (although often in different context). The grounds for challenge are usually construed as lack of qualities required in an arbitrator. The key terms in this respect are 'independence' and 'impartiality' lack of which is a ground for challenge in most of major sets of rules.[75] Other rules mention only one of these terms[76] which brings a question whether there is a difference between the two terms and if there is what is the impact of omitting one of them in challenge provisions.

Slightly different path was taken by both Czech Arbitration Rules and the Czech Arbitration Act. Both of them contain similar wording pursuant to which arbitrator may be challenged if: *"[…] there is a reason to question his lack of bias in view of his relationship to the case, the parties or their representatives.*"[77] Very different approach was taken by the FCCP which does not provide any ground for challenge and relies on case law instead.[78]

Apart from the grounds which address conflict of interest (i.e. lack of independence or impartiality), most rules also include other grounds which regard arbitrator's competence. These most often relate to availability, language and other kinds of required skills and lack thereof. Reason for a challenge may also be an improper conduct of the proceedings.[79] The ICC Arbitration Rules address alternative grounds for challenge by adding rather cryptic "*or otherwise*" at the end of the list of

[75] E.*g.* Art. 12 UNCITRAL Arbitration Rules; Art. 14 ICC Arbitration Rules; Art. 10 LCIA Arbitration Rules; or Art. 12 UNCITRAL Model Law.
[76] E.g. Art. 180 SPIL stipulates „*justifiable doubts as to his [arbitrator's] independence*" as a ground for challenge while Art 24 (1) EAA operates with „*justifiable doubts as to his [arbitrator's] impartiality"*; Art. 57 in connection with Art. 14 (1) ICSID Convention finds ground for disqualification in manifest lack of quality to exercise an independent judgment.
[77] Art. 24 (1) of the Czech Arbitration Rules; similar wording is also used in Section 8 of the CAA.
[78] Supra note 64, section 4.2.2.
[79] BORN, supra note 1, pp 1917-1918.

challenge grounds.[80] Challenges made under this provision were based upon wide array of reasons ranging from alleged lack of skills to inability to conduct proceedings due to problems related to substance abuse.[81]

Apart from stipulating what constitutes the ground for challenge most the rules also provide for some standard of proof which must be achieved for the challenge to be successful. In the examined challenge provisions such standard, if any, is set as reasonable or justifiable doubt. The only exception is the ICSID Convention where manifest lack of the required qualities must be proven.[82]

The above shows that the challenge provisions are actually quite similar to each other in respect of the grounds for challenge. However, such similarity is not hard to achieve when very abstract terms such as 'independence' and 'impartiality' are used while interpretation of these terms is left to the bodies deciding upon the challenge. Use of the abstract terms is, of course, a necessity as it is not plausible for the challenge provisions to include a catalogue of factual circumstances upon whose occurrence an arbitrator should be disqualified. Nevertheless, there have been attempts to gather case law and form such indicative catalogue. The most notable result of these attempts is represented by the IBA Guidelines on Conflict of Interest in International Arbitration (IBA Guidelines)[83].

[80] Art. 14 (1) ICC Arbitration Rules.
[81] See FRY, supra note 26, para 3-567.
[82] Art. 57 ICSID Convention; Case law is not unified in interpretation of this provision as some tribunals has perceived it as standard similar to reasonable doubt while others have considered as standard set higher; see DAELE, supra note 18, pp 218 – 239.
[83] *IBA Guidelines on Conflict of Interest in International Arbitration* [online]. London: International Bar Association, 2014 [accessed on 8.12.2015]. ISBN 978-0-948711-36-7.
available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

3.2. Role of the IBA Guidelines

The IBA Guidelines are a soft law instrument published by the International Bar Association on 22 May 2004. The aim of the guidelines as set out in their introduction is to: *"[…] help parties, practitioners, arbitrators, institutions and the courts in their decision-making process on these very important questions of impartiality, independence, disclosure, objections and challenges made in that connection."*[84] This aim is followed by provision of seven general standards which act as a very detailed challenge provision. The general standards stipulate the desired qualities in an arbitrator and how an arbitrator and parties should react in different situations related to conflict of interest.[85]

The second part of the IBA Guidelines provides four lists of model scenarios of potential conflict of interest divided by their seriousness. These lists are (i) Non-Waivable Red; (ii) Waivable Red; (iii) Orange; and (iv) Green set in order from most problematic to the least. The Non-Waivable Red List describes situations where an arbitrator should be removed from the proceedings regardless of any waivers raised by the parties. On the other end of the spectrum, the Green List addresses situations where there should be no actual conflict of interest, but the circumstances may be disclosed to parties nonetheless. [86]

Although the IBA Guidelines have never become part of any arbitration rules and are applied almost exclusively as soft law, they have become rather popular and are largely relied upon by parties in their challenges. [87] Nevertheless, approaches of courts and institutions have been very inconsistent, ranging from open criticism to actual citations in their decisions.[88]

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[84] Ibid. p. 4.
[85] Ibid. p. 7 – 16.
[86] Ibid. p. 17 - 19
[87] BORN, supra note 1, pp 1838 – 1839, 1850; GREENBERG, Simon. , Appendix: References to the IBA Guidelines on Conflicts of Interest in International Arbitration when Deciding on arbitrator Independence in ICC Cases. *ICC International Court of Arbitration Bulletin* [online]. 2009, 20 (2) [accessed on 8.12.2015]. ISSN 1017-284X. available at http://www.iccdrl.com/bulletins.aspx, p. 2.
[88] See BORN, supra note 1, pp 1850-1851.

3.3. Interpretation of Independence and Impartiality

The core of the substance of challenge provisions lies in interpretation of terms 'independence' and 'impartiality'. The IBA Guidelines addressed above are of some help, however, their general standards are still very abstract and the lists of model situations are too limited to provide a complex guidance. Mixed acceptance of the guidelines does not improve the situation either. Therefore, clarification on this issue must be sought in case law and scholarly works.

The initial question is whether there is a distinction between independence and impartiality or if they are actually synonyms. Scholars are relatively consistent in stating that there is a distinction and that each term concerns different quality albeit practical impact of the difference seems limited.[89]

In distinction of these terms there appears to be something of a majority opinion which seems to be sourced in the Article 3.1 of the IBA Rules of Ethics for International Arbitrators (1987)[90] stipulating that:

"Partiality arises where an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject matter of the dispute. Dependence arises from relationships between arbitrator and one of the parties, or with somebody closely connected with one of the parties."

Similar opinion was expressed by Gary Born who explains that:

"*The fundamental purpose of the "impartiality" requirement is to ensure that the arbitrator is unbiased and fair-minded; in that sense, the requirement of impartiality could be considered fundamentally a subjective inquiry, that demands a certain state of mind on the part of the arbitrator. On the other hand, the fundamental purpose of the "independence" requirement is to ensure that there are no connections,*

[89] See BORN, supra note 1, pp 1774-1776;
[90] HWANG, supra note 6, p 3.

relations, or dealings between an arbitrator and the parties that would compromise the arbitrator's ability to be impartial"[91]

Generally this may be summarized by stating that impartiality concerns arbitrator's subjective state of mind while independence concerns factual ties between an arbitrator and other persons playing role in proceedings.[92] In respect of the relationship between independence and impartiality, I have encountered two different views. First approach is that these are essentially two sides of the same coin and that one supplements the other.[93] Second approach, sourced in the English Arbitration Act, sees lack of impartiality as the real issue while lack of independence is merely one of the factors which may lead to it.[94]

Regardless of which of these approaches one adopts, impartiality will always be very difficult to address for practical reasons. While lack independence is represented by tangible evidence such as contracts or letters, lack of impartiality remains hidden in arbitrator's mind.[95] This is also reflected in lists of the IBA Guidelines which describe factual objective circumstances giving rise to justifiable doubts. However, whether the arbitrator is actually partial and would reflect this in decision-making, remains unknown and is not subject to examination. It is even possible to imagine a situation where an arbitrator is biased without even being aware of it himself.

[91] BORN, supra note 1, pp 1775 – 1776.
[92] See DAELE, supra note 18, pp 269-270, 365-366.
[93] See BORN, supra note 1, p 1776; SINGHAL, Shivani. Independence and Impartiality of Arbitrators. *International Arbitration Law Review*. Sweet & Maxwell, 2008, 11. ISSN 1367-8272.
[94] See BORN, supra note 1, p 1775; STEYN, Lord. England: the Independence and/or Impartiality of Arbitrators in International Commercial Arbitration. *Special Supplement 2007: Independence of Arbitrators* [online], ICC Publishing S.A., 2008 [accessed on 8.12.2015] ISBN 9284200407. available at http://www.iccdrl.com/supplements.aspx.
[95] BORN, supra note 1, p 1776.

3.4. Conclusion

Unlike the procedural provisions which differ from one set of rules to another, the substance of challenges seems to be very similar. In my opinion, the reason for this lies in the fact that the substance is related closely to the fundamental principles of fair trial which are shared by all observed jurisdictions. The goal of the challenge provisions is obvious, to have arbitral disputes decided in the most equitable way possible. In order to achieve this goal the decision makers cannot be influenced by matters outside of this dispute. In other words the arbitrators must be independent and impartial.

4. Issue Conflict

As mentioned in the introduction, the issue conflict is a rather special type of bias which concerns a relationship between an arbitrator and the subject matter of a given case. The doctrine of issue conflict is based on the idea that an arbitrator (or any other type of adjudicator in fact) can render a just award only if he enters into deciding a dispute with an open mind and without pre-judgements on any of the issues which play role in the dispute.[96] Situations in which issue conflict may arise include (among others) cases where an arbitrator (i) was previously (or is currently) engaged in a related dispute; (ii) has previously assumed opinions regarding the specific dispute; or even (iii) adopted general opinions about legal issues upon which the dispute depends.

Placing of the issue conflict within the scheme of independence and impartiality depends on definition of the two terms and their counterparts (*i.e.* dependence and partiality). As described above,[97] the majority opinion seems to understand dependence as objective (factual) ties between an arbitrator and a party or its representative, while partiality addresses arbitrator's state of mind. Identifying with this division, the issue conflict falls to the category of partiality with little to none appearance of dependence as it does not entail any relationship with parties and instead addresses arbitrator's tendency to be prejudged on some issues or prefer certain view of the dispute.[98]

While a bias arising out of a relationship with one of the parties or a potential benefit that the arbitrator might receive depending on the outcome of a dispute is easily imaginable, the concept of partiality and issue conflict in particular is more elusive as it entirely occurs within arbitrator's mind. We are unable to see into a mind of an arbitrator to inspect if he is capable of rendering an impartial award and therefore we

[96] BRUBAKER, supra note 6, p 111.
[97] See supra sub-chapter 3.2.
[98] HWANG, supra note 6, p 4; DONAHEY, M. Scott. The Independence and Neutrality of Arbitrators. Journal of International Arbitration [online] 1992, 9(4) [accessed on 8.12.2015]. ISSN 0255-8106. available at http://www.kluwerarbitration.com/CommonUI/document.aspx?id=ipn11675, pp 31 – 32.

must rely on evidence hinting towards a potential bias. If a party provides sufficient evidence the arbitrator shall be replaced regardless of whether he was or was not actually able to decide impartially.[99] For this reason challenge provisions operate with justifiable doubts as to arbitrator's impartiality (or similar term) as a standard of proof instead of certainty of bias as that exists only in theory similarly to certainty of impartiality. In this regard the often made distinction between an actual bias and an appearance of bias seems to be only a matter of evidentiary threshold.

Height of this threshold depends on circumstances. Decades of challenge decisions and their analysis have established reasonably clear borderline between acceptable and unacceptable behaviour of arbitrator with regard to some forms of bias. Issue conflict unfortunately is not one of them. There is very large grey area filled with inconsistent case law where different courts and institutions took conflicting approaches. Even the IBA Guidelines which are otherwise very good tool in identifying potential problems are of limited use in this regard as articles regarding forms of issue conflict are placed on orange and green list which are ambiguous in saying whether they should be a sufficient ground for a successful challenge.

In order to address this issue, one must assume perspective of a party which is selecting an arbitrator with regard to potential issue conflict. Issue conflict is, of course, not limited to arbitration and may occur whenever disputes are settled, however, in arbitration this problem gains a new dimension as it is the parties who select their adjudicators.

According to an often quoted proclamation of Martin Hunter, when selecting an arbitrator to nominate on behalf of his client he is looking for "(…) *someone with the maximum predisposition towards my client, but with the minimum appearance of bias."* [100] Other authorities are providing guidelines in how to select impartially appearing but

[99] See BAGNER, Hans. Arbitrator Impartiality: Appearance is everything. Mealey's International Arbitration Report, Lexis Nexis, 2006, 21(6). ISSN 1089-2397.
[100] HUNTER, Martin. Ethics of the International Arbitrator. *Arbitration.* 1987, 53. ISSN 0003-7877.

predisposed arbitrator[101] and similar approach is even mentioned in the renowned commentary to ICC arbitration.[102] Employing this tactic, it would seem only natural for parties to select arbitrators with a favourable relationship with the subject matter of a given case. This brings very obvious question: 'Where is the borderline between predisposition and bias?'

Answer to this question is of particular importance for the parties which need to know where good appointment tactics end and a risk of successful challenge begins. Aim of this chapter is to attempt to provide assistance to the parties is selection of arbitrators. On the following pages sample scenarios are assessed and compared with relevant case law and commentaries in an attempt to find a pattern. The final sub-chapters use these findings to address the ongoing debates around proposals to limit opportunities for bias of the arbitrators by barring them from acting as counsels or even having all of the arbitrators selected institutionally.

[101] See SEPPALA, Christopher R. Obtaining the Right International Arbitral Tribunal: A Practitioner's View. *International Construction Law Review*. 2008, 25(2). ISSN 0265-1416.
[102] CRAIG, W. Laurence, PARK, William W., PAULSSON, Jan. *International Chamber of Commerce Arbitration*.3rd ed. Dobbs Ferry, NY: Oceana Publications. ISBN 9284212510, s 12.04.

4.1. Issue Conflict Regarding Specific Issue

The first type of issue conflicts to be discussed in this chapter entails a relationship between an arbitrator and specific subject matter. The bias in such cases consists of a prejudgment and possibly asymmetrical information on certain issues. Such circumstances form an inner imbalance in a tribunal where one of the arbitrators is biased by basing his decisions upon information and opinions acquired outside of the current proceedings. Subsequent sub-chapters discuss this type of issue conflict in the following three scenarios:

1. Arbitrator previously served on a tribunal in a related case and rendered an award where he adopted an opinion on issue which may overlap to the ongoing proceedings
2. Arbitrator currently serves on a tribunal in a related case where similar issues to the ongoing proceedings may arise but has not rendered a final award yet
3. Arbitrator expressed an opinion on an issue relevant to current proceedings prior to any ruling on such issue

I do not include scenarios where an arbitrator expressed opinions on specific issues in a related case as a counsel or expert of a party which selected him in the current proceedings. Under such circumstances the relationship with the party would tend to overshadow any possible issue conflict and thus would not work very well in this illustration.

Applying the IBA Guidelines on the above examples we find ourselves on the orange list in articles 3.1.5[103] and 3.5.2[104], which is exactly the grey zone where disclosure may be sufficient, however, objections of the parties should still be taken very seriously.[105] AAA

[103] The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties. (IBA Guidelines, Art. 3.1.5).
[104] The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise. (IBA Guidelines, Art. 3.5.2).
[105] IBA Guidelines, p 17 para 3.

Code of Ethics[106] seems even stricter as it stipulates that: "(…) *an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration."*[107] According to these instruments, the above examples are problematic to say the least.

4.1.1. Past Related Cases

Multiple examples of the first scenario may be found in Anna Marie Whitesell's report of the ICC practice with regards to confirmation and challenges of arbitrators.[108] In practice the standard situation is that there are two subsequent disputes where at least one party is identical and the underlying contractual relationship is somehow connected. Such situation are for instance disputes between the main contractor and two different subcontractors within the same project where the contracts are to a large extent similar. The party which is identical in both disputes often nominates the same arbitrator in both proceedings, especially if it was successful in the first one. This forms a problem as the arbitrator would have access to information from the previous dispute unlike his colleagues on the tribunal. There is also high risk of prejudgment as it is very possible that some issues especially regarding jurisdiction of the tribunal could be prevalently identical. In case of ICC arbitration, this is usually settled at the outset of the proceedings as every arbitrator nominated by the parties needs to be confirmed by the ICC Court.

Whitesell provides two examples of such basic situation where the arbitrator in question also failed to disclose his involvement in the previous proceedings.[109] The non-disclosure seems to be a common phenomenon as the arbitrators often assume that their prior involvement

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[106] *The Code of Ethics for Arbitrators in Commercial Disputes* [online],American Arbitration Association, 2004 [accessed on 8.12.2015]. available at: https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased.

[107] Ibid., Comment to Canon I, p 4.

[108] WHITESELL, Anna Marie, Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators. *Special Supplement 2007: Independence of Arbitrators* [online], ICC Publishing S.A., 2008 [accessed on 8.12.2015] ISBN 9284200407. available at http://www.iccdrl.com/supplements.aspx.

[109] WHITESELL, supra note 107, pp 12 – 13: Case 7 and 8.

is common knowledge. This, however, is acceptable only when same parties, counsels and arbitrators are involved in both cases.[110] The non-disclosure in the two cases is not a reason for non-confirmation *per se*, however, it may be regarded as aggravating circumstances. The arbitrator was confirmed in neither of these cases, ICC does not publish decisions of the ICC Court so it is unknown what the final deciding factor was, but descriptions of both cases point at risk of prejudgment and asymmetric information.

Similar concerns were raised in another case where claimant nominated same arbitrator as in previous arbitration over related matter against sub-contractors of the respondent.[111] This arbitrator also initially did not disclose his previous involvement, and did so only following a query by the respondent. Description of this case is more detailed than the previous two and mentions same issues in both cases and also mirror provisions in the underlying contract which would cause some submitted documents to be identical in both cases. This arbitrator was also not confirmed by the ICC Court.

Different approach was taken in a case where both parties were identical as in previous two arbitral proceedings over different provisions of the same contract.[112] The claimants nominated the same arbitrator for a third time in a row to which the respondent objected. The court considered that while the claims differ from the previous proceedings, the parties and their legal representation is identical and decided to confirm the arbitrator despite the fact that the respondent's nominee was different.

Based on the above it seems that principle of equality of arms might be prevailing over requirements of impartiality in decisions of the ICC Court. Such conclusions are supported by Whitesell's remark suggesting that asymmetrical information is considered only when parties, their counsels and nominees are not identical to the previous

[110] Ibid., pp 3 – 4.
[111] Ibid., p 15: Case 17.
[112] Ibid., pp 10 – 11:Case 7.

disputes.[113] The more similarities between the two proceedings the higher the threshold for non-confirmation seems to be.

4.1.2. Parallel Related Cases

While the first model scenario involved subsequent proceedings this one regards proceedings which are occurring at the same time. Example of such situation may be found in Loretta Malintoppi's report of the ICC practice.[114] It has been established that the deciding factors are the risk of prejudgment, asymmetrical information and similarity of the issues and subjects involved. Question posed by this sub-chapter is what role does timing play in the scheme.

Some hint on this matter is provided by Whitesell, who mentions that consideration should be given to the stage which the proceedings have reached suggesting that the later stage the higher the risk of prejudgement is.[115] Malintoppi provides an example from her practice where the arbitrator was nominated by Claimant while he was also serving on a different tribunal as a nominee of Claimant's subsidiary in related proceedings.[116] Consideration was given to how closely related the two proceedings are (the closer the worse), the stage of proceedings (the later the worse) and if the composition of the rest of the tribunal is the same. As the relationship between the two proceedings was quite tight, the stage was relatively late and the rest of the tribunal was different the court decided not to confirm the arbitrator.

This suggests that time-wise the ideal circumstances for confirmation of an arbitrator in parallel proceedings are when the other proceedings are procedurally at the same stage *i.e.* the nomination of arbitrators. Under such circumstances the same arbitrator in both proceedings can actually prove beneficial as likelihood of rendering

[113] Ibid., p 4.
[114] MALINTOPPI, Loretta, International Arbitration: The ICC Perspective, In. *Current Issues in ICC Arbitration: What You Need to Know to Enhance your International Practice* [lecture transcript]. The Cornell Club – New York, 15 November 2006.
[115] WHITESELL, supra note 107, p 4.
[116] MALINTOPPI, supra note 113, pp 7 – 8.

conflicting decisions on the issues shared in the two proceedings is decreased.

4.1.3. Expression of an Opinion regarding a Specific Case

While the first two model scenarios in this chapter regarded involvement of an arbitrator in related proceedings, the last scenario entails statements which were made by arbitrators regarding subject matter of a dispute they are involved in. Example of such conduct may be found in Canfor Corp. v U.S.A.[117], an arbitration governed by the UNCITRAL arbitration rules regarding a dispute over anti-dumping measures taken by the U.S. In this case the claimant-nominated arbitrator made a public speech to the Canadian Government council in which he supported position held by the claimant. No decision was rendered in this regard, however, the appointing authority asked the arbitrator to resign following discussion with the respondent who argued by the Art. 3.5.2 of the IBA Guidelines.[118]

Similar circumstances were in the ICSID case Perenco v Ecuador[119] where Charles N. Brower, nominated by the claimant, gave an interview where he made statements which were interpreted as criticizing conduct of Ecuador.[120] Ecuador subsequently submitted a challenge and Brower was asked to step down by the PCA Secretary General. In this case, however, it is questionable whether the problem was issue conflict or general bias against Ecuador.

Very interesting case in this regard is the judgment of the Swiss Federal Supreme Court regarding appeal to challenge of an arbitrator in Swiss Pilot Association (appellee) v Swiss Federal Airlines AG

[117] *Canfor Corporation v. United States of America*. NAFTA Arbitration [accessed on 8.12.2015]. available at: http://www.state.gov/s/l/c7424.htm.
[118] See BRUBAKER, supra note 6, pp 130 – 131.
[119] *Perenco Ecuador Ltd v Ecuador*, ICSID Case No. ARB/08/6, PCA Case No. IR-2009/1.
[120] Ibid., in the Matter of a Challenge to be Decided by the Secretary General of the Permanent Court of Arbitration Pursuant to an Agreement Concluded on October 2, 2008 in ICSID Case No. ARB/08/6 (December 8, 2009).

(appelant) ('Swiss Pilots').[121] The challenge arose in the second arbitral proceedings on the matter where the appellant nominated an arbitrator who previously published very critical commentary regarding the first award rendered in the dispute. In the judgment the court explicitly rejected that publishing an academic writing on a related topic should be ground for challenge unless it regards a specific issue and "(…) *takes such a position on the particular issues of the proceedings that the case no longer seems open."*[122] The court subsequently evaluated the exact wording of the arbitrator's commentary and ruled to uphold the removal of the arbitrator. The decisive factor was that the arbitrator's critique was "(…) *so unambiguous that it had to be reasonably assumed that he had taken a final stance on the issue in dispute."*[123]

Another set of relevant examples may be found in the challenge decisions of the LCIA which dealt with prejudgment.[124] All three cases provided in the digest concern an arbitrator who gave an impression that he has already decided upon certain issue prior to (or in the last case during) the evidentiary hearing. In the first case[125] a procedural order issued by majority of the tribunal indicated that it is undisputed that the disputed shares are owned by one of the parties. In the second case[126] respondent challenged the claimant-appointed arbitrator on the basis of his dissenting opinion to a procedural order in which he interpreted the disputed contract. In the third case[127] the arbitrator posed a question to a witness during cross-examination which sounded as if the arbitrator has already made a decision on existence of harm to the claimant. Although the arbitrator corrected himself almost immediately afterwards the

[121] *Swiss Pilot Association v Swiss Federal Airlines AG*, decision 4P.247/2006 dated 7 November 2006; published in DFC 133 I 89.
[122] NAEGELI, Georg, BOEHM, Hannah. Swiss Federal Supreme Court upholds challenge of an arbitrator. *IBA Arbitration Committee Newsletter* [online], October 2007 [accessed on 8.12.2015]. available at http://www.homburger.ch/fileadmin/publications/COURTUPH_01.pdf, pp 62 - 63.
[123] Ibid., p 64.
[124] WALSH, Thomas W., TEITELBAUM, Ruth, The LCIA Court Decision on Challenges to Arbitrator: An Introduction. *Arbitration International* [online], 2011, 27 (3) [accessed on 8.12.2015]. ISSN 0957-0411. available at http://arbitration.oxfordjournals.org/content/27/3/283.
[125] LCIA Reference No. 3488.
[126] LCIA Reference No. 81007/81008/81024/81025.
[127] LCIA Reference No. UN7949.

respondent challenged him on the basis of the ambiguous sentence. None of the three challenges was successful. The main points of the decisions dismissing challenges were that the statements in question has to be seen in the context of the proceedings and that having some provisional view of the merits is acceptable.[128]

Assessing the above cases the decisive factor seems to be the circumstances of the statement in question and its background. In the first three mentioned cases the arbitrators who eventually left the tribunal were speaking for themselves and expressed their honest opinion. The LCIA cases involved careless statements that the arbitrators made within proceedings which could have been interpreted in the wrong way, but in the context of the entire proceedings were regarded as a mere error.

[128] See Thomas W. Walsh & Ruth Teitelbaum, *supra* note 31.

4.2. Issue Conflict Regarding General Issue

One of the more discussed issues in international arbitration entails whether an arbitrator may be challenged on the basis of his previously expressed opinions regarding general legal issues. This topic is especially frequented in investment arbitration where both pool of arbitrators and key legal issues are more limited in comparison with commercial arbitration. Despite the ongoing discussion, the notion that an arbitrator could be successfully challenged on a basis of his general legal opinion alone has been consistently rejected.[129] In the IBA Guidelines such situation is described on the green list[130] which should not give rise to a challenge[131] and the AAA Code of Ethics specifically states that: "*Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration* (…)"[132]

Despite such consistent rejection which is also supported by various case law[133], there are some hints that the rejection may not be completely absolute. In an ICSID case Urbaser v Argentina ('Urbaser')[134] Campbell McLachlan was challenged by the claimants on basis of a book he co-authored where opinions on some issues relevant to the dispute were expressed. The challenge was dismissed in the end as:

"(…) the opinions referred to by Claimants have been expressed by Prof. McLachlan in his capacity as a scholar and not in a decision that could have some kind of a binding effect upon him. One of the main qualities of an academic is the ability to change his/her opinion as required in light of the current state of academic knowledge. The Two Members have no doubt that Prof. McLachlan reaches such high

[129] HWANG, supra note 6, p 18.
[130] IBA Guidelines, Article 4.1.1.
[131] IBA Guidelines, p 18 para 6.
[132] AAA Code of Ethics, Comment to Canon I, p 4.
[133] See HWANG, supra note 6, pp 16 – 23.
[134] *Urbaser SA and other v. The Argentina Republic*, ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (August 12, 2010).

standard of science and conscience. "[135]

The wording of the decision suggests that the consideration could be different if the views in question were not expressed in a scholarly writing but in an award or other decision but does not discuss this possibility further. Additionally the decision on the challenge also states that:

'What matters is whether the opinions expressed by Prof. McLachlan on the two issues qualified as crucial by Claimants are specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the Parties in this proceeding.'[136]

The second quote indicates that there are even some circumstances under which an arbitrator may be successfully challenged on the basis of his scholarly opinion. The standard described in the quote suggests that the crucial factors in deciding upon such challenge are the specificity and clarity of the statement in question. The threshold of these factors seems to be very high as it has to give impression that the arbitrator will rely on the expressed opinions regardless of the circumstances of the case. Converting the quote to practice it suggests that the result of challenge depends on the language the arbitrator uses in his scholarly works. Hence, arbitrators should not be challengeable as long as they do not forget to add a small bit of ambiguity to their published opinions. Applying this standard to the challenge decision itself we find that this quote is exactly what the standard requires: a small bit of ambiguity.

Different situation arose in UNCITRAL case of *Malaysian Telekom v Republic of Ghana* ('Telekom') where Emmanuel Gaillard was challenged by Ghana on basis of his involvement as a counsel in

[135] Ibid., para 51.
[136] Ibid., para 44.

Consortium RFCC v Kingdom of Morocco ('RFCC').[137] Although the two proceedings were unrelated, both addressed similar legal issues and Ghana was relying on award rendered in RFCC while Gaillard was arguing for its annulment. Ghana argued that Gaillard as a counsel in RFCC will advance all arguments he can think of against the award in question which prevents him from being unbiased when he discusses relevance of this award in Telekom.[138]

Gaillard reacted to the challenge by emphasizing that the two matters are unrelated and concern different BITs and expressing his confidence that he is impartial and independent.[139] The provisional measures judge of Hague district court which was administering the challenge proceedings assessed the arguments of Ghana and ruled that Gaillard must resign in his position of a counsel in RFCC otherwise the challenge will be upheld. In the reasoning of his decision the judge stated that attitudes Gaillard would adopted in his two roles would be incompatible and subsequently it would be impossible to appear impartial.[140]

Gaillard consequently resigned from the RFCC case and Ghana filed an appeal against the ruling. The appellate court upheld the ruling of the first instance stating:

'*Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before. Therefore, in such a situation, there is, in our opinion, no automatic appearance of partiality vis-a-vis the party that argues the opposite in the arbitration.*'[141]

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[137] Challenge No. 13/2004, Petition No. HA/RK 2004.667, Decision of the District Court of The Hague of 18 October 2004.
[138] Ibid., at 4.
[139] Ibid., at 5.
[140] Ibid., at 6.
[141] Challenge No. 17/2004, Petition No. HA/RK 2004.788, Decision of the District Court of The Hague of 5 November 2004, para 11.

While the settings in Urbaser and Telekom are fairly different, they provide very good illustration of how hard would it be for a challenge based on general legal opinion to be successful. None of the decisions would go as far as to categorically reject such challenges *per se*, however, they both suggest that this type of challenge could be successful only under exceptional circumstances. The virtue sought in an arbitrator in this respect is open-mindedness. The best approach for potential arbitrators is to keep the possibility of issue conflict in mind and reflect this in the language they use in their publishing.

4.3. Proposals to Limit Opportunities for Bias

There are several ongoing debates regarding proposals which aim to amend the system of international arbitration in a manner which would limit occurrences of biased arbitrators. Following chapter uses previous conclusions and applies them to two of these discussions which are relevant to issue conflict.

4.3.1. The Double Hat Dilemma

The first discussion regards the so-called double hat dilemma which asks whether an arbitrator who acts as a counsel in different proceedings can remain impartial. The underlying idea suggests that a player wearing two hats may find himself in a situation where while acting as an arbitrator he has to rule on the same legal issue he was advocating for as a counsel, in even worse case the two roles may be played concurrently. Another situation which may arise is counsel arguing for or against an award he previously rendered as an arbitrator. In both of these situations the lawyer is in conflict of interest caused by issue conflict which may adversely influence his impartiality. [142]

In this respect some commentators suggest that this danger of bias should be reduced by prohibiting arbitrators from wearing multiple metaphorical hats, or in other words, separating the pools of counsels and arbitrators.[143] The commentators present precedents of such practice from International Court of Justice and Court of Arbitration for Sport where similar measures were taken, however, at the same time they agree that introducing this solution for all arbitration would be highly problematic. [144] To provide more feasible solution the commentators suggest to widen the disclosure duty to cover as much previous and concurrent involvement in arbitration.[145]

[142] See HORVATH, Gunther J., BERZERO, Roberta, Arbitrator and Counsel: The Double Hat Dilemma. *Transnational Dispute Management Journal* [online]. 2013, 4 [accessed on 8.12.2015] ISSN 1875-4120. available at http://www.transnational-dispute-management.com/article.asp?key=1985.
[143] Ibid., pp 16 – 19; ZIADE, supra note 6, p 64.
[144] HORVATH, supra note 141, pp 12 – 13.
[145] Ibid., pp. 16 – 19; ZIADE, supra note 6, p 64.

Although the examples of case law in the previous two chapters are far from being a representative sample, they provide good illustration to show that issue conflict is not just a matter of two hats. Eliminating of the double-hat problem would prevent cases with similar circumstances to Telekom, but these represent merely a fragment of the total. Cases such as Urbaser or Swiss Pilots where scholarly opinion has raised a suspicion of partiality and all the cases involving previous service as an arbitrator would remain unaddressed. The problem goes down to one of the fundamental questions of the issue conflict which entails whether we want arbitrators who are free from any risk of prejudgment or arbitrators who have experience.[146]

From this point of view I believe that strengthening the disclosure requirements in respect of previous arbitration experience, be it as an arbitrator, counsel, expert or scholar, is an excellent proposal. Nonetheless, it should not be interpreted as a first step towards prohibition of wearing two hats which would, in my opinion, provide only little benefit at a very high cost.

4.3.2. Inherent Bias of Unilaterally Appointed Arbitrators

Another ongoing debate regards question whether all arbitrators should not be appointed jointly or institutionally since unilaterally appointed arbitrators are shrouded in inherent bias. The most recent round of this debate was initiated by Jan Paulsson[147] and Albert Jan van den Berg[148] who expressed their concerns about statistics which suggested that in more than 95% of cases, dissenting opinions are submitted by party-appointed arbitrators in favour of the party which appointed them.

The critique of unilaterally appointed arbitrators revolves around

[146] BRUBAKER, supra note 6, pp 111 – 112.
[147] See PAULSSON, JAN. *Moral Hazard in International Dispute Resolution*, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law 29 April 2010[online]. [accessed on 8.12.2015]. available at http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf.
[148] See VAN DEN BERG, Albert Jan, 2010 Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration, In: *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman.* Leiden: Martinus Nijhoff, 2010. ISBN 9004173617.

the fact that once a dispute arrives to arbitration, the disputants' only interest is winning which negatively reflects on the arbitrators they nominate.[149] There are two elements to the debate: the first saying that party-appointed arbitrators tend to be biased *per se* due to their relationship with the appointing party; the second element discusses tendency of parties to nominate predisposed arbitrators. Although the former element is very interesting and would certainly warrant an essay, I will focus only on the latter as it is closely connected with issue conflict.

In this respect Paulsson argues that parties tend to select arbitrators in an attempt to gain a benefit in the proceedings and denounces such practice as immoral as the arbitrators should be completely neutral regardless of who nominates them.[150] Charles N. Brower rebuts Paulsson's assertion by stating that there is a difference between nominating a biased arbitrator which is improper and nominating an arbitrator who is likely to share party's view of the case which is benign and commonly practiced.[151] Brower further rejects Paulsson's proposal that all arbitrators should be appointed jointly, institutionally or from pre-existing lists by stating that this would have adverse effect on legitimacy of arbitration perceive by the parties.[152]

In order to address the debate between Paulsson and Brower, one has to understand what exactly the two authors mean by biased arbitrator. Brower makes a difference between advocate-arbitrator and predisposed arbitrator where the former is ineffective and challengeable while the latter is generally accepted.[153] On the other hand Paulsson only speaks of arbitrators who are nominated by parties in order to gain benefit in the proceedings which suggests inclusion of both Brower's

[149] PAULSSON, supra note 146, p 11.
[150] Ibid., pp 9 – 10.
[151] BROWER, Charles N., ROSENBERG, Charles B. The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is wrongheaded. *Arbitration International* [online]. 2013, 29 (1) [accessed on 8.12.2015]. ISSN 0957-0411. available at http://arbitration.oxfordjournals.org/content/29/1/7 pp 17-18.
[152] Ibid., pp 21 – 26.
[153] Ibid., pp 17 – 18.

groups of arbitrators.[154] In this respect Paulsson represents an idealistic approach which stipulates absolute neutrality of all arbitrators while Brower is a realist addressing the current status. In this regard the development has two ways to go, either it follows idealistic approach by establishing that predisposed arbitrators are not impartial and hence Paulsson's proposals on limiting the parties' right to select arbitrators should be adopted; or it identifies with Brower upholding the *status quo*.

In my opinion the practice will most likely stay realistic. Unilateral selection of arbitrators is inherent characteristic of arbitration which includes various tactics in choosing the candidates. Paulsson's proposals are very interesting and provide important input into the discussion, but if they were adopted many new and potentially bigger problems would arise. Brower expresses concerns in respect of legitimacy of arbitrators appointed institutionally or from pre-existing lists as it would lead to politicization of the process and suspicions of cronyism and other forms of corruption.[155] Generally it seems that the users of international arbitration are not interested in changing the system. Under such circumstances perhaps it would be for the best to simply accept this practice and reflect it in the law to remove the shade of hypocrisy as some authors suggest.[156]

[154] PAULSSON, supra note 146, pp 9 - 10.
[155] BROWER, supra note 150, pp 23 - 24.
[156] See BRANSON, David, Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them. *ICSID Review Foreign Investment Law Journal* [online], 2010, 25 (2) [accessed on 8.12.2015] ISSN 2049-1999
available at http://icsidreview.oxfordjournals.org/content/25/2/367.full.pdf+html, pp 367 – 369.

4.4. Conclusion

The borderline between predisposition and bias in respect of issue conflict is very hard to track. It passes through many dimensions including factual, temporal and moral ones.

The most important factors which decide whether an arbitrator is predisposed or biased regard: (i) specificity of the respective opinions; (ii) strength of the language which was used in expressing them; (iii) equality of arms in respect of related proceedings; and (iv) similarity of circumstances in respect of parallel proceedings.

Having all these factors in mind and confronting them with case law and commentaries, it should be possible to determine whether an arbitrator is at risk of successful challenge with reasonable accuracy.

In order to increase transparency in international arbitration it would seem beneficial to broaden disclosure duties of prospective arbitrators in this respect. Legal certainty of parties could be bolstered by considering to reflect practice of selecting predisposed arbitrators in the applicable rules.

5. Conclusion of the Thesis

The thesis has analysed principles underlying challenge provisions across jurisdictions. It may be established that contemporary international arbitration is truly global as it may be easily perceived how different rules and laws influence each other. Naturally some jurisdictions are more interconnected than others which is caused mainly by historical reasons, nevertheless, the global trend is obvious.

The common elements to all jurisdictions are obvious and are all based upon clash of principles which result in necessary compromises. In respect of procedure this means trying to find a balance between diligence and speed; efficiency and strictness. Important aspect is also the costs of administration where large institutions such as ICC and LCIA have a benefit of being able to justify high arbitration fees.

Substance offers very wide array of factual scenarios on the background of very simple provisions referencing independence and impartiality. The obvious problem lies in the standard of proof as material evidence must establish doubts to the desired state of mind.

As for the ethical points, challenge procedure may be seen from theoretical or practical point of view. From theoretical (idealistic) view the challenge is a safety mechanism ensuring that the arbitration is conducted by properly selected arbitrators guaranteeing just result. The practical (pragmatic) view sees challenge in connection with quality of the award. The challenge is then merely a method to remove a possible flaw which could impair enforcement of the award. Alternatively the losing party may perceive challenge as a mean to prepare ground for subsequent set aside proceedings.

For this reason I am slightly suspicious about the role of the issue conflict in selection of arbitrators. I understand that many practitioners perceive it as something positive, as a hidden advantage instead of risk. However, having the ideal of independent and impartial tribunals in mind I would tend to side with Paulsson in proposals to take measures to make arbitration more honest.

To conclude, this thesis performed a comparison of selected challenge procedures and identified common elements. These findings were subsequently used in examination of issue conflict as a specific kind of bias. This examination suffered from lack of sources due to the fact that decisions in commercial arbitration are rarely (if ever) published. Nevertheless, despite this hardship I have attempted to identify some patterns in the issue conflict to contribute to discussion of this topic.

6. Teze v českém jazyce

Rozhodčí řízení se v posledních desetiletích stalo velice oblíbenou metodou řešení mezinárodních sporů. Historie rozhodčího řízení je samozřejmě mnohem delší než několik desetiletí, nicméně nikdy v historii nebylo využíváno v takovém rozsahu (obzvláště v oblasti mezinárodních obchodních sporů). Důležitým faktorem, který pozitivně ovlivňuje oblibu rozhodčího řízení, se zdá být to, že v rozhodčím řízení mají strany možnost zvolit si rozhodce, místo toho, aby jim byl přidělen veřejnou institucí tak, jako v soudním řízení. Podle průzkumu trendů v rozhodčím řízení, který v roce 2013 zpracovala Queen Mary University, jsou za největší dvě výhody rozhodčího řízení (oproti ostatním metodám řešení sporů) považovány odbornost a neutralita rozhodce.

Dalším důkazem určité averze stran mezinárodních sporů vůči veřejnoprávním institucím je obdobný průzkum z roku 2012, podle něhož velká většina (76 %) osob využívajících rozhodčí řízení upřednostňuje jednostrannou volbu rozhodců v tříčlenném rozhodčím tribunálu. Toto ukazuje, jak důležité je pro strany sporů, aby měly možnost si zvolit rozhodce a udržet si vliv na sestavení rozhodčího tribunálu.

Právo volby rozhodce je však omezené základními právními principy jako je například právo na spravedlivý proces. Konkrétní obsah tohoto práva se může do určité míry lišit v jednotlivých právních řádech, nicméně jeho základ zůstává stejný. V kontextu volby rozhodců se právo na spravedlivý proces projevuje skrze princip, že rozhodci musí být nezávislí a nestranní. To znamená, že osoba rozhodující spor nesmí být ovlivněna vnějšími zájmy, jež by vedly k podjatosti vůči stranám. Z tohoto důvodu zásadně všechny rozhodčí řády obsahují úpravu procesu vyloučení rozhodce z řízení, pokud tyto požadavky nesplní. Tyto procesy jsou nejčastěji nazývány jako odvolání rozhodce, což je hlavním tématem této práce.

Rozhodl jsem se zaměřit svou diplomovou práci na mezinárodní rozhodčí řízení zejména z důvodu, že se domnívám, že jde o oblast, ve

které se mi podařilo v průběhu studia získat nejvíce znalostí. Mezinárodní rozhodčí řízení je však natolik rozsáhlá oblast, že by nebylo možné napsat smysluplnou diplomovou práci, aniž bych toto téma zúžil na konkrétní otázku. Proto jsem si zvolil téma odvolání rozhodců, což je prvek rozhodčího řízení, se kterým mám dokonce i základní praktickou zkušenost. Kromě výše uvedeného považuji otázku podjatosti rozhodců za velice přitažlivou vzhledem k tomu, že obsahuje prvek etiky, kterým je jednak zajímavé, ale především důležité se v právu zabývat.

Diplomovou práci jsem se rozhodl rozdělit do navazujících kapitol podle deduktivního modelu. Nejprve se tedy zabývám obecnými otázkami a provádím komparaci právní úpravy odvolání rozhodců v pravidlech rozhodčích soudů a rozhodčích řádech. V této souvislosti dělím úpravu na procesní část a meritorní část, abych rozlišil jednotlivé prvky úpravy. Samotný institut odvolání rozhodce je samozřejmě čistě procesněprávní, nicméně i v jeho rámci je nutné rozlišovat meritum věci, tedy posouzení, zda je rozhodce podjatý, od procesních otázek zabývajících se tím, kdo podává návrh na odvolání, kdo o něm rozhoduje, v jakých lhůtách a podobně. Ve druhé polovině práce aplikuji nabyté poznatky na konkrétní typ podjatosti, za který jsem si zvolil takzvaný ‘issue conflict‘. Tato kapitola, jež obsahuje teze v českém jazyce je členěna obdobně, ačkoli nezachází do takové hloubky jako originální text v anglickém jazyce.

Cílem této práce je tedy provést komparaci úpravy odvolání rozhodce a její výsledky aplikovat na otázku issue conflict a pokusit se najít společné jmenovatele řešení tohoto typu podjatosti napříč právními řády. Ve vztahu k samotné analýze issue conflict, si kladu za úkol rozpoznat, kde přesně se v rámci spektra odvolacích důvodů nachází a jaké jsou jeho rozhodné prvky. Výsledkem by měl být příspěvek k současné diskuzi o issue conflict ve formě srozumitelného shrnutí vzorců a trendů v soudobé právní vědě.

6.1. Komparativní část

V komparativní části práce jsou porovnávány právní úpravy odvolání rozhodce ve vybraných pravidlech pro rozhodčí řízení a rozhodčích řádech. Z hlediska procedury odvolacího řízení jsou mezi jednotlivými úpravami poměrně značné rozdíly, které odrážejí povahu jednotlivých pravidel.

Nejsofistikovanější systémy k zajištění nepodjatosti rozhodců mají pravidla pro rozhodčí řízení u největších rozhodčích institucí ve výběru, tedy ICC a LCIA. Tyto instituce mají výhodu robustního a důvěryhodného administrativního aparátu, který umožňuje předběžný přezkum nepodjatosti rozhodců. Díky těmto procesům je většina potenciálních problémů vyřešena již při jmenování rozhodce a k následnému odvolání tak u těchto institucí dochází spíše výjimečně.

Na druhém konci tohoto porovnání se nachází úprava v Úmluvě ICSID a v Řádu Rozhodčího soudu při Hospodářské komoře České republiky a Agrární komoře České republiky. Obě tyto úpravy totiž počítají s tím, že o odvolání rozhodců budou rozhodovat ostatní rozhodci v tribunálu. Tato metoda je cílem časté a dle mého názoru oprávněné kritiky a je mimo jiné důvodem, proč historicky první rozhodce byl podle Úmluvy ICSID odvolán až v roce 2014.

Úprava procedury odvolání rozhodce se v jednotlivých pravidlech a řádech liší, zároveň však existuje mnoho prvků, které mají společné, což je způsobeno především tím, že sledují stejný záměr. Tímto záměrem je vypořádání se s podjatostí rozhodců co nejefektivněji a nejdůsledněji aniž by ovšem zároveň bylo možné institut odvolání snadno zneužít. Takový záměr je však obtížné naplnit vzhledem k tomu, že jeho jednotlivé složky mají tendenci kolidovat. Například pokud se úprava zaměří na důslednost tím, že umožní stranám odvolání se proti rozhodnutí o odvolání rozhodce, pak nebude dosaženo efektivnosti, protože takové řízení bude pomalé a navíc bude snadno zneužitelné. Naopak u systému, který se soustředí zejména na rychlost řízení, bude vysoká pravděpodobnost, že podjatý rozhodce bude přehlédnut.

Důvody pro odvolání rozhodce jsou ve většině zkoumaných úprav stanoveny jako nedostatek určitých vlastností, které jsou od rozhodce vyžadovány. Klíčové termíny v tomto ohledu jsou „nezávislost“ a „nestrannost“ jejichž absence je explicitně stanovena jako důvod k odvolání rozhodce ve většině zkoumaných předpisů. České právo v tomto smyslu používá termín „podjatost“, který je ovšem s nezávislostí a nestranností úzce propojen, jak již bylo mnohokrát potvrzeno v judikatuře i komentářích. Některé další předpisy (např. Anglická nebo Švýcarská zákonná úprava) uvádí jen jeden z těchto termínů. To vede k otázce, zda je mezi těmito termíny rozdíl a pokud ano, jaký vliv má vynechání jednoho při stanovení důvodů pro odvolání rozhodce.

Otázka interpretace termínů nezávislost a nestrannost je tedy pro odvolávání rozhodců naprosto klíčová. Komentáře se touto otázkou zabývají zevrubně a dá se říci, že dospěly ke konsensu nebo alespoň většinovému názoru. Obecně se dá konstatovat, že nestrannost se týká rozhodcova subjektivního duševního stavu, zatímco nezávislost řeší faktické vztahy mezi rozhodcem a dalšími osobami zúčastněnými na řízení.

Co se týče vztahu mezi nezávislostí a nestranností, dají se vypozorovat dva částečně protichůdné názorové proudy. První z nich říká, že oba tyto termíny jsou pouze dvěma stranami téže mince a jeden doplňuje druhý. Z tohoto důvodu, tedy není problém, když předpis jeden z nich vynechá, neboť ten druhý je v něm obsažen. Druhý možný pohled, považuje za zásadní pouze nedostatek nestrannosti, který způsobuje zaujatá rozhodnutí. Nedostatek nezávislosti je naopak považován pouze za možný, ale nikoliv nutný zdroj nedostatku nestrannosti. Původ tohoto názoru zřejmě sahá k debatám ohledně podoby anglické úpravy rozhodčího řízení.

Důležitou roli v aplikaci abstraktně definovaných důvodů pro odvolání hrají takzvané IBA Guidelines, která v roce 2004 publikovala Mezinárodní advokátní komora. Kromě sedmi obecných standardů, které fungují jako velice detailní ustanovení o odvolání rozhodců, obsahují i

seznamy modelových situací. Tyto seznamy jsou rozděleny do čtyř částí podle jejich závažnosti a ke každé z těchto částí obecné standardy poskytují doporučené řešení.

Kromě důvodů pro odvolání rozhodce, které se vztahují k otázce střetu zájmů, některé zkoumané předpisy obsahují i další důvody, které se týkají rozhodcových vlastností. Zpravidla se týkají nedostatečných jazykových a jiných dovedností a znalostí, případně rozhodcovy dostupnosti. Důvodem pro odvolání rozhodce může být i nevhodné chování v průběhu řízení. Pravidla ICC výslovně uvádějí možnost odvolání rozhodce z nespecifikovaných „jiných důvodů." Odvolání rozhodců, která byla provedena na základě tohoto ustanovení, zahrnují nejrůznější případy od neznalosti jazyka řízení až po neschopnost vést řízení kvůli závislosti na návykových látkách.

6.2. Issue conflict v mezinárodním rozhodčím řízení

Jak je zmíněno výše, takzvaný issue conflict je zvláštním typem podjatosti, který se týká vztahu rozhodce s předmětem daného řízení. Issue conflict spočívá na myšlence, že rozhodce (resp. soudce nebo jiná osoba v obdobném postavení) dokáže vydat spravedlivý nález, pouze pokud do řízení vstupuje s otevřenou myslí a bez jakýchkoliv předsudků vůči otázkám, jež hrají v tomto řízení roli. Situace, ve kterých může vyvstat issue conflict, jsou zejména ty, kde rozhodce (i) působí nebo působil ve spřízněném řízení; (ii) zaujal určitá stanoviska ohledně konkrétního sporu; nebo dokonce (iii) zaujal určitá stanoviska ohledně obecných právních otázek, na kterých spor závisí.

Umístění issue conflict do schématu nezávislosti a nestrannosti závisí na definici těchto termínů a jejich protikladů (tj. závislosti a zaujatosti). Jak bylo uvedeno výše, většinový názor považuje závislost za objektivní, faktický vztah mezi rozhodcem a stranou nebo jejím právním zástupcem, zatímco zaujatost značí určitý duševní stav rozhodce. Při použití těchto definic issue conflict spadá do zaujatosti s pouze minimálním (pokud vůbec nějakým) přesahem do závislosti. Issue conflict totiž nespočívá v objektivním (např. smluvním) vztahu s jinou osobou, nýbrž se týká rozhodcovy tendence mít předsudky v některých otázkách nebo upřednostňovat určitý pohled na věc.

Podjatost vyplývající ze vztahu s jednou ze stran nebo určité výhody, kterou rozhodce může získat v závislosti na výsledku sporu, je snadno představitelná. Naopak koncept zaujatosti a obzvlášť v případě issue conflict je těžko zachytitelný, neboť se odehrává v rozhodcově mysli. Nahlédnutí do mysli rozhodce za účelem kontroly zaujatosti není možné, a proto je nutné spoléhat na důkazy, které poukazují na možnost podjatosti. V případě, že strana sporu poskytne dostatek takových důkazů, rozhodce bude odvolán, bez ohledu na to, zda byl ve skutečnosti schopen rozhodovat nestranně. Právě z tohoto důvodu ustanovení ohledně odvolání rozhodců operují s oprávněnými pochybnostmi o rozhodcově nestrannosti (případně obdobným termínem), aby určila

určitou míru dokazování, které je nezbytné dosáhnout, aby odvolání bylo úspěšné. Jistota nestrannosti stejně jako jistota zaujatosti totiž neexistuje.

Vyžadovaná míra dokazování záleží na okolnostech. Analýza rozhodnutí o odvolání rozhodců vytvořila ve vztahu k některým typům podjatosti poměrně dobrou představu o hranici mezi přijatelným a nepřijatelným. Issue conflict bohužel jedním z těchto typů není. Rozhodovací praxe a právní věda vytvořily poměrně rozlehlou šedou zónu plnou navzájem se vylučujících stanovisek. Dokonce i IBA Guidelines nejsou v tomto ohledu příliš použitelné vzhledem k tomu, že modelové scénáře týkající se issue conflict jsou na oranžovém nebo zeleném seznamu, takže by neměly vést k odvolání. Praxe tento závěr ovšem nepotvrzuje.

Aby bylo možné se touto otázkou zabývat, je nezbytné zaujmout pozici strany sporu, která vybírá rozhodce a zamýšlí se, zda nehrozí issue conflict a jaký by byl jeho případný dopad. Issue conflict samozřejmě není omezen jen na rozhodčí řízení a může se vyskytnout při jakémkoliv typu řešení sporů, nicméně u rozhodčího řízení tato otázka získává nový rozměr tím, že to jsou právě strany, které si volí své rozhodce.

Martin Hunter prý prohlásil, že když zvažuje koho jménem strany nominovat do pozice rozhodce, tak hledá někoho, kdo je co nejvíce zaujatý ve prospěch jeho klienta, ale zároveň vykazuje co nejmenší známky podjatosti. Jiné autority v oboru dokonce poskytují návody, jak zvolit nestranně vypadajícího, leč předpojatého rozhodce. Podobný přístup je dokonce doporučen i v oficiálním komentáři k rozhodčímu řízení u ICC. V případě ztotožnění se s tímto přístupem není nic jednoduššího, než využít právě issue conflict, který je ve většině případů tolerován. To však přináší zásadní otázku: Kde je hranice mezi tolerovanou předpojatostí a postihovanou podjatostí?

Odpověď na tuto otázku je mimořádně důležitá obzvláště pro strany sporu, které potřebují vědět, kde končí dobrá jmenovací taktika a

začíná riziko odvolání.

Issue conflict se dá v zásadě rozdělit na dva různé typy tj. issue conflict ve vztahu ke konkrétnímu sporu a issue conflict ve vztahu k obecným právním otázkám. V prvním případě podjatost spočívá zejména v hrozbě předsudků ohledně určitých otázek a přístupu k informacím, které nemusí být dostupné ostatním účastníkům řízení. Druhý typ spočívá pouze v hrozbě předsudku.

Issue conflict ve vztahu ke konkrétnímu případu studuji na těchto třech modelových situacích:

1. Rozhodce se v minulosti účastnil řízení v související věci a vydal nález obsahující určité stanovisko, které může mít dopad v současném řízení;
2. Rozhodce se v současnosti účastní řízení v související věci, ve které mohou vyvstat obdobné otázky, ale zatím nevydal konečný nález;
3. Rozhodce před vydáním nálezu vyjádřil svůj názor na určitou otázku, na které závisí rozhodnutí ve věci.

V tomto výčtu nejsou zahrnuty případy, kdy rozhodce v souvisejícím řízení působil jako právní zástupce nebo znalec strany, která jej nyní nominovala jako rozhodce a vyjádřil názor na určité otázky. V takovém případě totiž vztah se stranou bude mnohem závažnější a případný issue conflict zastíní.

Pokud na výše uvedené situace aplikujeme IBA Guidelines, ocitneme se na oranžovém seznamu v článcích 3.1.5 a 3.5.2 což je určitá šedá zóna, kde sdělení potenciálního střetu zájmů stranám může být dostačující, nicméně následné námitky stran by stále měly být brány velice vážně. Etický řád AAA se zdá být ještě přísnější, když uvádí, že: *„[…] rozhodce nesmí být rozhodnut předem ve vztahu k jakýmkoliv specifickým faktickým nebo právním otázkám, které budou projednávány v průběhu rozhodčího řízení.*“ Podle těchto publikací jsou tedy výše uvedené příklady přinejmenším problematické.

Několik příkladů prvního případu je uvedeno ve zprávě Anny

Marie Whitesell o praxi ICC ohledně potvrzování a odvolávání rozhodců. Nejčastější scénář představuje situace, kdy dojde ke dvěma navazujícím sporům, kde alespoň jedna ze stran je shodná a smluvní vztahy, ze kterých tyto spory vyvstaly, jsou nějakým způsobem propojené.

Jde například o spory mezi hlavním dodavatelem a dvěma různými subdodavateli v rámci jednoho projektu, kde jsou příslušné smlouvy do značné míry obdobné. Osoba, která se účastní obou těchto sporů (v našem případě hlavní dodavatel) obvykle v obou případech nominuje stejného rozhodce, obzvlášť pokud byla v prvním řízení úspěšná. Tím vzniká problém, neboť tento rozhodce bude mít přístup k informacím z prvního řízení, na rozdíl od jeho ostatních kolegů v tribunálu. Vzniká navíc vysoké riziko, že tento rozhodce do nového řízení vstoupí již rozhodnut, jak některé (nejčastěji jurisdikční) otázky řešit. U ICC jsou tyto problémy obvykle vyřešeny již na začátku řízení, vzhledem k tomu, že všichni rozhodci, kteří jsou nominování stranami sporu, musí být potvrzení Soudem ICC.

Whitesell uvádí dva příklady tohoto základního scénáře, kde rozhodce při nominaci do druhého sporu opomenul upozornit ICC a ostatní účastníky na své předchozí angažmá. Zdá se, že takové opomenutí je poměrně běžné a je často způsobeno tím, že rozhodci předpokládají, že jejich předchozí působení je účastníkům známé. Takový přístup je však přijatelný pouze v případě, že obou řízení se účastní stejné osoby, to znamená jak účastníci, tak i jejich právní zástupci a rozhodci. Neupozornění na předchozí nominaci samo o sobě obecně není považováno za důvod pro nepotvrzení rozhodce, nicméně může být považováno za přitěžující okolnost. V obou uvedených případech byl rozhodce nepotvrzen. Vzhledem k tomu, že ICC bohužel nepublikuje rozhodnutí Soudu ICC, není jasné, co přesně byl v těchto případech rozhodující faktor. Popis obou rozhodnutí však naznačuje, že problém byl spatřován v riziku asymetrických informací a vstupu do řízení s již vytvořeným úsudkem.

Podobné obavy se objevily v dalším případu, kdy žalobce

nominoval stejného rozhodce jako v předchozím řízení v související věci proti subdodavateli žalovaného. Tento rozhodce také původně na předchozí působení neupozornil a učinil tak až na výzvu žalovaného. Popis tohoto případu obsahuje více detailů, než u předchozích dvou a dokonce zmiňuje vznesení obdobných otázek v obou případech a identická ustanovení v předmětné smluvní dokumentaci. Tento rozhodce byl rovněž nepotvrzen.

ICC však zvolilo jiný přístup v řízení, kde byly všechny strany shodné jako v předchozích dvou sporech ohledně jiných ustanovení stejné smlouvy. Žalobci v tomto případě nominovali potřetí v řadě stejného rozhodce, proti čemuž se ovšem postavil žalovaný. Soud ICC vzal v úvahu, že zatímco vznesený nárok je jiný, strany i jejich právní zastoupení jsou shodné a rozhodl se potvrdit rozhodce dokonce navzdory tomu, že žalovaný nominoval jiného rozhodce než v předchozích řízeních.

Podle výše uvedeného se zdá, že zásada rovnosti stran u ICC převažuje nad požadavkem na nestrannost rozhodce. Takový závěr je podpořen i poznámkou, kterou Whitesell naznačuje, že asymetrické informace jsou posuzovány pouze v případě, kdy účastníci, jejich právní zastoupení a rozhodci nejsou obdobní jako v předchozím řízení. Platí tedy, že čím více podobnosti, tím nižší je riziko, že rozhodce bude nepotvrzen.

Druhý řešený příklad spočívá v řízeních, která se odehrávají zároveň. Takový příklad je možné nalézt například ve zprávě Loretty Malintoppi. Již bylo uvedeno, že rozhodujícími otázkami je přítomnost rizika asymetrických informací a vstupu do řízení s již vytvořeným úsudkem se zohledněním společných prvků posuzovaných řízení. Otázkou však zůstává, jaká je role načasování.

Malou nápovědu poskytuje Whitesell, která zmiňuje, že by měla být zohledněná fáze, do které řízení dospělo ve smyslu, že čím dále se řízení nachází, tím je riziko předsudku větší. Malintoppi uvádí příklad z vlastní praxe, kdy rozhodce byl nominován žalobcem, zatímco zároveň

působil v související věci v jiném tribunálu jako rozhodce nominovaný žalobcovou dceřinou společností. Soud ICC zkoumal zejména, jak úzce spolu tato dvě řízení souvisí (čím blíže, tím hůře), fázi, do které řízení dospělo (čím pozdější, tím horší) a zda jsou shodní i ostatní členové tribunálu. Vzhledem k tomu, že souvislost byla poměrně úzká, řízení dospělo do pozdní fáze a ostatní členové tribunálu byli rozdílní, Soud ICC tohoto rozhodce nepotvrdil.

Z tohoto je možné vyvodit, že z hlediska času je pro potvrzení rozhodce nejvhodnější, aby se obě řízení nacházela ve stejné fázi, tedy u nominace rozhodců. V takovém případě může být nominace stejného rozhodce dokonce hodnocena jako prospěšná, neboť snižuje pravděpodobnost, že tato řízení dosáhnou protikladných rozhodnutí.

Třetí modelová situace se týká případu, kdy se rozhodce vyjádří ke sporu, který rozhoduje. Příklad takového jednání se nachází například v Canfor Corp. v USA, rozhodčím řízení podle Rozhodčích Pravidel UNCITRAL, které se týkalo protidumpingových opatření přijatých spojenými státy. V tomto případě rozhodce nominovaný žalobcem veřejně podpořil stanovisko žalobce při slyšení před Kanadskou vládní radou. Žádné usnesení v tomto ohledu nebylo přijato, nicméně jmenovací orgán požádal tohoto rozhodce, aby dobrovolně rezignoval poté, co žalovaný reagoval na tyto výroky argumentací článkem 3.5.2 IBA Guidelines.

Obdobné okolnosti nastaly v případě Perenco v Ecuador podle úmluvy ICSID, kde Charles N. Brower, nominovaný žalobcem, poskytl rozhovor, ve kterém učinil výroky, které byly interpretovány jako kritika počínání Ekvádoru. Ekvádor na toto reagoval podáním návrhu na odvolání a Brower byl požádán, aby rezignoval tajemníkem PCA. V tomto případě je však k diskuzi, zda byl příčinou issue conflict nebo pouze obecná podjatost proti Ekvádoru.

Velice zajímavé je v tomto ohledu rozhodnutí Švýcarského nejvyššího federálního soudu ohledně dovolání proti odvolání rozhodce ve věci Swiss Pilot Association v Swiss Federal Airlines AG. Návrh na

odvolání rozhodce vzešel z druhého rozhodčího řízení v této věci, ve kterém dovolatel nominoval rozhodce, který publikoval velice kritický komentář ohledně rozhodčího nálezu vydaného v prvním rozhodčím řízení ve věci. Ve svém rozsudku soud výslovně odmítnul, že by publikace akademického textu mohla být důvodem pro odvolání, pokud se ovšem netýká konkrétní věci a *„[…] nezaujímá takový postoj ohledně určité otázky, který nepřipouští žádnou možnost jeho změny“* Soud následně zkoumal přesné znění rozhodcova komentáře a nakonec rozhodl o potvrzení jeho odvolání z tribunálu. Rozhodujícím faktorem bylo, že rozhodcova kritika byla „*[…] tak jednoznačná, že bylo možno rozumně předpokládat, že jeho postoj ohledně sporných otázek je konečný.*“

Dalším hojně diskutovaným tématem je otázka, zda je možné, aby byl rozhodce odvolán na základě jeho prohlášení ohledně obecných právních otázek. Toto téma je obzvláště frekventované v investiční arbitráži, kterou se zabývá jen velmi omezené množství rozhodců, a množství klíčových otázek práva je výrazně omezenější ve srovnání s obecným rozhodčím řízením. Navzdory trvající akademické diskuzi, je představa, že by rozhodce mohl být odvolán čistě na základě vyřčeného právního přesvědčení soustavně odmítána. V IBA Guidelines je tato situace popsána na zeleném seznamu, což znamená, že by k odvolání vést neměla. Etický řád Americké advokátní komory dokonce výslovně uvádí, že „*Rozhodci nejednají v rozporu s tímto principem, pokud na základě svých zkušeností a odbornosti zaujímají určitý pohled na obecné otázky, které mohou vyvstat v rozhodčím řízení […]*“

Navzdory tomuto soustavnému odmítání, které je podpořeno judikaturou, existují určité náznaky, že toto odmítnutí nemusí být absolutní. V řízení podle úmluvy ICSID ve věci Urbaser v Argentina bylo žalobci navrhnuto odvolání Campbella McLachlana na základě knihy, na jejímž autorství se podílel, a ve které byly uvedeny názory na určité otázky řešené v tomto řízení. Tento návrh byl ostatními rozhodci v tribunálu jednomyslně odmítnut, neboť knihu považovali za čistě akademické dílo, přičemž akademikovi nic nebrání změnit názor. Za

zásadní dále považovali, že navrhovatelé neprokázali, že by publikované názory byly natolik rigidní, že by prof. McLachlan měl tendenci kvůli nim ignorovat okolnosti jednotlivých případů. Takový závěr však naznačuje, že pokud by nešlo o knihu, ale například o rozhodčí nález a názory byly vyjádřeny bez připuštění kompromisu, jejich rozhodnutí by mohlo být jiné.

Rozdílná situace nastala v případu investiční arbitráže podle pravidel UNCITRAL ve věci Malaysian Telekom v Republic of Ghana. V tomto případu Ghana navrhla odvolání Emmanuela Gaillarda z tribunálu na základě jeho působení v řízení ohledně zrušení nálezu ve věci Consortium RFCC v Kingdom of Morocco, kde zastupoval navrhovatele. Tyto dva případy spolu sice nijak nesouvisely, ale oba se dotýkaly stejných právních otázek. Zatímco na základě nálezu ve věci RFCC postavila svoji argumentaci, prof. Gaillard se v paralelním řízení naopak snažil o jeho zrušení. Ghana proto namítala, že je prof. Gaillard podjatý neboť nebude schopen se oprostit od své argumentace při rozhodování jejich případu. Na to prof. Gaillard reagoval s tím, že tato dvě řízení nejsou nijak propojena a že sám sebe považuje za nestranného a nezávislého. Návrh na odvolání byl posouzen příslušným soudem v Haagu, který následně vydal rozhodnutí, že prof. Gaillard musí rezignovat na svou roli v řízení ve věci RFCC, jinak je soud připraven jej odvolat. Prof. Gaillard v návaznosti skutečně rezignoval a v následném odvolacím řízení byl potvrzen ve funkci rozhodce.

Navzdory tomu, že okolnosti jsou v případech Urbaser a Telekom značně odlišné, poskytují rozhodnutí v těchto věcech dobrou ilustraci, jak obtížné by bylo odvolat rozhodce na základě jeho právního přesvědčení. Ani jedno z těchto rozhodnutí však neuvádí, že je takové odvolání nemožné. Pro rozhodce je proto důležité, aby možnost issue conflict brali v potaz a zohlednili tuto hrozbu v jazyku, který používají ve svých textech.

Hranici mezi předpojatostí a podjatostí je ve vztahu k issue conflict mimořádně obtížné vystopovat. Nejdůležitějšími faktory, které je třeba brát v potaz při rozpoznávání, zda může být rozhodce považován za podjatého, jsou: (i) specifičnost předmětných názorů; (ii) síla jazyka, který byl použit k vyjádření tohoto názoru; (iii) rovnost stran ve vztahu k souvisejícím řízením; a (iv) podobnost okolností ve vztahu

k paralelním řízením.

Při zohlednění všech těchto faktorů v rámci určitého sporu a jejich konfrontaci s judikaturou a komentářovou literaturou by mělo být možné určit, zda rozhodci může hrozit odvolání ve vztahu k issue conflict s dostatečnou určitostí.

6.3. Závěr

Tato práce analyzuje principy, na kterých stojí úprava odvolání rozhodců napříč jurisdikcemi. V tomto směru se dá říci, že je soudobé mezinárodní rozhodčí řízení skuteční globální ve smyslu, že je snadno sledovatelné, jak se jednotlivá pravidla a zákony navzájem ovlivňují. Přirozeně některé jurisdikce jsou propojenější než jiné, což je nejčastěji způsobeno historickými důvody, nicméně obecný trend je jednoznačný.

Společné znaky ve všech zkoumaných právních řádech jsou zjevné a jsou zpravidla postaveny na střetu principů, což vyúsťuje v nezbytné kompromisy. Ve vztahu k proceduře jde o snahu najít rovnováhu mezi pečlivostí a rychlostí; výkonností a přísností. Ohledně meritu to znamená snažit se co nejlépe vystihnout, kde by se měl nacházet dokazovací standard. Situace, kdy hmotné důkazy musí prokazovat nehmotný stav mysli rozhodce je totiž mimořádně komplexní.

Ve vztahu k etickým otázkám lze, odvolání rozhodce vnímat buďto z teoretického nebo z praktického směru. Teorie (idealisticky) vidí odvolání jako způsob, jak zajistit, že bude spor rozhodován nezávislou a nestrannou osobou, aby bylo dosáhnuto ideálu spravedlnosti. Naopak praktický (pragmatický) pohled vnímá odvolání jako pouhý způsob, jak zbavit budoucí rozhodčí nález vady, která by mohla bránit jeho následnému výkonu. Z tohoto důvodu existuje také dvojí nahlížení na issue conflict. Na jedné straně může být považován za nežádoucí prvek narušující rovnováhu řízení, zatímco na straně druhé může být vnímán jako těžko odhalitelná výhoda.

Abych uzavřel, tato práce provedla komparaci ustanovení o odvolání rozhodce ve vybraných pravidlech a předpisech a označila společné prvky. Tato zjištění byla následně využita při zkoumání issue conflict jako zvláštního typu podjatosti. Toto zkoumání bylo ztíženo zejména nedostatkem zdrojů, vzhledem k tomu, že rozhodnutí v obchodním rozhodčím řízení zpravidla nejsou publikována. Navzdory těmto obtížím, jsem se snažil určit základní znaky issue conflict a poskytnout tak příspěvek do diskuze o tomto tématu.

7. List of Abbreviations

AAA	American Arbitration Association
Art. / Arts.	Article / Articles
CAA	Czech Arbitration Act, Act no. 216/1994 Coll., on Arbitration Proceedings and Enforcement of arbitral awards (Czech Republic)
CCCP	Czech Code of Civil Procedure, Act no. 99/1963 Coll., Code of Civil Procedure (Czech republic)
Czech Arbitration Court	Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic
Czech Arbitration Rules	Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic, consolidated version as of 1 October 2015
e.g.	Exempli gratia (for example)
EAA	English Arbitration Act, Arbitration Act 1996, in force since 31 January 1997 (England)
FCCP	French Code of Civil Procedure, Code de procédure civile, enacted by Decree No. 81-500 of 12 May 1981 (France)
i.e.	Id est (that is)
IBA	International Bar Association
IBA Guidelines	IBA Guidelines on Conflict of Interest in International Arbitration
Ibid.	Ibidem (in the same place)

ICC	The International Court of Arbitration of the International Chamber of Commerce (in the meaning of the institution)
ICC Arbitration Rules	Rules of Arbitration of the International Chamber of Commerce in force from 1 January 2012
ICC Court	The International Court of Arbitration of the International Chamber of Commerce (in the meaning of the decision-maker)
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
LCIA	London Court of International Arbitration (in the meaning of the institution)
LCIA Arbitration Rules	LCIA Arbitration Rules effective 1 October 2014
LCIA Court	London Court of International Arbitration (in the meaning of the decision-maker)
p / pp	page / pages
para / paras	paragraph / paragraphs
PCA	Permanent Court of Arbitration
RFCC	Consortium RFCC v Kingdom of Morocco
SCC	Arbitration Institute of the

	Stockholm Chamber of Commerce
sec.	section
SPIL	Swiss Private International Law, Federal Private International Law Act of 18 December 1987 (Switzerland)
Swiss Pilots	Swiss Pilot Association v Swiss Federal Airlines AG, decision 4P.247/2006 dated 7 November 2006; published in DFC 133 I 89
Telekom	Malaysian Telekom v Republic of Ghana
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
Urbaser	Urbaser SA and other v. The Argentina Republic, ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (August 12, 2010)

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9. Abstract in English

In the past several decades, arbitration has become very popular method of settlement of international business disputes. One of the key factors behind this success is the possibility to choose the arbitrator. Nevertheless, the right of a party to select an arbitrator is subject to limitations as it may clash with some basic legal maxims such as the right to a fair trial. The specific definition of the right to a fair trial varies from one jurisdiction to another, but its essentials remain the same. In the context of selection of arbitrators, the right to a fair trial manifests itself in a form of the principle that all arbitrators must be and remain independent and impartial. That means that a person deciding a dispute must not be influenced by matters outside of the proceedings which would result in a bias towards or against either of the parties. In order to achieve this, rules applicable to arbitration contain a procedure to remove an arbitrator who fails to meet these requirements from the tribunal. One of the types of bias which impairs impartiality of an arbitrator is the so-called "issue conflict." This term refers to a relationship between an arbitrator and the subject matter of a case with a potential to cause prejudgment on certain issues. Various authorities, however, recommend that the parties nominate arbitrators who are predisposed in favour of the position they hold in the case. This forms a dilemma for the parties as the borderline between predisposition and bias is very thin. This thesis compares selected provisions for challenge of an arbitrator and finds common elements. These findings are subsequently applied to examination of the issue conflict. By assessing sample scenarios and comparing them with relevant case law and commentaries, this thesis attempts to find a pattern which could help parties resolve this dilemma.

10. Abstrakt v českém jazyce

Rozhodčí řízení se v posledních desetiletích stalo velice oblíbenou metodou řešení mezinárodních obchodních sporů. Jeden z klíčových faktorů stojících za tímto úspěchem je možnost zvolit si rozhodce. Právo strany rozhodčího řízení zvolit si rozhodce je však omezeno základními principy jako je například právo na spravedlivý proces. Konkrétní definice tohoto práva se liší napříč právními řády, jeho základ však zůstává neměnný. V kontextu volby rozhodců se právo na spravedlivý proces projevuje skrze pravidlo, že rozhodci musí být nezávislí a nestranní. To znamená, že osoba rozhodující spor nesmí být ovlivněna vnějšími zájmy, jež by vedly k podjatosti vůči stranám. Z tohoto důvodu zásadně všechny rozhodčí řády a pravidla obsahují úpravu procesu vyloučení rozhodce z řízení, v případě, že tyto požadavky nesplňuje. Jeden z typů podjatosti, který má negativní vliv na nestrannost je takzvaný „issue conflict“ značící vztah mezi rozhodcem a předmětem sporu, který má potenciál vyústit v předsudky vůči určitým otázkám v rámci řízení. Jedná se zejména o případy, kdy rozhodce působí ve více příbuzných řízeních, ale může jít i o situace, kdy rozhodce pouze projevil určitý názor naznačující zaujatost. Různé komentáře ovšem stranám sporu doporučují volit rozhodce, kteří jsou příznivě nakloněni vůči pozici, kterou ve sporu zastávají. Tento protiklad vytváří pro strany dilema, protože hranice mezi příznivým nakloněním a podjatostí je velice tenká. Tato diplomová práce porovnává ustanovení sloužící k odvolání rozhodce ve vybraných právních řádech a hledá společné prvky. Tyto nálezy jsou následně využity při zkoumání issue conflict. Posuzováním modelových příkladů a jejich srovnáváním s judikaturou a komentářovou literaturou se tato práce snaží nalézt určitý vzorec, který by pomohl stranám rozhodčích řízení vyřešit toto dilema.

Key Words:
Arbitration
Challenge of Arbitrator
Issue Conflict

Klíčová slova:
Rozhodčí řízení
Odvolání rozhodce
Issue Conflict