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LIST OF ABBREVIATIONS

IBA Guidelines	International Bar Association Guidelines on Conflicts of Interest in International Arbitration
LCIA	London Court of International Arbitration
ICAC	International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry
ICC	International Chamber of Commerce
HKIAC	Hong Kong International Arbitration Centre
SCC	Stockholm Chamber of Commerce
VIAC	Vienna International Arbitral Centre
GAFTA	Grain and Feed Trade Association
ECHR	European Court of Human Rights
New York Convention	New York Convention on Recognition and Enforcement of Foreign Arbitral Awards
UNCITRAL	United Nations Commission on International Trade Law
Law on ICA	Law of Ukraine “On International Commercial Arbitration”
FAI	Finland Arbitration Institute
CIETAC	China International Economic and Trade Arbitration Commission
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
PCA	Permanent Court of Arbitration

INTRODUCTION

Topicality. Resolution of commercial disputes via international arbitration has become a central component of the present-day international trade and investment activities [1, p. 1]. Nowadays, the prevailing number of contracts being entered into within the international trade framework would contain a dispute resolution clause providing for disputes to be resolved by international arbitral tribunal [2, p. 794].

Professor Margaret L. Moses in her well-known handbook on international commercial arbitration considers the parties significant autonomy and control over the procedure of the resolution of disputes to be the main reason for the prevailing attraction of international arbitration over the national courts [3, p. 1]. According to the scholar Moses, such an autonomy also covers the parties' freedom to "*select arbitrators who are knowledgeable in the subject matter of the dispute*" [3, p. 1]. Margaret L. Moses further argues that, contrary to national courts, international arbitration provides the parties with a private, neutral forum where either party is deprived of "*home court advantage*" [3, p. 1]. Consequently, international commercial arbitration endowed the parties with an opportunity to privately, outside any national court's jurisdiction, resolve their commercial disputes by submitting it to "*an individual whose judgment they are prepared to trust* [1, p. 2].

At the same time, as argued by the prominent international law practitioner Guillermo Aguilar Alvarez, the fact that parties consciously and intentionally choose to pursue international arbitration instead of the national litigation proceedings should not indicate that the parties refuse to apply some standards of conduct to arbitrators, which are generally attributed to judges, such as independence and impartiality [4, p. 203]. Otherwise, this could seriously undermine the status of international arbitration as a forum for just resolution of disputes, where both parties would be treated by chosen arbitrators equally and fair, and due consideration will be given by them to the arguments of either of parties. Consequently, although the parties are endowed with the wide discretion in how the arbitration should be conducted, there is still a perceived need in arbitrators selected by the parties to be governed by some external and strict

standards for violation or non-compliance with which they could have been dismissed or challenged by the interested parties.

Therefore, the mechanism of challenge of arbitrators is primarily called to ensure the perceived legality of arbitration proceedings and directly influences the popularity of this type of dispute resolution among the interested players in the field of international commerce. Although the parties are generally willing to avoid complex and overly legally-based court proceedings, they still seek the fair and legal arbitral award at the end of their dispute, which will be based on the thorough factual analysis of all circumstances surrounding the case and based on correctly applied contractual or law provisions, corroborated with sound legal reasoning and not being hampered by any misconduct from the arbitrators' side. Thus, if the parties had not have any instruments to rule the incompetent or impartial arbitrator out of the proceedings, the international arbitration would unlikely have become such a popular forum for resolution of commercial disputes as it is now.

The key point for disputes and discussions among arbitration practitioners, scholars and other interested person revolves around a specific manner in which an arbitrator's challenge procedure is carried out in the specific case and under specific factual circumstances. There are variety of circumstances that may point to arbitrator's incompetence, partiality or dependence, which in each case should be analyzed against certain standard and factual background of each specific case. The issue arises as to what are the substantive contents of these standards, considering variety of rules governing international arbitration proceedings and the absence of unified and obligatory code of arbitrators conduct.

Moreover, this analysis in each case should be made with a view to the fact that in a typical tribunal with three arbitrators, two of which are appointed by each of the parties, these parties are likely to intend "their" arbitrator to facilitate the consideration of the dispute in light of such party's interests [5, p. 381]. The issue thus arises as to whether the standards should vary depending on the fact whether the arbitrator was selected by the party to arbitration proceedings or was appointed by a neutral authority.

This thesis' structure comprehensively covers both the theoretical and practical backgrounds of arbitrator's challenge mechanism, its grounds, procedure and legal framework in which it operates.

Therefore, **the main purpose** of this thesis is to analyze the specific features of the challenge procedure that necessitates its existence in international commercial arbitration, as well as to explore the substantive contents of the standards on which the challenges are usually based, as well as to identify the necessity for Ukrainian arbitration legislation to adopt the detailed clarifications of these standards in the light of limited provisions of national law in this regard.

To achieve this purpose, the author has identified the following research tasks:

- **a)** to identify whether there is a need in existence of the arbitrators' challenges in the international commercial arbitration;
- **b)** to identify who is in the best position to decide on challenge of arbitrator;
- **c)** to analyze whether a challenge of arbitrator may be used by a parties as a disruptive technique and what measures could be taken to prevent abuse of procedural rights via challenge mechanism;
- **d)** to analyze the legal regulation of the arbitrators' challenges in the international commercial arbitration and the role of soft law instruments, such as the IBA Guidelines;
- **e)** to define what "impartiality" and "independence" of arbitrators mean and identify the difference between these two terms;
- **f)** to examine whether the standard of impartiality and independence is different for party-appointed arbitrators;
- **g)** to determine what legislative amendments are necessitated in Ukrainian legal regulations of the arbitrators' challenge procedure, if any, etc.

Hence, the **object** of this thesis is the legal relations among different interested persons that constitute the foundations of challenge procedure and determine its importance for any international commercial arbitration proceedings, whereas the **subject-matter** of this thesis is legal rules and substantive standards based on which the parties to international arbitration proceedings conduct and substantiate their

challenges of arbitrator and whose application by competent authority is the most crucial point in any challenge procedure.

The theoretical background of the thesis is based on the articles and handbooks of the following prominent international arbitration scholars and practitioners: Gary B. Born, A. Redfern, M. Hunter, M. Moses, G.A. Alvarez, M. Baker, L. Greenwood, L. Mustill, S.C. Boyd, L. Trakman, W.M. Tupman, C. Koch, E. Vassilakakis and others. In addition to the scientific articles and handbooks, the author of this thesis also reviewed and analyzed the arbitration rules of various arbitral institutions, including but not exclusively the LCIA, ICAC, ICC, HKIAC, SCC, VIAC, as well as the jurisprudence of the national courts from different jurisdictions, including Austria, England, Switzerland, practice of the European Court of Human Rights, as well as the jurisprudence of arbitral tribunals.

To accomplish the main purpose of this thesis, the author relied on the following scientific methods for analysis:

– **Dialectical method** – to explore the definitions of "impartiality" and "independence" of arbitrators; to review and analyze the national courts jurisprudence and practice of arbitral tribunals with respect to application of standards of impartiality and independence; to explore the theoretical foundations, which substantiate the existence of challenge mechanism in the international arbitration.

– **Descriptive method** – to provide an overview of the legal framework governing the challenges of arbitrators, to define the main issues giving rise to challenge of arbitrators, to provide the examples of how challenge mechanism could be used by the parties to disrupt the arbitration proceedings.

– **Comparative method** – to compare the different challenges of arbitrators decided by different persons and entities to identify who is the most suitable and competent decision-maker within a challenge procedure context.

– **Analysis and synthesis** – to analyze the contents of impartiality and independence standards, to identify whether the standard should vary depending on whether the arbitrator was appointed by a party, to identify the role played by the soft law instruments in the context of challenge mechanism.

This thesis is of particular importance and relevance for Ukraine since Ukrainian entities are usually engaged in the foreign trade activities, which may potentially end up in arbitration proceedings being commenced, with challenge of arbitrator being raised. Thus, the insights of this thesis would instruct these commercial entities as well as Ukrainian arbitration practitioners as to how conduct the challenge procedure effectively and expeditiously. Moreover, the present thesis' insights may potentially contribute to the development of Ukrainian national arbitration legal framework, making Ukraine a step forward to having the status of "arbitration-friendly" jurisdiction.

Ultimately, the thesis has the following structure:

1. In **Chapter 1**, the author of the thesis provides a theoretical substantiation of the existence of arbitrator's challenges in international arbitration. The author analyzes the negative effects that are inherent for challenge mechanisms, including the possibility that the challenge mechanism may be employed as one of the disruptive techniques by the parties in order to delay or obstruct arbitration. The author further compares these negative features with the benefits that the challenge mechanisms implies. Consequently, the author elaborates on whether the above-mentioned benefits necessitate the existence of the challenge mechanism in the international commercial arbitration. Lastly, the author explores the theoretical foundations behind the authority that should decide on the challenge, trying to identify that person or entity is the best suitable to decide on challenge of arbitrators, so such approach could be taken by different jurisdictions, including Ukraine, when amending and developing their national arbitration laws.

2. In **Chapter 2**, the author of this thesis explores the legal framework in which the challenge mechanism operates. In particular, the author explores the role of and relationships between the arbitration rules of arbitral institutions and national arbitration laws as the sources governing the challenges of arbitrators in the international commercial arbitration. The author further pays specific attention to the IBA Guidelines, as the most well-known instrument in arbitration community dealing with impartiality and independence of arbitrators and having significant effect on the

challenge procedures worldwide. Consequently, the author elaborates on what Ukraine may take as an example in amending its national regulations over the arbitrators' challenge procedures.

3. In **Chapter 3**, the author of this thesis reviews and analyzes the most common grounds for challenge of arbitrators – lack of impartiality and independence. In particular, the author analyses the definitions of terms "impartiality" and "independence", analyses the difference between these two terms, representing specific theoretical concepts. The author further explores the issues of impartiality and independence that commonly give rise to the challenge of arbitrator. Moreover, the author analyses whether the different treatment shall be accorded to arbitrators appointed by the parties in light of the unified standard of impartiality and independence for all arbitrators.

DISCLAIMER:

The author did not analyze the actual problems of challenge mechanism in investor-state international arbitration, except to extent the investor-state arbitral tribunals apply the same standards and rules applicable and operating in international commercial arbitration.

CHAPTER 1.
GENERAL THEORETICAL BACKGROUND OF THE ARBITRATORS' CHALLENGES IN THE INTERNATIONAL COMMERCIAL ARBITRATION.

1.1. Theoretical substantiation of existence of the arbitrators' challenges in the international commercial arbitration.

International arbitration as a type of dispute resolution is a private system operating exclusively within the borders of parties' agreement, which serves as both a basis and limitations for the powers of arbitral tribunal, contrary to judicial resolution of disputes that is always based on strict rule of law providing for requirements and procedure to be followed. As it was aptly observed by the Canadian Supreme Court in paragraph 51 of its judgement in *Dell Computer Corp. v. Union des consommateurs*: "*[a]rbitration is a creature that owes its existence to the will of the parties alone*" [6].

In this regard, the issue arises as to whether the fact that international arbitration is not strictly regulated and not governed by rules of national law influences the existence or absence of any requirements or standards of conduct that arbitrators should met when deciding on the parties' dispute.

From the practical standpoint, arbitrators are persons specifically entrusted by the parties to the dispute to resolve such dispute [1, p. 2]. The parties, therefore, are primarily interested in their dispute being resolved in light of their commercial considerations and, thus, assumption may be made that the parties are not interested in what qualities the arbitrators they selected possess if, at the end of the day, such arbitrators render the award, which is beneficial and favorable for both of the parties.

In addition, one more factor to be taken into account is that, contrary to judges of national courts and other judicial institutions, arbitrators even do not have to possess a degree in law to resolve international commercial arbitration disputes [3, p. 118]. This represents yet another feature that distinguish international arbitration from

judicial dispute resolution. This feature stems from the almost borderless parties' autonomy that, among other things, vest the parties with the power to choose as arbitrator any individual who, as highlighted by Alan Redfern, Martin Hunter and others in their prominent handbook, should meet only one general condition – to have full legal capacity [1, p. 246].

James E. Meason and Alison G. Smith, international arbitration practitioners and scholars, point out in this regard that "*the most successful arbitration is that which sets a smooth course for future commercial operations*" [7, p. 25]. To conduct this kind of arbitration proceedings the arbitrators do not need to have a law expertise, rather they should have an understanding of commercial interests of both parties, the business they are operating in and experience necessary to render an enforceable award that will not be set aside or refused in enforcement. The efficiency and smoothness of arbitration will rather be conditioned upon personal qualities of arbitrator, his inherent ability to expeditiously control the process and supervise the conduct of parties and their representatives, imposing timely sanctions for unscrupulous behavior, posing right questions and attentively listening to answers, and thoroughly review any piece of evidence presented by the parties.

For instance, according to Article 3.7 of the Arbitration Rules of the GAFTA, an arbitrator appointed under these Rules shall be a "*GAFTA Qualified Arbitrator*", as well as provide some other requirements not related to legal expertise of arbitrator [8].

Furthermore, the GAFTA Rules and Code of Conduct for Qualified Arbitrators and Qualified Mediators, in Rule 1.1 define GAFTA Qualified Arbitrator as individual member of the GAFTA of certain category, but, again, not as a legally educated professional [9].

Against this background, the GAFTA does not establish any requirements as to legal education or legal expertise for individuals, which are to be appointed as arbitrators in arbitration proceedings conducted under the auspices of the GAFTA. What is more, GAFTA arbitrators are indeed in predominant number of occasions are not lawyers, but rather traders fully involved in this or that capacity in commercial activities of enterprises conducting trade within the GAFTA framework. Notably, the

GAFTA arbitrators are legally required to be involved in trade activity as a precondition for serving as the GAFTA arbitrator. This experience enables such arbitrators to efficiently conduct arbitration proceedings, having in-depth understanding of all commercial issues arising out of parties' disputes, even having no experience or expertise in law.

Therefore, again, the issue arises as to whether the conduct of non-lawyer arbitrators should be governed by any legal-like standards of conduct and other requirements. Moreover, proceeding against such background, some doubts arise as to whether such arbitrators should be challenged merely based on failure to meet the above-mentioned standards and requirements, even in case when the award rendered by non-lawyer arbitrator satisfies the commercial interests of both contesting parties and ultimately resolve the dispute between such parties.

Furthermore, with development of international arbitration and increase in number of analysis and insights on international arbitration proceedings, the parties involved in the dispute or even other interested parties find the way to disrupt arbitration proceedings for the sake of their own interests by using and abusing their procedural rights and discretions, including the challenge of arbitrators. By using these tools to achieve their own goals, the parties in overwhelming number of occasions substantially contribute to delays and decreasing efficiency of international arbitration proceedings, which, in turn, deprives international arbitration of the features that were inherently considered as the ones that make international arbitration so popular choice among the parties involved in the commercial activities.

This line of parties' conduct is usually known as "dilatory tactics", which are commonly used and relied on by those parties that are well-aware of the weakness of their arguments and evidence on the merits of a case [10, p. 424]. Typical examples of dilatory tactics include use of available procedural protection mechanisms, such as party's attempt to apply for extensions of time or on a number of occasions to object to the other party's alleged violations of due process and, notably, challenging of arbitrators with no apparent grounds to do so [11, p. 132]. Consequently, mechanism of challenge of arbitrators may endow unscrupulous users of international commercial

arbitration with a perfectly legal opportunity to obstruct, postpone and delay the proceedings.

According to the prominent international arbitration scholars Alan Redfern, Martin Hunter and others, the number challenges for the recent years has increased significantly, putting at the risk efficiency and expediency of international commercial arbitration proceedings [1, p. 258]. As aptly pointed out by Mark Baker and Lucy Greenwood, well-known international arbitration practitioners, mechanism of challenges of arbitrators is "*a cost-effective way to ensure an expensive delay*", since any challenge of arbitrator, whether successful or not, would result in disruption and delay of proceedings to some extent [12, p. 102].

Such state of affairs could be explained, first and foremost, by the procedural rules of the most international arbitration institutions governing the procedure for challenge of arbitrators. For instance, under the arbitration rules of the world-renowned arbitration institutions, such as LCIA, ICC, SCC and, the most popular arbitration institution for Ukraine-seated arbitration, ICAC, the challenge of arbitrator mechanism entails the additional procedures and exchanges of written or, sometimes, oral submissions between the parties and arbitral tribunal or administrative body of arbitral institution, as well as presenting of additional evidence corroborating the challenge of arbitrator, which inevitably results in some obstruction of arbitration proceedings.

For instance, according to Article 10.3 of the 2014 LCIA Arbitration Rules, a party challenging an arbitrator must deliver a written statement of the reasons for its challenge to the LCIA Court, the Arbitral Tribunal and all other parties [13]. In its turn, according to Article 10.4 of the 2014 LCIA Arbitration Rules, the LCIA Court shall provide to those parties and the arbitrator being challenged a reasonable possibility to provide comments on the challenging party's written challenge statement [13]. Moreover, according to Article 10.4 of the 2014 LCIA Arbitration Rules, the LCIA Court may order the parties or arbitrator to provide at any time further information and materials related to the challenge of arbitrator [13].

Similarly, according to Article 33(2) of the 2018 ICAC Arbitration Rules, a party seeking challenge of arbitrator must provide ICAC and other parties with written

motivated statement of an arbitrator challenge [14]. In its turn, according to Article 33(2) of the 2018 ICAC Arbitration Rules, the ICAC Secretariat must provide an arbitrator whose challenge is sought and the other party an opportunity to make comments in relation to the statement of challenge [14].

Consequently, challenge of arbitrators from procedural perspective leads to a number of derivative submissions made by the parties and their legal counsels, as well as communication delivered to the parties by the arbitral institutions or their administrative bodies and arbitral tribunal, which eventually contributes to significant delay in the general procedure of resolution of the dispute.

However, not only additional submission may result in delay, but also the procedure that follows as a result of successful challenge of arbitrator may equally obstruct and deteriorate the arbitration proceedings. As a result, the negative effect of a successful challenge is two-fold: firstly, the lengthy procedure for filling a vacancy of resigned or challenged arbitrator should be followed, which takes an additional time, and, secondly, there could be a necessity to repeat the oral or written submission the parties made before the challenge or resignation of arbitrator for the purposes of a newly arbitrator to be on the same page with the other member of the panel. All these factors contributes to a further delay in arbitration proceedings.

For instance, according to Article 21(1) of the 2017 SCC Arbitration Rules, the SCC Board shall appoint a substitute arbitrator in the event a previous arbitrator has been removed voluntarily, as a result of death or as a result of successful challenge [15]. According to Article 21(1) of the 2017 SCC Arbitration Rules, if the arbitrator, which was removed by the SCC Board, was appointed by a party, then the burden on appointing the new arbitrator lies with the party that appointed removed arbitrator [15]. Moreover, according to Article 21(3) of the 2017 SCC Arbitration Rules, in the event of appointment of substitute arbitration as a result of challenge of previous arbitrator, the arbitral tribunal in its new composition has to decide whether and to what extent the proceedings or certain stages thereof should be repeated [15].

Final yet important aspect indicating negative influence of challenge mechanism on the whole arbitration proceedings is that the current regulatory mechanisms allow

the parties to raise the challenge based on minor and overly scrupulous deviations of the arbitrator's conduct that does not affect the legality and fairness of proceeding as a whole.

Such state of affairs in no small part may be explained by the development of new regulations governing challenges of international arbitration and aiming to clarify and explain the standards to be applied to challenges of arbitrators and grounds of such challenges. In particular, the substantial contribution to expansion of grounds and applicable standards of arbitrator's challenge was made by the IBA Guidelines,[1] whose clarifications are heavily used and referred to by the parties seeking to challenge the arbitrator in the international commercial arbitration [12, p. 107].

Despite all of these negative factors mentioned above, there is a strong corroboration for challenges to be used and employed by the parties to arbitration proceedings. First and foremost, this relates to the safeguarding impartiality and independence, as well as the competence and quality skills of arbitrators selected by the parties, which is of the crucial importance for the latter, even though the arbitration is a private system not being governed by strict standards inherent for national court's judges. Margaret Moses points out in this regard that "*[b]ecause arbitration is a private dispute resolution process lacking some of the safeguards of a national legal system, the quality of the tribunal has a significant impact on maintaining parties' confidence in arbitration as a system that works.*" [3, p. 116]. Therefore, the lack of strict rules and standards that would govern conduct, impartiality and independence of arbitrators does not indicate that these standards should not apply to arbitration, but to the contrary, indicate the necessity of existence of some procedural powers and mechanisms available to the parties to keep the arbitration proceedings impartial and independent, regardless of the fact that arbitration is a private dispute resolution system.

In institutional arbitration and to certain extent in *ad hoc* arbitration (if the parties agreed so), the independence and impartiality of arbitrators before the start of arbitration proceedings and appointment of arbitrators is controlled and supervised by

[1] Please note that the IBA Guidelines will be subject to a separate detailed analysis in Chapter II of this thesis.

the disclosure mechanism. For instance, Article 11(2) of the 2017 ICC Arbitration Rules envisages that before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence [16]. According to Article 11(2) of the 2017 ICC Arbitration Rules, the prospective arbitrator has to reveal in writing to the ICC Secretariat any facts or circumstances which might cast doubt on the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality [16].

In the same way the arbitrator's appointments are dealt with by the SCC Arbitral Institution. In particular, Article 18(2) of the 2017 SCC Arbitration Rules provides for a prospective arbitrator's obligation to disclose any circumstances that may give rise to justifiable doubts as to his or her impartiality or independence before his or her appointment as an arbitrator [15]. Furthermore, Article 18(3) of the 2017 SCC Arbitration Rules sets forth an arbitrator's obligation to file to the SCC Secretariat a statement of acceptance, availability, impartiality and independence after being appointed, disclosing any circumstances that may give rise to justifiable doubts as to his or her impartiality or independence [15].

Hence, as evidence by widespread and commonly similar provisions of institutional arbitration rules, before being appointed by the parties, an arbitrator shall confirm to arbitral institution that there are no any facts or events that could cast doubt or prevent him or her from being fully impartial and independent.[2] However, some other more effective tools are required to keep arbitration impartial and independent and preserve legality of proceedings as a whole during the arbitration [4, p. 203]. Challenge of arbitrator is the most effective instrument the parties are endowed with during arbitration in this vein.

The legality of arbitration through challenge mechanism is also preserved in a way that challenge of arbitrator allows to respect parties' fundamental right to fair trial, which should not be considered waived by the parties by virtue of mere fact that the

[2] This is a generalized conclusion made by the author based on the analysis of above-mentioned provisions of the 2017 ICC Arbitration rules and 2017 SCC Arbitration Rules.

parties entered into arbitration agreement, ruling out the possibility to approach national courts [17, page 268]. In this regard, the judgement of the ECHR in case *Suovaniemi and others. v Finland* is of indicative nature [18]. The ECHR in this case dealt with, among other things, applicants' arguments and contentions with respect to impartiality and independence of arbitrator in the course of arbitration proceedings commenced by the applicants (paragraph 24) [18]. During the arbitration proceedings, the applicant made an enquiry as to arbitrator's indirect connections with the opposing party and the arbitrator rejected any such allegations, stating though that he is willing to resign if his impartiality to be questioned (paragraph 13) [18]. Following this, the applicants have approved this arbitrator's candidacy and have never ever raised any challenges against him based on his compliance with some impartiality and independence standards (paragraphs 13-14) [18]. Consequently, the applicants' claims were rejected in full by arbitral tribunal and the set-aside proceedings were initiated before the Finnish courts, followed by the filing of application to the ECHR (paragraphs 15, 17) [18]. The court took this opportunity to clarify and establish a guidance as to the application of the fair trial right set forth in Article 6 of the European Convention on Human Rights to arbitration proceedings.

The ECHR firstly underlined in paragraph 27 of its judgement that "*as the arbitration was based on voluntary agreements between the parties, there was an explicit renunciation by them of a procedure before an ordinary court*" [18]. Proceeding against this background, the Court further noted in paragraph 29 of its judgement that such renunciation my result in non-application of Article 6's guarantees to arbitration proceedings only in case of unequivocal waiver and, in any event, such a waiver "*should not necessarily be considered to amount to a waiver of all the rights under Article 6*" [18]. By this, as evidenced by paragraph 29 of the Court's judgement, the ECHR meant that such Article 6's rights as, for instance, the right for public hearing may well be waived by the parties by virtue of their arbitration agreement, but the same does not hold true for such a fundamental right as a right to an impartial and independent judge or arbitrator [18]. Although, as it can be seen from paragraph 35 of the Court's judgement, the ECHR eventually find the applicants' application

inadmissible [18] this was not because of non-applicability of Article 6's impartiality and independence guarantees to arbitration proceedings, but rather, as stipulated by paragraph 30 of the Court's judgement, because of apparent, explicit and unequivocal waiver by the applicants of their right to fair trial before independent and impartial arbitrator [18]. In particular, in paragraph 30 of its judgement the Court took into account the fact that the applicants not only clearly approved arbitrator's candidature, but also continually refrained from challenging the arbitrator in question during arbitration proceedings, although being fully aware of the apparent grounds for arbitrator's challenge, which, in the ECHR's view, served as unequivocal waiver of Article 6's guarantees by the applicants [18].

Consequently, this case clearly demonstrates the importance of challenge mechanism for preserving the parties' fundamental guarantees for fair trial before impartial and independent tribunal. If the applicants in the present case had resorted to challenge of arbitrator, they would have been protected by Article 6's guarantees and would have been able to expect the tribunal being fully impartial and independent. Consequently, the challenge mechanism constitutes an effective and powerful tool that legitimates the arbitration and preserve the parties' confidence and expectation that arbitration to be fair and just [19, p. 26], thus being in compliance with well-known dogma proclaimed by Lord Hewart in *R. v Sussex Justices*: "*[I]t is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done*" [20, p. 259].

Furthermore, it should be noted that the arbitrator's conduct, professional skills and expertise directly and significantly influences the quality, expediency and efficiency of the arbitration proceedings and the ultimate result thereof – the arbitral award [3, p. 116]. Therefore, the challenge of arbitrator plays one more important role, since it enables parties to the arbitration proceedings to get rid of arbitrator that does not meet the requirements and competences agreed by the parties.

In its turn, if there had not been such an instrument in place, this would have been inevitably result in increase of set-aside proceedings or resisting the enforcement of the award by the losing parties, thus casting doubt on efficiency and credibility of

arbitration proceedings. This could be explained by the fact that, for instance, Article V(1)(d) the 1958 New York Convention, one of the most important international law instrument in international arbitration purview, provide that arbitrator's misconduct during the arbitration proceedings may constitute the grounds for the award being refused enforcement by the national court[3] [21].

Similarly, the 1985 UNCITRAL Model Law on International Commercial Arbitration in Article 34(2)(a) provides that an arbitral award may be set aside by the national court if the party to arbitration proceedings proves that, among other things, the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties [22]. Furthermore, Article 34(2)(b) of the 1985 UNCITRAL Model Law on International Commercial Arbitration envisages that an award may also be set aside if the national court finds that the award contravenes the public policy of the state of arbitration's seat [22]. Commentators generally agree that both of the above-mentioned grounds may cover the cases of arbitral awards rendered by arbitral tribunal lacking impartiality and independence [23, p. 68-69].

While it is genuinely true that, as it was mentioned above, the challenge of arbitrator may be employed by some parties with the only purpose to delay and deteriorate the arbitration proceedings, it is equally true that such bad faith conduct will not be left unnoticed and without any negative consequences. As Margaret Moses aptly points out, any party aiming to delay the arbitration proceedings by filing unsubstantiated challenges "*should understand that the process could be damaging to [such party's] case if it causes [it] to lose credibility before the tribunal*" [3, p. 142]. The damage Professor Moses mentions is the damage that could result from the loss of arbitral tribunal's credibility for such a party, and this, in turn, could place such a party in a restrained and significantly negative position in the course of arbitration [3, p. 142].

Consequently, taken all the above factors in considerations, the author of this thesis comes to conclusion that despite all the negative reflections and consequences that challenge of arbitrator may have, these negative aspects are not in the position to

[3] Here and hereinafter the translation from Ukrainian into English is provided by the author of the thesis.

outweigh the advantages and possibilities that this mechanism gives to the parties. In particular, the challenge of arbitrator vests the parties with fundamental and crucial possibility to control the impartiality and independence of arbitrators they selected. The effectiveness of such control, in turn, has substantial implications of the effectiveness, expediency and legitimacy of the arbitration as a whole. If the parties do not have efficient mechanisms to prevent arbitrators' misconduct at the stage of arbitration proceedings, they will inevitably face with struggles and obstacles presented by set aside and enforcement proceedings, which will not allow the legitimization of the award rendered by partial or dependent arbitral tribunal.

1.2. Determination of the competent authority to decide on challenges of arbitrators in the international commercial arbitration.

Efficiency, expediency and fairness of any challenge of arbitrator will ultimately be dependent upon the person endowed with power on handling of such a challenge. This issue is of crucial importance for any jurisdiction aiming to develop or update its national arbitration law, including Ukraine, as it will enable such jurisdictions to identify the current trends in how the challenges are currently handled and, consequently, follow the approaches taken by the most "pro-arbitration" states and leading arbitration institutions.

The importance of authority competent to decide on challenge is explained by the fact that, as have already been demonstrated in the section 1.1 of the Chapter I of this thesis, the decision on challenge, whether negative or positive, will inevitably influence the arbitration proceedings by creating obstructions and aggravating the parties' primary expectations as for the course of arbitration [12, p. 102]. Therefore, to minimize the risks of any negative consequences for efficiency and expediency of arbitration proceedings, the decision on the challenge should be rendered by independent, authoritative and competent person or entity that will be in the position to ensure fair resolution of imminent dispute on arbitrator's challenge and compliance with such decision by the parties.

The procedure for challenge of an arbitrator, including the determination of the authority competent to decide on such challenge, primarily should be looked for in parties' arbitration agreement, which, in turn, may contain the reference to the arbitration rules of certain arbitration institution or the parties themselves may make up the rules that should govern the challenge procedure [1, p. 264]. In case the parties decided to have a recourse to the *ad hoc* arbitration and failed to determine the procedure for challenge of an arbitrator, one should look into the rules of the applicable arbitration law at the place of arbitration, usually known as "*lex arbitri*" [1, p. 264].

Institutional arbitration and respective arbitration rules generally create the framework where the challenges are handled by respective institutional administrative bodies. For instance, according to Article 19(3) of the 2017 SCC Arbitration Rules, a party wishing to challenge an arbitrator shall submit a written statement to the SCC Secretariat corroborating such statement with the reasons and evidence for the challenge [15]. Then, according to Article 19(4) of the 2017 SCC Rules, the SCC Secretariat shall notify the parties and the arbitrators of the challenge and give them an opportunity to provide their comments and opinions as to the challenge [15]. Lastly, Article 19(5) of the 2017 SCC Rules provides that the arbitrator will resign if the party reach an agreement on such resignation, or, if there is no such agreement, the SCC Board will be authority that takes the final decision on the challenge [15].

Similarly, according to Article 20(2) of the 2018 VIAC Arbitration Rules, a party's challenge of an appointed arbitrator shall be submitted to the VIAC Secretariat [24]. After that, as evidenced by Article 20(3) of the 2018 VIAC Rules, the VIAC Secretary General shall request comments from the challenged arbitrator and the other party/parties and, finally, the VIAC Board shall decide on the challenge [24].

In the same vein, the 2018 HKIAC Administered Arbitration Rules provide in Article 11(8) that the challenging party has to submit the notice of challenge to HKIAC, all other parties, the challenged arbitrator and any other members of the arbitral tribunal [25]. Then, according to Article 11(9) of the 2018 HKIAC Administered Arbitration Rules, if the arbitrator in question does not resign voluntarily or if the non-challenging

party does not agree on challenge of such arbitrator, HKIAC has to conclusively decide on the challenge [25].

Somewhat different procedure is envisaged by the 2018 ICAC Arbitration Rules. These rules provide for three-tier authority system, thereby, firstly, according to Article 33(2) of the 2018 ICAC Arbitration Rules, the party should submit a written statement of an arbitrator challenge to ICAC with relevant reasoning, motivation and corroborated with evidence [14]. Then, secondly, as stipulated by Article 33(2) of the 2018 ICAC Arbitration Rules, the ICAC Secretariat has to provide an arbitrator and the other, non-challenging party with an opportunity to provide comments on the statement of challenge [14]. After that, according to Article 33(3) of the 2018 ICAC Arbitration Rules, the ICAC Presidium has to make a conclusive decision on the challenge, provided that challenged arbitrator did not withdraw voluntarily and there is a disagreement with the challenge by other party [14]. However, unlike the other arbitral institutions' rules, the 2018 ICAC Arbitration Rules in Article 33(4) provide that if the challenge is rejected, a dissatisfied party may have an additional recourse to the President of the Ukrainian Chamber of Commerce and Industry that, in such a case, has to pass an order on the challenge that will be subject to no appeal [14].

Considering that within a framework of the institutional arbitration decisions on challenges are rendered by a respective institution's administrative body rather than by judge or arbitral tribunal, proceedings on challenge of arbitrator do not possess an adversarial nature [26, p. 337]. This is reflected in that neither the challenged arbitrator nor the challenging party are able to clearly present their case and provide extensive arguments on the challenge, except for the exchange of comments, which generally serves to ensure that the institutional administrative body is fully aware of all factual circumstances to render a comprehensive decision on the challenge [26, p. 337]. Therefore, such an approach may leave both the challenging party and challenged arbitrator dissatisfied with such state of affairs and willing to present comprehensively their respective defenses before the adversarial and judicial-like authority.

National arbitration laws, which have their floor in case the parties to *ad hoc* arbitration proceedings neither selected any arbitration rules nor drafted their own rules

on challenge procedure [1, p. 264], seem to take this concern into consideration. In particular, the 1985 UNCITRAL Model Law on International Commercial Arbitration, which "*serves worldwide as a pattern for designing national legislation in the field of international commercial arbitration*" [27, p. 251], in Article 13 provides for challenge procedure with the possibility of both arbitral tribunal and the national court involved [22]. Article 13(2) of the 1985 UNCITRAL Model Law on International Commercial Arbitration directs that a party who intends to challenge an arbitrator has to file a written statement, corroborated with respective reasons for the challenge, to the arbitral tribunal and the latter, unless the challenged arbitrator resigns from his office or the other party agrees to the challenge, will be in the position to decide on the challenge [22].

However, the 1985 UNCITRAL Model Law on International Commercial Arbitration does not endow the arbitral tribunal's decision with finality, as Article 13(3) provides that in case the challenge before an arbitral tribunal or a challenge under any other procedure agreed by the parties is rejected, the challenging party may still request, within thirty days after having received notice of the decision rejecting the challenge, the national court to decide on the challenge, which decision will be final and subject to no appeal [22].

On the one hand, this two-step procedure ensures that primary arbitral tribunal's jurisdiction is not abused by the fellow arbitrators, particularly in the cases where an arbitral tribunal is composed of the sole arbitrator that, in such a case, should decide on its own challenge [26, p. 337]. Such a situation apparently has some inherent negative implications, since, as confirmed by Mr Christopher Koch, notable arbitration scholar and practitioner, "*it is hardly compatible with the notion that justice must be seen to be done and that a judge should not sit in his or her own cause*" [26, p. 337]. Moreover, even in case of three-member arbitral tribunal, the unchallenged arbitrators' decision on their fellow arbitrator's challenge may well be prejudiced by their personal or professional relationships within a closed community of arbitrators and, thus, creating the risks of improper predisposition from the side of unchallenged arbitrators towards their challenged colleague [28, p. 299]. Last but not least, the determination

on the challenge by the arbitral tribunal may result in confrontation between, on the one hand, the challenging party, that apparently and unequivocally demonstrated its doubts with respect to tribunal's competence, impartiality or independence, and, on the other hand, the unchallenged arbitrators, who are facing with obvious lack of confidence in the tribunal from the party's side [27, p. 258].

On the other hand, involvement of the national courts for the purposes of supervising the arbitral tribunal's decision on the challenge may seriously impair the arbitration proceedings, resulting in substantial disruptions caused by lengthy and complex judicial procedures [26, p. 338]. This state of affairs results in a "*trial within the trial*" situation that could be effectively used by the parties acting in bad faith to delay and prolong the arbitration proceedings [27, p. 256]. Furthermore, the national courts are bound by essential and strict jurisdictional limitations in conducting the supervision over the international arbitration proceedings, including challenge procedures, and, thus, their judicial power may extend exclusively to removing arbitrators in an international arbitration seated within such court's jurisdiction [29, p. 1938].

Moreover, one should take into consideration the fact that not all jurisdictions endow their national courts through the national legislation with the power to rule on challenges of arbitrators. For instance, as noted by notable scholar Koch, the *lex arbitri* of the United States of America did not allow any pre-award interventions, including challenge procedures, in the international commercial arbitration proceedings by the US national courts [26, p. 339]. In this regard, the US court of appeal in case *Florasynth Inc. v. Pickhol* clarified in part II of its judgement that: "*[the US Federal Arbitration Act] does not provide for judicial scrutiny of an arbitrator's qualifications to serve, other than in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service*" [30].

Consequently, the US courts are allowed to intervene into arbitration proceedings only after an award is rendered by the arbitral tribunal, which is on the set-aside stage [26, p. 339]. Therefore, there is a risk that the US-seated arbitration proceedings governed by the arbitration agreement which does not contain a reference

to institutional rules or other rules for challenge procedure, may be obstructed or significantly delayed due to parties' inability to dismiss an arbitrator who they believe is incompetent, or biased, or dependent.

Hence, the conclusion may be made that the most suitable and competent authority to decide on the challenge is a respective arbitral institution's administrative body. Although there are negative features related to this authority, as the lack of adversarial process, but in general only this authority is in position to ensure that the decision on challenge will be considered by the parties as fair and just and that such decision will neither delay nor obstruct the arbitration proceedings by necessity to have a recourse to some external authority. Moreover, institutional administrative body possess sufficient independence from challenged arbitrator, contrary to the cases when the challenge should be decided by the fellow unchallenged co-arbitrators. Thus, institutional body may guarantee both efficiency and expediency of the challenge procedure.

CONCLUSIONS TO CHAPTER 1

1. Mechanism of arbitrator's challenge poses a number of potential obstacles for arbitration proceedings, as it could possibly result in significant delays and may be used by unscrupulous party to obstruct the proceedings for its own benefit. Moreover, the issue arises as to whether arbitrators should be dismissed at all, considering that no strict rules governing their conduct exist within the international arbitration framework. However, the benefits of this instrument substantially outweigh the above-mentioned negative features. Challenge of arbitrators enables the parties to dismiss a partial, biased and incompetent arbitrator, thus preserving the parties fundamental rights to be heard before impartial and independent tribunal, which survive despite the fact the parties resorted to private arbitration mechanism, ruling out the possibility to resolve their dispute in national court. Finally, challenge of arbitrator allows the arbitration proceedings to remain efficient and expedite, providing the party with final and binding decision, which will not be subsequently overruled due to the fact that the award was rendered by a biased arbitrator.

2. There are three main players in the international commercial arbitration that could serve as authority that decides on the challenge of arbitrator. These are a respective institution's administrative body, arbitral tribunal and national court. The exact authority should be determined by the parties in their arbitration agreement either by having a reference to institution's arbitration rules, which usually contains the rules on challenge procedure, or by drafting its own rules for challenge procedure. Should the arbitration agreement remain silent on the challenge procedure, one should look into the national arbitration law of the state where the arbitration proceedings are seated. Among all of those potential authorities, only administrative bodies of arbitral institutions are able to ensure the fair, independent, impartial, expedient and efficient decision on the challenge of arbitrator. This factor should be taken into account by jurisdictions, including Ukraine, aiming to develop and upgrade their national arbitration laws following the trends and approaches taken by the most popular arbitration jurisdictions worldwide.

CHAPTER 2.
LEGAL REGULATION OF THE ARBITRATORS' CHALLENGES IN THE INTERNATIONAL COMMERCIAL ARBITRATION.

2.1. The role of the arbitration rules and national arbitration laws in governing the challenges of arbitrators in the international commercial arbitration

As has already been noted in Introduction to this thesis, one of the most apparent advantages of international commercial arbitration in comparison with other forms of commercial dispute resolution is that it ensures wide range of party autonomy and procedural flexibility [3, p. 1], which, in turn, means that the parties to arbitration proceedings enjoy broad autonomy to agree upon both the substantive law applicable to arbitration and procedural rules governing the conduct of arbitration by arbitral tribunal [31, p. 13-14]. The same holds true for procedural rules on challenge of arbitrators.

However, one should always note that the arbitration procedure is inevitably governed by the mandatory law of a place of arbitration (*lex arbitri*), which could not be ignored by the arbitrators, otherwise causing an award being set aside by the national court on the grounds of the tribunal's excess of powers, or based on the arbitrators' failure to follow the procedure established by the parties agreement [3, p. 63].

The governing and mandatory nature of the national arbitration law of a seat of arbitration is based on the "jurisdictional" theory in relation to arbitration as a whole [32, p. 30]. This theory, which is also referred to as "territoriality" theory, revolves around the general principle of international law according to which "*a state is sovereign within its own borders and that its law and its courts have the exclusive right to determine the legal effect of acts done (and consequently of arbitral awards made) within those borders*" [33, p. 24]. In the meaning of this theory, the *lex arbitri* serves as the factor that turn the arbitration proceedings into legal and legitimized proceedings

and constitutes the ground for the state's supervision over such proceedings [32, p. 30]. It should be also noted that only some of the *lex arbitry* rules should be deemed as mandatory, whereas other rules do not usually have mandatory character and may thus be mirrored in arbitration rules of arbitral institutions, which the parties are free to incorporate into their arbitration agreement [32, p. 30].

As far as specifically rules on challenge of arbitrators, the approaches taken by the national arbitration laws varies from state to state. For instance, in Ukraine the international commercial arbitration and, respectively, challenge procedure are governed by the Law on ICA [34]. First of all, the Law on ICA in Article 12 (1) establishes the grounds on which the challenge of arbitrator may be made, namely if there are reasonable doubts as to arbitrator's impartiality and independence or if arbitrator's qualification falls short of what was agreed by the parties[4] [34].

Furthermore, Article 13(1) of the Law on ICA firstly provides for parties' freedom to determine the challenge procedure on their own by drafting the respective rules in their arbitration agreement or by incorporating institutional rules into their arbitration agreement [34]. Should the arbitration agreement remain silent on the challenge procedure, provisions of Article 13(2) of the Law on ICA comes to play. Article 13(2) of the Law on ICA establishes the detailed procedure, according to which a party intending to challenge an arbitrator shall, within 15 days from the date it became aware of the formation of the arbitral tribunal or of any of the circumstances serving as a ground for challenge, inform the arbitral tribunal in writing of the reasons for the challenge and the tribunal has to decide on challenge [34]. Moreover, Article 13(3) of the Law on ICA allows the party whose challenge was rejected to approach the President of the Chambers of Commerce and Industry of Ukraine that should finally and with no appeal decide on the challenge [34].

Consequently, the Law on ICA, although providing for a detailed procedure of arbitrator's challenge and establishing the grounds for such a challenge, accords the primary importance to the parties' agreement on the matter. This evidences that, at least

[4] Here and hereinafter the translation from Ukrainian into English is provided by the author of the thesis.

in relation to Ukrainian jurisdiction and Ukraine-seated arbitration proceedings, national arbitration rules on challenge of arbitrators will only come to play in the case if the parties' arbitration agreement contains neither its own specific rules on challenge nor a reference to arbitration rules of a respective arbitral institution.

The similar approach is taken by the French and Swiss national arbitration laws. For instance, Gary B. Born, when analyzing the respective national law provisions in its notable handbook noted as follows:

> *In France, for example, Article 1456 of the French Code of Civil Procedure provides the Paris Tribunal de grande instance with jurisdiction in domestic arbitrations to hear challenges to arbitrators, as well as to resolve disputes arising in connection with the constitution of the arbitral tribunal, provided that the parties cannot agree upon other procedures* [29, p. 1927].

In the same vein, Mr Born refers also refers to the Swiss Law on Private International Law, which, as he observed, stipulates that arbitrators in Switzerland-seated arbitrations may be challenged under the procedure agreed by the parties, and only in the case of absence of such an agreement will the Swiss national court have the power to rule on challenge of arbitrator under the procedure established by the Swiss legislation [29, p. 1927-1928].

The relevance of the *lex arbitri* rules governing challenge of arbitrators may be even more undermined in other jurisdictions. For instance, as referred to by the commentator Ms Zahradníková, the national arbitration law of Czech Republic does not contemplate the procedure for challenge of arbitrator as such, merely mentioning a party's right to challenge an arbitrator by filing a respective motion to the national court [17, p. 270]. The same holds true for the US Federal Arbitration Act that does not allow any prior-award court's interventions at all, thus excluding challenge procedure from the regulation of the *lex arbitri* [17, p. 270]. Hence, in general, it may be highlighted that not all, if none of the *lex arbitri*'s procedural rules on challenge of arbitrators are mandatory, and, thus if the parties' arbitration agreement have a reference to institutional arbitration rules - those rules will ultimately will be of utmost relevance

for the challenge procedure [3, p. 65]. This could be explained by the fact that some national arbitration laws, like Ukrainian Law on ICA or Swiss and French national arbitration laws, will explicitly accord the primary importance to parties' arbitration agreement with respect to challenges of arbitrators, whereas the national rules are to be triggered only in case if the arbitration agreement does not contain any such rules and procedures. Moreover, as in case of the US and Czech Republic jurisdictions, some national arbitration law will not contain at all the provisions on challenge of arbitrators. Consequently, despite the fact of its perceived supremacy in the international arbitration, the *lex arbitri* rules has less role to play, in comparison to other rules, with respect to arbitrators' challenges procedure.

Therefore, apart from rules on impartiality and independence of arbitrators, as well rules on challenge procedure under national law, most well-known institutional rules not merely provide for analogous standards of impartiality and independence, but also establish the detailed and sophisticated procedure for both appointing and challenging arbitrators, which could be effectively incorporated into parties' arbitration agreement [31, p. 138]. In the words of the leading and one of the most prominent international arbitration practitioners and scholar Gary B. Born, "*these provisions play a central role in the process of constituting a tribunal, largely (but not entirely) superseding the role of national courts and legislative standards*" [31, p. 138].

For instance, the 2020 Arbitration Rules of the Finland Chamber of Commerce in Article 21(1) establish the general duty of an arbitrator to be and remain impartial and independent of the parties [35]. Moreover, Article 21(4) of the 2020 Arbitration Rules of the Finland Chamber of Commerce Arbitration Rules sets out the continuing disclosure duty of an arbitrator, which means that an arbitrator has to disclose promptly in writing to the FAI, the parties and the other arbitrators any circumstances casting doubt on his or her impartiality and independence, which may arise in the course of the arbitration [35].

Furthermore, the 2020 Arbitration Rules of the Finland Chamber of Commerce in Article 23(1) enumerate the grounds based on which an arbitrator may be challenged by the parties, namely (a) if circumstances exist that give rise to justifiable doubts as

to the arbitrator's impartiality or independence, or (b) if the arbitrator does not possess any requisite qualification on which the parties have agreed [35]. Moreover, in Articles 23(1)-23(7), the 2020 Arbitration Rules of the Finland Chamber of Commerce further establishes the detailed challenge procedure and determines that the final decision on the challenge should be made by the FAI Board [35].

Somewhat different general obligations are established by the 2015 CIETAC Arbitration Rules, which in Article 24 provide that an arbitrator is prohibited from representing any party, and is obliged to be and remain independent of the parties and treat them equally [36]. In turn, Article 31(1) of the 2015 CIETAC Arbitration Rules sets forth common provision according to which an arbitrator before being appointed by the parties or the Chairman of CIETAC has to sign a declaration and disclose any facts or circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence [36]. Article 31(2) of the 2015 CIETAC Arbitration Rules, in its turn, establishes the disclosure duty, meaning that an arbitrator should promptly disclose in writing any circumstances evidencing that its impartiality and independence were compromised should such circumstances arise during the arbitral proceedings [36].

Article 32 of the 2015 CIETAC Arbitration Rules establishes the grounds for and procedure of the challenge of arbitrator, which are quite uncommon, as there are two main grounds based on which the parties may challenge an arbitrator with two different deadlines for submission of such a challenge [36]. In particular, according to Article 32(1) of the 2015 CIETAC Arbitration Rules, the party may challenge an arbitrator based on the grounds of the facts or circumstances disclosed in declaration signed by arbitrator before its appointment [36]. In such a case, according to Article 32(1) of the 2015 CIETAC Arbitration Rules, the party has to file a challenge in writing within ten days from the date of receipt of arbitrator's declaration [36]. In its turn, according to Article 32(2) of the 2015 CIETAC Arbitration Rules, a party may also challenge an arbitrator if such a party has justifiable doubts as to the impartiality or independence of an arbitrator [36]. In such a case, according to Article 32(2) of the 2015 CIETAC Arbitration Rule, party should file a challenge in writing, stating the facts and reasons on which the challenge is based with supporting evidence. According

to Article 32(3) of the 2015 CIETAC Arbitration Rules, the deadline for such filing is fifteen days from the date challenging party receives the Notice of Formation of the Arbitral Tribunal or, if a party becomes aware of a reason for a challenge after such receipt, fifteen days after such reason has become known to it, but no later than the conclusion of the last oral hearing [36]. As confirmed by Article 32(7) of the CIETAC Arbitration Rules, the final decision on the challenge is to be made by the Chairman of the CIETAC [36].

The 2014 ICDR International Dispute Resolution Rules and Procedures provide their own unique insights on challenge procedures in the international commercial arbitration [37]. In particular, while establishing in Articles 13(1)-13(3) general provisions on arbitrator's duty to be and remain impartial and independent, to sign the notice of appointment affirming his or her availability to serve, as well as confirming his or her independence and impartiality, and continuing duty to disclose any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence, the 2014 ICDR International Dispute Resolution Rules and Procedures provide some specific provisions that could not be found in other arbitration rules [37].

For instance, Article 13(4) of the 2014 ICDR International Dispute Resolution Rules serves as a disclaimer that disclosure by an arbitrator or party does not necessarily indicate belief by the arbitrator or party that the disclosed information gives rise to justifiable doubts as to the arbitrator's impartiality or independence [37].

Furthermore, Article 13(5) of the 2014 ICDR International Dispute Resolution Rules provides the circumstances under which the party may lose the right to challenge an arbitrator, namely in case if a party does not bring a challenge within a reasonable time after it becomes aware of circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence [37]. In the words of Gary B. Born, the main reason for existence of this kind of provisions is that "*parties should not be permitted to proceed with an arbitration while retaining secret grounds for objection to the decision-makers*" [29, p. 1919].

Moreover, contrary to most of arbitration rules, the 2014 ICDR International Dispute Resolution Rules in Article 13(6) establish the regulation on the so-called *ex parte* communications, by providing that neither a parties nor its representatives shall have any *ex parte communication* relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or impartiality and independence in relation to the parties, or to discuss the suitability of candidates for selection as a presiding arbitrator where the parties or party-appointed arbitrators are to participate in that selection [37].

According to Article 14(1) of the 2014 ICDR International Dispute Resolution Rules, the only ground for an arbitrator's challenge is the existence of circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence [37]. Lastly, according to Article 14(3) of the 2014 ICDR International Dispute Resolution Rules, the ICDR Administrator serves as the authority competent to make a final decision on the challenge [37].

Consequently, it may be concluded that, considering the party autonomy inherent for international commercial arbitration, the primary role as an applicable regulation is accorded to party's arbitration agreement. However, one should remember that the parties rarely agree on detailed challenge procedure in their arbitration agreements and, therefore, challenge procedures usually will be governed by institutional arbitration rules incorporated by the parties into their arbitration agreement, or if no such arbitration rules have been incorporated by the parties, by the relevant provisions in the national arbitration laws – *lex arbitri* [17, p. 275].

Although the *lex arbitri* rules usually possess an obligatory character for arbitral proceedings from the international arbitration doctrinal standpoint, from the practical perspective these rules play less important role, than the arbitration rules, especially in case of challenge procedures. This could be explained by the fact that either national arbitration laws themselves prioritize the parties' arbitration agreement as the source

of challenge procedures, or respective national arbitration laws do not contain any provisions on challenge as such.

Consequently, the arbitration rules of a respective arbitral institution in a predominant number of cases would contain a comprehensive and clear procedure on challenge of arbitrators, which much more likely result in expedite and efficient decision on the arbitrator's challenge [17, p. 270].

2.2. The role of the IBA Guidelines on Conflicts of Interest in International Arbitration for challenges of arbitrators in the international commercial arbitration

2.2.1. Nature of the IBA Guidelines Conflicts of Interest in International Arbitration and their acceptance in international commercial arbitration

As it was demonstrated in Section 2.1 of Chapter 2 of this thesis, although the *lex arbitri* rules and arbitration rules of respective arbitral institutions establish procedures with respect arbitrator's challenge, grounds based on which such challenges could be made by the parties, as well as provide for an arbitrator's duty to be and remain impartial and independent, they are, in most of the cases, are not comprehensive enough [38, p. 224]. Furthermore, these provisions contained in the national laws and arbitration rules usually pose diversified interpretation challenges for arbitral tribunals, national courts and other bodies competent to decide on challenges [38, p. 224]. This, among other things, could be explained by the fact that these provisions, while proclaiming general rules and standards, do not elaborate any further on the standards and guidance as to practical applications of these general rules and standards. Moreover, this state of affairs resulted in that many arbitrators have difficulties with determination of what they should disclose to other arbitrators and the parties, trying to evade the "overdisclosing" situation in light of the fact that recently the parties has become more willing to challenge an arbitrator without any grounds, having the only purpose to obstruct the arbitration process [3, p. 131].

Having all these factors and concerns in mind, the International Bar Association appointed a Working Group that in 2004 has presented to the world the IBA Guidelines [3, p. 131]. The main aim of the Working Group in the course of developing the IBA Guidelines was not only to establish the uniform standard of impartiality and independence, but also to set out the examples of practical application of such general standards based on the case law from different jurisdictions, as well as the professional experience of the Working Group's members [39, p. 434]. As the IBA Guidelines' preamble in paragraph 4 further proclaims, these Guidelines "*reflect the Working Group's understanding of the best current international practice*" with respect to practical application of the standards of impartiality and independence, based on "*statutes and case law in jurisdictions and upon the judgment and experience of members of the Working Group and others involved in international commercial arbitration*" [40]. Consequently, the IBA Guidelines constitute a code of best international practice in relation to disclosure obligations of arbitrators and challenge in the events of independence and impartiality standards violations, which is reflected in a three-colour-coded list (green, orange, red) of a number of specific practical situations which arbitrators should or should not to disclose and based on which they may or may not be challenged [38, p. 224]. In the nutshell, the structure and contents of the Guidelines were described by Alan Redfern, Martin Hunter and others as follows:

> *They start with a general introduction; continue by setting out "General Standards Regarding Impartiality, Independence and Disclosure", which is the core of the document; and conclude with a section on the "Practical Application of the General Standards". This last section divides a non-exhaustive list of "circumstances" into four separate colour groups* [1, p. 257].

The core element of the IBA Guidelines are the Red, Orange and Green Lists, which elaborate on the particular practical examples of conflict of interests circumstances, dividing them into (1) those that both should be mandatorily disclosed by an arbitrator and serve as ground for his or her disqualification (Red List), which is, in turn, sub-divided into two sections, referring to the circumstances that are not

waivable at any event and those, which may be waived by parties' agreeement, (2) those that establish a presumption that they should be disclosed and, in some cases, may amount to potential grounds for challenge of arbitrator (Orange List) and lastly, (3) those that do not require disclosure and may not amount to the ground for challenge of arbitrator (Green List) [29, p. 1846].

While the content of the Guidelines will be in detail analyzed in the following sections of this thesis, in this section the author will analyze the role and the nature of the IBA Guidelines, determining the impact that it has on legal regulation of challenge procedures in international commercial arbitration, as well as the impact it may have on the amending of national arbitration laws in this context.

Although the substantial part of the Guidelines is not specifically devoted to the challenge of an arbitrator, they have significant impact on the arbitral tribunals and national courts jurisprudence in the light of rapid increase of challenges to international arbitrators based on conflicts of interests [41]. Meanwhile, one should note that the different treatment of the Guidelines is accorded in different jurisdictions and there is no uniform approach to understanding of their global nature and worldwide impact [29, p. 1840].

First of all, the binding nature of the Guidelines should be explored. The Guidelines themselves are unambiguous in this regard, as the paragraph 6 of the preamble of the IBA Guidelines explicitly provides that "*[t]hese Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties*" [40]. Thus, as it is evidenced even from their name, the Guidelines do not possess "*independent legal effect*" [29, p. 1839]. The IBA Guidelines are binding neither for institutional arbitration, considering that they were not adopted or incorporated by any arbitral institution as binding rules, nor in *ad hoc* arbitration, unless the parties incorporated the Guidelines into their arbitration agreement or their application is agreed by the parties in any other manner [29, p. 1839-1840]. However, Gary B. Born notes that, unlike other soft law instruments operating in the international commercial arbitration, such as the IBA Rules on the Taking of Evidence, the parties

in practice are usually reluctant to incorporate or make a reference to the IBA Guidelines in their arbitration agreements [29, p. 1840].

Notwithstanding their non-obligatory nature, number of recent international arbitration's surveys reveal that the IBA Guidelines are heavily relied on by large number of practitioners of the international arbitration community [41]. For instance, the 2016 IBA Report on the reception of the IBA arbitration soft law products also confirmed the IBA Guidelines' wide reception in the international commercial arbitration community, corroborating this conclusion with the following data evidence on the number of cases, where the Guidelines were referenced in paragraph 108:

> *Of the three IBA instruments surveyed, the Conflicts of Interest Guidelines were the most commonly referred-to instrument. Out of 3,201 arbitrations known to the respondents over the past five years in which issues of conflicts of interest arose (at the beginning of the arbitration), the Conflicts of Interest Guidelines were referenced in 57 per cent of them* [42].

Moreover, the 2016 IBA Report on the reception of the IBA arbitration soft law products also confirmed in paragraph 110 that the Guidelines are extensively used by the counsels during the selection of arbitrators, as corroborated by the following findings:

> *At the global scale, counsel made use of the Conflicts of Interest Guidelines when appointing arbitrators in 67 per cent of all reported cases. Counsel in North America reported a more frequent use of the Conflicts of Interest Guidelines (77 per cent), followed by counsel in Asia Pacific (69 per cent), Latin America (59 per cent), the Middle East (54 per cent), Europe (51 per cent) and Africa (47 per cent)* [42].

Lastly, the 2016 IBA Report on the reception of the IBA arbitration soft law products in paragraph 113 elaborated on how often the IBA Guidelines are referred to in the decisions on conflict of interests rendered by arbitral institutions, arbitral tribunals or national courts, concluding that at the global scale the Guidelines were referred to in 67 per cent of such decisions [42]. These numbers are additionally supported by the arbitral institutions' endorsement of approaches taken by the IBA Guidelines, which are usually cited in submissions to such arbitral institutions as ICC

and LCIA, and, reportedly, are relied on by both institutional competent authorities when deciding on challenges of arbitrators [29, p. 1851].

However, somewhat different stance towards the Guidelines is taken at the level of the national courts. In particular, the IBA Guidelines are referred to in the decisions of the national courts although significantly less frequently in comparison to respective institutional challenge decisions [29, p. 1852]. The rationale behind such reluctance of the courts to rely on the IBA Guidelines may be that national courts consider it inappropriate to refer to foreign rules or guidelines issued by foreign non-governmental private entities when resolving the issues of arbitrators' conflict of interests, regardless of such rules' practical relevance among arbitration practitioners and arbitral institutions [43, p. 6]. Additionally, such state of affairs may be explained by the fact that the national procedural laws may not allow the national courts to rely on such non-binding instruments having no legal value within the meaning of respective national legal system, leaving aside their irrelevance at the national level.

For instance, the IBA Conflicts Committee refers to the judgement of the Vienna Commercial Court in Case No 16 Nc 2/07w, dated 24 July 2007, where the court took an opportunity to clarify the Austrian national courts' treatment of the IBA Guidelines when deciding on an application for challenge of arbitrator, which was heavily based on circumstances covered by the IBA Guidelines, namely the multiple arbitrator's appointments by the same party, in an arbitration conducted under the Rules of the International Arbitral Centre of the Austrian Federal Economic Chamber [43, p. 7]. Consequently, the Vienna Commercial Court rejected the claimant's application for the challenge of arbitrator and noted with respect to application of the IBA Guidelines that in the absence of a clear statement in the legislation otherwise, the court could not interpret Austrian law in light of international non-binding legal instruments and customs, including the IBA Guidelines [43, p. 8].

In the same vein, the Swiss First Civil Law Court in the case *Adrian Mutu v. Chelsea Football Club Ltd* ruled in paragraph 3.3.3.1 of its judgement on the application of the Guidelines as follows:

> *Indeed, one should not forget that the Guidelines, admittedly a precious working instrument, do not have legislative value. Hence the circumstances of the case at hand and the case law of the Federal Tribunal in this field will ever remain decisive to dispose of the issue of a conflict of interest* [44].

However, not all national courts accorded such a little relevance to the IBA Guidelines in their decision on arbitrator's challenges. For instance, the IBA Conflicts Committee referred to the judgement of the Court of First Instance of Brussels on the challenge of an arbitrator based on the grounds that an arbitrator did not disclose to the parties circumstances which supposedly were casting shadow on his impartiality, by virtue of which the court dismissed the application for the challenge expressly endorsing one of party's contentions with reference to the IBA Guidelines [43, p. 9-10]. The same holds true for the Swiss Supreme Court's judgement in case *X. v. Y.*, where in paragraph 3.3.2.2 it noted the following with respect to Guidelines' relevance:

> *Such guidelines admittedly have no statutory value; yet they are a precious instrument, capable of contributing to harmonization and unification of the standards applied in the field of international arbitration to dispose of conflict of interests and such an instrument should not fail to influence the practice of arbitral institutions and tribunals* [45].

Consequently, this second block of national courts' decision indicates that there is still a room for application of the IBA Guidelines on the national legislation level within certain jurisdictions and, on the other hand, these decisions also evidence the apparent lack of uniformity in the national courts jurisprudence in relation to understanding of nature and relevance of the Guidelines. According to the opinion of Gary B Born, such jurisprudence indicates that currently the relationship between the IBA Guidelines and national law challenge procedures is unidentified [29, p. 1853]. Mr Born argues that such lack of clarity is predominantly caused by the Guidelines themselves, as they do not set out any provisions, which could have defined their relevance in national challenge procedures [29, p. 1853].

Moreover, such state of affairs may also be caused by the relevant national arbitration laws which do not allow the referencing of the soft law instruments, like the Guidelines, in the respective challenge decisions and, at the same time, do not contain

detailed and comprehensive provisions and standards applicable in the challenge procedures, analogous to the Guidelines, resulting in the ambiguity in the interpretation and application of the national law provisions in the course of the challenge proceedings.

Hence, although being widely accepted at the level of institutional arbitration, the IBA Guidelines have not yet played the leading role at the level of the national challenge procedures. As the above-mentioned analysis has demonstrated, for the IBA Guidelines to have a full effect at the national level, they have to be either referenced directly by the relevant national legislative act or such legislative act should provide for possibility for decision-makers to take non-binding guidelines into account when deciding on challenge issues. As a result, the issue arises as to whether the IBA Guidelines are so valuable and efficient instrument that it could warrant its direct application at the national level or even inspire the amendment of the national legislation taking the example of the Guidelines and adopting the similar provisions and standards at the national level. This issue is subject to the analysis in the following section of this thesis.

2.2.2. Impact of the IBA Guidelines Conflicts of Interest in International Arbitration on amending the national international commercial arbitration legislation

Considering the fact that, as has been established in Section 2.2.1 of Chapter 2 of this thesis, the IBA Guidelines did not have aim to take precedence over or become incorporated into the national law, but instead only supplemented already existing legal regulations with another source of provisions regarding impartiality and independence of arbitrators, more uncertainty arose with respect to application and the effects of the Guidelines [29, p. 1858]. This uncertainty, however, may be and, in some instances, should be eliminated by amending the respective national laws. Such necessity could be explained by the fact that the national arbitration laws in most of their part do not go sufficiently deep in defining relevant standards of impartiality and independence of

arbitrators, whereas the IBA Guidelines provided uniform and more comprehensive and detailed criteria for reviewing the impartiality and independence of an arbitrator in the course of the challenge procedure [41].

For instance, if one refers to the Ukrainian national arbitration law, namely the Law on ICA, the lack of sufficient clarifications on how standards of impartiality and independence should be applied may be identified. In particular, Article 12(1) of the Law on ICA provides that before the possible appointment as an arbitrator, a person shall disclose any circumstances which may give rise to reasonable doubts as to his or her impartiality or independence [34]. Furthermore, Article 12(1) of the Law of ICA stipulates that the arbitrator, after his appointment and in the course of the arbitration proceedings, has to without delay inform the parties of any such circumstances [34].

Meanwhile, the Law on ICA remains absolutely silent on what circumstances may or may not give rise to the justifiable doubts as the arbitrator's impartiality and independence, leaving both the parties and the arbitrators without clear and unambiguous guidance and clarifications as to what information should be disclosed and based on what factual and practical circumstances the certain arbitrator may be challenged. This situation inevitably leads to significant uncertainty and ambiguity with respect to interpretation and application of the respective standards of impartiality and independence in the course of challenge procedures under Ukrainian law. As a result, challenges that may be raised in the course of the *ad hoc* Ukraine-seated arbitration proceedings, which would warrant an application of challenge procedure envisaged by the Law on ICA, will be decided by a respective authority based on limited provisions of Ukrainian law only, as they did not have any reference to possibility of application other instruments for determination of issues giving rise to challenge of arbitrator. This state of affairs if far from being acceptable and definitely does not make Ukraine closer to other popular arbitration jurisdictions.

In its turn, the IBA Guidelines presents the broad field full of detailed insights and clarifications to be considered as a valuable and beneficial source, which could be used by Ukrainian legislator to effectively develop the challenge mechanisms under Ukrainian national regime. The IBA Guidelines' positive effect on the challenge

procedure may be corroborated by reference to the numbers of successful challenges that has increased in the wake of the Guidelines' release [29, p. 1856]. For instance, Gary B. Born summarized the statistical data on challenges decided by the ICC administrative body and came to the following conclusions:

> *At the same time, again based on ICC statistics, the frequency of disqualifications appears to have increased somewhat following adoption of the Guidelines. Between 1992 and 2003, 26 challenges were successful, out of a total of 238 challenges in ICC cases, for a rate of successful challenges of 9.15%. Between 2004 and 2012, 35 challenges were successful, out of a total of 388 challenges in ICC cases, for a success rate of 11.09%* [29, p. 1856].

Consequently, Ukraine has an option to develop its national mechanisms of arbitrators' challenges by either providing a reference in the Law on ICA to the effect that international guidelines and other instruments may be taken into account by the competent authority when deciding on the challenge of arbitrator in Ukraine-seated ad hoc arbitration proceedings. This amendment would allow Ukrainian challenge mechanism to avoid uncertainties as to application of the standards embodied in the Guidelines. Moreover, another option would be for Ukrainian legislator to accompany the existing limited provisions of the Law on ICA with more detailed clarifications as to application of impartiality and independence standards currently employed by Ukrainian legislator, following the example of the IBA Guidelines, while not making any direct reference to them.

In doing so, the IBA Guidelines will have an opportunity to follow a Ukrainian path of the 1985 UNCITRAL Model Law on International Commercial Arbitration, which, although also being a soft law non-binding instrument and guide for national legislators in international commercial arbitration, have been adopted by numerous states by virtue of enacting their national arbitration legislation based on the 1985 UNCITRAL Model Law on International Commercial Arbitration's provisions [46, p. 295]. In this regard, the 1985 UNCITRAL Model Law on International Commercial Arbitration successfully serves as an authoritative and leading example of how soft law instrument may signify substantial interest upon the sphere of international arbitration, practically turning into hard law instrument [46, p. 295]. This is an example and leading

point to be followed by Ukrainian legislator in providing detailed provisions on challenge of arbitrators.

This would potentially constitute another step for Ukraine towards becoming more favourable and attractive jurisdiction for conducting international commercial arbitration proceedings, considering that the clear and expedient challenge mechanism is an integral part of successful arbitration proceedings.

CONCLUSIONS TO CHAPTER 2

1. The primary source of legal regulation over the challenge mechanisms in the international arbitration is arbitration rules of different arbitral institutions, which the party are free to incorporate into their arbitration agreements. In its turn, the national law, although being mandatory in many other respects, plays less important role in governing challenge procedure, since in most of the cases it accords primary importance to parties agreements, which usually incorporate arbitration rules, or does not contain any regulation on challenges at all.

2. Adoption of the IBA Guidelines has had the significant effect on the challenge mechanism in the international commercial arbitration, as it introduced the uniform standards of impartiality and independence and provided clear and comprehensive clarifications as to the practical application of these standards during the challenge procedures. Although the Guidelines do not have any binding effect neither for arbitral tribunals and institutions nor for the national courts, they were widely referenced and relied on in a number of challenge proceedings. Due to their non-binding nature, the application of the IBA Guidelines at the level of national challenge regime is surrounded by uncertainties. At the same time, Ukrainian national arbitration law, which has limited and undeveloped provisions governing the independence and impartiality of arbitrators, has an option to ensure direct application of the Guidelines in the challenge procedures in Ukraine-seated arbitration proceedings by respectively amending the Law on ICA. Another option would be for Ukrainian legislator to amend the Law on ICA to provide more detailed provisions on impartiality and independence, taking the IBA Guidelines as an example. Either option will have significant positive effect on regulation of the challenge mechanism in Ukraine.

CHAPTER 3.
GROUNDS FOR THE ARBITRATORS' CHALLENGES IN THE INTERNATIONAL COMMERCIAL ARBITRATION.

3.1. The content of and difference between impartiality and independence standards in international commercial arbitration.

As Alan Redfern, Martin Hunter and others aptly noted in their well-known handbook on international commercial arbitration, "*[i]t is a fundamental principle in international arbitration that every arbitrator must be and remain independent and impartial of the parties and the dispute*" [1, p. 254]. Unsurprisingly, the most popular and common basis for an arbitrator in international commercial arbitration proceedings to be challenged is the existence of conflict of interests in cases where an arbitrator does not comply with requirements of impartiality and independence [3, p. 140].

Obligation of arbitrators to be impartial and independent stems from their another crucial obligation owed to the parties that approached such arbitrators, namely the obligation to resolve the dispute that such parties submitted to them [47, p. 789]. In this regard, the prominent French and English international commercial arbitration practitioners Emmanuel Gaillard and John Savage in their handbook on international commercial arbitration refer to the following citation from the Paris Tribunal of First Instance judgement in case *Raffineries de pétrole d'Homs et de Banias v. Chambre de Commerce Internationale*:

> *[A] chosen arbitrator–who is a judge, not a representative of the party which appointed him–must derive his judicial powers from a single, common manifestation of the intentions of the parties to the proceedings, even though his appointment may have been initiated by one party alone* [48, p. 462].

In the similar vein, Lord Clarke of the United Kingdom Supreme Court in its judgement in *Jivraj v. Hashwani* in paragraph 45 explicitly referred to importance of

impartiality and independence standards existing in international commercial arbitration as follows:

> *I would hold that the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties* [49].

This may be primarily explained by the fact that lack of independence or partiality of arbitrators in international commercial arbitration may apparently result in latter's deprivation of legal nature inherent for any other legal proceedings [50, p. 111]. In the course of resolution of disputes submitted to international commercial arbitration there are many different economic and commercial interests that may be revolve around such dispute, thus creating potential risks as to bad faith conduct of arbitrator or improper influence that may be exercised over such arbitrator in the course of international commercial arbitration proceedings [50, p. 111].

Provisions envisaging such a ground for challenge may be pinpoint in both arbitration rules of different arbitration institutions, in national *lex arbitri* and even in some intergovernmental legal instruments [29, p. 1761].

For instance, Article 11(6)of the 2018 HKIAC Administered Arbitration Rules, alongside with other grounds such as lack of qualifications agreed by the parties on the part of arbitrator, *de jure* or *de facto* inability of arbitrator to perform his or her functions undue delay, also lists the existence of circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence as the ground for challenge of arbitrator [25].

Similarly, Article 32(2) of the 2015 CIETAC Arbitration Rules provides that any party becoming aware of circumstances leading to such parties having the justifiable doubts as to the impartiality or independence of an arbitrator may challenge such an arbitrator by providing the written statement with the relevant facts and reasons on which the challenge is based and supporting evidence being attached to such statement [36].

To the same effect, Article 33(1) of the 2018 ICAC Arbitration Rules provides that the parties may challenge an arbitrator if circumstances that give rise to justifiable doubts as to his impartiality or independence exist, alongside with such a ground for challenge as the lack of qualifications agreed to by the agreement of the parties [14].

In the same vein, Article 10(1) of the 2014 LCIA Arbitration Rules lists among the grounds for challenge and resignation of arbitrator in international commercial arbitration the written notice of arbitrator to the LCIA Court of his or her intent to resign as arbitrator, or in cases when such an arbitrator falls seriously ill, refuses or becomes unable or unfit to act or, finally and most commonly, in cases where circumstances exist that give rise to justifiable doubts as to such arbitrator's impartiality or independence [13].

In its turn, Article 14(1) of the 2017 ICC Arbitration Rules provides for non-exhaustive list of grounds based on which an arbitrator may be challenged in international commercial arbitration by stating, alongside with the most common ground for challenge being an alleged lack of impartiality or independence of an arbitrator, that the challenge of an arbitrator may be based on other reasons and grounds [16].

Referring to *lex arbitri*, Article 12(2) of the Law on ICA expressly and contrary to, for instance, the ICC Arbitration Rules, provides for exhaustive list of grounds based on which the arbitrator may be challenged, listing among them the events when circumstances exists leading to reasonable doubts as to an arbitrator's impartiality and independence and when an arbitrator lack sufficient qualifications specifically agreed on by the parties in their arbitration agreement [34].

In its turn, the 1996 English Arbitration Act in Article 24(1) provides for extensive and exhaustive list of grounds for challenge of arbitrator by providing that an arbitrator may be removed by the national courts upon the party's application based on, first and foremost, the fact that circumstances exist that give rise to justifiable doubts as to such an arbitrator's impartiality, or that such an arbitrator does not possess the qualifications required by the arbitration agreement, or that such and arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable

doubts as to his or her capacity to do so, or, lastly, that such an arbitrator has refused or failed properly to conduct the proceedings, or to use all reasonable dispatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the challenging party [51].

In its turn, as in detail analyzed by Gary B. Born in his well-known handbook on international commercial arbitration, the Federal Arbitration Act of the United States, contrary to the *lex arbitrti* of overwhelming number of developed jurisdictions, deals with obligations of impartiality and independence only indirectly by merely listing the failure of arbitrator to comply with an obligation to be and remain impartial or arbitrator's involvement into corrupt actions among the other grounds for setting aside the arbitral awards in international commercial arbitration [29, p. 1765].

However, one should note that review of arbitrator's compliance with the obligations of the independence and impartiality during the stage of the vacation of the arbitral award or the latter's enforcement becomes meaningless considering that the arbitration has already been finished and the parties expectations of the arbitral tribunal being fully impartial and independent to effectively resolve their dispute failed [47, p. 804]. Therefore, the approach taken by American legislator and the latter's failure to elaborate on the obligations of impartiality and independence of arbitrators in international commercial arbitration should not apparently be welcomed by arbitration community.

Consequently, almost universally, variety of arbitration rules and different national arbitration laws in predominant number of jurisdictions not only provide for obligations of impartiality of arbitrators in international commercial arbitration, but also make a reference to the lack of independence or partiality of arbitrator as the basis for challenge or removal of arbitrator in international commercial arbitration proceedings [29, p. 1761-1762]. This, in turn, indicates the pivotal and crucial importance of identification and determination of what these grounds substantively and contextually cover behind themselves. As one may notice, the above-mentioned provisions of different institutional arbitration laws, as well as provisions of various national *lex arbitrti* do not reveal specifically what impartiality and independence mean

and whether there any peculiarities or differences between these concepts, or that circumstances fall within and are caught by these two equally theoretical and practical concepts and definitions.

This problematic is aptly and accurately described by Gary B. Born in his world-renowned and widely cited comprehensive handbook on international commercial arbitration, where he noted that "*although there is virtually universal agreement on the existence of the arbitrators' obligations of independence and impartiality, there is substantial controversy and divergence in approaches as to the precise content of these obligations*" [29, p. 1762].

The national laws and arbitration rules of respective arbitral institutions will usually not be helpful and guiding with respect to content of the standards of impartiality and independence, since these rules are usually quite abstract, whereas the application of these standards will commonly and substantially be revolving around the provisions of the parties' arbitration agreement and the surrounding context in which it has been entered into, as well as the specific fact-based circumstances surrounding parties' dispute [29, p. 1763].

One may note, for instance, that Article 32(1) of the ICAC Arbitration Rules and Article 12(1) of the Law on ICA provide for an obligations of arbitrators to be both impartial and independent [14; 34]. In its turn, Article 24(1)(a) of the English Arbitration Act refers exclusively to the concept of impartiality when listing grounds for the challenge of arbitrator in international commercial arbitration [51].

As noted by Margaret Moses in her well-known and prominent handbook on principles operating in international commercial arbitration, the concept of impartiality, in general, refers to such an arbitrator's state when "*the arbitrator is not biased because of any preconceived notions about the issues, or any reason to favor one party over another*" [3, p. 130]. In its turn, according to Margaret Moses, the concept of independence, in general, objectively refers to the absence of any financial interests that an arbitrator may potentially and secretly have in the dispute submitted to the arbitration tribunal or its outcome, or to the cases where "*arbitrator is not dependent on one of the parties for any benefit, such as employment or client referral, and that*

the arbitrator does not have a close business or professional relationship with one of the parties" [3, p. 130]. According to W.M. Tupman, the apparent example of an arbitrator in international commercial arbitration lacking impartiality is when such an arbitrator has publicly expressed an opinion on one of the legal matters to be decided upon by such an arbitrator in the course of arbitration proceedings [19, p. 29]. In its turn, according to Mr Tupman, the apparent example of an arbitrator in international commercial arbitration lacking independence would take place when such an arbitrator had or has "*prior or current relationship with one of the parties or its legal adviser, either business, professional or social*" [19, p. 29].

Alan Redfern, Martin Hunter and others in their widely cited handbook on international commercial arbitration make the following observation with respect to difference between the concepts of impartiality and independence:

> *'Independence' is generally considered to be concerned with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise. This is thought to be susceptible to an objective test, because it has nothing to do with an arbitrator's (or prospective arbitrator's) state of mind.*
>
> *By contrast, the concept of 'impartiality' is considered to be connected with actual or apparent bias of an arbitrator—either in favour of one of the parties, or in relation to the issues in dispute. Impartiality is thus a subjective and more abstract concept than independence, in that it involves primarily a state of mind* [1, p. 255].

Consequently, Gary B. Born concludes that the main aim of the concept of impartiality revolves around guaranteeing that there is no lack of independence on the part of arbitrator and he or she keeps fair mind when resolving the dispute, thus referring to essentially subjective test, requiring an arbitrator to maintain specific state of mind in the course of international commercial arbitration proceedings [29, p. 1776-1777]. In its turn, and to the contrary, according to Gary B. Born, the essential aim of the concept of independence is "*to ensure that there are no connections, relations, or dealings between an arbitrator and the parties that would compromise the arbitrator's ability to be impartial; in that sense, the independence inquiry is an objective one, that*

demands the absence of factual connections or relations which are likely to result in subjective bias" [29, p. 1777].

Mr Born further concludes as follows in this regard:

> *Properly understood, however, this distinction obscures a more fundamental point. The requirement that an arbitrator be subjectively impartial is virtually always established only through inquiry into external, objective facts and circumstances, while objective circumstances indicating a lack of independence are generally relevant insofar as they evidence an unacceptable risk of a lack of subjective impartiality on the part of the arbitrator. That is, a lack of independence is a matter of concern because it indicates the possibility of partiality or bias, which in turn can only be evidenced through showings of external relations or connections; the two concepts are inextricably linked and neither can be properly understood or applied without reference to the other* [29, p. 1777].

Consequently, approach taken rather by Ukrainian legislator and the ICAC Arbitration Rules, than approach taken by English legislator, should be followed as an example of correctly reflecting the nature of interconnections between the concepts of impartiality and independence by providing both of them as the grounds for challenge of arbitrator in international commercial arbitration.

Moreover, the commentators to the English Arbitration Act reveal that the English *lex arbitri*'s drafters intentionally omitted the standard of independence, forecasting that the latter's strict interpretation, which is reflecting almost actual absence of any business or professional connections between arbitrating parties and arbitrator, would undermine the possibility to keep the most demanded and knowledgeable arbitrators in the panel, subjecting them to the risks of being challenged and removed [52, p. 399]. Moreover, the drafters considered that, in any event, the issue of independence will inevitably arise in the course of impartiality analysis, thus pointing to their close connection between each other [52, p. 399-400].

Ukrainian Law on ICA in Article 12(1) refers to the standard of reasonable doubts to establish whether the challenged arbitrator is indeed lacking independence or being partial toward one of the parties to the proceedings [34]. This approach is mirrored with similar tests incorporated, for instance in Article 32(2) of the CIETAC

Arbitration Rules, which refer to the standard of justifiable doubts as to arbitrator's impartiality and independence as the ground for challenge of the arbitrators in international commercial arbitration [36]. Consequently, the issue arises as to what contextually these apparently similar standards refer to.

An example of application of justifiable doubts standard in the course of challenge proceedings could be the Decision on Challenge to Arbitrator in ICSID case *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, thereby prominent arbitrator Charles Brower has been challenged by one of the parties [53]. The challenge in this case was based on a number of comments that Mr Brower made in the course of his public interview with respect to the respondent in arbitration proceedings, as well as some issues raised in this arbitration proceedings (paragraphs 25-27) [53]. The PCA Secretary-General, being the competent authority to decide on Mr Brower's challenge in this arbitration proceedings, in paragraph 44 of the decision elaborated on the standard to be applied to alleged impartiality of Mr Brower towards the respondent in this arbitration proceedings, by noting that "*a finding that Judge Brower is actually biased against Ecuador or has actually prejudged the merits of the dispute is not necessary in order for the challenge to be sustained*", but rather the mere appearance of bias will suffice for him to be dismissed from the current proceedings, which could be inferred from "*a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts" as to Judge Brower's impartiality or independence*" [53].

Applying the standard of reasonable third person, the PCA Secretary General challenged Mr Brower finding that, although there was no actual bias on the part of Mr Brower, still "*from a reasonable third person's point of view, the comments do give rise to an appearance that Judge Brower has prejudged the issue*" (paragraph 58) [53].

Consequently, this standard does not establish a requirement for challenging party to prove beyond reasonable doubt that the arbitrator is certainly and actually dependent upon one of the parties to arbitration proceedings or is partial and favors one of the parties to the proceedings, rather for a party to successfully challenge and remove an arbitrator from international commercial arbitration proceedings it will be enough

to demonstrate that some doubts or hesitations exists with respect to such arbitrator's impartiality and independence [29, p. 1778].

The reason for such a substantially low standard for an arbitrator to be challenged could be explained by the fact that such standard is aimed to ensure the efficiency and integrity of international commercial arbitration proceedings in light of the fact that other mechanisms would allow only limited intervention into and review of the conduct and behavior of arbitrators in the course of international commercial arbitration proceedings to pinpoint the mistakes and unethical actions of the arbitrators [29, p. 1778-1779]. In this regard, Gary B. Born refers to the citation of the Swedish Supreme Court, which elaborates on the reasons behind the low standard of proof as follows:

> *[A] high standard must be set for the requirement of objectivity and impartiality when it comes to arbitrators, since flaws with respect to the evaluation of evidence or questions of law cannot lead to an arbitration award being set aside* [29, p. 1779].

Consequently, one may almost definitely conclude that despite all unique characteristics that each concept of impartiality and independence possesses, there are inherent connecting points between them making them highly and significantly interdependent between each other in each case of challenge procedure commenced by the challenging party with reliance on this particular ground.

In its turn, the justifiable or reasonable doubts standards in relation to independence and impartiality of arbitrators in international commercial arbitration, which is enshrined on the Ukrainian legislative level both in the Law on ICA and the 2018 ICAC Arbitration Rules, serves the pivotal role of ensuring that the bias or dependence of arbitrator will be identified, prevented and eradicated at the earlier stages of international commercial arbitration proceedings before the visible reflections of such bias reach the serious and significantly harmful level of actual lack of impartiality and independence, so the parties will not need to commence the additional proceedings to invalidate the award or seek refusal in enforcement of award and thus undermining any value and efficiency of the arbitration proceedings they referred their dispute to.

Last but not least, this standard fully corresponds with the nature of concepts of impartiality and independence, which, as noted by Gary B. Born, virtually are not capable of being identified through objective inquiry into actual state of mind of arbitrator in international commercial arbitration proceedings [29, p. 1786].

3.2. Standards of impartiality and independence applicable to party-appointed arbitrators in international commercial arbitration

Appointment of arbitrators is one the most crucial and constituent steps in international commercial arbitration [54, p. 247], as the expertise and experience of the arbitrators selected by the parties will significantly influence the efficiency of the arbitration process and the subsequent award [3, p. 116]. As Wang Sheng Chang aptly points out: "*Arbitration is said to be as good as the arbitrators*" [55, p. 401].

Considering the fundamental principle of party autonomy prevailing in the international commercial arbitration, in general, the parties are free to agree on the procedure for the appointment of arbitrators, which includes the number of prospective arbitrators, their qualifications and other requirements they should meet [54, p. 247-248]. This feature of international commercial arbitration has proved to be the most important difference between litigation and arbitration [54, p. 248], since, contrary to the national court proceedings, parties in arbitration are entitled to select their decision-makers as they seem fit to their dispute's needs [29, p. 1807].

The parties' autonomy in this regard is extensively accepted and recognized in a number of arbitration rules of different arbitration institutions. For instance, Rule 13(a) of the 2013 American Arbitration Association Commercial Arbitration Rules explicitly stipulates that if the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method has to be followed [56].

In the same vein, Article 30(1) of the 2018 ICAC Arbitration Rules, although slightly limiting party's freedom with respect to a number of arbitrator, provides that the parties are free to determine the odd number of arbitrators, including one arbitrator

[14], whereas Article 31(1) of the 2018 ICAC Arbitration Rules gives the parties a freedom to agree on a procedure of appointing an arbitrator or arbitrators [14].

While the most common composition of arbitral tribunal in international commercial arbitration is either one sole arbitrator or three arbitrators [3, p. 117], it is rather the latter type of composition that have gained the most popularity among arbitration users as being more appropriate for majority of international commercial arbitration disputes [55, p. 404]. This is also confirmed by the extensive provisions of different arbitration rules, which give the precedence to the three-member arbitral tribunal as a default rule. For instance, Article 30(1) of the 2018 ICAC Arbitration Rules provides that if the parties fail to determine the number of arbitrators in their arbitration agreement, the arbitral tribunal to be composed of three arbitrators, unless the ICAC Presidium or, on its behalf, the ICAC President, taking into account the complexity of the case, the amount of the claim and other circumstances, decides that the dispute to be subject to be resolved by a sole arbitrator [14]. Similarly, Article 25(2) of the 2015 CIETAC Arbitration Rules envisages that unless otherwise agreed by the parties or provided by these Rules, the arbitral tribunal shall be composed of three arbitrators [36].

In case the arbitral tribunal is composed of three arbitrators, such a tribunal will usually look like "*a tribunal formed by each party appointing an arbitrator, followed by those arbitrators or an independent appointing authority then appointing the third arbitrator*" [5, p. 381]. For instance, such a procedure is followed by the 2018 VIAC Arbitration Rules, which in Article 17(4) provide that if the dispute is to be resolved by three arbitrators, each party shall nominate an arbitrator [24]. Then, according to Article 17(5) of the 2018 VIAC Arbitration Rules, the co-arbitrators shall jointly nominate a chairperson or, if they fail to do so, such nomination shall be made by the VIAC Board [24].

The rationale behind the popularity of three-member arbitral tribunal is that it enables each of the parties to the dispute to select an arbitrator "whom it knows and trusts" [57, p. 5]. As aptly described by Jacques Werner, this opportunity and freedom will allow the parties "*to have a friend, who must be independent enough to award*

against the party who appointed him should the merits of the case warrant it, but who will ensure that all the arguments of his party get a thorough and fair hearing" [57, p. 5].

While recognizing the apparent beneficial characteristics of party-appointed arbitrators' role, the issue arises as to whether the same standards of impartiality and independence have to be applied to both presiding and party-appointed arbitrators in light of the inherently close and trust-based relations between the latter and the party that appoints them. In this regard, two main theories exists: (1) the civil-law theory, according to which the standards of impartiality and independence are analogous to all arbitrators, including party-appointed ones for all arbitrators and (2) the common-law theory, which allows a party-appointed arbitrator to act as an appointing party's representative during the tribunal's deliberations [57, p. 5].

One should note that such dichotomy is reflected not only in theory, but also in the practical level, namely in the number of arbitration rules of different arbitral institutions. The predominant number of the arbitration rules favor the traditional civil-law approach, placing no distinctions between the standards of impartiality of independence of party-appointed arbitrators and arbitrators appointed by other authorities [57, p. 5]. For instance, Article 5(3) of the 2014 LCIA Arbitration Rules has established more than clear rule, according to which all arbitrators shall be and remain at all times impartial and independent of the parties, and none of arbitrators shall act in the course of arbitration proceeding as advocate for or representative of any party [13]. Article 5(3) of the 2014 LCIA Arbitration Rules further concludes that no arbitrator shall advise any party on the parties' dispute or the outcome of the arbitration [13].

Similarly, Gary B. Born cites the decision of Sir Robert Jennings on challenge of arbitrator in Iran-US Claims Tribunal case *IUSCT* governed by the 1976 UNCITRAL Arbitration Rules, which stated as follows with respect to impartiality and independence of party-appointed arbitrators:

> *One ought to resist an assumption that the independence and impartiality of the Members of the Tribunal who are nominated by a Party are different in their juridical nature from the*

> *requirements for one of the 'neutral' judges. No such distinction is made in the [UNCITRAL] Rules governing challenges* [29, p. 1799].

What is more, Gary B. Born also refers to some other English court cases in which the fact that a party-appointed arbitrator followed the instructions of the party that appointed him or her amounted to criminal charge of corruption [29, p. 1800].

To the same effect, W.M. Tupman somewhat aggressively counteract and reject a possibility of party-appointed arbitrators being governed by other standards of impartiality and independence, than the sole arbitrator:

> *Unquestionably all members of the tribunal in international arbitration should be held to the same standard of independence, whether appointed by a party or not. The concept of a non-neutral arbitrator as it exists in some common law systems simply has no place where the parties are of different nationality and might lose faith in the arbitral process if a foreign, apparently lesser, standard were applied* [19, p. 49].

Diametrically opposite approach is taken by the 2014 JAMS Comprehensive Arbitration Rules and Procedures, as Rule 7(c) the 2014 JAMS Comprehensive Arbitration Rules and Procedures gives the parties a freedom to agree on that the appointed arbitrators may not be a neutral arbitrators that shall not meet the standards of impartiality and independence applicable to neutral arbitrator [58]. This is further magnified by the fact that Rule 14(c) of the 2014 JAMS Comprehensive Arbitration Rules and Procedures allows the parties to agree to permit extensive *ex parte* communications between such party and a non-neutral party-appointed arbitrator [58]. To the same effect, Rule 18(b) of the 2013 American Arbitration Association Commercial Arbitration Rules provides that the parties may agree in writing that arbitrators directly appointed by each of a party shall not be neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to challenge by the parties for partiality or lack of independence [56]. The 2013 American Arbitration Association Commercial Arbitration Rules further provide in Rule 19(b) that an obligation to refrain from *ex parte* communication does not extend to party-appointed arbitrators whom the parties have agreed in writing are non-neutral [56].

Similarly, Doak Bishop and Lucy Reed in their well-known and widely cited article refer to the approach taken by the national New York arbitration law, which establish a presumption that the party-appointed arbitrator is an advocate of the party that appointed him or her and is not legally defined as neutral, contrary to the presiding or sole arbitrator [52, p. 402-403]. In light of these provisions, an arbitral award under New York arbitration law may only be set aside in the event that only sole or presiding arbitrator violated or acted not in compliance with the existing standards of impartiality and independence and this resulted in the party's rights being prejudiced [52, p. 403].

However, not all rules on appointment of arbitrators operating in international commercial arbitration are as straightforward in this respect as the rules mentioned above. For instance, Article 12(1) of the Law on ICA stipulates that an arbitrator shall, from the time of his or her appointment and in the course of the arbitration proceedings, promptly notify the parties of any circumstances giving rise to his or her impartiality and independence [34]. As one can see, this provision of Ukrainian *lex arbitri* does not specify whether this obligation extends to both neutral and party-appointed arbitrators, leaving a room for significant uncertainty when time comes to interpret this provision during the challenge procedure.

Consequently, such state of affairs, involving an apparent dichotomy in approaches to independence and impartiality of party-appointed arbitrators and ensuing uncertainty necessitate a harmonization in international commercial arbitration regulation and finding a unified approach [57, p. 5]. This is particularly because the worst-case scenario for any international commercial arbitration proceeding would be, in words of Jacques Werner, "*to have one party-appointed arbitrator who behaves one way and the other party-appointed arbitrator who behaves another way, as this conveys the impression that one party is being put at a disadvantage within the arbitral tribunal*" [57, p. 5].

The degree of party-appointed arbitrator's deviation from general standards of impartiality and independence may usually vary "*from a covert sympathy with the cause of the nominating party to an overt taking of instructions from, and offering of advice to, the nominating party*" [59, p. 320]. For instance, Mr Murray L. Smith in his

article on impartiality and independence of party-appointed arbitrators refers to the cases of the Iran-United States Claims Tribunal, noting that in these cases "*an Iranian arbitrator revealed the contents of a draft award to the Iranian party, leading to a last minute settlement, and in another case that the Iranian arbitrator solicited further evidence from the Iranian party to satisfy questions that arose during the deliberations*" [59, p. 320].

Even more shocking deviation of the party-appointed arbitrator from generally accepted standards of impartiality and independence of arbitrator in international commercial arbitration took place during the Croatia and Slovenia border dispute submitted to *ad hoc* arbitration [60, p. 347]. In particular, one of the neutral newspapers revealed that Dr Secolec, arbitrator appointed on the part of Slovenia, in the course of arbitration was repeatedly engaged into *ex parte communications* with Slovenian legal adviser and agent [60, p. 351]. In the course of these conversations, Dr Secolec and Slovenian agent directly discussed the merits of the dispute with the Slovenian agent proposing the tactics on how to have an impact on the remaining arbitrators so that they decide in Slovenia's favor [60, p. 351]. Last but not least, Dr Secolec himself suggested to make up the computer file to be added to the case evidence record [60, p. 351].

Such state of affairs raised the inevitable criticism against the institute of party-appointed arbitrators as such. In particular, Professor Albert Jan van den Berg, world-renowned international arbitration practitioner and scholar, analyzed over 150 investment arbitration cases, and noted that in 34 of those cases dissenting opinions were rendered and in almost all of these cases the dissenting opinions were rendered specifically by the arbitrators appointed by the losing parties favoring the position of such parties [61, p. 824]. In Professor van der Berg's view, "*nearly 100 percent of the dissents favor the party that appointed the dissenter raises concerns about neutrality*" [61, p. 825].

Although all this shocking conduct on the part of party-appointed arbitrators in the course of arbitration proceedings may indeed cast doubt as to the latter's efficiency and neutrality, thus justifying the above-mentioned criticism, the critics still omit some important and valuable features that the institute of the party-appointed arbitrators

presents and implies [29, p. 1807]. In particular, the criticism of party-appointed arbitrators omit the fact that the institute of the party-appointed arbitrators ensure the ability of the parties to arbitration to maintain the control over the arbitration proceedings, which seeks to resolve their dispute, by participating in the constitution of the arbitral tribunal that will render the final decision in the parties' dispute [29, p. 1807]. Moreover, what such critics also omit is that it is the parties who are in the primary position to select the decision-makers that are well-suited to resolve their specific dispute, and it is the party-appointed arbitrators who are able to ensure that, despite different cultural, language or commercial misunderstandings, the conflicting positions of the parties will be carefully considered by the arbitral tribunal [29, p. 1807-1808].

Moreover, according to Doak Bishop and Lucy Reed, one should clearly distinguish "general sympathy" towards the appointing parties, which is inherent for party-appointed arbitrators' role in international commercial arbitration, on the one hand, and "bias and partiality", which serves as one of the most common ground for challenge of arbitrator in international commercial arbitrator, on the other hand [52, p. 396]. Contrary to the general sympathy of party-appointed arbitrator toward the appointing party, which usually implies "*sharing the appointing party's legal or cultural background or by holding doctrinal views that, fortuitously, coincide with a party's case*" [52, p. 395], partiality with respect to a party or its position in the arbitration implies "*a willingness to decide a case in favour of the appointing party regardless of the merits or without critical examination of the merits*", which is apparently fall short of any reasonable and existing standard of impartiality and independence of arbitrator in international commercial arbitration [52, p. 396].

Consequently, Gary B. Born aptly states in support of the party-appointed arbitrators the following:

> *At bottom, the critique of co-arbitrators is a little like criticizing water for being wet: it ignores the fundamental historical context and practice of arbitration and the parties' most fundamental motivations; instead, it would substitute external appointment of arbitrators, effectively returning the parties to the arbitrariness of most national court systems and*

> *denying them one of the most fundamental aspects of procedural autonomy available in the arbitral process. It is not surprising that users have ignored these criticisms* [29, 1808].

Therefore, the interim conclusion may be drawn that, although apparently *ex parte* contacts between arbitrators and party's agent should not be allowed, there is indeed a room for specific role of party-appointed arbitrator, distinctive from that of the sole arbitrator. This role of party-appointed arbitrators is of crucial importance for the users of international commercial arbitration, as it ensures voluntary compliance with the awards by the parties that appoint arbitrators, since the losing party will likely be in the position to agree with the tribunal's final ruling if it is aware of that that its position has been properly and fully heard with party-appointed arbitrator clarifying such position during the deliberations [57, p. 5]. Therefore, according to Gary B. Born, it is almost inevitable that the parties in the international commercial arbitration, while appointing an arbitrator, will be expecting that such an arbitrator will be somewhat predisposed to such party's substantive or procedural positions in the course of arbitration proceedings, and, thus, in the words of Gary B. Born, "*[t]hat is why Italian, Kuwaiti, or Californian parties often nominate Italian, Kuwaiti, or Californian co-arbitrators, known to the party or its counsel*" [29, p. 1808].

Somewhat similar position was reflected in paragraph 6 of the International Court of Justice's judge Lauterpacht's separate opinion to one of the court's judgements, where he elaborated on the exclusive role of *ad hoc* judges that may well be compared to that of party-appointed arbitrators:

> *Nonetheless, consistently with the duty of impartiality by which the ad hoc judge is bound, there is still something specific that distinguishes his role. He has, 1 believe, the special obligation to endeavor to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected - though not necessarily accepted - in any separate or dissenting opinion that he may write* [62].

As a result, such a role of party-appointed arbitrator and trust-based relations between him or she, on the one hand, and the appointing party, on the other hand, inherently imply and necessitate the contacts between such an arbitrator and the party's

representatives, the fact of which, by itself, should not be considered as outright violation of impartiality and independence standard by the party-appointed arbitrator [57, p. 6]. Thus, the IBA Guidelines in paragraph 4.5.1 of its Green List provide that the party-appointed arbitrator is allowed to have a contact with an appointing party prior to its appointment and this contact should not evidence the partiality or lack of independence of such arbitrator if:

> *this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute* [40].

In the same vein, the 2013 American Arbitration Association Commercial Arbitration Rules in Rule 19(a), although setting out a general prohibition on *ex parte* communication between party-appointed arbitrators and the representatives of the appointing parties, provide that such communication may be allowed in the event that such communications are carried out to advise the prospective arbitrator before his or her appointment of the general nature of the dispute and of the anticipated proceedings and to discuss the prospective arbitrator's qualifications, availability, or independence in relation to the parties or to discuss the suitability of prospective arbitrator for selection as a third arbitrator where the parties or party-appointed arbitrators are to participate in that selection [56].

Similarly, Article 11(5) of the HKIAC Arbitration Rules, although prescribing that neither parties to arbitration proceedings, nor its legal counsel shall have any *ex parte* communications concerning the arbitration proceedings with any arbitrator, still provide that such communications may be preserved in exceptional cases to advise the prospective arbitrator of the general nature of the dispute, to discuss the prospective arbitrator's qualifications, availability, impartiality or independence, or to discuss the suitability of candidates for the designation of a third arbitrator where the parties or party-designated arbitrators are to designate that arbitrator [25].

Consequently, having established that institute of party-appointed arbitrators plays a pivotal role in the international commercial arbitration, it is of utmost

importance for arbitral institutions and national courts to conceive the idea that the *ex parte* contacts between party-appointed arbitrators and the appointing parties as such are not the indication for the lack of independence or partiality of such arbitrators, since it is the nature of such conducts that should decisively establish whether a party-appointed arbitrator complied with existing impartiality and independence standards [57, p. 6]. The inherent role and functions of the party-appointed arbitrators constitute the situation of so-called "predisposed but ultimately impartial arbitrator", which does not warrant any differentiations to be made between standards of impartiality and independence of arbitrators in international commercial arbitration, but do necessitate the inherently different role and function of party-appointed arbitrator to be taken into account by authorities when making a decision on challenge of such arbitrator [52, p. 406].

At the same time, many national arbitration laws, including Ukrainian one, does not make a delineation between the roles of presiding and party-appointed arbitrators. For instance, Article 12(1) of the Law on ICA merely prescribes the general standard according to which an arbitrator may be challenged by the parties in the event that reasonable doubts exist as to his or her impartiality and independence [34]. Therefore, the Ukrainian *lex arbitri* merely follows the unified standard approach, which does not take into account the specific role and functions inherently incorporated into the role of party-appointed arbitrator, thus making it perfectly possible to challenge the party-appointed arbitrator on the same grounds and in the same situations as for the sole arbitrator.

Instead of this, it is highly recommended for Ukrainian national arbitration law, as well as any other national arbitration law following Ukrainian approach, to develop the detailed and comprehensive provisions which would describe the role of the party-appointed arbitrator and portray the latter's acceptable and unacceptable lines of conduct with a view to existing impartiality and independence standards for arbitrators in international commercial arbitration, including providing for permissible ex parte conversations before the prospective arbitrator's appointments. Such approach would allow Ukraine and any other jurisdictions to take into account both specific nature of

party-appointed arbitrators' institute and prevailing standards of impartiality and independence, which still should govern the party-appointed arbitrators' conduct in the course of arbitration proceedings.

CONCLUSIONS TO CHAPTER 3

1. The most commonly invoked ground for challenging an arbitrator in international commercial arbitration is the event of arbitrator lacking independence or being partial towards one of the parties to arbitration proceedings. Such state of affairs is explained by the external and internal climate in which any international commercial arbitration proceedings operate, involving variety of commercial and business interests being at stake, as well as a number of people being involved in the closed circle of international commercial arbitration community. This, in turn, creates the field of endless connections and possible unethical deviations in the conduct of arbitrators trying to get their own benefit from participation in arbitration proceedings. Although both standards of impartiality and independent possess their own unique features and specifications, closer look to their nature reveals the inherent and close interplay between them, playing pivotal role in the course of procedure for challenge of arbitrator. Ukrainian national arbitration law reflects the most common and correct in light of their nature definition of the standards of impartiality and independence, which is the reasonable doubt standard not requiring actual prove of an arbitrator being partial or dependent to be challenged by arbitrating party.

2. Meanwhile, Ukrainian national arbitration law does not reflect in full the nature and specific characteristics of the role of party-appointed arbitrator in international commercial arbitrator and the standard of impartiality and independence to be applicable to such an arbitrator in the course of challenge procedure. The party-appointed arbitrator, being the result of operation of party autonomy fundamental principle in international commercial arbitrator, has the most pivotal role to play in ensuring the interests of the appointing party in highly culturally, commercially and legally diverse international commercial arbitration community by articulating the positions of such party towards other members of the tribunal in an understandable and culturally and legally unified manner. Such a role of party-appointed arbitrator requires specific rules and provisions to be drafted so to reflect the acceptable way of conduct of such an arbitrator in connection with the appointing party, by providing the rules

allowing the appointing party to interview such an arbitrator prior the appointment and have ex parte communications with him or her in exclusive number of cases and in relation to exclusive number of issues in the course of arbitration proceedings. Considering that the Law on ICA, at this point of time, does not contain comprehensive and detailed provisions in this regard, this necessitates the legislative amendments to Ukrainian national arbitration law, so Ukraine could reflect the practice and legislative standards similar to that of developed pro-arbitration jurisdictions.

CONCLUSIONS

a. Although the procedure of challenge of arbitrators may significantly complicate and delay the arbitration proceedings, its existence from both theoretical and practical standpoints is necessitated in light of its unique possibility to ensure that the parties are being heard before the impartial, independent and competent tribunal and, even if some reflections of partiality and dependence are revealed, they are to be eradicated at the earliest stage possible, excluding the grounds for setting aside or refusing the enforcement of the arbitral award. This feature of challenge mechanisms not only preserves and guarantees fundamental rights of the parties to arbitration proceedings, but also directly influence the success and efficiency of international commercial arbitration as a means for resolution of multijurisdictional commercial disputes.

b. With the increase of studies and analytics of international commercial arbitration among the different users in the international commerce, the number of different techniques enabling the unscrupulous party to disrupt or delay the arbitral proceedings to their own benefit has equally increased. The challenge procedure belongs to the list of the most commonly employed tactic used to obstruct in bad faith the ongoing proceeding by virtue of repeatedly submitting unsubstantiated and groundless challenges against the arbitrators acting in good faith and in accordance with his or he mandate. At the same time, the challenge procedure, handled by competent and knowledgeable authority is inherently designed to expeditiously remove and replace the incompetent or biased arbitrators. Moreover, the mere fact that the unscrupulous party may employ the challenge mechanism to unduly disrupt the arbitration proceedings, should not deprive the other parties of opportunity to employ this procedure in good faith and remove the arbitrator that preclude the efficient and expedite resolution of commercial dispute.

c. The authority, which decides on challenge of arbitrators, plays the pivotal role in this procedure. The authority’s competence, expertise, independence and impartiality will have direct impact on possibility for a challenge to be dealt with

expeditiously, efficiently and fairly. Among all of the possible authorities endowed with the powers to decide on challenge of arbitrators under institutional arbitration rules, parties' arbitration agreements or national arbitration laws, it is the institutional administrative body, which is in the best position to decide on challenge of arbitrators. This is explained by the fact that this body is, contrary to fellow co-arbitrators of challenged arbitrator, independent from the parties and the challenged arbitrator. Moreover, such a body is in the position to ensure that no external intervention is made for the decision on challenge to be rendered, whereas it is not ensured in the event the decision on challenge is to be rendered by national court.

d. Considering that the national arbitration laws in most of the cases accord deference to the parties' freedom to determine the procedure for challenge of arbitrators in their arbitration agreements, such laws play minor role for challenge mechanisms and come into play only in case the arbitration agreement remains silent on the matter. Therefore, the primarily role in this regard is held by the institutional arbitration rules, which, as statics show, are usually incorporated by the parties into their arbitration agreement to govern the challenge procedure and which contain detailed and sufficiently comprehensive provisions to effectively and expeditiously deal with challenge of arbitrator. The same holds true for the IBA Guidelines, which, although being soft-law non-binding instrument, contain invaluable clarifications and specifications to the superficial and undetailed standards found in the *lex arbitri* or institutional rules, which are still widely referred to by the national courts and arbitral tribunals when deciding on challenge despite their non-obligatory inherent nature. Consequently, the Guidelines have enabled the competent authority to effectively deal with challenges in practice by wisely applying the detailed standards of impartiality and independence to the diversified factual circumstance surrounding complex international commercial disputes.

e. Lack of impartiality or independence of the part of arbitrator consitutes the most widely relied-on ground for challenge and removal of arbitrator in the international commercial arbitrations. The concept of impartiality refers to the specific subjective state of mind of certain arbitrator, which does not distort such an arbitrator's

position and opinion on the dispute through any predispositions and prejudices he or she may have toward the party of the issues raised during the arbitration proceedings. In its turn, the independence of arbitrator implies the lack of any objective connections such an arbitrator may have with the parties that submitted the resolution of dispute to such arbitrator or with the counsel representing such a party in the arbitration proceedings. While these standards may seem to have some unique features and being strictly separated, in fact there is an inevitable interplay between them coming to play in almost all challenge procedures, as the decision on whether the arbitrator is independent will usually be dependent upon the finding of whether the arbitrator is partial.

f. The institute of party-appointed arbitrator, although being heavily placed under the criticism of international arbitration scholars and practitioners, plays the crucial role in culturally and legally diversified world of international commercial arbitration. The party-appointed arbitrator is usually called to clearly and in understandable manner articulate the position of the party, which appointed him or her, to other members of the tribunal that are usually represented by other cultures or legal systems. In turn, even though the same standard of impartiality and independence should be applicable to any arbitrator as a member of arbitral tribunal, such specific characteristics of party-appointed arbitrator necessitate the existence of specific rules that would describe and govern the conduct of such arbitrator, as well as his or her connections with the appointing party, which are acceptable in light of standards of impartiality and independence.

g. Ukrainian national arbitration law, the Law on ICA, contains the provisions governing the challenge of arbitrator and lists the lack of impartiality and independence among the grounds for challenge of arbitrator, following the examples of developed pro-arbitration jurisdictions. Meanwhile, the provisions of the Law on ICA could have been and should be supplemented with detailed clarifications on what issues or circumstances could give rise to reasonable doubts as to arbitrator’s impartiality and independence, which would allow the competent authority to apply these standards more wisely and efficiently. Moreover, Ukrainian law provisions, as of now, does not

reflect the specific role of party-appointed arbitrator, which could be dealt with by supplementing the Law on ICA with more detailed provisions describing the acceptable way of conduct of party-appointed arbitrator, including his or her communications with appointing parties and interviews by appointing party before the appointment of such arbitrator.

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