

CHALLENGE OF ARBITRATORS UNDER THE 2011 ZAGREB ARBITRATION RULES

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UDK: 34.918(497.5)
Izvorni znanstveni rad
Priljeno: travanj 2015.

The grounds and the procedure for challenge of arbitrators in arbitration proceedings before the Permanent Arbitration Court of the Croatian Chamber of Commerce is governed by Article 25 of the Court's 2011 Arbitration Rules ("the Zagreb Rules"). While arbitrators are required under the Rules to make full disclosure of all facts which, from the subjective perspective of the parties, might raise doubts concerning their independence and impartiality, they will be removed only if their independence is doubtful by objective standards. Instead of the two-instance arbitral proceeding on challenge, which was applicable under the 2002 Zagreb Rules, the current Rules provide for a single instance challenge procedure which is subject to judicial control under Article 12 of the Croatian Arbitration Act. The single most important weakness of the system of challenge of arbitrators is the requirement that the arbitration proceedings be repeated in case of removal of an arbitrator. In this respect, the Rules differ sharply from major international arbitration rules which provide that, as a rule, the proceedings will continue before the newly appointed arbitrator.

Keywords: arbitration, arbitration rules, challenge of arbitrators, Permanent Arbitration Court of the Croatian Chamber of Commerce

I. INTRODUCTION

The office of the arbitrator is one of exceptional responsibility. By agreeing to arbitration parties waive their rights of recourse to courts of law and submit to the final decision of a person or persons of their mutual trust. The

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arbitrator's relationship to the parties is at the same time one of authority and of confidence. It is therefore crucial in arbitration, perhaps even more than in court litigation, that independence and impartiality in decision-making is observed, and is seen to be observed, throughout the proceedings.

The principal procedural safeguard relating to independence and impartiality of arbitrators is the procedure of challenge of arbitrators. The procedure allows the parties to seek from the authority responsible for appointment of arbitrators to remove an arbitrator who does not meet the applicable standards of independence and impartiality.

In arbitration before the Permanent Arbitration Court of the Croatian Chamber of Commerce, challenge of arbitrators is governed by Article 25 of the Rules of Arbitration of the Permanent Arbitration Court¹ (the "Zagreb Rules" or the "Rules"). As any other set of arbitration rules, the Zagreb Rules operate in the context of the legal order which governs the arbitration (*lex arbitri*). In practice, the law applicable to arbitration in proceedings according to the Zagreb Rules will almost always be Croatian law since the place of arbitration, as the connecting factor determining the law applicable to arbitration², is almost always Zagreb.³ The challenge procedure available under Article 25 of the Zagreb Rules is thus best understood in the context of the Croatian Arbitration Act.

The provisions of the Croatian Arbitration Act governing the challenge of arbitrators (Article 12) are largely modelled on the corresponding provisions of the UNCITRAL Model Law on International Commercial Arbitration (Articles 12 and 13) on which the Act is generally based.⁴ Consistent with the Model Law, the Arbitration Act allows the parties to agree on a procedure for challenge of arbitrators (Article 12(4)). By agreeing to arbitration according to the Zagreb Rules, parties are deemed to have agreed on the challenge procedure provided by Article 25 of the Zagreb Rules (Article 2(2) of the Arbitration Act). Procedure according to Article 25 of the Zagreb Rules is thus a challenge procedure agreed by the parties within the meaning of Article 12(4) of the Arbitration Act (Article 13(1) of the Model Law).

¹ Official Gazette (*Narodne novine*), No. 142/2011.

² Arbitration Act (*Zakon o arbitraži*), *Narodne novine*, No. 88/2001, Article 1.

³ According to Article 7 of the Zagreb Rules, if the parties do not agree on the place of arbitration, the place of arbitration shall be Zagreb.

⁴ S. Triva and A. Uzelac, *Hrvatsko arbitražno pravo* (*Narodne novine*, 2007), pp. XXXIII – XXXV.

The aim of this paper is to examine the grounds for challenge of arbitrators and the challenge procedure under Article 25 of the Zagreb Rules. The paper will first discuss the available grounds for challenge (2). It will then focus on the rules of procedure (3). The paper will then address the judicial review of the decision on challenge available under the Arbitration Act (4) and close with concluding remarks (5).

2. GROUNDS FOR CHALLENGE

2.1. Lack of Independence and Impartiality as Sole Grounds for Challenge

Under Article 25 of the Zagreb Rules appointment of an arbitrator may be challenged if circumstances exist which raise justifiable doubts as to his or her independence and impartiality. The Rules do not mention the possibility of challenge on other grounds, in particular on grounds that the arbitrator lacks qualifications agreed to by the parties.

Under the Croatian Arbitration Act, challenge may also be sought if the arbitrator lacks the qualifications for his or her appointment agreed to by the parties (Article 12(2)). This raises an issue as to how the appointing authority under the Zagreb Rules should respond to an application for challenge based on such grounds. A conservative interpretation would be that, because Article 25 of the Rules does not mention challenge on grounds of lack of qualifications, such challenge is not provided for under the Rules. Under such interpretation, parties would need to resort to the default procedure applicable under the Arbitration Act when the parties have not agreed on a specific challenge procedure (Article 12(5) of the Arbitration Act). An alternative approach would be based on the assumption that the intention of the Rules could not reasonably have been to provide different procedures for challenge on different grounds under Article 12(2) of the Act and that the provisions of the Rules on the challenge of arbitrators ought to be interpreted as applying to all grounds for challenge available under the Act. It remains to be seen which course will be taken in future practice of the Court.

2.2. Independence and Impartiality Defined

Arbitrator's independence and impartiality are normative concepts. Whether an arbitrator is independent or impartial is a matter of law, not of

fact. The meaning of independence and impartiality therefore depends on the applicable law or, to the extent allowed by the applicable law, the agreement of the parties.⁵

Given that, as already mentioned, the Zagreb Rules are drafted with the understanding that the place of arbitration under the Zagreb Rules is almost always Zagreb, independence and impartiality within the meaning of Article 25 of the Zagreb Rules should be construed as having the same meaning as under the Croatian Arbitration Act (Article 12).

Independence and impartiality of arbitrators, under the Croatian Arbitration Act and the UNCITRAL Model Law, are closely related but distinct concepts. Impartiality is a subjective, psychological category. It denotes an absence of bias. An arbitrator is impartial if his or her state of mind is such that he or she will decide the case only on the basis of the merits, without favouring any of the parties. Independence, on the other hand, is an objective category. An arbitrator is independent where no external circumstances exist which would indicate partiality.⁶ Because absence of partiality cannot reasonably be proved or refuted, the focus of the inquiry is on external factors, i.e. arbitrator independence.

2.3. Standard of Proof

An arbitrator can be successfully challenged under Article 25 of the Rules if circumstances exist that give rise to *justifiable doubts* as to his or her impartiality or independence. This language, which corresponds entirely to Article 12 of the Arbitration Act, suggests that the challenging party need not submit conclusive proof of lack of impartiality and independence but merely to demonstrate reasonable doubt. Article 25 does not require certainty but rather a likelihood of lack of independence and impartiality.

The inquiry under Article 25 is an objective one. The issue is whether, from the perspective of a third reasonable person, circumstances at hand would

⁵ D. Babić, *Nezavisnost i nepristranost arbitra*, Pravo u gospodarstvu (2008), pp. 670 – 690.

⁶ L. Trakman, *The Impartiality and Independence of Arbitrators*, 10 International Arbitration Law Review (2007), p. 999; M. S. Donahey, *Independence and Neutrality of Arbitrators*, 9 Journal of International Arbitration 4 (1992), p. 31; E. Gaillard, *Les manoeuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international*, Revue de l'Arbitrage (1990), p. 761; P. Lalive, *Conclusions*, in *The Arbitral Process and the Independence of Arbitrators* (ICC Publication No 472, 1991), p. 119.

reasonably lead to doubts regarding impartiality and independence. This test inevitably involves a balance between the need to ensure integrity and fairness of the arbitration process and the need to prevent obstruction and abuse of procedural rights.⁷

The requirements relating to independence and impartiality under the Zagreb Rules apply equally to all arbitrators regardless of whether they sit as sole arbitrators, presidents of tribunals or party-appointed arbitrators. This is consistent with Article 12 of the Arbitration Act which, following the approach of the UNCITRAL Model Law, applies the same standards of independence and impartiality to all arbitrators.⁸ Party-appointed arbitrators are therefore subject to the same duties of disclosure and same standards for challenge as sole arbitrators or presidents of arbitral tribunals.⁹

Article 25 is narrower in scope than Article 23 which defines the duty of a prospective arbitrator to make full disclosure. According to Article 23, arbitrators have a continuing duty to disclose circumstances which “may give rise to doubts” as to their impartiality or independence, not merely those which “*give rise to justifiable doubts*”. Article 23 thus requires from the arbitrator to consider his or her independence and impartiality not only objectively, but also from the partial perspective of the parties. This includes circumstances which may reasonably lead a party to apply for a challenge which is plausible, although not justified. The combined effect of Articles 23 and 25 is that arbitrators are motivated to give full disclosure because they can legitimately expect that a challenge of their appointment will not be successful unless doubts as to independence and impartiality are objectively justifiable.¹⁰ It is important to note

⁷ G. Born, *International Commercial Arbitration* (Kluwer Law International, 2014), 2. ed., pp. 1780 – 1781.

⁸ H. Holzmann and J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 1995), p. 389.

⁹ On independence and impartiality of party appointed arbitrators *see e.g.* H. Smith, *Impartiality of the Party-Appointed Arbitrator*, *Arbitration International* (1990), p. 320; A. A. de Fina, *The Party Appointed Arbitrator in International Arbitrations – Role and Selection*, 15 *Arbitration International* 4 (1999), pp. 381 – 392; D. Bishop and L. Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *Arbitration International* 4 (1998), pp. 395 – 430; J. Paulsson, *Moral Hazard in International Dispute Resolution*, 25 *ICSID Review* 2 (2010), pp. 339 – 355; C. N. Brower and B. Rosenberg, *The Death of the Two-Headed Nightingale*, 29 *Arbitration International* (2013), pp. 7 – 44.

¹⁰ In this regard the approach of the Zagreb Rules is consistent with the principles prevailing in arbitration practice. *See e.g.* A. K. Hoffmann, *Duty of Disclosure and*

that, while arbitrators are encouraged to fully disclose all conflict of interest, failure to disclose, in and of itself, does not justify a challenge of the arbitrator.

2.4. Circumstances Which May Give Rise to Doubts as to Independence and Impartiality

Determining whether or not justifiable doubts exist regarding independence and impartiality of an arbitrator, involves an analysis of all the relevant circumstances on each given case. There are no concrete guidelines as to which particular circumstances justify a challenge of an arbitrator. Attempts have been made at the international level to develop common standards. The best known example are the IBA Guidelines on Conflict of Interest in International Arbitration which were adopted in 2004 and revised in 2014. While some aspects of the 2004 Guidelines have been well received by the arbitration community, others have been criticized.¹¹ The Guidelines may be consulted when determining whether a challenge is justified, but they are not to be considered as binding in any way.

There are circumstances in arbitration practice which recurrently arise in connection with the issue of arbitrator independence and impartiality. Most of the circumstances are such that they can create only a potential basis for challenge and cannot be considered as disqualifying in isolation of the entirety of the circumstances.

With respect to most circumstances which may cast doubt regarding independence and impartiality, parties may waive their right to challenge an arbitrator. In most cases such waiver will be implied in the failure to submit challenge within the required time limit after the disclosure by the arbitrator has been made.

2.4.1. Relationship with a Party to the Arbitration

In considering whether relationships with the party create justifiable doubts as to independence and impartiality regard is to be had to a multitude of factors. Direct relationships are more likely to lead to a successful challenge than indi-

Challenge of Arbitrators: The Standard Applicable Under the New IBA Guidelines on Conflicts of Interest and the German Approach, 21 *Arbitration International* 3 (2005), pp. 427 – 436.

¹¹ See e.g. C. T. Salomon, J. M. Alcalá and C. Cardozo, *Arbitrator Disclosure Standards in a State of Flux*, in *ICDR Commentaries* (Juris Publishing, 2012); Born, *op. cit.* (fn. 7), p. 1839.

rect ones (such as a business relationship with a person who has a relationship with a party). Past relationships are less likely to create justifiable doubts than ongoing or recent ones. Professional or business relationships of substantial importance are more likely to disqualify an arbitrator than ones which are insignificant, in terms of financial value or otherwise. Kinship or close friendship with a party will disqualify the arbitrator, while more distant relationships such as mere acquaintanceship or casual friendship normally will not.¹²

Arbitrator's business and professional contacts with a party can lead to a successful challenge if they reasonably indicate a risk that the arbitrator will have a sense of loyalty to the appointing party or an expectation of a future benefit. Where the arbitrator has a significant financial interest in the company involved or if he or she serves on a board of a company which is party to the proceedings, this will inevitably lead to justifiable doubts regarding his independence or impartiality.

In international cases, the fact that the arbitrator, especially the sole arbitrator or president of the tribunal, shares the nationality of a party may sometimes cause the other party to challenge the appointment on that basis. In arbitration according to the Zagreb Rules this may occur when the dispute involves a Croatian and a non-Croatian party where the sole arbitrator or the president of the tribunal is a Croatian national. The appointment of an arbitrator of neutral nationality is certainly desirable in many cases. The practical difficulty in achieving this goal in proceedings according to the Zagreb Rules is that in most arbitration proceedings the arbitration agreement provides that the language of arbitration shall be Croatian and that the applicable law is Croatian law. This limits options for the appointing authority to appoint arbitrators of neutral nationality. When appointing arbitrators in international cases, the appointing authority under the Rules has a statutory duty to take into account the advisability of appointing an arbitrator of a nationality other than those of the parties (Article 10(2) of the Arbitration Act). This provision requires the appointing authority to strive to ensure appointment of neutral arbitrators when appropriate, but it also implies that nationality of the arbitrator, in and of itself, does not indicate a lack of impartiality so that an arbitrator cannot be challenged on that basis alone.¹³

¹² K. Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Kluwer Law International, 2012), p. 277.

¹³ Holzmann and Neuhaus, *op. cit.* (fn. 8), p. 389; I. Lee, *Practice and Predicament: The Nationality of the International Arbitrator*, 31 *Fordham International Law Jour-*

2.4.2. Relationship with Counsel

Most objections to independence and impartiality raised in practice relate to the relationship of the arbitrator with one of the parties' counsel, typically the party who appointed the arbitrator. Since the pool of experienced arbitration professionals is relatively small, in most cases the counsel will have met the arbitrator personally.¹⁴ Casual professional relationships between the counsel and the arbitrator will normally not cast doubts as to independence and impartiality. Close friendships or close (prior) professional relationships may however disqualify the arbitrator.

In this regard it is to be noted that repeat appointments of an arbitrator by a counsel or a party have sometimes led to challenges in international practice. In determining whether a challenge should be granted in case of repeat appointments various factors should be taken into account such as the number of previous appointments, their financial value and importance in the practice of the arbitrator and of the appointing counsel, the outcome of cases (whether the arbitrator consistently voted for the appointing party), etc. In international practice the starting assumption is that repeat appointments are the result of arbitrator's quality and experience, so that most challenges made on this basis have not been successful.¹⁵

It is crucial for an arbitrator to abstain from all *ex parte* contacts regarding the merits of the dispute. The Code of Ethics of the Court expressly forbids such contacts and provides for the obligation of the arbitrator to inform the other parties, members of the tribunal and the Court of attempted *ex parte* communication (Section 3(4)). A violation of the duty to abstain from *ex parte* contacts regarding the merits may create a justifiable ground for challenge.

It is increasingly common in international arbitration practice for prospective arbitrators to be interviewed by the appointing party. Such interviews are ethical as long as they do not involve discussions regarding the merits of the dispute. Interviews may be conducted to explore the required experience, availability of the arbitrator or the absence of conflicts of interest. Parties are allowed and indeed encouraged to discuss with the prospective arbitrator the method of selection of the president of the tribunal and prospective candidates.

nal (2007-2008), p. 603; N. Pearson, *Nationalité et attaches de l'arbitre*, *Revue de l'Arbitrage* (1970), p. 239.

¹⁴ Y. Derains and E. Schwartz, *A Guide to The ICC Rules of Arbitration* (Kluwer, 2005), p. 125; Babić, *op. cit.* (fn. 5), p. 680.

¹⁵ Born, *op. cit.* (fn. 7), p. 1882.

2.4.3. Relationship with Other Arbitrators and the Institution

Prior contacts of an arbitrator with another member of the tribunal or with the arbitral institution typically do not constitute cause for a successful challenge. Arbitrators will often have known each other or will have worked together in past arbitration cases or otherwise. Past relationships such as these can normally not be expected to affect independence or impartiality. Doubts regarding independence and impartiality may arise if one of the arbitrators is subordinated to another outside the context of arbitration, i.e. when the presiding arbitrator is the managing partner in the firm where one of the members of the tribunal is employed, but even then a careful analysis of the relationship is needed before a conclusion is reached that an arbitrator is to be disqualified.

Involvement of the arbitrator in the work of the Permanent Arbitration Court also does not, as a rule, disqualify him or her from appointment. The president, vice-presidents and members of the Board can, according to the Zagreb Rules, be appointed as arbitrators, without restrictions.

2.4.4. Prior Involvement in the Dispute

Arbitrator's involvement in the dispute disqualifies him or her from accepting appointment. Such involvement may, for example, consist in the fact that the arbitrator represented or advised one of the parties with respect to the dispute or rendered an expert opinion on matters in dispute. Equally, a person who acted as a mediator may not serve as an arbitrator in the same dispute, unless the parties agree otherwise.¹⁶

Arbitrator's prior expression of opinion concerning matters relating to the subject-matter of the dispute does not, as a rule, justify his or her challenge. A public expression by the arbitrator of his general opinions concerning legal or other matters cannot be taken as a proof that the arbitrator will decide in favour of a particular position in the context of a specific case. Similarly, involvement in a similar case or a related case involving the same parties also does not normally justify challenge.

¹⁶ Croatian Mediation Act (*Zakon o mirenju*, Narodne novine, No. 18/2011, Article 16) allows parties to agree, whether before or after mediation, on *med-arb*: entrusting the mediator with the authority to decide the dispute as arbitrator. See D. Babić, *Mediation Law in Croatia: When EU Mediation Directive met the UNCITRAL Model Law on Conciliation*, *SchiedsVZ* (German Arbitration Journal) (2013), pp. 214, 220.

2.4.5. Arbitrator's Conduct During the Proceedings

Improper conduct by the arbitrator in the hearings and otherwise during the arbitration proceedings may cause the parties to doubt his or her impartiality. Arbitrator's expressions of criticism of the behaviour of the parties or counsel does not form grounds for a justified challenge. Unprofessional and inappropriate behaviour which demonstrates animosity or favouritism to a party can however disqualify the arbitrator.¹⁷

Arbitrator's expressions of his or her preliminary views on issues in dispute do not warrant challenge as long as it is clear that the arbitrator remains open to hear full argument of the parties on the issue. Indeed, the Croatian Arbitration Act expressly requires the arbitrators to disclose to the parties their views, to the extent necessary and possible, and give appropriate explanations in order to evaluate all relevant factual and legal issues (Article 17(3)). In order to avoid creating doubts as to his or her independence and impartiality, arbitrators typically seek consensus of the parties before they share their preliminary views on matters in dispute.

Parties in arbitration sometimes seek challenge on the grounds that an arbitrator has rendered an erroneous procedural or substantive decision to the disadvantage of the challenging party. For such challenge to be successful the challenging party would have to demonstrate not only that the decision was erroneous but that it was made out of partiality to the opposing party. Because the motives of the arbitrator are almost always impossible to prove, challenges of this kind will almost inevitably fail.

3. CHALLENGE PROCEDURE

3.1. Application for Challenge

According to Article 25(3) of the Zagreb Rules, an application for challenge shall be made in writing and shall indicate reasons on which it based. At a

¹⁷ In a ruling which has attracted considerable attention, LCIA recused an arbitrator because of his angry response to the challenge, even though the challenge was found to be meritless (LCIA Ref. No 1303 of 22 November, 27 Arbitration International (2001), p. 344). In an arbitration between the Portuguese and the Norwegian party, the arbitrator was famously removed because of his remark that Portuguese are "all liars and will say anything to suit their book" while Norwegians are generally truthful people (*The Owners of the Steamship 'Catalina' v. The Owners of the Motor Vessel 'Norma'*, 1938 61 Lloyd's List LR 360, 36).

minimum the application ought to state an allegation of a circumstance indicating a lack of independence and impartiality. The rules do not require the challenging party to submit documentary evidence, if any, in support of the challenge together with the application. An early submission of documentary evidence can however not only save time but also help enhance the credibility of the challenge.

The general rule of Article 10(1) Zagreb Rules regarding written communication in arbitration applies also to the application for challenge. According to that provision, all submissions and written notifications in arbitration are to be submitted to the Secretary of the Court in sufficient number of copies for the Secretary, the opposing party and members of the tribunal. This applies as a default rule even after the Tribunal has been constituted. If, once the tribunal has been constituted, the parties have agreed on direct transmission of documents with a copy to the Court (Article 11), as is often the case, then copies of the application may be transmitted by the challenging party directly to the arbitrators and the other parties.

The challenge of an arbitrator must be made in unambiguous terms. Communications to the Court expressing dissatisfaction with an arbitrator or allegations of his lack of impartiality are not, in and of themselves, tantamount to an application for challenge.

An application for challenge cannot be made to the tribunal itself. Expressions of doubt or allusions regarding independence or impartiality of arbitrators made to the tribunal, whether in writing or orally, cannot be characterized as an application for challenge.

As the decisions of the Court are issued in a written procedure, parties cannot address the Court on the matter of challenge in the form of an oral argument. In that respect the Zagreb rules do not differ from the rules of prominent international arbitral institutions.¹⁸ It is an open issue whether the party may rely on video or sound recordings of hearings or meetings in arbitration to support its claims that arbitrator's conduct demonstrates his or her lack of impartiality and independence.¹⁹

An application for challenge can, by definition, be sought only against the appointment of an arbitrator. Any possible concerns over independence or im-

¹⁸ Born, *op. cit.* (fn. 7), p. 1916.

¹⁹ The practice of the ICC Court of Arbitration has been to refuse such recordings and rely only on transcripts of hearings as evidence. J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC, 2012), p. 171.

partiality of the Secretary, the President or other officers or staff of the Court cannot be addressed in the form of an application for challenge. The parties are entitled to require from the Court that the personnel also meets certain standards of independence and impartiality, but such demands are not governed by the provisions of the Rules on the challenge of arbitrators.

3.2. Time Limits

According to Article 25(3) of the Zagreb Rules, an application for the challenge of an arbitrator must be filed either (1) within 30 days from the date when the challenging party learned of the appointment of the arbitrator or (2) within 30 days from the date when he or she learned of the circumstances which bring the independence and impartiality of the arbitrator into reasonable doubt.

The time periods allowed by Article 25(3) are relatively long.²⁰ In the majority of cases they will be sufficient for the challenging party not merely to file the application but also to explain in detail the circumstances on which the challenge is based and to collect and submit with the application any relevant documentary evidence. Where circumstance so require, the time limits can be extended in accordance with the Rules (Article 39).

The first-30 day time limit set in Article 25(3) of the Rules starts to run from the date when the challenging party learned of the appointment of the arbitrator concerned. This raises the issue of when, according to the Rules, an arbitrator is deemed to have been appointed.

According to Article 28(2)(f) and 29(2), the parties appoint arbitrators in their initial submissions. According to Article 22(1), a tribunal is deemed to have been constituted when the Court has received the statements of acceptance from the appointed sole arbitrator or all the members of the tribunal. It follows from these provisions that an arbitrator is appointed by mere declaration of the appointing party or entity. Appointment thus occurs prior to and independent from the acceptance of appointment by the arbitrator. The Zagreb Rules do not envisage confirmation of arbitrators or another similar process which would involve the Court in the process of appointment of arbi-

²⁰ Most arbitration rules provide for a 14 or 15 day time limit (LCIA Rules (2014), Article 10(3); SCC Rules (2010), Article 15; UNCITRAL Rules (2010), Article 13(1); Vienna Rules (2013), Article 20(2); a 30 day time limit is provided for in the ICC Rules (2012), Article 14(2)).

trators nominated by the parties.²¹ Appointment is thus not contingent on any subsequent act by the institution or by the arbitrator.

It follows from the foregoing that the 30-day time limit for challenge referred to in Article 25(3) begins to run as soon as the challenging party learns of the declaration of the appointing party, co-arbitrators or the appointing authority that the arbitrator concerned has been appointed. As a result, challenge of an arbitrator may be sought against the arbitrator who has not yet accepted appointment.

The challenging party will learn of the appointment by the opposing party from that party's initial submission (request for arbitration or answer to the request) or in any additional time limit extended to the appointing party by the Secretary in accordance with Article 16(2). In case of joint appointment of a sole arbitrator by the parties, the challenging party is deemed to have learned of the appointment, for the purposes of Article 25(3), from the date when the joint appointment was made. Where appointment is made by the appointing authority or by co-arbitrators, the time limit for challenge starts to run from the date when the challenging party has received the decision of the appointing authority on the appointment of the arbitrator concerned. Where party-appointed arbitrators choose the presiding arbitrator, the Rules do not mention that the arbitrator is thus appointed but rather "chosen". It follows from the context of the Rules, in particular from Article 22(1), that the presiding arbitrator is in this case deemed to be appointed when he or she is chosen by the co-arbitrators so that the time limit starts to run when the challenging party is informed of the co-arbitrators decision.

Beyond the time limit of 30 days from the notice of appointment, an application for challenge can be filed if a party has learned during the course of the proceedings of the circumstances which create grounds for challenge. In such a case the 30-day limit starts to run from the date when that party learned of such circumstances.

The question of when exactly the challenging party learned of the relevant facts can be difficult to establish. When parties challenge arbitrators late in the proceedings, this often raises doubts as to whether the challenge is frivolous and is being filed only to delay the proceedings. Surveys of arbitration practice indicate that objections to appointments at the outset of the proceedings have

²¹ Many institutions provide for oversight, in one form or another, of appointments of arbitrators by the institution. *See e.g.* ICC Rules (2012), Article 13; Vienna Rules (2013), Article 19; LCIA Rules (2014), Article 7; Swiss Rules (2012), Article 5.

better prospects of success than challenges which are made late in the course of arbitration.²²

The time limit for challenge starts to run from the date when the challenging party gained actual knowledge of the relevant facts. This follows from the wording of Article 25(3) according to which the time limit starts to run from the date when the party “learned” rather than “ought to have learned” of the grounds for challenge. It follows from this that the challenging party does not have a duty to investigate conflicts of interest. Parties in arbitration are entitled to expect that the declarations of independence and impartiality signed by the arbitrators are accurate. Suggestions have been made in academic writings that parties ought to be subject to a duty to investigate conflicts of interests.²³ While it is true that imposing this duty reduces options for dilatory challenges, the disadvantage of this approach is that it creates disincentives for arbitrators to make full disclosures when accepting appointment.

3.3. Authority Deciding on the Challenge

Challenges of arbitrators are decided according to the Zagreb Rules by the person or entity who acts as the appointing authority. In comparison to most other arbitration rules, an unusual feature of the Zagreb Rules is that they expressly provide that parties may agree that the appointing authority shall be any person or entity which will accept to serve as such (Article 19). The Court, acting through its President, is the appointing authority only if the parties have not agreed on another authority. In actual practice, the parties never agree on another appointing authority, so that the President almost always acts as the appointing authority.

It should be noted that Article 25 contains a textual inconsistency with respect to the authority deciding on the challenge. Under Article 25(1) challenges are decided by “the President of the Court” and under Article 25(4) by the “appointing authority”. It is manifest that the reference to the President in Article 25(1) is erroneous. Nothing in the Rules speaks of the intent to confer on the President the power to decide challenges in rare cases when he or she is not the appointing authority. The error can be explained by the fact that in practice the parties almost never use the option allowed by Article 19(1) to choose an appointing authority other than the President of the Court.

²² For example, in ICC practice approximately 70% of pre-appointment objections are accepted, while less than 10% of post-appointment challenges succeed (Born, *op. cit.* (fn. 7), p. 1919).

²³ Born, *op. cit.* (fn. 7), p. 1919.

A welcome change introduced by the 2011 Rules is that the arbitral tribunal has no part in the decision making regarding the challenge of an arbitrator. In arbitration according to 2002 Rules, because the rules were silent on the challenge of arbitrators, the default challenge procedure provided under the Croatian Arbitration Act (Model Law, Article 13) applied. According to that procedure, an application for challenge was decided by the arbitral tribunal, including the arbitrator concerned and, only if the challenge was denied by the tribunal, by the President or other appointing authority. The two-instance procedure meant, first of all, that it often took a substantial amount of time for a challenge to be decided. A major drawback was that the challenged arbitrator acted as a *iudex in causa sua*, participating in the decision of the tribunal on whether a challenge against him was appropriate.²⁴ Inevitably, the arbitrator's position was that there were no grounds for challenge, because had his or her position been different, he or she would have resigned. Other members of the tribunal, on the other hand, had the unpleasant duty to be involved in deliberations over whether their colleague met the required standards of independence and impartiality.

The new Rules avoid these difficulties by leaving it to the appointing authority to decide the challenge. This approach also prevails in international arbitral practice; most international arbitration rules now provide that an application for challenge is addressed directly to the appointing authority or the institution.²⁵

3.4. Opportunity to Comment and to Accept the Challenge

According to Article 25(4) of the Rules, before the decision on an application for challenge is made, the arbitrator concerned and the opposing party must be given an opportunity to comment on the challenge. This implies that the Secretary of the Court, as the officer responsible for communication on behalf of the Court with the parties and the arbitrators, is not merely to notify them of the decision but also expressly invite them to comment.²⁶

²⁴ This criticism can be generally expressed with respect to Article 13(2) UNCITRAL Model Law, see e.g. P. Mankowski, *Die Ablehnung von Schiedsrichtern*, SchiedsVZ (2004), pp. 304 – 305.

²⁵ ICC Arbitration Rules (2012), Article 14; LCIA Rules (2014), Article 10; Vienna Rules (2013), Article 20; UNCITRAL Arbitration Rules (2010), Article 13; Swiss Rules (2012), Article 10.

²⁶ Similar rules are found in e.g. ICC Rules (2012), Art. 14(3); SCC Rules (2010), Art. 15(3); Vienna Rules (2013), Art. 20(3). Conversely, the practice in the U.S. is not to inform the challenged arbitrator of the challenge so as to avoid the creation of

Where a member of the tribunal has been challenged, other members will be notified of the challenge, but not asked to give their comments. It would be inappropriate for them to interfere with the challenge procedure by submitting their comments *sua sponte*, whether against or in support of the challenge. Other arbitration rules, such as those of LCIA or VIAC, also provide only for comments by the arbitrator concerned²⁷, although there are also institutions which provide that all members of the tribunal shall be invited to comment.²⁸

Article 25(4) does not define the time limit in which comments on the application for challenge are to be made. It is for the Secretary to determine the time limit in the notification of the application. The time limit can be adapted to the circumstances, including the procedural context in which the application was made as well as the substance of the grounds for challenge. In determining the time limit regard should be had to the interests of the parties and the arbitrator to elaborate their position on the challenge as well as the need for expedient administration of the arbitration proceeding. Nothing in Article 25(4) precludes the Court from allowing further rounds of comments or receiving unsolicited comments prompted by comments of the arbitrator or the opposing party. It is for the Court to control communication with the parties and the arbitrator concerned in order to avoid undue delay.

According to Article 25(4) of the Rules, the appointing authority shall not decide on the application for challenge if the arbitrator concerned withdraws from his or her office or if the opposing party agrees to the challenge. A mere failure by the arbitrator or the party to comment on the challenge cannot be deemed as an acceptance of the grounds for challenge. What is required is an express declaration by the arbitrator that he or she withdraws from office or an express declaration of the opposing party that the challenge is accepted.

Article 25(4) mentions the “opposing party” as the party to be given opportunity to comment and the party who may accept the challenge of an arbitrator. A mechanical application of the provision would mean that parties in arbitration which are not opposed to the challenging party are not entitled to comment and accept or oppose the application for challenge. Under such interpretation if, for example, there are multiple respondents, and only one

bias against the challenging party (AAA Commercial Arbitration Rules, Rule 18; ICDR Arbitration rules, Art. 14.2).

²⁷ LCIA Rules (2014), Art. 10(4); Vienna Rules (2013), Article 20(3).

²⁸ ICC Rules (2012), Art. 14(3); SCC Rules (2010), Article 15(3).

of them applies for challenge, other respondent(s) would not be entitled to comment on the application for challenge and that the consent of that respondent is not needed for a challenge to be deemed to have been accepted.

General procedural principles governing arbitration mandate that all parties, whether or not opposed to the challenging party, be entitled to be heard on the application of challenge and that they be entitled to accept it or oppose it. On proper interpretation, the reference to the “opposing party” should not be construed as limiting the rights of parties not opposed to the applicant. All the parties to the arbitration ought to be recognized the right to be heard on the application for challenge.

3.5. Arbitration Proceedings Pending Challenge

Applications for challenge are often made with the purpose of stalling the arbitration process and creating a combative atmosphere in which the proceedings cannot run smoothly. The arbitration process must be safe, as much as possible, from attempts to sabotage the proceedings by seeking challenge of an arbitrator.

For these reasons, an application for challenge of an arbitrator, in and of itself, has no effects on the work of the arbitral tribunal. Pending a challenge, arbitral proceedings may continue without the tribunal being required to order suspension. As the application for challenge creates an atmosphere of uncertainty regarding the future involvement of the arbitrator concerned, it is important that the decision by the appointing authority on the challenge be made with due speed.

Nothing in the Zagreb Rules prevents the tribunal from ordering the suspension of proceedings or the postponement of certain procedural steps pending challenge where it considers that doing so would be appropriate under the circumstances. For example, if the application for challenge is supported by conclusive evidence of exceptionally grave violations of the duty of independence and impartiality by an arbitrator, the tribunal may find it improper to proceed as if no such evidence had been presented.

The provisions of the Zagreb Rules regarding replacement of an arbitrator unfortunately create a pressure on tribunals to suspend proceedings pending challenge whenever there is a plausible case for challenge. As discussed below, if an arbitrator is successfully challenged, the procedure before the tribunal is likely to be repeated. The prospect of repetition of the proceedings makes the

case for the suspension of the proceedings stronger. This unfortunate consequence has a strong potential to encourage abusive applications for challenges in future practice.

3.6. Decision on Challenge

The decision on challenge is a procedural decision by the appointing authority. It has no *res judicata* effect. If an application for challenge is refused, nothing prevents the challenging party to submit another application for challenge, provided that new circumstances or evidence arise with respect to the lack of independence and impartiality of the arbitrator.

Article 25(4) of the Zagreb Rules expressly requires the decision on challenge to be substantiated. This requirement is not universally accepted in international arbitration rules. Some institutions, notably the ICC, do not issue reasoned decisions on challenge. In ICC arbitration, applications for challenge are decided in full Court which makes it impossible to draft a single set of reasons for the decision.²⁹ While the absence of a requirement for substantiation allows for speedier decision making on challenges and has the potential to minimize unfounded challenges based on the misunderstanding of prior practice³⁰, the advantage of requiring substantiation of decision on a challenge is that it allows parties and arbitrators to familiarize themselves with the position of the appointing authority on the challenge and facilitates the decision of the competent court acting pursuant to Article 12(7) of the Arbitration Act. Substantiated decisions enable the institution to increase the predictability of its work by publishing excerpts of decisions on challenge.³¹

²⁹ N. Blackaby *et al.*, *Redfern and Hunter on International Arbitration*, (Oxford University Press, 2009), 5th ed., p. 279; Fry, Greenberg and Mazza, *op. cit.* (fn. 19), p. 131. See e.g. A. M. Whitesell, *Independence in ICC Arbitration: ICC Court Practice Concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, ICC International Court of Arbitration Bulletin, Special Supplement (2007), p. 9.

³⁰ A. Whitesell, *Remarks on International Arbitration in Latin America: The ICC Perspective*, Fifth Annual ICC Conference (2007), cited per Born, *op. cit.* (fn. 7), p. 1921.

³¹ M. L. Moses, *Reasoned Decisions in Arbitrator Challenges*, 3 Yearbook on International Arbitration (2013), p. 199; G. Nicholas and C. Partasides, *LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish*, 23 Arbitration International 1 (2007), p. 26; Blackaby *et al.*, *op. cit.* (fn. 29), p. 273. See e.g. *LCIA Arbitrator Challenge Digest*, 27 Arbitration International (2011), p. 283.

3.7. Replacement of the Arbitrator and Proceedings Following Replacement

According to Article 24 of the Rules, if an arbitrator is to be replaced for any reason, the appointment of a substitute arbitrator shall be made in accordance with the provisions of the Rules according to which the replaced arbitrator ought to have been appointed. This also applies when a party failed to participate in the process of appointment. Thus, if a party failed to appoint an arbitrator and the arbitrator is subsequently challenged, the party will be invited to appoint a substitute arbitrator. Also, if the president of the tribunal who was appointed by the appointing authority was successfully challenged, the co-arbitrators will have an opportunity to select a new president.

According to the letter of Article 24, it is possible for the party who appointed an arbitrator who was then successfully challenged to appoint another arbitrator who again does not meet the required standards of independence and impartiality and thus to provoke new applications for challenge in order to obstruct the process. On proper interpretation, such a party should be deemed to have implicitly waived its right to appoint an arbitrator so that appointment should be made by the appointing authority. Many international arbitration rules now expressly cater for this situation and provide for the power of the appointing authority to act in lieu of the party concerned.³²

According to Article 27 of the Zagreb Rules, in the event of a change in the composition of the arbitral tribunal, the argument will be repeated before the tribunal. The provision further states that the tribunal may decide not to repeat the argument if the parties so agree and that, where a sole arbitrator has been appointed, the argument must be repeated.

The requirement that proceedings be repeated is the single most important weakness of the system of challenge and replacement under the Zagreb Rules. Repetition of proceedings, especially where witnesses and experts have already been heard, can cause a substantial waste of time and money.³³ It is unfortunate that, under the Rules, repetition can only be avoided if the parties so agree, which means that in cases where the respondent has no interest to cooperate,

³² ICC Rules (2012), Article 15(4); LCIA Rules (2014), Article 11(2); Swiss Rules (2010), Article 13; Vienna Rules (2013), Article 22(1); SCC Rules (2010), Article 17(1).

³³ J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration* (Springer, 2001), pp. 320 – 321; Blackaby *et al.*, *op. cit.* (fn. 29); Born, *op. cit.* (fn. 7), p. 1954.

the proceedings will not continue. To take the matter to a further extreme, where a sole arbitrator is appointed, the Rules seem to mandate repetition of the argument even where the parties agree that proceedings should continue. Article 27 is in stark contrast with other arbitration rules which leave it to the tribunal to decide, in light of the circumstances, whether the proceedings should be repeated, often starting from an expectation that no repetition will be necessary.³⁴

As already mentioned, the provision of Article 27 on repetition of proceedings encourages abusive challenges. If the tribunal can expect that the application for challenge has any chance of success, it will be under a pressure to suspend the proceedings in order to avoid repetition of hearings.

4. COURT REVIEW

If the challenge of an arbitrator according to the Rules is rejected, the challenging party is entitled to seek judicial determination on the challenge pursuant to Article 12(7) of the Arbitration Act. Under an express provision of Article 12(4) the right to apply to court under Article 12(7) may not be waived by the parties. Article 25 of the Zagreb Rules does not purport to exclude or limit this right.

Application to the court can be made within thirty days of the receipt by the challenging party of the notice of the decision rejecting the challenge. Article 12(7) provides for an alternative thirty-day time limit which applies when no decision on challenge has been made. This time the limit starts to run

³⁴ Swiss Rules (2010), Article 14: "If an arbitrator is replaced, the proceedings shall, as a rule, resume at the stage reached when the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise."; UNCITRAL Rules (2010), Article 15: "If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise."; Vienna Rules (2012), Article 22(2): "If an arbitrator's mandate terminates prematurely pursuant to Article 21, the new arbitral tribunal shall determine, after requesting comments from the parties, whether and to what extent previous stages of the arbitration shall be repeated."; ICC Rules (2012), Article 15(4): "When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal."; SCC Rules (2010): "Where an arbitrator has been replaced, the newly composed arbitral tribunal shall decide whether and to what extent the proceedings are to be repeated."

after the expiry of thirty days from the challenge. The time limit is however applicable only when the challenge was to be decided by the arbitral tribunal acting under the default provision of Article 12(5), which applies when no challenge procedure was agreed by the parties. Where a challenge procedure has been agreed, as in the case when parties have agreed on the application of the Zagreb Rules, the alternative time limit does not apply. It follows that in arbitration according to the Zagreb Rules, the challenging party may resort to the procedure under Article 12(7) only if the appointing authority issued a decision rejecting the challenge.³⁵

The court competent to decide on the application under Article 12(7) is the Commercial Court in Zagreb in legal matters falling within the competence of commercial courts, and in other matters the County Court in Zagreb.

The application under Article 12(7) is not an application to annul the decision of the appointing authority under the Zagreb Rules, but a decision which decides anew on the application for challenge.

The court's decision under Article 12(7) finally disposes of the matter of challenge.³⁶ Since the possibility of an appeal against that decision is not provided for by the law, and the Act provides that courts may intervene in matters relating to arbitration proceedings only when provided by the law (Article 41), the court's decision regarding challenge may not be appealed.

By the express provision of Article 12(7), while the application under Article 12(7) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Independence and impartiality of the arbitrator as grounds for challenge under Article 25 of the Rules may also be reviewed by the courts after the award is rendered. A dissatisfied party may invoke lack of independence or impartiality in the context of setting aside proceedings. In proceedings to enforce a domestic award, lack of independence and impartiality is not grounds for refusal of enforcement except to the extent that the lack of independence and impartiality is such that enforcement of the award would violate public policy.³⁷ If recognition and enforcement of an award rendered in Croatia is sought abroad, lack of independence and impartiality may be invoked as grounds for refusal of recognition and enforcement within the confines of Article

³⁵ Triva and Uzelac, *op. cit.* (fn. 4), p. 104.

³⁶ *Ibid.*

³⁷ H. Sikirić, *Public policy as a Ground for Setting Aside an Arbitral Award*, 16 Croatian Arbitration Yearbook (2009), pp. 9 – 48.

V(1)(d) or, in exceptional circumstances, under Article V(2)(b) of the New York Convention.³⁸ In any of these scenarios, an arbitral award may not be successfully opposed on grounds of lack of independence or impartiality if the opposing party failed to challenge the arbitrator after having learned of the relevant circumstances.

5. CONCLUSION

Any set of rules governing the arbitral procedure must strike an appropriate balance between the need to provide effective remedies against an arbitrator's partiality and the need to minimize the potential for obstruction of the arbitration process by meritless challenges.

With respect to the available grounds for challenge, the Zagreb Rules strive to meet such a balance by requiring arbitrators to make full disclosure of all facts which, from the subjective perspective of the parties, might raise doubts concerning their independence and impartiality, at the same time providing that a challenge will be successful only if the independence of the arbitrator is objectively doubtful.

As regards the challenge procedure, efficiency has been significantly enhanced by providing that applications for challenge are decided only by the appointing authority. The parties and the arbitrators are thus spared of the two-instance procedure applicable under the 2002 Zagreb Rules, in which the application for challenge was initially decided by the tribunal and only then by the appointing authority. Adequate review of the decision of the appointing authority is afforded by the statutory procedure on court review under Article 12 of the Arbitration Act.

The most important weakness in the system established by the Zagreb Rules in relation to the challenge of arbitrators is that if an arbitrator is removed as a result of a challenge, the proceedings are to be repeated (Article 27). This approach is in stark contrast with major international arbitration rules which provide that in the event of removal, the proceedings will, as a rule, continue before the newly appointed arbitrator. The prospect that proceedings might be repeated in the event of a successful challenge might create a pressure on the tribunal to order suspension pending challenge whenever there is a reasonable chance for success of the application for challenge.

³⁸ R. Wolff, *New York Convention – Commentary* (C. H. Beck, 2012), pp. 339 – 340, 420 – 422; J. van den Berg, *The New York Arbitration Convention of 1958* (Kluwer, 1981), pp. 377 – 380.

Sažetak

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IZUZEĆE ARBITARA PREMA ZAGREBAČKIM PRAVILIMA IZ 2011.

Razlozi i postupak izuzeća arbitara u postupcima pred Stalnim arbitražnim sudištem pri Hrvatskoj gospodarskoj komori uređeni su odredbama čl. 25. Pravilnika o arbitraži Sudišta ("Zagrebačka pravila"). Arbitri su prema Pravilniku dužni iznijeti sve okolnosti koje, iz subjektivne stranačke perspektive, mogu izazvati sumnju u nezavisnost ili nepristranost arbitara, no izuzimaju se samo ako je njihova nezavisnost dvojbena prema objektivnim kriterijima. Umjesto dvostupanjskog arbitražnog postupka o izuzeću, koji se primjenjivao prema Pravilniku iz 2002., važeći Pravilnik predviđa jednostupanjski postupak koji je podložan sudskoj kontroli prema čl. 12. Zakona o arbitraži. Najveća slabost sustava izuzeća arbitara jest u tome što je u slučaju izuzeća arbitra propisano da će se postupak ponoviti. U tom pogledu Pravilnik se znatno razlikuje od važnih međunarodnih arbitražnih pravila koja predviđaju da će se, u pravilu, postupak nastaviti pred novoimenovanim arbitrom.

Ključne riječi: arbitraža, arbitražna pravila, izuzeće arbitara, Stalno arbitražno sudište pri Hrvatskoj gospodarskoj komori

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