Resolving the problem of lack of independence and impartiality of party-appointed arbitrators

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Abstract

The procedure for appointing the arbitrators is a core part of arbitration as one of the types of alternative dispute resolution. Nomination of the arbitrators by the parties may give rise to the problem of lack of independence and impartiality as a result of which the whole arbitration procedure may be adversely affected. The mentioned concern may influence the essence of arbitration itself, since arbitration is meant to serve as the neutral legal tool for the resolution of disputes.

The research gap in the mentioned problem is that there is no uniform remedy that could prevent the occurrence of lack of independence and impartiality of party-appointed arbitrators. Jan Paulsson, a renowned arbitration practitioner, is convinced that unilateral appointment causes "moral hazard" to arbitration and proposed the idea of nominating the arbitrators by a neutral body. Other arbitration practitioners, such as Charles N. Brower and Charles B. Rosenberg, are of opposing opinion and support the importance of party-appointments.

The objective of this Thesis is to seek for and define an effective remedy on how to prevent the occurrence lack of independence and impartiality of party-appointed arbitrators. This Thesis analyses different remedies such as nomination of arbitrators by a neutral body or their selection from pre-existing list of candidates, improvement of accountability of arbitrators and establishment of the appeal mechanism in arbitration. The analysis of the above will be aimed at finding the most optimal and potent remedy with the provision of additional recommendations on how such remedy may be implemented in practice.

The subsidiary issues and questions stemming from the central research question will focus on discussing the concepts of "independence" and "impartiality" and their standards under the national laws (i.e. UNCITRAL Model Law, U.S. Federal Arbitration Act, English Arbitration Act 1996); discussing the main causes of partiality and bias of arbitrators appointed by the parties. The subsidiary questions will also focus on the analysis of the proposed remedies aimed at preventing the lack of independence

and impartiality of party-appointment of arbitrators. The desk research and analysis is used as method in preparing Capstone Thesis.

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Introduction

Independence and impartiality may constitute the "hallmark of any adjudicatory mechanism, whether domestic or international, that is based on the idea of the rule of law".[1] These principles are widely recognized by arbitration legislation. In international arbitration, the arbitrator must be impartial and independent in rendering the award.[2]

Historical evidence suggests that arbitrators honored impartiality obligations for centuries. One of the examples is present in ancient Greece,[3] where the term "arbiter" was a synonymous to impartiality.[4] The impartiality and independence obligations are equally important and highly relevant in the present-day arbitration proceedings as well. Nomination of the arbitrators by the parties may give rise to the problem of lack of independence and impartiality as a result of which the whole arbitration procedure may be adversely affected. The system of party-appointment gives the parties the right to choose "their judge" to resolve the dispute and somehow "shake" the procedure. According to Gary Born's view: "Arbitration is adjudication by virtue of party autonomy".[5] The problem of the lack of independence and impartiality of the arbitrators appointed by the parties may influence the essence of arbitration itself, since arbitration is meant to serve as the neutral legal tool for the resolution of disputes.

Why this issue is so critical for arbitration? The lack of impartiality and independence is one of the grounds to challenge the arbitrator,[6] which may potentially create and great mistrust to the arbitration.

[1] Working Group 6, 'Lack of Independence and Impartiality of Arbitrators' (*Cids.ch*, March 2019), 1 <https://www.cids.ch/images/Documents/Academic-Forum/6_Independence_-_WG6.pdf> accessed 15 March 2020

[2] Seung-Woon Lee, "Arbitrator's Evident Partiality: Current U.S. Standards and Possible Solutions Based On Comparative Reviews" [2017] Arbitration Law Review 2017, Volume 9, Article 2, 1 <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1199&context=arbitrationlawreview > accessed 15 March 2020; Ann Ryan Robertson, *International Arbitration in the U.S.: Evident Partiality Based on Nondisclosure: Betwixt and Between*, (45 HOUSTON LAW 2007), 22-23

[3] Gary B. Born, *International Commercial Arbitration* (1st ed., Wolters Kluwer 2009), 1462

[4] Ibid.

[5] Gary B. Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International 2014), 1642; Siegfried H. Elsing, Alexander Shchavelev, "The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer" [2017] Kluwer Law International 2017, 66

[6] UNCITRAL Model Law on International Commercial Arbitration 2006, Art. 12

There is almost no adequate and effective remedy to prevent lack of independence and impartiality of arbitrators appointed by the parties. The remedies proposed by some scholars have not been sufficiently discussed. For instance, Jan Paulsson provided the idea of nomination of arbitrators by the neutral body or from pre-existing lists of candidates, however, he has not clarified how such a remedy may be implemented in practice, what advantages and disadvantages the nomination of neutral body may have and how this idea may be put into effect. By considering some remedies, their advantages and disadvantages, whether they are hypothetical or real, in this Thesis I am trying to find out the most suitable and effecting remedy preventing the lack of independence and impartiality of party-appointed arbitrators. In addition, some of the proposed solutions may remove the party-appointment system at all, which is too extreme and judgmental. Therefore, the objective of this Capstone Thesis is to define an appropriate effective remedy, which may not only prevent the lack of independence and impartiality, but also does not exclude the party-appointments.

The core part of Thesis consists of two chapters. Chapter 1 relates to the consideration of concepts of "independence" and "impartiality" and possible differences among them. In addition, this Chapter illustrates the main causes and grounds demonstrating when the arbitrator's partiality or bias may occur in unilateral appointment.

Due to that fact that the existing ideas on how to minimise the partiality and bias of party-appointed arbitrators, are usually laid down without due and proper critical analysis, Chapter 2 is called to critically consider the proposed ways on how the problem of lack of independence and impartiality may be remedied (such as the appointment arbitrators by a neutral and impartial body or their selection from the pre-existing lists of candidates, improvement of arbitrators' accountability, and implementation of an arbitration appeal mechanism. The discussion of the proposed methods will demonstrate their pros and cons, contemplate on the realization of such methods – be they hypothetical and unreal - in practice, and, as a result, contribute to finding the most suitable and effective remedy.

Chapter 1. The lack of independence and impartiality

1.1. Consideration of the concepts "impartiality" and independence"

Prior to starting the discussion of possible grounds for occurrence of lack of independence and impartiality, the theoretical review of the impartiality and independence concepts must be performed firstly. At first sight, the concepts "independent" and "impartial" are almost similar.[7] However, arbitration scholars have put a lot of efforts into discussing the possible differences between them.[8]

The concept "*independence*" is usually used to denote the institutional independence not only arbitrators, but also "judiciary and adjudicators from the other branches of government".[9] This notion is related to the personal connection or relationships between the arbitrator and a party or its counsel.[10] Bruno Manzanares Bastida states that "The stronger the connection between the arbitrator and one of the parties, the less independent the arbitrator is".[11] This concept is associated with an objective measure what the relations exist between the arbitrator and the party. Thus, independence means that there are no unacceptable external relationships or connections between the arbitrator and the party or the party's attorney (such as financial, professional, labor or personal relations). The concept '*impartiality'* means that the "arbitrator is subjectively unbiased and not predisposed towards one party".[12] Unlike independence, the concept "partiality" is more abstract, since it represents a state of mind that can only be proved by facts.[13] Impartiality means the absence of any prejudice in the mind of the arbitrator. Thus, the requirement of impartiality could be considered as subjective measure. In conclusion, the

[7] Bruno Manzanares Bastida, "The Independence and Impartiality of Arbitrators in International Commercial Arbitration", REVIST@ e – Mercatoria Volumen 6, Número 1 [2007], 3

[8] J. Lew, L. Mistelis, S. Kroll, *Comparative International Commercial Arbitration*, (Wolters Kluwer Law International 2003) 11-7, 11-29; A. Redfern & M. Hunter (eds.), *Law and Practice of International Commercial Arbitration*, (4th ed. Thomson/Sweet & Maxwell 2004), 4-55

[9] Working Group 6, 'Lack of Independence and Impartiality of Arbitrators' (*Cids.ch*, March 2019), 1 <https://www.cids.ch/images/Documents/Academic-Forum/6_Independence_-_WG6.pdf> accessed 15 March 2020

[10] Redfern, Alan, Hunter, Martin, *Law and Practice of International Commercial Arbitration*, (Sweet & Maxwell 2003), 212-213

[11] Bruno Manzanares Bastida, "The Independence and Impartiality of Arbitrators in International Commercial Arbitration", REVIST@ e – Mercatoria Volumen 6, Número 1 [2007], 3-4

[12] Gary Born, *International Commercial Arbitration* (1st edition, Wolters Kluwer 2009), 1474

[13] Redfern, Alan, Hunter, Martin, *Law and Practice of International Commercial Arbitration*, (Sweet& Maxwell 2003), 212-213

fundamental goal of independence is to ensure that there are no connections, relations, or dealings between the arbitrator and the party, which would encourage the arbitrator's ability to be impartial.

National courts, as well as legislative commentators of the domestic laws, have formulated various standards of independence and/or impartiality.[14] UNCITRAL Model Law on International Commercial Arbitration 2006 (UNCITRAL Model Law) as the prominent example, to which Gary Born refers in considering these two concepts, reflects straightforward arbitrator's obligations to be independent and impartial. Article 12(2) of UNCITRAL Model Law provides: "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties".[15] In contrast, the United States Federal Arbitration Act observes independence of the arbitrator less strictly. Unlike the UNCITRAL Model Law, the Federal Arbitration Act only considers the impartiality of arbitrators in §10 in the course of the grounds for annulment of a arbitral award, and in §10 (a)(2) which provides that the award may be vacated if "there was evident partiality or corruption in the arbitrators, or either of them".[16] Federal Arbitration Act does not provide for the provisions of forwarding interlocutory judicial challenges or removal of an arbitrator.[17] As a result, almost all U.S. court decisions regarding the independence and impartiality of arbitrators were made in the context of actions to reverse or recognize arbitral awards.[18]

Speaking about the common law system, section 24(1)(a) of the English Arbitration Act 1996 is equivalent to Article 12 of UNCITRAL Model Law which permits removal of an arbitrator where circumstances give rise to "justifiable doubts as to his impartiality".[19]

In France, the courts resort to no particular formulas,[20] but, as a rule, rarely go beyond the wording of the abstract principles of impartiality.[21] For instance, the Cour de cassation has declared "an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be and it

[14] Ibid.
[15] UNCITRAL Model Law on International Commercial Arbitration 2006, Art. 12(2)
[16] U.S. Federal Arbitration Act, 9 U.S.C. §10(a)(2)
[17] Gary Born, *International Commercial Arbitration* (1st edition, Wolters Kluwer 2009), 1466
[18] Gary Born, *International Commercial Arbitration* (1st edition, Wolters Kluwer 2009), 1467
[19] English Arbitration Act 1996, §§24(1)(1), 33(1)
[20] Gary Born, *International Commercial Arbitration* (1st edition, Wolters Kluwer 2009), 1471
[21] Ibid.

is one of the essential qualities of an arbitrator."[22] The Paris Cour d'appel has similarly explained "the independence of the arbitrator is essential to his judicial role, in that from the time of his appointment he assumes the status of a judge, which excludes any relation of dependence, particularly with the parties. Further the circumstances relied on to challenge that independence must constitute, through the existence of material or intellectual links, a situation which is liable to affect the judgment of the arbitrator by creating a definite risk of bias in favor of a party to the arbitration".[23]

Thus, national arbitration statutes use different, although often very alike requirements towards the notions of impartiality and independence. The formulation of the arbitrator's obligations for independence and impartiality may be considered as universal. While considering the cases on the challenges of arbitrator or the cases on the recognition of the arbitral award the domestic court may interpret the realities at hand in different ways according to facts of the case. In their turn, the national arbitration laws of different jurisdictions may not consider impartiality and independence as one unique legal requirement. UNCITRAL Model Law requires that the arbitrators be both "independent and impartial,"[24] while, for instance, the Swiss Law on Private International Law requires that arbitrators be independent[25] and the English Arbitration Act requires that the arbitrators be impartial.[26] Nevertheless, the discussed concepts are strengthened on the legislative level, and therefore do not have only a hypothetical meaning.

1.2. Causes of arbitrator's bias and partiality

Some arbitration scholars criticize party appointments both in commercial and investment arbitrations. Yenew B. Taddele states that: "Party-appointed arbitrators will not be neutral, impartial and independent

[22] *Judgment of 13 April 1972, Ury v. Galeries Lafayette*, 1975 Rev. arb. 235 (French Cour de cassation civ. 2e); Gary Born, *International Commercial Arbitration* (1st edition, Wolters Kluwer 2009), 1471

[23] *Judgment of 2 June 1989*, 1991 Rev. arb. 87 (Paris Cour d'appel); Gary Born, *International Commercial Arbitration* (1st edition, Wolters Kluwer 2009), 1471-1472

[24] UNCITRAL Model Law on International Commercial Arbitration 2006, Art. 12(2)

[25] Swiss Law on Private International Law 1987, Art. 180(1)(c); Gary Born, *International Commercial Arbitration* (1st edition, Wolters Kluwer 2009), 1474

[26] English Arbitration Act 1996, §24(1)(a); Gary Born, *International Commercial Arbitration* (1st edition, Wolters Kluwer 2009), 1477

decision-makers, but rather will be biased in favor of the party who appointed them".[27] Arbitrators nominated by the parties may constitute doubts regarding the relevance of this practice because when a party nominates its arbitrators, it relies getting an advantage that may support unfair conduct in arbitration proceedings. Further, Yenew B. Taddele clarifies that: "Jan Paulsson argues that the motivation in appointing one's own arbitrator necessarily involves the overriding interest in winning the case and permitting such appointments corrupts the institution of international arbitration".[28]

To illustrate the "hazard" of unilateral appointment, Paulsson refers to a number of real cases where the issue impartiality and independence of party-appointed arbitrator raises. One of the most striking examples is *Lowen case*.[29] In that case, the arbitrator, a former U.S. federal judge, was appointed by the United States and met with the U.S. Department of Justice prior to his appointment.[30] During this meeting, the arbitrator was told by officials: "'You know, judge if we lose this case we could lose NAFTA.' He remembered his answer as having been: 'Well if you want to put pressure on me, then that does it'".[31] This meeting was never disclosed in the course of the arbitral proceedings and was disclosed by this arbitrator only after many years. This case, in which the United States won and the arbitrator disclosed this fact after the completion of the arbitration, led Paulsson to conclude that in the light of pressure with respect to this arbitrator, the dispute between the parties was not considered by impartial and independent arbitral tribunal.

Indeed, the critics of party-appointment of arbitrators show that it may constitute "hazard" and be considered as problematic. First, the arbitrators play a key role in dispute resolution in all substantive

[27] Yenew B. Taddele, 'Why Party-Appointed Arbitrators: A reflection' (*Abyssinialaw*, 28 September 2018) <https://www.abyssinialaw.com/blog-posts/item/1830-why-party-appointed-arbitrators-a-reflection> accessed 22 March 2020

[28] Ibid.

[29] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID (NAFTA) Case No. ARB(AF) 98/3, Award on Merits (26 June 2003); Jan Paulsson, *Moral Hazard in International Dispute Resolution*, (Transnational Dispute Management, Vol. 8, Issue 2, May 2011), 346

[30] Christoph Müller, Antonio Rigozzi (Eds), 'New Developments in International Commercial Arbitration 2013' (*Schulthess*, 2013), 20 <http://www.derainsgharavi.com/wp-content/uploads/2013/11/New-developments-2013.pdf> accessed 20 March 2020

[31] Jan Paulsson, *Moral Hazard in International Dispute Resolution*, (Transnational Dispute Management, Vol. 8, Issue 2, May 2011), 346

and procedural issues.[32] The parties have a clear incentive to choose a person who is appropriate and close to his own views as much as possible, and that there is a thin line between sympathy and addiction.[33] Secondly, the choice of a party to appoint an arbitrator can create an incentive for this arbitrator to act in favor of the appointing party, for example, by voting for it and induce a reduction of costs.[34] This also may lead to an unfair process. In addition, a biased arbitrator may disrupt the process by conducting meetings, refusing to participate in proceedings, delaying the proceeding and issuing destructive dissent opinions.[35] For all these reasons, the arbitrator may inevitably side with the party appointed him. To assess whether party-appointments are in a fact "hazardous" or unreliable, the grounds which may cause the lack of independence and impartiality (such as inappropriate contacts between arbitrators and parties, repeat appointments, confusion of role by the arbitrator and influence of nationality of arbitrator) will be discussed further.

1.2.1. Inappropriate contacts between arbitrators and parties

Some contacts between parties and arbitrator may become inappropriate and may therefore create conflict of interest and the appearance of partiality and bias.[36]

The first-order issue is to determine what constitutes an unacceptable contact between parties and arbitrators.[37] At the pre-appointment stage, most random contacts are considered valid.[38] During the arbitration proceedings, any contact between the parties and the arbitrators is generally prohibited,[39] with the exception of casual contact in a social context. In the course of arbitration proceedings, if any communication takes place, it must be disclosed.

[32] Working Group 6, 'Lack of Independence and Impartiality of Arbitrators' (*Cids.ch*, March 2019), 5 <https://www.cids.ch/images/Documents/Academic-Forum/6_Independence_-_WG6.pdf> accessed 15 March 2020

[33] Albert Jan van den Berg, '*Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*,' (*Brill*, 2011) <https://doi.org/10.1163/9789047427070_043> accessed 18 March 2020; Working Group 6, 'Lack of Independence and Impartiality of Arbitrators' (March 2019), 5 <https://www.cids.ch/images/Documents/Academic-Forum/6_Independence_-_WG6.pdf> accessed 15 March 2020

[34] Ibid., 5

[35] Ibid.

[36] Working Group 6, 'Lack of Independence and Impartiality of Arbitrators' (*Cids.ch*, March 2019), 6 <https://www.cids.ch/images/Documents/Academic-Forum/6_Independence_-_WG6.pdf> accessed 18 March 2020

[37] Ibid.

[38] Ibid.

[39] Ibid.

The lack of independence stems from what can be called a "problematic relationship" between the arbitrator and one party or its attorney.[40] Often, such relationships are the result of financial connections (such as business transactions), sentimental relationships (friendship or family relationships) or links of group identification (common nationality and professional or social affiliation).[41] The example of professional affiliation is illustrated in American case Commonwealth Coatings Corp. v. Continental Casualty Co case.[42] In this case, the Supreme Court vacated an arbitral award because the impartiality requirement of arbitrators under §10(a)(2) of the Federal Arbitration Act had not been complied with. In particular, the Supreme Court precisely considered the fact that the presiding arbitrator had failed to disclose his four-to-five-year consulting relationship with one party to the arbitration which had earned him $12,000, including compensation on "the very projects" involved in the arbitration. The ground for vacating the award was "the undisclosed business relationship with one of the parties, related to the subject matter of the arbitration".[43]

One of the main documents specifying possible situations with contacts between arbitrators and parties is IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), which contain the principle: "Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated".[44] The IBA Guidelines focuses on occasions or situations "when an arbitrator should disclose potential conflicts, as well as when he or she should simply not accept appointment".[45]

[40] Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, Clair Balchain (eds), *The Blacklash against Investment Arbitration. Perceptions and Reality* (Kluwer Law International, 2010), 194 <https://books.google.com.ua/books?id=h1H8Er1Y8X8C&printsec=frontcover&hl=ru#v=onepage&q&f=false > accessed 3 June 2020

[41] William Park, "Arbitrator Bias", [2015] Boston University School of Law, Scholarly Commons at Boston University School of Law, Faculty Scholarship, 1-2015, 6

[42] *Commonwealth Coatings Corp. v. Cont'l Cas. Co*., 393 U.S. 145 (U.S. S.Ct. 1968)

[43] Gary Born, *International Commercial Arbitration* (1st edition, Wolters Kluwer 2009), 1467

[44] IBA Guidelines on Conflicts of Interest in International Arbitration, Introduction 2014, para. 1

[45] Margaret Moses, 'The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges' *(Kluwer Arbitration Blog*, 23 November 2017) <http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/?doing_wp_cron=1591011199.0828380584716796875000 > accessed 23 March 2020

There should be no private meetings, correspondence between the party and the arbitrator appointed by this party. It is quite common that during arbitration proceedings, arbitrators and parties have to communicate. However, such communication should be conducted between the arbitral tribunal and all parties to the dispute. In this regard, there are Guidelines that clarifies some types of arbitrator's behavior that is not proper.[46] Rule 5.3 of IBA Rules on Ethics for International Arbitrators states that: "Throughout the arbitral proceedings, an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives. If such communication should occur, the arbitrator should inform the other party or parties and arbitrators of its substance".[47] Thus, the exchange of opinions regarding the case between arbitrators and one of the parties in private is not allowed. However, IBA Rules on Ethics for International Arbitrators allow the communication between party and arbitrator before appointment in order to verify arbitrator's availability.

1.2.2. Repeat appointments

Repeat appointment or appointment occurring several times may be defined as "situation where an arbitrator has been previously appointed on several occasions by the same party, company or counsel".[48] The deep clarification of the repeat appointment of arbitrators establishes that: "The term refers to situations in which the same party (A) or companies belonging to the same group of companies as the party appoint the same arbitrator (X) in several arbitrations. A similar situation is found when the same counsel regularly appoints the same arbitrator or different, but often similar, cases".[49] Natalia Giraldo-Carrillo states that: "If an arbitrator who is being appointed on several occasions has previously worked on the same set of facts or on the same transaction, common sense would dictate to seek his participation again".[50] Yves Derains affirmed that "In such cases a party may nominate the same arbitrator in the

[46] Herman Duarte, '*Unilateral Appointments in International Commercial Arbitration. Is it time to change the way Arbitral Tribunals are constituted?*', [2013] Derecho En Sociedad, N. º 4, Ene ro de l 2013, 88
[47] IBA Rules on Ethics for International Arbitrators 1987, Rule 5.3
[48] Natalia Giraldo-Carrillo, 'The 'Repeat Arbitrators' Issue: A Subjective Concept', (*Scielo.org.co*, 15 October 2015), 81 <http://www.scielo.org.co/pdf/ilrdi/n19/n19a04.pdf> accessed 23 March 2020
[49] Fatima-Zahra Slaoui, 'The Rising Issue of 'Repeat Arbitrators': A Call for Clarification (Arbitration International, Volume 25, Issue 1, 1 March 2009), 109; Natalia Giraldo-Carrillo, 'The 'Repeat Arbitrators' Issue: A Subjective Concept', (*Scielo.org.co*, 15 October 2015) <http://www.scielo.org.co/pdf/ilrdi/n19/n19a04.pdf> accessed 23 March 2020
[50] Natalia Giraldo-Carrillo, 'The 'Repeat Arbitrators' Issue: A Subjective Concept', (*Scielo.org.co*, 15 October 2015), 93 <http://www.scielo.org.co/pdf/ilrdi/n19/n19a04.pdf> accessed 23 March 2020

hope that identical Arbitral Tribunals will be constituted in the related arbitrations so as to reduce the possibility of inconsistent results… A party may feel that designating a common arbitrator will nevertheless serve the useful purpose of ensuring that one of the arbitrators, at least, is already familiar with the contract or project that is the subject of the arbitration".[51] It is quite obvious that if the party appoints the same arbitrator often, the problematic relationships and connections develop between them. Such relations influence the arbitrator's impartiality and independence.

A party also may prefer to choose the same arbitrator since this arbitrator, for instance, had previously taken up a certain position regarding particular legal questions.[52] From the perspective of the party, it seems illogical to appoint an arbitrator who has publicly expressed his opinion or position[53](for instance, in the award rendered by such an arbitrator, his judicial publications or commentaries on the legal topics), which is contrary to the interests of this party. According to Paulsson, "only when the arbitrator expressed his opinion on the relevant case (namely, when he gave a legal opinion on the very facts and issues), he will be in a situation of bias".[54] The nominating party may perceive such a position in the way that this arbitrator may take the side of the party who appoints him.

Concerns about the independence and impartiality of the arbitrators may arise as a result of repeated appointments by the same party in successive or parallel arbitration proceedings or in proceedings against the same host state (in case of investment arbitration). In this regard, there is a risk that the arbitrator will have an incentive to have or, at least, be perceived as having, a tendency to make decisions in favor of those who make such appointments. One of the scholar studies showed that out of 13 disputes in ICSID arbitrations regarding re-appointments, only one was upheld. In cases considered in accordance

[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Natalia Giraldo-Carrillo, 'The 'Repeat Arbitrators' Issue: A Subjective Concept', (*Scielo.org.co*, 15 October 2015), 97 <http://www.scielo.org.co/pdf/ilrdi/n19/n19a04.pdf> accessed 23 March 2020; Jan Paulsson, 'Ethics, Elitism, Eligibility' (Journal International Arbitration, Vol. 14, No. 4 1997), 2 <https://a.storyblok.com/f/46533/x/833faf0d50/ethics-elitism-eligibility-jan-paulsson-1997.pdf> accessed 23 March 2020

with the UNCITRAL Arbitration Rules or arbitration rules of the International Chamber of Commerce disqualifications occurred more often with repeat appointments by one party.[55]

1.2.3. "Confusion of role" by arbitrator

One of the controversial issues relating to the independence and impartiality of arbitrators is the switching of roles between arbitrators, advisers and experts in different cases. This situation has also been called the confusion of roles or "double-hatting" practice.[56] Such practice is more related to the international investment dispute settlement.[57] In respect of investment arbitration, Philippe Sands clarifies that role confusion is "a situation where the appearance of an individual as an arbitrator in one ICSID case who acts as counsel and as expert in another ICSID case may give rise to a perception of bias, in the sense that his or her role might be perceived to inform actions in the other".[58]

The reputable arbitration rules contain the legal restrictions regarding the double-hatting practice. Under Articles 14 and 40(2) of the ICSID Convention arbitrators "shall be persons of high moral character and recognized competence… who may be relied upon to exercise independent judgment".[59] Article 6(2) of ICSID Arbitration Rules requires that arbitrators should be independent and impartial, and provide a statement of their relationships "that might cause [their] reliability for independent judgment to be questioned". Also, this legal document imposes duty of disclosure.[60] Under Article

[55] Maria Nicole Cleis, 'The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions' (*Brill*, 2017) < https://www.jstor.org/stable/10.1163/j.ctt1w8h3hc > accessed 18 March 2020

[56] Stefanie Schacherer, 'Independence and Impartiality of Arbitrators. A Rule of Law Analysis' (*Archive ouverte UNIGE*, January2018), 10 <https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/Schacherer.pdf> accessed 18 March 2020

[57] John R. Crook, 'Symposium: A Focus on Ethics in International Courts And Tribunals Dual Hats and Arbitrator Diversity: Goals in Tension' (*Cambridge.org*, 2019) <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/FC6538AE5CBDF495577F94D8F51AFA0F/S2398772319000369a.pdf/dual_hats_and_arbitrator_diversity_goals_in_tension.pdf> accessed 26 March 2020

[58] Philippe Sands, 'Conflict of Interests for Arbitrator and/or Counsel', in: M Kinnear et al (eds), *Building International Investment Law – The First 50 Years of ICSID*, (Wolters Kluwer Legal, 2016), 655

[59] International Centre for Settlement of Investment Disputes Convention, Art. 14, 40(2); John R. Crook, 'Symposium: A Focus on Ethics in International Courts And Tribunals Dual Hats and Arbitrator Diversity: Goals in Tension' (*Cambridge.org*, 2019) <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/FC6538AE5CBDF495577F94D8F51AFA0F/S2398772319000369a.pdf/dual_hats_and_arbitrator_diversity_goals_in_tension.pdf> accessed 26 March 2020

[60] International Centre for Settlement of Investment Dispute Arbitration Rules, Art. 6(2); John R. Crook, 'Symposium: A Focus on Ethics in International Courts And Tribunals Dual Hats and Arbitrator Diversity: Goals in Tension' (*Cambridge.org*, 2019) <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/FC6538AE5CBDF495577F94D8F51AFA0F/S2398772319000369a.pdf/dual_hats_and_arbitrator_diversity_goals_in_tension.pdf> accessed 26 March 2020

8.30.1 of Canada-European Union Comprehensive Economic and Trade Agreement, when the arbitrator is going to be appointed, he "shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement".[61]

When we are talking about double-hatting practice as the reason for lack of independence and impartiality in particular of party-appointed arbitrators, in my opinion, the borders of arbitration market should be considered as well. Only in the small (limited) arbitration market, for instance, Ukrainian, such reason may be more concerned in respect of party-appointments. In such market, it is quite difficult for an arbitrator to build his professional legal career of arbitrator without acting as the lawyer or adviser. Thus, at the beginning of arbitrator's career pathway, the party may hire the lawyer, who plans in the future to requalify his legal professional activity from legal practitioner to arbitrator. In such case, the professional ties may still exist between this party and this legal practitioner. After that, when this particular lawyer becomes an arbitrator as a part of, for instance, International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, the same party may appoint this arbitrator to resolve the dispute. Also, it should be noted that the party may have different parallel disputes where on one dispute certain particular arbitrator may act as the party's legal counsel and in another dispute act as an arbitrator. In addition, Ukrainian arbitration law contains no prohibiting requirements towards the lawyers to act as the arbitrators or vice versa.

1.2.4. Nationality of arbitrator

It cannot be denied that unilateral appointment is adopted on the basis that "my nominee will ensure that the tribunal as a whole understands my culture".[62] Nominating party may think that if the appointed arbitrators will have the same nationality as the party, this may bring the win in the case. It seems that this thinking corresponds to the tactics of "selling" arbitration which relates to selfish goals.[63] To achieve

[61] Ibid.
[62] Jan Paulsson, *Moral Hazard in International Dispute Resolution*, (ICSID Review - Foreign Investment Law Journal, Volume 25, Issue 2, Fall 2010), 349
[63] Ibid., 350

this goal, it is necessary to choose an arbitrator of the same nationality who will provide a certain "degree of comfort to the appointing party".[64]

In addition to independence and impartiality, there is another concept, namely the concept of "neutrality". It is not an easy task to distinguish between impartiality and neutrality at the first sight. The so-called "national neutrality" may influence the arbitrator's independence and impartiality. Since in the vast majority of cases the parties have different nationalities, places of residence or commercial institutions, it is quite natural that the ""third arbitrator" or chairman should not, as a general rule, have the same nationality as one of the parties".[65] The nationality requirement in itself may not be an important or even legally significant factor in party-appointments, especially in cases where the parties choose the arbitrator directly and jointly. But, as the arbitration practitioner Neil Pearson aptly remarked "as a symbol of impartiality, the national neutrality of an arbitrator is a vital factor for the proper functioning of a good arbitral tribunal".[66] The neutrality may be reached by appointment of arbitrator other nationality than the party itself.

[64] Peter Morton, 'Selection and Appointment of Party-Nominated Arbitrators', (*Klgates.com*, 23 March 2006), 2 <http://www.klgates.com/files/Publication/ef5a6a6e-3dc8-425f-8142-78a404d04e4f/Presentation/PublicationAttachment/97a9c2ca-ebaf-4093-8391-7d52eba88c31/ArbitrationSemina.pdf> accessed 24 March 2020

[65] Pierre Lalive, "On the Neutrality of the Arbitrator and of the Place of Arbitration" (*Lalive.ch*, 1989), *25* <http://www.lalive.ch/data/publications/43_-_On_the_Neutrality_of_the_Arbitrator_and_of_the_Place_of_Arbitration_Recueil_de_travaux_suisses_sur_l'arbitrage_international.pdf > 24 March 2020

[66] Ibid.

Chapter 2. Remedies for the lack of impartiality and independence of party-appointed arbitrators

As illustrated above, the different grounds such as inappropriate contacts between an arbitrator, arbitrator's acting as an expert or a counsel in parallel arbitration proceedings, repeat appointment of an arbitrator and the appointment of the party's same-nationality arbitrator may lead to the prerequisites for the occurrence of lack of independence and impartiality. At the same time, some scholars have proposed the ways or methods how such as an occurrence of the lack of independence and impartiality may be remedied.

In order to avoid cases of arbitrator bias influencing the arbitral process and the deliberations, Paulsson proposes "the practice of unilateral appointments".[67] Such a prohibition or control of unilateral appointments will obviously affect what many parties and arbitration practitioners consider as a valuable right of the parties to choose "their own" arbitrator. Paulsson strongly rejects the idea that the parties have the right to appoint their own arbitrator, and states that if such a right exists at all, it will certainly not be fundamental.[68] In this Chapter the proposed methods, which may stop the occurrence of partiality of arbitrators from happening, will be critically reviewed in order to define the most effective remedy.

2.1. Appointment of arbitrators by neutral institution or from pre-existing lists

The first obvious option instead of unilateral appointment may be an appointment of arbitrators by a neutral institution or from pre-existing lists of candidates. This remedy is strongly recommended by Jan Paulsson. From Paulsson's explanations it is not entirely clear how such remedy may be realized. Paulsson does not clarify what is the nature of this neutral institution that may nominate arbitrators. Is this body separate authority or constituted near the arbitral institution? In fact, Jan Paulsson named that such institution can be the Court of Arbitration Sports (CAS). However, in my understanding, such

[67] Jan Paulsson, *Moral Hazard in International Dispute Resolution*, (ICSID Review - Foreign Investment Law Journal, Volume 25, Issue 2, Fall 2010), 348
[68] Ibid.

institution should be the same arbitration institution, but not a separate body established only for the purpose of nomination of arbitrators. As I understood from Paulsson's description, the institution similar to CAS will deal only with the arbitrator's nomination is slightly blurry.

Before coming to the conclusion if this method of appointment of arbitrators may resolve the problem of lack of independence and impartiality, it is worthwhile considering its advantages and disadvantages. One of the first advantage of institutional appointment is that it has a sustainable mechanism. The mechanism of institutional appointment is inextricably linked to the existence of the arbitral institution. As long as the institution exists, the institutional nomination will exist as well. When the parties have decided that possible disputes will be resolved by means of institutional arbitration, institutional arbitration rules will inevitably apply to such arbitration. The mechanism of institutional appointment may not be subjected to amendments for a long period of time, and the legal requirements introduced in the arbitration rules are not often changed as well. Thus, this may bring some sort of predictability for the parties, which may review and be familiar with the arbitration rules pertaining to the provisions of appointment of arbitrators as such arbitration rules are in free access.

Second advantage of institutional appointment is the existence of strict impartiality and independence commitments for arbitrators. When the arbitrator maintains its professional activity under the institutional rules, he has stricter disclosure commitments on the impartiality and independence. The arbitrator by default has to sign the Statement of impartiality and independence - the special form by virtue of which the arbitrator expresses his acceptance, confirms his availability to resolve the particular dispute and provides warranties as to the disclosure on his previous and current cases. Provision of the false information in the Statement may influence his professional reputation as of the institutional arbitrator. One of the reputable arbitration institutions, such as International Court of Arbitration at the ICC, requires the prospective arbitrator to sign ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence. Such Statement requires arbitrator under the Article 11(2) of the Arbitration Rules to provide the details "whether there exists any past or present relationship, direct or indirect, whether financial, professional or of any other kind, between you and any of the parties, their

lawyers or other representatives, or related entities and individuals. Any doubt must be resolved in favor of disclosure".[69] The signing of the impartiality and independence statement approved by the institution puts additional burden on the arbitrator to carry on his impartiality and independence commitments besides the ethical obligations. The top arbitration institutions select the listed arbitrators having a very strong professional experience and good reputation, in particular, arbitrators who are reluctant to take disputes where their impartiality and independence obligations may be compromised. Such arbitrators are clearly recognizable in the arbitration market. Therefore, it is very important for the arbitrators to save their reputation and follow the strict institutional rules.

On the other side, there are some disadvantages of institutional nomination. Considering the neutral institution as the option, it has to be taken into account that nowadays there are no independent or neutral special arbitration authorities established for making appointments. In general, each arbitration institution is created to conduct the whole arbitral process, including the appointment of arbitrators. Therefore, if the party choses the institutional arbitration and nomination, they will bear the costs charged for the nomination. Also, the parties always have the right to choose an *ad hoc* arbitration that is not administered by a specific institution.

The parties prefer to nominate the arbitrator because they may have an illusion of control of the process. That is why arbitration is distinctive from litigation. In the case with institutional nomination, no institution can fully be aware about the potential knowledge or professional skills of arbitrators being nominated by the parties. Therefore, institutions could never properly assess "how much trust a party would have in the arbitrators it would appoint, which might negatively affect the perceived legitimacy of the arbitration proceedings".[70] Along these lines, the arbitrator David Williams QC recently noted

[69] Arbitrator Statement Acceptance, Availability, Impartiality and Independence (International Court of Arbitration, 2017) <https://iccwbo.org/content/uploads/sites/3/2016/06/ICC-Arbitrator-Statement-Acceptance-Availability-Impartiality-and-Independence-Arbitration-Rules-ENGLISH.pdf> accessed 24 March 2020

[70] José I. Astigarraga, Steve Smith, Edna Sussman, 'The Debate: Unilateral Party Appointment of Arbitrators' (American Bar Association, Section of International Law, International Arbitration Committee 2013, Volume 1, Issue 1), 12 <https://sccinstitute.com/media/29997/aba-sil-newsletter-sent-to-list-serve-on-arbitrator-appointments-001-1.pdf > accessed 3 June 2020

that parties tend to avoid appointing by the institution as president of the tribunal, which "demonstrate[s] a lack of confidence in institutions in respect of appointments".[71]

Considering the option of nomination of arbitrators from the pre-existing lists of candidates, in my understanding, this option is always dependent on the authority which administers such lists, once this lists cannot exist by themselves. Indeed, each arbitral institution has its list of arbitrators.

The pre-existing list approach justified by Paulsson is undesirable because it may involve the lobbyism and create an artificial barrier to entry of the new candidates. In addition, such lists are not updated frequently. For instance, the list of arbitrators administered by International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry is updated once in five years.

I think that institution nomination is quite a good method instead of direct party-appointments. Institutional nomination minimizes the parties' intervention into the impartial and independent arbitral proceeding. At the same time, I would propose some recommendations with regard to institutional appointment. The first recommendation is related to the introduction of amendments to the model arbitration clauses. Quite often the parties use the model arbitration clause constituted by the arbitral institutions. An institution may include the provisions into model arbitration clause that by default the appointment of arbitrators will be conducted only by such institution. In such arbitration clauses, the name of particular arbitral institution will be specified. The appointment of arbitrators will be done by institution, but after the review of the candidates by the parties. The party has the right to review arbitrator's curriculum vitae which contains arbitrator's professional skills and knowledge. I think, such clause will not limit the parties' autonomy as one of the cornerstone arbitration principles, but may guarantee a higher neutrality of arbitrators. Party will not have opportunity to provide their own candidate.

Nomination from pre-existing list also has "right to exist". This is quite important for party which has never taken part in arbitration and does not have any idea where to find the prospective arbitrator. In

[71] David A.R. Williams QC, *Address to Society of Construction Lawyers FCL* (*DIF Courts*, March 2011) <https://www.difccourts.ae/2011/03/20/address-to-society-of-construction-lawyers-fcl-by-justice-david-a-r-williams-qc-dubai-sunday-20-march-2011/> accessed 20 March 2020

order for institutional nomination to work in favor of impartiality and independence, a particular institution should update the its arbitral list at least once a year.

2.2. Improvement of "accountability" of arbitrators

Another possible solution that can be introduced to prevent a lack of independence and impartiality is the improvement of the "accountability" of arbitrators. Upon the observations of Charles N. Brower, the "accountability" and "accountable" may be defined as "required or expected to justify an action or decision; responsible; answerable; when one party must report its activities and take responsibility for them.[72] Charles N. Bro clarifies that: "Accountability as a process can be described as "someone reports/is responsible to someone else for something".[73]

One of the grounds for the appearance of lack of independence and impartiality is a double-hating practice or confusion of the role of arbitrator and the counsel which was mentioned in Chapter 1. As it was mentioned this cause is also related to party-appointed arbitrators. An arbitrator may be accused of double-hatting when he is acting as arbitrator, advisor, or expert witness.[74] The most critics in respect of double-hatting practice relate to the international investment dispute settlement. A frequent critic of this practice, Philippe Sands, affirms that: "We … need to address the deplorable practice of the same individual sitting as arbitrator in one case and acting as counsel in another, giving rise to situations in which you might find yourself deliberating with your fellow arbitrators in the knowledge that one or more of them is actually litigating the very point that you are seeking to write an award on. That is unacceptable".[75] The presence of critics of double-hatting reflects that existing ethical or legal

[72] Charles N. Brower, 'Accountability in International Investment Arbitration' (*American Society of International Law*, 31 March 2016), 2 <https://lk-k.com/wp-content/uploads/2017/07/KAUFMANN-KOHLER-Accountability-in-International-Investment-Arbitration-Brower-Lecture-31-March-2016.pdf> accessed 20 March 2020

[73] Ibid., 3.

[74] Malcolm Langford, Daniel Behn & Runar Hilleren Lie, *The Revolving Door in International Investment Arbitration*, (*ResearchGate*, January 2017) <https://www.researchgate.net/publication/327208015_The_revolving_door_in_international_investment_arbitration >

[75] Philippe Sands, 'Reflections on International Judicialization' (The European Journal of International Law, Vol. 27, no. 4, 2017) < http://www.ejil.org/pdfs/27/4/2701.pdf> accessed 26 March 2020; John R. Crook, 'Symposium: A Focus on Ethics in International Courts And Tribunals Dual Hats and Arbitrator Diversity: Goals in Tension' (AJIL Unbound, Volume 113, 2019)<https://www.cambridge.org/core/services/aop-cambridge-

requirements and control mechanisms are not enough to prevent the risk or appearance of mercenary behavior of the double-hatting arbitrators.

I cannot imagine how the proposed remedy may be realized due to the following. The preliminary issues that may occur with an introduction of this remedy in practice are whether the legal requirements are strict enough to reduce the double-hatting practice, and which authority will conduct the verification the compliance of accountability requirement.

Some of the arbitration rules and laws already contain the legal provisions able to contain an increase of double-hatting practice. Under Articles 14 and 40(2) ICSID Convention arbitrators "shall be persons of high moral character and recognized competence…who may be relied upon to exercise independent judgment." Article 6(2) of ICSID Arbitration Rules requires that arbitrators "affirm their independence and impartiality and provide a statement of past and professional business and other relationships that might cause their reliability for independent judgment to be questioned,"[76] and it requires the disclosure. Nevertheless, there are existing legal requirements for the arbitrator's moral characteristics which could prevent arbitrator to not act as a counsel and vice versa, but such requirements are diffused. Another aspect relates to the supplemental soft arbitration documents also containing quasi requirements towards the impartiality and independence. For example, the IBA Guidelines on Conflict of Interest is quite a good tool for accounting the situations when the arbitrator conducted his professional activity as the counsel or advisor to the parties. However, this document is just a guide and is of non-mandatory nature, therefore does not provide for any liability.

Considering possible verification of accountability, there is no comprehensive coordinating authority that could facilitate compliance with the rules of conflict of interests. This issue may be raised only in case of cancelation of the arbitral awards or refusal to recognize and enforce them. These proceedings

core/content/view/FC6538AE5CBDF495577F94D8F51AFA0F/S2398772319000369a.pdf/dual_hats_and_arbitrator_diversity_goals_in_tension.pdf> accessed 26 March 2020

[76] John R. Crook, "Dual Hats and Arbitrator Diversity: Goals in Tension" (AJIL Unbound, Volume 113, 2019) <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/dual-hats-and-arbitrator-diversity-goals-in-tension/FC6538AE5CBDF495577F94D8F51AFA0F/core-reader > accessed 26 March 2020

are conducted by the domestic courts. Thus, such a verification mechanism is not a permanent and is used on a case-by-case basis. Something that reminds such verification is the ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence. The Statement contains a request to provide ICC Arbitration Court with information on the ongoing proceedings where arbitrator has acted as the counsel. However, such requirements exist in institutional arbitration. In ad hoc arbitration where parties also may appoint arbitrators, this Statement may not contain such a request since arbitrator constitutes the form of the statement independently and provide it for parties.

Not only the existence of institutions or straightforward rules may raise the level of accountability, but also lead to the application of additional measures. The first possible measure is self-regulation proposed by Malcolm Langford.[77] Arbitration scholars assumed that if 10 to 15 prospective arbitrators agreed not to use double-hatting practice, the number of cases would sharply decrease, and, most likely, a double-hatting practice will also decrease.[78] I think , this measure is more hypothetical than real. It would be very naive to rely on the approach that the arbitrator will decline the prospective nomination, especially when the amount of the dispute or the case is "reputable". This approach is only relying on the arbitrator's will.

The second measure is to increase transparency.[79] Bringing the practice into the limelight of public attention may reduce willingness of arbitrators to act as the arbitrator and counsel simultaneously. However, increasing transparency around the practice may negatively affect the reputation. In order to make this measure work, there should be a certain database or register that could demonstrate an index showing the trends of using dual-hatting practice, as well as list the parties resorting to the double-hatting practice more or less during a specific period of time, which could introduce the notion of high accountability of this practice.

[77] Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, "ESIL Reflection The Ethics and Empirics of Double Hatting", (University of Oslo, Vol 6, Issue 7), < https://esil-sedi.eu/post_name-118/> accessed 26 May 2020

[78] Magdalene D'Silva, 'Dealing in Power: Gatekeepers in Arbitrator Appointment in International Commercial Arbitration', (5 Journal of International Dispute Settlement 605, 2014) <https://academic.oup.com/jids/article-abstract/5/3/605/866457> accessed 1 April 2020; Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, "ESIL Reflection The Ethics and Empirics of Double Hatting", (University of Oslo, Vol 6, Issue 7) < https://esil-sedi.eu/post_name-118/> accessed 26 May 2020

[79] Ibid.

The final measure may be an institutional or legislative reform.[80] This may include a prohibition on double-hatting practice or change the institutional rules governing the vast majority of arbitrations.[81] Arbitration institutions may develop guidelines or rule changes to strengthen ethical requirements or ensure wider disclosure by potential arbitrators. Also, the prohibiting provisions to act, for instance, in parallel proceedings as counsel and arbitrator can be introduced into arbitration laws. At the same time, the significant limitation of the double-hatting practice may limit the diapason of new arbitrators being appointed.

From my perspective, it is quite difficult to imagine how improvement of accountability may be reached. Definitely, it cannot be satisfied only by one proposed measure explained by Malcolm Langford, for instance, by tightening legal requirements towards not acting as the counsel if potential arbitrator acts as the arbitrator, or by existence of institution that verifies compliance of accountability. If all the above-mentioned measures are implemented altogether, that may raise the level of accountability of double-hatting arbitrators and, in its turn, decline the risk of lack of impartiality and independence of party-appointed arbitrators. Improvement of accountability may be realized if there will be a specific institution and database that will conduct the verification of double-hatting practice. Also, without straightforward rules prohibiting to act arbitrator as the counsel this remedy may not be effective.

2.3. Appeal mechanism in arbitration

UNCITRAL Model Law on International Commercial Arbitration provides that awards shall be made in writing and binding on the parties.[82] English Arbitration Act 1996 provides that award is final and binding for parties.[83] It means that the arbitration award cannot be subject to the appeal like the court judgments. In view of the issues associated with the impartiality of the arbitrators, the lack of an appeal

[80] Ibid.
[81] Ibid.
[82] UNCITRAL Model Law on International Commercial Arbitration 2006, Art. 31(1), 35(1)
[83] English Arbitration Act, Art. 58(1)

mechanism in international arbitration is alarming. This issue is related both to commercial and investment arbitration.

One of the examples of the appeal mechanism in commercial arbitration is present in the Grain and Feed Trade Association (GAFTA). GAFTA resolves disputes arisen from commodity contracts. One of the main differences between GAFTA arbitration and other institutional commercial arbitrations is the ability to appeal the arbitration award.[84] In GAFTA arbitration, the parties have the right to appeal the award of the first instance.[85] In this case, a panel consisting from qualified arbitrators appointed by the association holds an appeal hearing. If the first decision was made by one arbitrator, then the appeal instance will consist of three arbitrators; if the first decision was made by three arbitrators, the appeal instance will consist of five arbitrators.[86]

In the course of the arbitration reforms, the EU members has proposed to establish a multilateral investment court,[87] which has attracted great interest from both scholars and practitioners. This is permanent body that aimed to decide the investment disputes, which will have an appeal tribunal.[88] The proposed court "would replace the bilateral investment court systems included in EU trade and investment agreements".[89] However, there is considerable skepticism regarding such a model on the part of the interested parties. The proposed reform on the appeal mechanism relates only to the EU territory. For example, it is hard to imagine the United States, or other non-European country joining the mandatory jurisdiction of a multilateral investment court. And for the countries that are already worried about investment arbitration violating their sovereignty, it is unlikely that a multilateral court will alleviate these concerns. The proposed system will consist of a permanent international institution whose

[84] Iryna Polovets, 'GAFTA ARBITRATION AS THE MOST APPROPRIATE FORUM FOR DISPUTES RESOLUTION IN GRAIN TRADE' (*Arizona Journal of International & Comparative Law*, 2013) <https://www.academia.edu/5840283/GAFTA_ARBITRATION_AS_THE_MOST_APPROPRIATE_FORUM_FOR_DISPUTES_RESOLUTION_IN_GRAIN_TRADE > accessed 25 March 2020

[85] Ivan Kasynyuk, Dmitry Koval, Ukrainian Arbitration Association, 'Arbitration in trading in grain and oilseeds", (*Arbitration.kiev.ua*) < http://www.arbitration.kiev.ua/en-US/Industry-arbitrations/Arbitration-in-trading-in-grain-and-oilseeds.aspx?ID=544 > accessed 6 June 2020

[86] Ibid.

[87] Working Group 6, 'Lack of Independence and Impartiality of Arbitrators' (March 2019) <https://www.cids.ch/images/Documents/Academic-Forum/6_Independence_-_WG6.pdf> accessed 15 March 2020

[88] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608

[89] Ibid.

judges will be permanent members of the institute appointed by the EU Member States, but subject to strict criteria regarding ethics and impartiality.

I would rather prefer the point of view that institution of appeal mechanism in arbitration is more of an idea, but not a real remedy that could resolve the problem of lack of independence and impartiality due to following. If appeal arbitrators are appointed by an institution, the lobbyism of some arbitral positions may occur. Therefore, no arbitrator in this regard will be impartial and independent. It is quite difficult to imagine how such a big legal doctrine may be introduced today. This would be an additional tier (instance) in arbitral proceeding. The good example of appeal mechanism is illustrated by GAFTA, but the appellate instance was established in this arbitral institution from the beginning of its foundation.

In order to establish appeal mechanism in commercial arbitration, a lot of amendments should be introduced into the existing arbitration laws and rules. The establishment of the appellate instance is time- and cost-intensive process. It will change the arbitration as the dispute resolution method entirely since it will remind the litigation system with its appellate instance in place.

Conclusions

The lack of independence stems from what can be called a problematic relationship between the arbitrator and party appointing this arbitrator. Often, they are the result of financial transactions (such as business transactions and investments), sentimental ties (friendship or family) or group identification ties (for example, common nationality and professional or social affiliation). The main rule in this regard - the prospective arbitrators should refuse an appointment if they have doubts about their ability to be impartial or independent, or if there are facts, such that raise reasonable concern on any of the points. As it was discussed in Chapter 1, the lack of impartiality and independence does not arise by itself, there are several reasons that contribute to the occurrence of lack of independence and impartiality such as inappropriate contacts between prospective arbitrators and parties when they problematic relations caused by private meetings or inappropriate communications, presence of double-hatting practice, especially in the small arbitration market, repeat appointments and influence of nationality of arbitrator. The main objective of this Capstone Thesis was to find an appropriate solution how to prevent lack of independence and impartiality of party-appointed arbitrators. As the research has illustrated, it is not a simple task to invent something just in order to prevent the lack of independence and impartiality. The proposed remedies have both their advantages and disadvantages.

One of the proposed remedies is an improvement of accountability of arbitrator. Such remedy is called to prevent, first of all, a double-hatting practice, when arbitrator acts as the counsel in parallel arbitral proceedings or did so previously. Two main issues that occur with establishment of this remedy in practice are whether the legal requirement is strict enough to reduce the double-hatting practice and which authority will conduct the verification the compliance of accountability requirement. Some of arbitration legislation has already contained the requirements for the arbitrator's moral characteristics, which could prevent arbitrator to not act as the counsel and vice versa, but they are diffused. There is also supplementary arbitration document IBA Guidelines on Conflict of Interest which accounts situations when the arbitrator conducted his professional activity as the counsel or advisor to the parties.

At the same time, these Guidelines do not create any obligations for arbitrators and do not provide for the liability in case for breach the principles of impartiality and independence. In addition, there is no authority that could conduct the verification of the compliance of the accountability of arbitrators. In my opinion, such remedy is in some sense hypothetical. From my prospective, this remedy is not enforceable. In order to realize this remedy in practice, there should be more precise requirements towards the accountability for arbitrator. The arbitration legislation should precisely state, for instance, that the prospective arbitrator shall refrain from the appointment in case if he is acting in the parallel arbitral proceedings as the counsel or expert witness appointed by the party, etc. At the same, time, arbitration laws shall contain the legal provision in respect of possible liability for arbitrators. As there is no technical mechanism to carry on the verification the compliance of accountability requirements, realisation of this remedy is quite problematic.

Another one remedy that is proposed in order to prevent the lack of independence and impartiality is the establishment of appeal instance in arbitration. Whether the party win or lose in arbitration, the award of the arbitrator is final and there is no appeal instance in arbitration. It should be noted that some domestic arbitration laws contain the provisions in respect of cancelation of arbitral awards. One of the grounds for cancelation of arbitral award is the partiality of the tribunal. It is not reasonable to introduce the appeal mechanism just in case to appeal the arbitral award only under the ground of breach the impartiality and independence requirement. Appellate instance is an additional tier in dispute resolution system and absence of this additional instance makes arbitration distinct from litigation. In order to establish appeal instance in arbitration, the huge pool of work should be done. A lot of amendments should be introduced into arbitration legislation. This is cost and time intensive process. It would be more sufficient, if appeal instance appeared in the process of establishment of the whole system of arbitration.

The last proposed remedy by Jan Paulsson is a nomination of arbitrators by neutral body or their appointment from pre-existing lists of candidates. From my perspective view, this is not an ideal remedy that may resolve the problem of lack of independence and impartiality; however, it can be realised in

practice. When we are talking about such type of nomination, in my understanding, this nomination may be conducted by the same arbitral institution. After the consideration of this remedy, it may be affirmed that this method is entirely real due to a number of its advantages. One advantage of institutional appointment is that it has a sustainable mechanism due to existence of arbitration institution. When the parties have decided that disputes will be resolved by means of institutional arbitration, institutional arbitration rules will also apply to such arbitration. The mechanism of institutional appointment may not be amended for long period of time, the legal requirement introduced in the arbitration rules are not amended frequently. Thus, this may bring for the party some sort of predictability. Party may review the arbitration rules regarding the appointment of arbitrators in advance as such documents are in free access. Second advantage of institutional appointment is the existence of strict impartiality and independence commitments for arbitrators. Institutional arbitrators have stricter disclosure commitments on the impartiality and independence since they need to sign impartiality and independence statement. The good example of such statement is ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence, which requires to provide the details regarding past or present relationship, direct or indirect, whether financial, professional or of any other kind, between you and any of the parties, their lawyers or other representatives, or related entities and individuals. The signing of the impartiality and independence statement approved by the institution put additional burden on the arbitrator to carry on his impartiality and independence commitments besides the ethical obligations.

However, I would suggest some recommendations in addition to this remedy that could factor in the realization of this solution. In respect of nomination procedure, institution may include model clauses that appointment of arbitrators will be done by entirely institution, but after the review of the candidates by the parties. The party can consider arbitrator's experience and professional skills under his curriculum vitae sent by institution to the parties before the appointment. This will ensure that the party have not been abandoned entirely from the nomination procedure, and their principle of party autonomy has not breached. Such clause will not limit parties' autonomy principle as one of the cornerstone principle in arbitration, but may guarantee more neutrality of arbitrators. No party will be able to "grab the biggest

piece of the pie" in the arbitral proceedings. The party in this case may not appoint the arbitrator who has a close connection to it. I assume that it will be a rare occasion when institution appointing arbitrator gives the prospective candidate for appointment of the party that has already some close connection to this candidate.

Appointment from pre-existing arbitrator's lists, in my opinion, can also be realised. One of the concerns in this regard is that the lists of arbitrators are not updated by institution frequently enough. For instance, the list of arbitrators administered by International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry is updated once in five years. If such lists are updated at least once a year, this will prevent potential partiality or bias of prospective arbitrator.

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