

# THE EXCUSAL OF A JUDGE AND THE EXCUSAL OF AN ARBITER – A GUARANTEE FOR THE IMPARTIALITY OF COURT PROCEEDINGS AND ARBITRATION PROCEEDINGS

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*The principles of independence and impartiality are of core importance and interest in court and arbitration proceedings. They represent "tools" and guarantees for establishing and assuring fair proceedings that will not be based upon favors, bias, or prejudice in the adjudication of a case.*

*This paper focuses on one mechanism that attempts to guarantee as much as possible the impartiality of judges in a court proceeding and the impartiality of an arbiter in an arbitration procedure. The excusal of judges and arbitrators represents a mechanism implemented in both court and arbitration procedures to ensure that the judge or the arbiter will decide without prejudice or influence of a direct or indirect nature from any source or for any reason. Lack of impartiality may affect the final decision. Thus, national and international documents set out cases that may reflect a judge's and an arbiter's impartiality. In this paper, we will analyze and compare the reasons for a judge's and an arbiter's lack of impartiality and give conclusions about the similarities and distinctions between them. This paper will also focus on the neutrality of the arbitrators.*

Keywords: impartiality, judges, arbitrators, excusal of judges and arbitrators

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## 1. INTRODUCTION

A tribunal's Independence and impartiality are often synonymous but represent two different notions. Legal theory emphasizes that these notions include two different aspects of objectivity,<sup>1</sup> or they are seen as two sides of the same coin <sup>2</sup>These two principles are relevant to arbitration and judicial procedures. Due to the different subjects of those two procedures, their definitions and functioning in practice share some similarities and differences.

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<sup>1</sup> Knezević G., Pavić V., Arbitraža i ADR, Treće Izdanje, Pravni fakultet Univerziteta u Beogradu, Beograd, 2010, pp.92

<sup>2</sup> Redfern A. & Hunter M., Law and Practice of International Commercial Arbitration, Fourth Edition, Sweet & Maxwell, London, 2004, pp. 238

Since we will analyze the excusal of judges and arbitrators, this paper's primary goal will be the court's impartiality and the arbitration. The excusal is a mechanism for reflecting on the tribunal's impartiality.

While Independence of the judiciary means a judiciary that is free from internal and external pressures and makes decisions only by application of law and in line with the solemn declaration, impartiality sounds as close. However, it is not the same as that. Impartiality means that in a particular case, the judging and decision-making process, the judge will not be biased by any parts and, thus, be able to bring the right decision through due process. Impartiality does not exclude only pressures and influences from different entities but excludes pressures and influences for any reason. This means that judges may not be influenced only by different actors, but they may sometimes have a reason to bring a decision in favor of a part. The word "impartiality" etymology suggests that the judge will be free of both parties within a case. If we look at the general picture, this is sent to the decision-making process done through the application of law and by their solemn declaration- mentioned in the part about Independence. However, the elements that ensure impartiality are different and will be elaborated in addition to this text. The term "impartiality" describes a state of mind in which the subject is balanced in a perfect equilibrium between parties- it is synonymous with "non-partisan" or "neutral." It is generally defined logically in negative terms as "the absence of prejudice or bias."<sup>3</sup> The concept of impartiality requires that a judge act without favor, bias, or prejudice in adjudicating a case. A judge who holds an actual bias or prejudice against a person who is a party to the proceedings (e.g., the accused) or who has personal knowledge of the disputed facts of the case cannot be considered impartial. Moreover, a judge must not have a vested interest in a case. A vested interest occurs when a judge has an economic or other interest in the case's outcome or has a spousal, parental, or other close family, personal or professional relationship, or a subordinate relationship with any part<sup>4</sup>.

In international commercial arbitration, "independence" means an objective situation that derives from the relations between the arbitrator and one of the parties, which may be financial or other relations.<sup>5</sup> Scott Donahey gives a similar definition: "The term independence measures the relationship between the arbitrator and the parties- personal, social and financial. The closer the relationship in any of these spheres, the "less" independent the arbitrator is from the party. The test is objective in that it is generally easy to measure whether the arbitrator and the party are in a kinship, whether they have a business and financial relations, and whether and to what degree they are involved socially."<sup>6</sup> These definitions imply that Independence supposes that the arbitrator must

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<sup>3</sup> Stephan Treshcel, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2005, pp.61

<sup>4</sup> O'Connor- Rausch, *Model Codes for Post-Conflict Criminal Justice*, Volume II, United States Institute of Peace Press, Washington D.C., 2008, pp. 64

<sup>5</sup> Blackaby, N., C. Partasides, A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, Oxford, 2009, pp.267

<sup>6</sup> Donahey S., 'The Independence and Neutrality of Arbitrators', *Journal of International Arbitration*, Vol. 9, No. 4, December 1992, pp. 31

be free from any relationship with the parties that may make him *suspect* in his Independence. Namely, that might affect his decision. The arbitrator will not be independent if a financial, professional, or social relationship between him and one of the parties indicates his interest in the case or the final decision.<sup>7</sup>

On the other hand, the term "impartiality" refers to the arbitrator's lack of impermissible bias toward a party or the subject matter in dispute. This is a subjective test since it is difficult to measure directly.<sup>8</sup> Impartiality means freedom from favoritism or bias by word or action and a commitment to serve all parties. Impartiality is a more abstract concept than Independence in the sense that it implies a state of mind which is difficult to measure and quantify<sup>9</sup>. According to the above-given definitions, an arbitrator will be impartial if he does not favor either any of the parties or when there is no prejudice regarding the subject matter of the dispute. As a subjective category, it is challenging to prove that the arbitration institutions and national courts face significant difficulties when examining this standard.<sup>10</sup> From what has been pointed out, these two terms are similar but not the same. In this regard, Doak Bishop and Lucy Reed emphasize that: "An arbitrator who is impartial but not completely independent may be qualified, while an independent arbitrator who is not impartial must be disqualified. In selecting arbitrators in international arbitration appointed by the parties, the absolute and prevalent criteria must be impartiality.<sup>11</sup>

## 2. IMPARTIALITY OF JUDGES AND IMPARTIALITY OF ARBITRATORS

### 2.1. Impartiality of judges

By far the most important guarantee enshrined in Article 6 of the European Convention on Human Rights<sup>12</sup> [herein after ECHR] is that of an independent and impartial tribunal established by law. It is also one of the most important guarantees of the whole Convention. There are two aspects of this guarantee. On the one hand, an individual's human rights ensure that a neutral authority decides disputes involving the individual. On the other hand, however, it also has an institutional aspect of constitutional importance: it lays the foundation for what has been labeled since Montesquieu is the third power in a state after the legislative and the executive.<sup>13</sup> It is unnecessary to enter

<sup>7</sup> Ademi A., Zgjidhja e kontesteve tregtare para arbitrazhit tregtar ndërkombëtar, Doctoral Dissertation, University of Tirana- Tirana, 2015, pp. 162

<sup>8</sup> Donahey, pp. 32

<sup>9</sup> Mullerat R., 'Ethical Rules for International Arbitrators', publikuar në *Chicago International Dispute Resolution Association*, 29th of March, 2004, available in: [http://www.cidra.org/ethicalrules03#4th-III\\_2](http://www.cidra.org/ethicalrules03#4th-III_2) (last seen on: 10.07.2021).

<sup>10</sup> Ademi, pp.162

<sup>11</sup> Bishop D. & Reed L., 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration,' *Arbitration International*, Volume 14, Issue 4, 1998, pp. 399

<sup>12</sup> Article 6 of the European Convention on Human Rights, 1950

<sup>13</sup> Treschel, pp.46

into a long argument to establish that no rule of law can exist without independent courts. One may wonder whether the law itself can have any actual existence in the absence of a judiciary. An examination of the development of Roman law leads to the conclusion that the judges (in particular the praetor) contributed more to the development of the law than the legislature.<sup>14</sup> The fact that the guarantee of an independent and impartial tribunal is the essential element of Article 6 of the ECHR is not just a theoretical aspect. It can also be seen in the case law. In particular, it is always the first element to be examined in a case brought under Article 6. If it turns out that a tribunal does not conform to the requirements of Article 6, there will be no further examination of the proceedings-proceedings before a tribunal that does not satisfy the criteria of Independence and impartiality can never be fair, and there is thus no reason either to examine whether a hearing before such a tribunal was held in public or reasonable time<sup>15</sup>.

According to the Bangalore Principles for Judicial Conduct<sup>16</sup> (Value 2), Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. A judge shall perform his or her judicial duties without favor, bias, or prejudice and shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession, and litigants in the impartiality of the judge and the judiciary. Impartiality is a part of the IBA Minimum Standards for Judicial Independence (Section G-Securing Impartiality and Independence). Namely, paragraph (44) foresees that a judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias, and (Paragraph 45), a judge shall avoid any course of conduct which might give rise to an appearance of partiality.<sup>17</sup>

### **2.1.1 Exclusion of a judge as a tool for impartial justice**

Impartiality may occur for subjective reasons and objective reasons.

However, it is impossible to determine whether the judge has an impartial state of mind. It is even very doubtful whether it is possible in theory, particularly if one has regard to the psychoanalytical school of psychology. There can hardly be any doubt that no human being will be entirely without bias. Mostly, however, we are not aware of our hidden tendencies. Lawyers, in particular, tend to overestimate their objectivity. In practice, a judge who is aware of his or her tendency to be biased and is capable of sufficient self-criticism and self-control will be more neutral than a judge who is entirely unaware of his or her predispositions.

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<sup>14</sup> Ibid, pp.46

<sup>15</sup> Ibid, pp.46-47

<sup>16</sup> THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT 2002 (The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002)

<sup>17</sup> Articles 45 and 46 of IBA Minimum Standards for Judicial Independence, 1982

The exclusion of judges is generated when impartiality occurs for objective reasons. This second group of reasons that might cause a lack of impartiality of a judge or a court comes into consideration where there have been some previous involvements of a judge in the same case but in different positions. The position that a judge might hold and can make a judge doubtful and ineligible, thus partial, for further remaining as a judge in a specific case is previously being a prosecutor of that case, a member of the police, an investigator, a member of a body responsible for preparing the indictment, having taken one or more decisions regarding the defendant's detention, a judge on the merits, a defense counsel.

According to paragraph 18 (Excusal of a Judge on Account of Lack of Impartiality) of the Model Code for Post-Conflict Criminal Justice<sup>18</sup>, a judge must not participate in a case if he or she: a). is a victim of the criminal offense; b) is a relative of a defense counsel, the victim, the counsel for the victim, or the accused; c) has taken part in the proceedings as a prosecutor, a defense counsel, or a counsel for the victim, or has been examined as an expert witness or witness; or d). In the same case, has taken part in rendering a decision of a lower court, or, if in the same court, has taken part in rendering a decision challenged by appeal. A judge must not participate in confirming an indictment where he or she has ordered the suspect's detention (paragraph 2). A judge must not participate in the trial of an accused if he or she: a) has participated in pre-trial proceedings, including proceedings to confirm an indictment in the same case; or b) has participated in pre-trial proceedings to confirm an indictment against the same accused person in a different case. Besides this, a judge must refrain from participating in a case where, apart from the above-given situations, his or her impartiality is likely to be doubted on any ground.

The Bangalore Principles for Judicial Conduct<sup>19</sup>, also foresees situations for judges' excusal from a particular case. Namely, according to value 2.5: "A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge cannot decide the matter impartially. Such proceedings include, but are not limited to, instances where a). the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; b). the judge previously served as a lawyer or was a material witness in the matter in controversy, or c). the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy. Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a severe miscarriage of justice.

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<sup>18</sup> Vivienne O'Connor and Colette Rausch, *Model Codes for Post-Conflict Criminal Justice*, Volume II, United States Institute of Peace, Washington D.C., 2008, pp.64

<sup>19</sup> THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT 2002 (The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002)

North Macedonia's legislation foresees two grounds for the exclusion of a judge: a) the absolute grounds for exclusion, and b) the relative grounds for exclusion<sup>20</sup>. The absolute grounds for disqualification do not allow a judge to decide and participate in a case and make that judge or juror an ineligible judge or juror-*index inhabits*. The Law on Criminal Procedure<sup>21</sup> of North Macedonia in its article 33, paragraph 1 (1-5) enumerates these grounds, and according to the law, they are: 1) if he or she is damaged or a victim of that crime- *Nemo iudex in sua causa*; 2) if the defendant, his counsel, the plaintiff, the damaged party, his legal representative or authorized representative is his or her spouse or a non-married spouse or relative by blood, in the straight line to any degree, in the sideline to the fourth degree and by affinity to the second degree; 3) if with the defendant, his counsel, the plaintiff, or the damaged party, is about a guardian, a person under guardianship, an adoptive parent, or an adoptive child, 4) if in the same criminal case, has participated as a pre-trial judge, has participated in the examination of the indictment before the main hearing, or has participated in the procedure as plaintiff, defense counsel, legal representative or counsel of the victim, or has been examined as witness or as an expert and 5) if in the same case, has participated in the decision of the lower court or if in the same court has participated in the adoption of a decision that has been challenged by appeal.

According to the Law on Criminal Procedure of North Macedonia, there is also one more ground or reason for the disqualification of a judge. This is outlined in the Article 33 and states that a judge or a juror may be disqualified from a trial, if any circumstances causes suspicion of his or her impartiality- *iudex suspectus*. The Article 33 may be considered in different situations, such as joint property interests, the relationship between trustee-debtor, close relatives ( mentioned in paragraphs 2 and 3), and close friendship.

According to the law on criminal procedure in North Macedonia, the judge can initiate the issue of impartiality. However, if a judge does not voluntarily exclude himself or herself from a case, mechanisms must be established for his or her exclusion with the parties' initiative. This kind of disqualification does not mean permanent removal of a judge but only removal from the specific case. Usually, the decision is brought by the Court's President.

## 2.2. The impartiality of the arbitrators

In order to ensure the consistent application of the Principle of Independence and Impartiality of the arbitration process in the cases in front of the international commercial arbitration, the provisions of national legislations and the dispositions of rules of institutional arbitration have obliged the arbitrator to disclose all of the circumstances

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<sup>20</sup> Matovski N., Buzharovska G., Kallajxhiev G., Kazneno procesno pravo, Vtoro dopolneto i izmeneto izdanie, Skopje, 2011, pp. 106

<sup>21</sup> Article 33 of the Law on Criminal Procedure of North Macedonia, Official Gazzete nr.115/10

and facts that may put suspicions in his Independence and impartiality. This duty of the arbitrator is foreseen in order to fasten the process of appointment of another arbitrator, to strengthen the trust among the parties and the arbitrators, and thus to eliminate all grounds of suspicion that are or can be related to the integrity of the arbitrators and the process as a whole.<sup>22</sup>This is a very important duty and responsibility in international commercial arbitration because the parties usually come from different countries and know little about the arbitrators appointed by their counterparts.

Even though the arbitrator's duty to disclose all of the important circumstances that may make him or her a "partial" or "dependent" arbitrator is almost universally recognized in the national legislation, rules of institutional arbitration, and codes of ethics, these specific standards are not unified. Consequently, we can face more specific requirements in some arbitration institutions than others. The dilemmas or the questions about the facts and circumstances that must be disclosed differ and vary a lot, and they also need to specify in detail which facts and circumstances must be disclosed. However, the arbitrator must disclose and present all facts and circumstances that may cause his/her exclusion.<sup>23</sup>

### **2.2.1 National legislation and the arbitrator's duty to disclose circumstances that might be relevant to the assessment of his/her Independence and impartiality**

The obligation of the arbitrator to disclose facts and circumstances that might be relevant during the assessment of his/her Independence and impartiality is a fundamental element of different national legislations. The French Code of Civil Procedure<sup>24</sup>Article 1456, paragraph 2 provides the following solution: "Before the acceptance of the mandate, the arbitrator has to disclose any circumstance that may affect his or her independence or impartiality. He/she must disclose any circumstances arising after accepting the mandate". German Code of Civil Procedure also obliges the potential arbitrator to disclose all circumstances that may raise reasonable doubts about his/her impartiality or Independence. Furthermore, an arbitrator, from the moment of his or her appointment and throughout the arbitration process, has to, without delay, disclose to the parties all such circumstances, unless in cases where he or she has previously informed them of these circumstances. *On the contrary*, the United States Federal Arbitration Law does not contain any provision that would explicitly impose the arbitrator's duty to disclose facts and circumstances that may put suspicion on his or her independence or impartiality. However, such an obligation for the arbitrators derives from the US court decisions. Thus, according to a US Supreme Court decision: "Arbitrators should disclose to the parties any dealings which might create an impression of possible bias."<sup>25</sup>

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<sup>22</sup> Triva S., Uzelac A., *Hrvatsko Arbitražno Pravo: Komentar Zakona o arbitraži i drugi izvori hrvatskog arbitražnog prava*, Narodne Novine, Zagreb, 2007, pp. 97

<sup>23</sup> Ademi, pp.164

<sup>24</sup> French Code of Civil Procedure, [https://allowb.org/acts\\_pdfs/CPC.pdf](https://allowb.org/acts_pdfs/CPC.pdf)

<sup>25</sup> US Supreme Court, *Commonwealth Coatings v. Continental Cas.*, 393 U.S. 145 (1968).

The Law on International Commercial Arbitration of North Macedonia<sup>26</sup> has adopted the solution from the article 12(1) of UNCITRAL<sup>27</sup> (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration in terms of the arbitrator's duty to disclose the circumstances relevant to assessing his or her Independence and impartiality. Namely, article 12, in paragraph 1, provides that: "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or Independence. From the time of his appointment and throughout the arbitral proceedings, an arbitrator shall without delay disclose any such circumstances to the parties unless he has already informed them."

As we can see from this legal provision, the Law on international commercial arbitration of North Macedonia does not specify nor describe the circumstances the arbitrator has to present. However, it derives from the abovementioned situations and solutions, according to which the arbitrator has to present all circumstances, which for his or her disqualification may be requested, even those circumstances which he or she does not believe may affect his/her Independence and impartiality, but which, may arise suspicions to the parties. This obligation exists both before and after the appointment of the arbitrator. Regarding the deadline when this obligation must be fulfilled, the cited provision operates with the expression "without delay," which means that the arbitrator must present such circumstances immediately, as soon as he or she realizes them or in the first opportunity to disclose them. On the contrary, unreasonable delays of the arbitrator in this respect may result in his or her liability for eventual damages caused. The law does not expressly provide the form of disclosure (written or oral), but it should be presented in writing to facilitate the presentation experience.<sup>28</sup>

### **2.2.1.1 Guidelines of the International Chamber of Advocates on Conflict of Interest in International Arbitration**

Although national legislations and arbitration regulations provide specific standards about the arbitrator's duty to disclose circumstances that may affect his/her Independence and impartiality, they do not provide detailed guidelines on this matter, and there is a lack of uniformity in this duty. In order to avoid different standards in terms of the duty of the arbitrator to clarify the circumstances and to establish a set of common principles for identifying circumstances that may raise doubts about the Independence and the impartiality of the arbitrator, the International Bar Association (IBA) adopted Guidelines on Conflicts of Interest in International Arbitration. The latest version of the IBA Guidelines was adopted by the Resolution of the IBA Council on the 23<sup>rd</sup> of October, 2014, and they are dedicated for immediate use worldwide. This version clarifies and

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<sup>26</sup> Law on International Commercial Arbitration of North Macedonia, Official Gazette of North Macedonia no.39/2006

<sup>27</sup> UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration, 1985 amended 2006

<sup>28</sup> Ademi, pp.165



modifies the original Guidelines, which the IBA Council adopted on 22<sup>nd</sup> of May, 2004. The publication consists of two parts<sup>29</sup> The The First Part follows the Introduction entitled "General standards related to independence, impartiality and disclosure," and the Second Part is entitled "Practical implementation of general standards". In the last part of the Guidelines, the Working Group that drafted this publication provided examples of how the general standards set out in Part I should be applied. The list of unique situations is divided into three groups named by the traffic light colors: red (absolute and relative), orange, and green. Let us look at the four illustrated categories of situations, defined in colors, in which the arbitrator might be:

- **"The Absolute Red List"** (Non-Waivable Red List)- includes situations that reflect such a close relationship between the arbitrator and a party that makes non-allowable the acceptance of the arbitrator, based on the basic principle that no one can be a judge in his or her case. In these cases, the arbitrator is obliged not to accept the appointment. Such situations, for example, are if the arbitrator is a manager, a director, or a member of the supervisory board or has a similar influence toward one of the parties; if the arbitrator has a significant financial and personal interest from one of the parties or in the outcome of the case and so on.
- **"The Relative Red List"** (Waivable Red List) includes examples potentially leading to disqualification. However, if the parties are aware of the circumstances of this nature and if they expressly agree not to disqualify the arbitrator, then the arbitrator can accept the appointment. In any case, the arbitrator must fully disclose the circumstances or facts described in this list. Some arbitrators call the Relative Red List "the Pink List."<sup>30</sup> Such situations occur if the arbitrator has been previously involved in the given case, if a close family member of the arbitrator has a substantial financial interest in the outcome of the dispute, if the arbitrator is an advocacy lawyer in the same law firm as the lawyer of one of the parties, and so on.
- **"The Orange List"**- includes situations in which the potential arbitrator must disclose the circumstances and the facts that may give the parties reasonable doubt in terms of the dependence and bias of the arbitrator. The obligation of the arbitrator to disclose such circumstances and facts is provided to allow the parties to evaluate whether the arbitrator may serve or not. If the parties, after properly disclosing such circumstances and facts, do not make any objections within the prescribed time, it is considered that they have accepted the arbitrator and have given up on any possible conflict of interest based on disclosed facts and circumstances. Such situations, for example, may occur if the arbitrator within the

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<sup>29</sup> International Bar Association (IBA) adopted Guidelines on Conflicts of Interest in International Arbitration, (<[http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)> (last seen on 02.03.2015)

<sup>30</sup> Moses, M. L., *The principle and practice of International Commercial Arbitration*, Cambridge University Press, Cambridge, 2008, pp.133

last three years has been appointed as arbitrator in two or more cases by one of the parties or by the dependent company of one of the parties; if the lawyer's office in which the arbitrator works at the same time provides services to one of the parties or its dependent company but without establishing a significant commercial relationship and without the involvement of the arbitrator; if a close family member of the arbitrator is a partner or an employee in the lawyer's office representing one of the parties but the arbitrator himself or herself is not assisting in the dispute; if the arbitrator has previously in a public way presented a specific view or position about the case and other similar situations.

- **"The Green List"** includes situations that cannot doubt the Independence and the arbitrator's impartiality, and thus, the arbitrator is not obliged to disclose such circumstances. This group includes situations where the arbitrator has previously published a general opinion (i.e., in a legal journal or a public lecture) on a legal issue that is presented as contentious before the arbitration (but this opinion is not linked or focused on the case that is being arbitrated); if the lawyer's office in which the arbitrator works has acted against the party or its dependent company in a matter that is not related to the dispute; if the arbitrator has a relationship with another arbitrator or with the defense council of one of the parties through the organization in the same professional association or social organization, and so on.

### **2.3. Exclusion of the arbitrator as a tool for impartial arbitration**

Bearing in mind the importance of the principle of Independence and impartiality of arbitrators in the successful implementation of this dispute resolution mechanism, the international commercial arbitration law provides the institute of exclusion of arbitrators, which is expressed if there are reasonable doubts on the objectivity of the arbitrator. The exclusion of arbitrators is the primary tool in checking and guaranteeing the moral, professional, and other qualities of the arbitrator, which is provided due to the request that the arbitrator meet specific minimum criteria or standards to ensure a fair trial. The exclusion of the arbitrator can be defined as an important mechanism that protects the integrity of the process. As Miodrag Trajkovich points out: "The exclusion of the arbitrator is a correctional institute of the arbitration law, which through an arbitrator can be disqualified due to doubts on his or her impartiality or neutrality."<sup>31</sup>.

Legal discussions about this institute mainly focus on the following questions: What will happen if the arbitrator appointed by the party does not have any or none of the qualifications provided in the arbitration agreement, the applicable arbitration

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<sup>31</sup> Trajković, M., *Međunarodno Arbitražno Pravo*, Pravni Fakultet Univerziteta u Beogradu, Beograd, 2000, pp.376

regulation, or even the applicable national legislation? What will happen if the appointed arbitrator fails to comply with the obligation to carry out his or her mission independently and impartially?

The answers to the reasons for the arbitrator's exclusion and the procedure that will take place are part of the rules of arbitration institutions and national legislation. In the upcoming part of this paper, while dealing with the arbitrator's exclusion and the proper procedure, we will focus mainly on the Law of international trade arbitration of the Republic of North Macedonia.

### **2.3.1. The reasons for the exclusion of the arbitrator**

The reasons for the arbitrator's exclusion vary and depend on the rules of the applicable arbitration institution and the applicable national legislation. One widely accepted reason is the arbitrator's lack of Independence and impartiality, although many national legislations and arbitration rules provide other reasons.

Regarding the reasons for the exclusion of the arbitrator, the Law on International Trade Arbitration of North Macedonia contains a provision of an imperative nature (*ius cogens*) from which parties cannot voluntarily waive. According to this law, the institute of exclusion of the arbitrator does not refer only to the situations in which there are reasonable doubts about the objectivity of the arbitrator but also refers to the doubts related to the qualities that an arbitrator must have. Namely, following Article 12, paragraph 2 of this law, the exclusion of the arbitrator may be requested in two cases: first, if there are circumstances that lead to reasonable doubt in his or her impartiality or Independence, and second, if the arbitrator does not meet the criteria agreed by the parties. The exact reasons for the exclusion of the arbitrator are provided in the Rules of the Permanent Court of Arbitration at the Macedonian Chamber of Commerce, in its article 35, paragraph 2, in which it is stated that: "The exclusion of an arbitrator may be requested if there are circumstances which may raise a reasonable doubt to his or her impartiality or Independence or if the arbitrator does not have the qualifications agreed by the parties." We can conclude that the Law on international commercial arbitration of the Republic of North Macedonia contains the same solution as Article 12, paragraph 2 of the UNCITRAL Model Law on International Commercial Arbitration.

Regarding Independence and impartiality, the Law on International Commercial Arbitration of North Macedonia uses the term "reasonable doubt" and not any doubt. Regarding the lack of qualifications agreed upon by the parties, they should be evaluated in the context of the provisions in the arbitration agreement that the parties have made. For example, suppose the parties have agreed that the arbitrator is a lawyer and the

appointed arbitrator is an economist. In that case, the parties may request the removal of that arbitrator within the prescribed period.<sup>32</sup>

It should be mentioned that different national legislations do not provide the same reasons or grounds for excluding the arbitrator. For example, Swiss Federal Law on Private International Law<sup>33</sup> of 1987 refers only to the lack of Independence as a reason for the exclusion of the arbitrator, but not the lack of impartiality, although Swiss case law and arbitration practice recognize the exclusion of the biased arbitrator. On the other hand, article 1033, paragraph 1 of the Dutch Code of Civil Procedure<sup>34</sup> provides that the arbitrator may be excluded if circumstances give rise to reasonable doubts about his or her impartiality or Independence. The Law on Arbitration of the Republic of Kosova<sup>35</sup>, like the Law on international commercial arbitration of North Macedonia, article 10.2 provides that: " Each party may request the exclusion of the arbitrator if he or she has reasonable doubts on the impartiality or Independence of the arbitrator or if the arbitrator does not meet the qualifications agreed upon by the parties. A party may request the exclusion of the arbitrator only if the reasons for his or her exclusion have arisen after the arbitrator's appointment. The concerned party is obliged to request the exclusion of the arbitrator as soon as he or she is notified about the circumstances that justify the exclusion".

Compared to the law on international commercial arbitration in North Macedonia, there are also legislations that provide more reasons for the exclusion of the arbitrator. Thus, following the Croatian arbitration legislation, there are three basis or grounds for the exclusion of the arbitrator: a). the existence of circumstances that lead to reasonable doubt in the Independence or impartiality of the arbitrator; b). If the arbitrator does not meet the appropriate qualifications agreed upon by the parties and c). If the arbitrator fails to lead the process in due time<sup>36</sup>. The English Arbitration Act<sup>37</sup> of 1996 is even more comprehensive and provides the following grounds for exclusion of the arbitrator: a). the existence of circumstances that give rise to reasonable doubt about his impartiality; b). If the arbitrator does not possess the required qualifications by the arbitration agreement; c). If the arbitrator is physically or mentally incapable of leading the proceedings or has reasonable doubts about his or her capacity to do so; d). If the arbitrator has refused or failed to lead the process correctly.

The reasons for the exclusion of the arbitrator are also provided in the arbitration rules of proceedings. For example, the UNCITRAL Arbitration Rules of 2010, in its article 12,

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<sup>32</sup> Ademi, pp. 169

<sup>33</sup> Swiss Federal Law on Private International Law, 1987

<sup>34</sup> Dutch Code of Civil Procedure, <http://www.dutchcivillaw.com/civilprocedureleg.htm> (last opened: 01.06.2024)

<sup>35</sup> Law on arbitration of the Republic of Kosova, 2008, Law no. 02/L-75 Ligji për arbitration

<sup>36</sup> Zakon o arbitraži, NN 88/01, <https://www.zakon.hr/z/250/Zakon-o-arbitra%C5%BEi> (last opened: 01.06.2024)

<sup>37</sup> English Arbitration Act, 1996, <https://www.legislation.gov.uk/ukpga/1996/23/data.pdf>, (last opened: 01.06.2024)

paragraph 1, provides that: " Any arbitrator may be excluded if there are circumstances that give rise to a reasonable doubt as to the impartiality or Independence of the arbitrator." On the other side, the International Chamber of Commerce Arbitration Rules<sup>38</sup> of 2012 contains a comprehensive formulation that allows for different interpretations. According to the International Chamber of Commerce Arbitration Rules, the arbitrator may be disqualified if there are doubts about his or her Independence, impartiality, or other reasons.<sup>39</sup> (ICC Arbitration Rules 2012, Article 14(1)). Also, the London Court of Arbitration Rules<sup>40</sup>The law provides other grounds for excluding an arbitrator besides doubt related to the arbitrator's independence or impartiality.

### 3. THE NEUTRALITY OF THE ARBITRATOR

Arbitration law's fundamental tenet is that the sole arbitrator or chairman must be independent and impartial. The arbitrator's "neutrality" goes further than his Independence or impartiality, although it is often considered synonymous under a narrow and superficial interpretation. Its first and better-known aspect is sometimes called "national neutrality." As much as parties, in most cases, have different nationalities and/or residences or commercial establishments, it stands to reason that the "third arbitrator" or chairman should not, as a general rule, have the same nationality as one of the parties.<sup>41</sup>

Neutrality fundamentally relates to the arbitrator's predisposition towards a party or to the party's position. As noted, this predisposition has generally been accepted as resulting from the nationality and culture the arbitrator and one of the parties share. An international arbitrator should be neutral regarding both parties' nationalities, political systems, and legal systems and effectively possess a high degree of "international mindedness." Hence, the link between neutrality and nationality is predicated on the assumption that an arbitrator who shares the same nationality, culture, and language as one of the parties will be susceptible or sympathetic to that party and their position in the arbitration, with apparent concerns for both the fairness of the process and ultimate award, as the acceptability of the award will be dependent on the quality, skills, and credibility of the arbitrators who deliver it. While this is an assumption and may not be the practice in most cases, the concerns about bias, or the perception of bias, have been sufficient such that the general practice is to select sole arbitrators and presiding

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<sup>38</sup> International Chamber of Commerce Rules of Arbitration, 2012, <https://iccwbo.org/dispute-resolution-services/arbitration/> (last opened: 01.06.2024)

<sup>39</sup> ICC Arbitration Rules 2012, Article 14(1)

<sup>40</sup> London Court of Arbitration Rules, 2014, [https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2020.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx) (last opened: 01.06.2024)

<sup>41</sup> Lalive P., On the neutrality of the arbitrator and the place of arbitration, 1970, pp.43

arbitrators that possess nationalities that are different from the nationalities of the parties to the arbitration.<sup>42</sup>

However, others contend that a common outlook associating neutrality with nationality should not be generalized, as any arbitrator who is "neutral," regardless of nationality, should be sufficiently competent to use their judgment and determine the arbitration in favor of the party that makes the better case. Regardless of such contentions, neutrality is linked to nationality, and some contend that Independence, impartiality, and neutrality are all synonymous concepts. However, there are apparent differences as neutrality relates more to the perception of bias than actual bias and is consequently different from impartiality, which relates to actual bias and adopts a subjective test.<sup>43</sup>

The requirement that an arbitrator's nationality be different from that of the parties is reflected in various international arbitration rules including the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules ("UNCITRAL Rules"),<sup>28</sup> the American Arbitration Association International Arbitration Rules ("AAA Rules"),<sup>29</sup> the London Court of International Arbitration Rules ("LCIA Rules"),<sup>30</sup> the International Chamber of Commerce Arbitration Rules ("ICC Rules")<sup>31</sup> and the World Intellectual Property Organisation Arbitration Rules ("WIPO" Rules).

#### 4. CONCLUSIONS

The most widespread idea is that Independence and impartiality are different but, in the meantime, closely related to each other. Independence is often related to specific institutional guarantees that allow judges to free themselves from internal and external pressures while making a final decision. Such guarantees include independence from other branches of government, independence from an authority within the same court, and immunity.

For obvious reasons, such guarantees do not exist in international arbitration. Therefore, Independence is understood differently, mainly as an absence of family or social ties and professional or business relationships between the arbitrator and one of the parties or any third party with an interest in the proceedings.

Impartiality, in contrast, is usually associated with the objectivity of the decision or the absence of bias toward one or other parties. There is also a distinction between *personal* impartiality, which depends on having no stake in the outcome of the proceedings, and *institutional* impartiality, which is more related to what is usually referred to as Independence.

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<sup>42</sup> R. Feehily, Neutrality, Independence and Impartiality in International Commercial Arbitration, A Fine Balance in the Quest For Arbitral Justice, Volume 7, Issue 1, Penn State Journal of Law & International Affairs, 2019, pp. 92

<sup>43</sup> Ibid, pp. 93

In international arbitration, according to *Doak Bishop* and *Lucy Reed*, it is acceptable that "An arbitrator who is impartial but not completely independent may be qualified, while an independent arbitrator who is not impartial must be disqualified." In selecting arbitrators in international arbitration appointed by the parties, the absolute and prevalent criteria must be impartiality.

Impartiality may occur for subjective reasons and objective reasons. It is impossible to determine whether the judge has an impartial state of mind. It is even very doubtful whether it is possible in theory, particularly if one has regard to the psychoanalytical school of psychology. There can hardly be any doubt that no human being will be entirely without bias. Mostly, however, we are not aware of our hidden tendencies. Lawyers, in particular, tend to overestimate their objectivity. In practice, a judge who is aware of his or her tendency to be biased and is capable of sufficient self-criticism and self-control will be more neutral than a judge who is entirely unaware of his or her predispositions!

The exclusion of judges occurs when impartiality occurs for objective reasons, which are foreseen in national acts (Codes/ Laws of Criminal Procedures). The International Bar Association Minimum Standards of Judicial Independence also address a judge's personal and substantive Independence. The Bangalore Principles of Judicial Conduct of the United Nations also deal with judicial Independence and impartiality.

In order to ensure the consistent application of the principle of Independence and impartiality of the arbitration process in the cases in front of the international commercial arbitration, the provisions of national legislations and the dispositions of rules of institutional arbitration have obliged the arbitrator to disclose all of the circumstances and facts that may put suspicions in his Independence and impartiality. This duty of the arbitrator is foreseen in order to fasten the process of appointment of another arbitrator, to strengthen the trust among the parties and the arbitrators, and thus to eliminate all grounds of suspicion that are or can be related to the integrity of the arbitrators and the process as a whole.

Even though the arbitrator's duty to disclose all of the important circumstances that may make him or her a "partial" or "dependent" arbitrator is almost universally recognized in the national legislation, rules of institutional arbitration, and codes of ethics, these specific standards are not unified. Consequently, we can face more specific requirements in some arbitration institutions than others. The dilemmas or the questions about the facts and circumstances that must be disclosed differ and vary a lot, and they also need to specify in detail which facts and circumstances must be disclosed. However, the arbitrator must disclose and present all facts and circumstances that may cause his/her exclusion.

Although national legislations and arbitration regulations provide specific standards about the arbitrator's duty to disclose circumstances that may affect his/her Independence and impartiality, they do not provide detailed guidelines on this matter, and there is a lack of uniformity in this duty. In order to avoid different standards in terms

of the duty of the arbitrator to clarify the circumstances and to establish a set of common principles for identifying circumstances that may raise doubts about the Independence and the impartiality of the arbitrator, the International Bar Association (IBA) adopted Guidelines on Conflicts of Interest in International Arbitration. The latest version of the IBA Guidelines was adopted by the Resolution of the IBA Council on the 23<sup>rd</sup> of October, 2014, and they are dedicated for immediate use worldwide.

The reasons for the arbitrator's exclusion vary and depend on the rules of the applicable arbitration institution and the applicable national legislation. One reason that has been widely accepted is the arbitrator's lack of Independence and impartiality, even though this is not the only reason in many national legislations and arbitration rules.

The Law on international commercial arbitration of the Republic of North Macedonia contains the same solution as Article 12, paragraph 2 of the UNCITRAL Model Law on International Commercial Arbitration. Regarding Independence and impartiality, the Law on International Commercial Arbitration of North Macedonia uses the term "reasonable doubt" and not any doubt. Regarding the lack of qualifications agreed upon by the parties, they should be evaluated in the context of the provisions in the arbitration agreement that the parties have made.

Compared to the law on international commercial arbitration in North Macedonia, there are also legislations that provide more reasons for the exclusion of the arbitrator. Thus, according to Croatian arbitration legislation, there are three bases or grounds for the exclusion of the arbitrator: a). the existence of circumstances that lead to reasonable doubt in the Independence or impartiality of the arbitrator; b). If the arbitrator does not meet the appropriate qualifications agreed upon by the parties and c). If the arbitrator fails to lead the process in due time. The English Arbitration Act of 1996 is even more comprehensive and provides the following grounds for exclusion of the arbitrator: a). the existence of circumstances that give rise to reasonable doubt about his impartiality; b). If the arbitrator does not possess the required qualifications by the arbitration agreement; c). If the arbitrator is physically or mentally incapable of leading the proceedings or has reasonable doubts about his or her capacity to do so; d). If the arbitrator has refused or failed to lead the process correctly.



## **IZUZEĆE SUCA I IZUZEĆE ARBITRA – JAMSTVO NEPRISTRANOSTI SUDSKOG POSTUPKA I ARBITRAŽNOG POSTUPKA**

*Načela neovisnosti i nepristranosti od ključne su važnosti i interesa u sudskim i arbitražnim postupcima. Oni predstavljaju "alate" i jamstva za uspostavu i osiguranje pravičnog postupka koji se neće temeljiti na naklonosti, pristranosti ili predrasudama u presuđivanju predmeta. Ovaj se rad fokusira na jedan mehanizam kojim se pokušava u najvećoj mogućoj mjeri zajamčiti nepristranost sudaca u sudskom postupku i nepristranost arbitra u arbitražnom postupku. Izuzeće sudaca i arbitara predstavlja mehanizam koji se primjenjuje u sudskim i arbitražnim postupcima kako bi se osiguralo da sudac ili arbitar odluče bez predrasuda ili utjecaja izravne ili neizravne prirode iz bilo kojeg izvora ili iz bilo kojeg razloga. Nedostatak nepristranosti može utjecati na konačnu odluku. Stoga nacionalni i međunarodni dokumenti navode slučajeve koji mogu ukazivati na nepristranost suca i arbitra. U ovom radu analizirat ćemo i usporediti razloge sučeve i arbitrove nepristranosti te iznijeti zaključke o sličnostima i razlikama među njima. Ovaj će se rad također usredotočiti na neutralnost arbitara.*

Keywords: nepristranost, suci, arbitri, izuzeće sudaca i arbitara

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