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**Reflections on Arbitration  
 Proceedings: A Chance  
 for Dispute Resolution  
 Missed Forever?**<sup>1</sup>

**Key words:**  
*Arbitration  
 proceedings  
 | arbitrator |  
 independence |  
 impartiality of  
 arbitrators*

**Abstract** | *Arbitration practice has been evolving over time, in line with the historical and socio-political backdrop (the latter being an important aspect of commerce and trade in many legal systems), up to a point at which it is common practice for contractual parties to “promise” each other that such disputes as may arise from their business relationship will not be resolved in court proceedings, but be brought before a special body – a permanent arbitration court or an ad hoc arbitrator.*

*The institution of arbitration proceedings – as a part of a larger dispute resolution system and an alternative to judicial proceedings in general courts – confronts potential participants in arbitration with a dilemma: which of the dispute resolutions methods on offer should they use?*

*It is not easy to resolve the above-described dilemma of having to choose in favour of one method of dispute resolution or the other, nor is it easy to come to a final conclusion as to what direction should generally be taken by parties for resolving their disputes, as to what form of dispute resolution could be recommended as “more ideal” – that is, whether to take, at those metaphorical crossroads, the classic (and in some ways safer) route of court proceedings or to venture down a new “turning in the road” and take the risk of experimental alternative dispute resolution.*

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## I. Genesis of the Problem

- 9.01.** Worldwide interest in the arbitration procedure as an alternative method for resolving legal arguments (disputes, conflicts) between people (but also between legal entities) has undoubtedly been on the rise. What are the causes behind this? From the dawn of history, when barter became an inevitability, humankind has sought a way in which it could resolve and settle mutual interpersonal conflicts as arise from its customary cooperation and its civil (private-law) relations (including commerce and trade), and do so in a reasonable and expeditious manner that is efficient for the disputing parties. This is inherent in the constant striving of people to accomplish simplicity, order, balance, transparency and fairness on the level of natural human interaction. Before state structures came into existence, conflicts between people were resolved by the chieftains (elders) of tribes, by priests, but also by elected arbitrators<sup>2</sup>.
- 9.02.** The eldest forms of conciliatory proceedings (arbitrage) in the history of humankind, reaching back as far as the despotic systems of antiquity (in particular in ancient Rome), were not a mere historic relic, but became sort of a spontaneous expression (protest?) against the exclusivity of established (public-law) procedural mechanisms. The elected arbitrator no longer acts as a judge (*iudex*), but rather like a conciliator (mediator), and the final result of his work is rather a settlement of disrupted relations between the parties to the dispute than a solution (decision) of the dispute imposed from above, i.e., from a position of power, in the form of a judgment (ruling).
- 9.03.** From its very historic inception, the procedure before an elected arbitrator went fundamentally beyond the procedural public-law framework of court proceedings. The legal relevance of such procedures, and the consequences to which they gave rise, were in a certain sense comparable to proceedings in a (state) court<sup>3</sup>. Since the days of ancient Rome, and through the

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<sup>2</sup> Cf. ILONA SCHELLEOVÁ ET AL., ÚVOD DO CIVILNÍHO ŘÍZENÍ (*Introduction to Civil Procedure*), Praha: Eurolex Bohemia, s.r.o. 90 et seq. (2005).

See also HANS HATTENHAUER, EVROPSKÉ DĚJINY PRÁVA (*European History of Law*), Praha: C.H. Beck 29 et seq. (1998).

<sup>3</sup> The complexity of the Roman civil procedure has been pointed out by Prof. JÁN VÁŽNY, ŘÍMSKÝ PROCES CIVILNÍ (*The Roman Civil Procedure*), Praha: Melantrich, a.s. 66 et seq., 70 et seq., 81 et seq. (1935).

See also MILAN BARTOŠEK, DĚJINY ŘÍMSKÉHO PRÁVA (VE TŘECH FÁZÍCH JEHO VÝVOJE) (*The History of Roman Law [in three developmental stages]*), Praha: Academia 85 et seq., 91 et seq. (1988).

subsequent various ways in which Roman law was adopted in continental Europe, especially after the fall of the Western Roman Empire (476 CE), and incorporated into the legal systems of medieval European states, elements of classic Roman private law were demonstrably being carried over and, in a certain sense, modified, including the institution of elected arbitrators, whereas the legal systems of the nascent states and proto-states echoed in one form or another traces of yet more ancient home-grown elements and traditions of law from pre-Christian times<sup>4</sup>. In this context, it appears appropriate to note that most recent research work has shown how out-of-court settlements played their role alongside the dispute resolution in court within the circumstances of Middle-Age Hungary<sup>5</sup>.

- 9.04. The institution of arbitration also found its reflection in the legislation of Austro-Hungary, and here primarily in the statutes for civil court proceedings, i.e., specifically, in the Austrian law on court proceedings in civil legal matters of 1895 and in the Hungarian Act No. I/1911 on the civil court system – laws that remained on the books even during the existence of Czechoslovakia as an independent state, basically up until the passage of Czechoslovak Act No. 142/1950 Coll., which promulgated the Code of Civil Procedure<sup>6</sup>.

<sup>4</sup> Cf. FRANTIŠEK WEYR, *TEORIE PRÁVA (Theory of Law)*, Brno-Praha: Nakladatelství Orbis 149 et seq. (1936). In this respect, the author writes: *Roman law has been 'received,' as is known, by other (that is, national) systems of law. To the legal scholar, reception cannot mean anything else but the adoption of the content of norms from one legal system in another legal system: in other words, manifestations of that which ought to be are being adopted or, if you will, received. Conversely, the idea of a reception of theories from one legal system by another is nonsensical – after all, as we have already seen, the lawmaker-in-practice (i.e., the maker of that which ought to be, i.e., of legal norms) is in no position to set forth legal theories and provide that they should become binding law, much less to receive theories created by another maker of norms and incorporate them in his own work, i.e., 'his' legal system.*

For the details on how Roman law penetrated the European sphere, see HANS HATTENHAUER, *EVROPSKÉ DĚJINY PRÁVA (European History of Law)*, Praha: C. H. Beck 97 et seq. (1998).

<sup>5</sup> See also the intriguing work Adriana Švecová, Tomáš Gábriš, *Riešenie konfliktov v Uhorsku na podklade stredovekej listinnej praxe 13. a začiatku 14. Storočia (Conflict Resolution in Hungary on the Basis of the Documentary Record of Medieval Practice in the 13th Century and at the Beginning of the 14th Century)*, 19 (40) *PRÁVNĚHISTORICKÉ STUDIE* 359 et seq. (2009). The authors state:

*Conflict resolution is as topical today as it was in the past. It appears that, long before today's legal theory came to witness the boom of out-of-court dispute resolution among the legal and professional community, this form of dispute resolution actually dominated in the Middle Ages.*

*The authors further elaborate, with reference to TREVOR DEAN, CRIME IN MEDIEVAL EUROPE, Harlow: Pearson Education Ltd. 100-101 (2001): ...out-of-court dispute resolution was the preferred solution for parties to a dispute, seeing as it was faster and cheaper than court proceedings, corruption-proof and offered a greater certainty of higher compensation and actual conciliation between the parties.*

<sup>6</sup> Cf. VÁCLAV HORA, *ČESKOSLOVENSKÉ CIVILNÍ PRÁVO PROCESNÍ, DÍL III.- OPRÁVNĚNÉ PROSTŘEDKY A ZVLÁŠTNÍ ZPŮSOBY ŘÍZENÍ (Czechoslovak Civil Procedural Law, Vol. III – Remedies and Special Forms of Procedure)*, Praha: Věšhrd 228 et seq. (1929). In this respect, the author states:

- 9.05.** The process of expansion and, above all, internationalisation of arbitration in former Czechoslovakia noticeably gathered steam upon the creation of the Arbitration Court at the Czechoslovak Chamber of Commerce in Prague based upon Act No. 119/1948 Coll., on state oversight over foreign trade and international forwarding relations. This court was renamed the Arbitration Court at the Czechoslovak Chamber of Commerce and Industry in 1978<sup>7</sup>. It should be stressed that this court played an exceptionally important role in the further development and increased institutionalisation of arbitration in what was then Czechoslovakia and its two eventual successor states.
- 9.06.** In this respect, we ought to call to mind the previously implemented changes of civil-law statutes in 1963 and 1964, i.e., the adoption of a new Code of Civil Procedure (Act No. 99/1963 Coll.) and a new Civil Code (Act No. 40/1964 Coll.). During that era and along with these changes, the Czechoslovak concept of, and legal framework for, arbitration procedures also gradually changed. This occurred in a separate law, Act No. 98/1963 Coll., on arbitration in international business dealings and the enforcement of arbitral awards, which built upon its predecessor, Act No. 97/1963 Coll., on international private and procedural law<sup>8</sup>.
- 9.07.** Compared to the set of rules contained in Act No. 98/1963 Coll., the current legal framework for arbitration in Slovakia (Act No. 244/2002 Coll., as amended by Act No. 521/2005 Coll. and Act No. 71/2009 Coll.) and in

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*We speak of arbitration proceedings wherever private will entrusts certain private entities with hearing and deciding upon their dispute, thus removing the contested matter from the ambit of general courts. The said private will may manifest itself, above all, in the form of an agreement of the parties to the dispute, made in writing (577), but may also rest upon a last will and testament, as well as in other dispositions or in articles of association (599 Code of Civil Procedure).*

Conversely, Prof. Václav Hora differentiates these arbitration courts of a private nature from what he calls obligatory (authorised) arbitration courts *whose organisation and competencies derive from the sovereign will of the state and who enjoy exclusive jurisdiction over certain matters* (p. 229). Among these courts, he lists, *inter alia*, stock exchange arbitration, arbitration commissions for undertakings with trade-union plant committees, mining arbitration courts and others.

<sup>7</sup> It ought to be noted, however, that the establishment of a modern system of international commercial jurisdiction in commercial matters (international commercial arbitration) is connected with the creation of the International Chamber of Commerce – ICC in Paris in 1919, where the International Court of Arbitration – ICC Court – was constituted in 1923.

<sup>8</sup> Act No. 98/1963 Coll. was abolished in the Czech Republic by act No. 216/1994 Coll., on arbitration proceedings and the enforcement of arbitral awards, which is in force to this day. In Slovakia, act No. 98/1963 Coll. was abolished by way of act No. 218/1996 Coll., on arbitration proceedings.

Cf. VILÉM STEINER, FRANTIŠEK ŠTAJGR, *ČESKOSLOVENSKÉ MEZINÁRODNÍ CIVILNÍ PRÁVO PROCESNÍ (Czechoslovak International Civil Procedural Law)*, Praha: Academia – Nakladatelství Čs. Akademie věd 165 et seq. (1967).

In this work, the authors presented the view that *arbitrators are not bodies of state authority or public administration*. (p. 174).

See also VILÉM STEINER, *OBČIANSKE PROCESNÉ PRÁVO V TEÓRII A PRAXI (Civil Procedural Law in Theory and Practice)*, Bratislava: Obzor 14 et seq. (1980).

the Czech Republic (Act No. 216/1994 Coll., on arbitration proceedings and the enforcement of arbitral awards) is more comprehensive, and thus applies irrespective of whether arbitration takes place to resolve domestic (property) disputes or international (commercial-law or civil-law) relations<sup>9</sup>. However, the tendency towards legislative ‘complexity’, towards expanding the sphere (scope of application) of arbitrability, has recently encountered certain difficulties. The reason for this is the divergent character of those disputes which, under existing law, fall within the realm of arbitration proceedings.

- 9.08.** The Slovak lawmaker has long been looking for new models of arbitration procedure, in spite of the fact that the current act on arbitration proceedings from 2002 (itself already the second Slovak arbitration law, which abolished the historically first Slovak act on arbitration proceedings – Act No. 218/1996 Coll. in the wording of Act No. 448/2001 Coll.) has been amended twice already<sup>10</sup>. The first amendment took the form of Act No. 521/2005 Coll., which set forth a twin set of public record – namely, the list of permanent arbitration courts – to be kept in the Commercial Gazette and in a Record kept by the Slovak Ministry of Justice. The second amendment (Act No. 71/2009 Coll.) incorporated several provisions concerning consumers in the act on arbitration proceedings<sup>11</sup>.

<sup>9</sup> Cf. JITKA MOTHEJZÍKOVÁ, VILÉM STEINER, ET AL., *ZÁKON O ROZHODČÍM ŘÍZENÍ A VÝKONU ROZHODČÍCH NÁLEZŮ. KOMENTÁŘ (Commentary on the Act on Arbitration Proceedings and the Enforcement of Arbitral Awards)*, Praha: C. H. Beck 11 et seq. (1996). For a more detailed view, see ALEXANDER J. BĚLOHLÁVEK, *ZÁKON O ROZHODČÍM ŘÍZENÍ A O VÝKONU ROZHODČÍCH NÁLEZŮ. KOMENTÁŘ (Commentary on the Act on Arbitration Proceedings and the Enforcement of Arbitral Awards)*, Praha, C. H. Beck 26 et seq. (2004).

See KVĚTOSLAV RŮŽIČKA, *ROZHODČÍ ŘÍZENÍ PŘED ROZHODČÍM SOUDEM PŘI HOSPODÁŘSKÉ KOMOŘE ČESKÉ REPUBLIKY A AGRÁRNÍ KOMOŘE ČESKÉ REPUBLIKY (Arbitration Proceedings before the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic)*, Dobrá Voda u Pelhřimova: Vydavatelství Aleš Čeněk (2003).

See also PŘEMYSL RABAN, *ALTERNATIVNÍ ŘEŠENÍ SPORŮ, ARBITRÁŽ A ROZHODCI V ČESKÉ A SLOVENSKÉ REPUBLICE A ZAHRANIČÍ (Alternative Dispute Resolution, Arbitration and Arbitrators in the Czech and Slovak Republic and Abroad)*, Praha, C. H. Beck 73 et seq. (2004).

<sup>10</sup> The Czech act on arbitration proceedings and the enforcement of arbitral awards (216/1994 Coll., as amended by Act No. 245/2006 Coll. and Act No. 296/2007 Coll.) has proven more sustainable. It has been in force for 15 years already. Even though the historically first Slovak act on arbitration proceedings of 1996 was passed almost two years before the first Czech law, it was abolished only six years later.

<sup>11</sup> Effective as of July 1, 2009, the amendment expanded the original wording of Section 31 (3) of the act on arbitration proceedings by inserting an additional provision according to which the arbitration court shall also take into consideration the generally binding provisions for the protection of consumer rights, i.e., Section 53 of the Civil Code (on consumer contracts), the Consumer Protection Act (Act No. 250/2007 Coll.), Act No. 266/2005 Coll., on the protection of consumers in financial services sold at a distance, Regulation (EC) 2006/2004 of October 27, 2004, of the European Parliament and the Council, (on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 364/11, 12/09/2004).

- 9.09.** The pace of legislation which we could observe in our country from mid-2009 and which was headed towards passage of a third amendment of the act on arbitration proceedings was eventually slowed when the president refused to sign the bill adopted by parliament, and returned it to the legislative body for a new discussion. The proposed amendment to the act on arbitration proceedings conceives of, firstly, new legal institutions such as the “administration of a permanent arbitration court”, and, secondly, introduces a special review mechanism for remedying acts of arbitration which go beyond the standard procedural means set out in the act on arbitration proceedings, including the Code of Civil Procedure. Lastly, the concept of the founders’ liability “for the activities of the permanent arbitration court and of its arbitrators, including damage caused by the activities of the permanent arbitration court and its arbitrators” is ambiguous. Then there remains a body of other unresolved issues and problems, e.g., the question of which arbitration courts have jurisdiction over consumer disputes or labour-law disputes.
- 9.10.** Aside from legislative aspects, the issue of arbitration proceedings doubtlessly touches upon other interests as well. Firstly, there is the issue of identifying the legal character of the procedure itself, as a specific legal process, within the context of classic civil court proceedings – in short, the issue of localising where contractual arbitration stands within the hierarchy of legal process as such. These are systemic, branch-related questions – that is, questions of legal theory – and they include the root problem of defining arbitration with a view to constitutional and international aspects (including the European context). Building on these, we find that there is yet another issue, the core of which is that we have to arrive at some sort of doctrine (tenets, theory) of arbitration proceedings (both generally and in commercial relations specifically) which also involves bringing order to the relevant scientific findings, the normative (legislative) documentation (incl. foreign sources), and, finally, a comparative review, selection, and hierarchisation of compared (and selected) legal institutions from an international cross-section<sup>12</sup>.

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For the same reasons, the provision of Sec. 33 of the act on arbitration proceedings was expanded by adding the following: *Also, performance under a consumer contract may not be awarded if that contract is at odds with the generally binding provisions on consumer protection, i.e., in particular, if it contains unacceptable contractual terms and conditions.* Finally, the amendment supplemented the grounds on which action may be filed in the competent court for nullification of a domestic arbitration award, worded as follows: *the decision infringing upon generally binding statutory law for the protection of consumer rights.*

*Cf. Regina Palková, Vybrané problémy rozhodcovskej zmluvy (So zvláštnym zreteľom na oblasť sporov zo spotrebiteľských zmlúv) (Selected Issues of Arbitration Agreements [with Special Consideration for Consumer Contracts]), in 62 (2) JUSTIČNÁ REVUE 225 et seq. (2010).*

<sup>12</sup> In this respect, the work by ALEXANDER J. BĚLOHLÁVEK, *ARBITRATION LAW AND PRACTICE IN THE CZECH REPUBLIC (WITH REGARD TO THE ARBITRATION LAW IN SLOVAKIA)*, Praha: Linde a.s. 52 et seq. (2009) deserves particular attention.

- 9.11. Secondly, we are faced with theoretical and legislative issues of arbitrability, i.e., the definition of the scope of those legal relations which fall within the ambit of arbitration proceedings – in the form of a comparative cross-section, and taking into consideration the desired state under future law, as well as such other issues as may be pertinent. The legal position of arbitrators or, as the case may be, permanent arbitration courts in terms of their decision-making practice remains unresolved ‘by tradition.’

## II. Theoretical Issues of Arbitration Proceedings

- 9.12. In traditional Czechoslovak procedural doctrine, the arbitration procedure was treated within the context of Czechoslovak civil procedural law, and while it was, e.g., omitted from Part Three of Hora’s textbook – special forms of procedure – under doctrinal and pedagogical aspects – it did find its way into the following Part Four, where it was reviewed alongside the syndicalist procedure, the stock exchange arbitration procedure and the arbitration procedure in employment-related disputes<sup>13</sup>.
- 9.13. Hora’s approach with respect to the categorisation of arbitration in his standard textbook on civil law – i.e., treating it almost as an afterthought (in a marginal section of the textbook) – becomes understandable when we realise that Prof. Hora considered arbitration procedures to be a part of Czechoslovak civil procedural law only in a broader sense of the term, but not under the aspect of inherent integrity, whereas he reasoned that such procedures take place “before private persons by mutual accord of the parties...” Similarly, Prof. F. Štajgr states that “the procedure before arbitrators is a procedure aimed at deciding a property dispute (which has arisen from international commerce). The arbitrators may substitute for the court, but they are themselves not a court. They replace the court at the will of the parties, and are simply persons who enjoy a certain amount of trust of the parties”<sup>14</sup>.
- 9.14. New views of arbitration – which we may call diametrically opposed to the simplified (austere) understanding of arbitration as some sort of “special” procedure (derived from civil court procedures) – were conditional upon (and heavily influenced by) the expansion of the

<sup>13</sup> Cf. VÁCLAV HORA, *supra* note 6, at 179 et seq. & 228 et seq. Prof. Hora himself has this to say:

*Special procedures presuppose a procedure before regular courts. Therefore, the following are not special procedures:*

1. *Proceedings before arbitrator/arbitrators (even though these are addressed in Book VI. Section 4 of the Code of Civil Procedure), because they take place, by mutual accord of the parties, before private persons, and are governed by principles which are also either stipulated by mutual accord of the parties or by way of the arbitrators’ discretionary powers. The activities of regular courts in these proceedings concern only isolated random issues ... and where they do, they remain within the framework of the general principles for regular proceedings.*

<sup>14</sup> VILÉM STEINER, FRANTIŠEK ŠTAJGR, *ČESKOSLOVENSKÉ MEZINÁRODNÍ CIVILNÍ PRÁVO PROCESNÍ (Czechoslovak International Civil Procedural Law)*, Praha: Academia – Nakladatelství ČSAV 172 et seq. (1967).

sphere of international arbitration. Within the Czechoslovak context, the legislation on international private and procedural law contained in Act No. 97/1963 Coll., helped a great deal in this respect, as did (building upon the erstwhile law) the legal regulation of arbitration proceedings in international commerce and of the enforcement of arbitral awards codified in Act No. 98/1963 Coll. These laws *de facto* removed the issue of arbitration agreements (in terms of their concept, content and formal requirements) from the scope of classic rules and doctrines of civil procedural law (or rather, elevated the issue beyond that framework)<sup>15</sup>.

- 9.15.** The first arbitration laws adopted in the 1990s in the Czech Republic (Act No. 216/1994 Coll.) and in Slovakia (Act No. 218/1996 Coll.) in a sense unified the regime of arbitration proceedings held in international commercial relations and in domestic property disputes, so that the issue of arbitration is (to simplify somewhat) reduced to one of understanding (defining) arbitrability.
- 9.16.** Irrespective of the previous legislative dualism in the Czechoslovak laws on arbitration procedures – i.e., on the one hand, arbitration procedures as stipulated in historic laws on civil court proceedings (and therein labelled as “special”), i.e., categorised as a special form of procedure, and, on the other hand, arbitration procedures in commercial disputes with an international element, legal theory always stressed their commonalities, i.e., in particular, the contractual (consensual) basis of arbitration proceedings.
- 9.17.** The phenomenon of the (arbitration) agreement is the defining element of arbitration proceedings, in terms of how to interpret its legal character, its basic characteristics and the relevant sanctions (consequences of liability) for arbitrators (arbitration courts) who cause damage (in the broader sense of pecuniary loss) to the parties to the proceedings. The arbitration procedure, too, is concerned with the protection of subjective rights of people awarded under the given substantive law and otherwise guaranteed by the supreme laws of the given state<sup>16</sup>.
- 9.18.** In connection with the legal framework for arbitration procedures, several questions arise from the broader context, consequences and interpretations of that framework. Taking as their point of departure the very fact of how the laws on arbitration procedures are labelled (e.g., in

<sup>15</sup> Cf. VILÉM STEINER, *OBČIANSKE PROCESNÉ PRÁVO V TEÓRII A PRAXI (Civil Procedural Law in Theory and Practice)*, Bratislava: Obzor 217 et seq. (1980).

Similarly VILÉM STEINER, FRANTIŠEK ŠTAJGR, *supra* note 14, at 165 et seq.

<sup>16</sup> Cf. the basic rights and liberties – Article 12 et seq. of the Slovak Constitution (constitutional law No. 460/1992 Coll.).

Similarly Article 20 (right to own property), Article 35 (right to conduct business), Article 46 et seq. (right to protection by courts and other protection by the law), etc.

Cf. also the Charter of Fundamental Rights and Basic Freedoms (in particular Art. 2 et seq., Art. 11, Art. 26, etc.) in Jiří NOLČ, ET AL., *ÚSTAVA ČR S ÚVODNÍM KOMENTÁŘEM (The Czech Constitution, with an Introductory Commentary)*, Brno: Computer Press, a.s. (2005).

Cf. ROBERT ALEXY, *POJEM A PLATNOST PRÁVA (Concept and Rule of Law)*, Bratislava: Kalligram 126 et seq. (2009).

Slovakia, the “act on arbitration proceedings”, in the Czech Republic, the “act on arbitration proceedings and on the enforcement of arbitral awards”, but finally also the Model law on international commercial arbitration), several interpretations put particular stress on this aspect in the sense that these laws are thought to be of an expressly procedural character. These interpretations overlook the fact that, aside from the procedural aspect, arbitration laws often contain two additional elements: an organisational / institutional element (i.e., the mechanism for creating the position of arbitrators and the institution of permanent arbitration courts), and the element of applicable (governing) substantive law which in the specific case is to be applied, including relevant trade customs, the principles of fair business dealings, and *boni mores*.

- 9.19. Regarding the procedural side of the law, there are views that would consider the arbitration procedure to fall within the sphere of interest of procedural law as public law. This view disregards the contractual basis of arbitration, which “triggers” not only the mechanism for creating the position of the arbitrator (or of the permanent arbitration court), but also the entire process of hearing and deciding specific disputes before the arbitral tribunal, whereas the procedural steps and measures only superficially resemble proceedings in the general courts (e.g., in the matter of certain identical or similar procedural principles). The procedural aspects of arbitration are closely related to the adequate substantive law from which the claims that are made have been derived. In the older literature, we occasionally encounter the view that all legal procedures (processes) more or less exhibit common features. This concerns especially procedures which take place before the general courts, i.e., the civil court process and the criminal process. In this respect, Prof. Macur voiced the opinion at the time that some sort of general doctrine of procedural law, referred to as *Allgemeine Prozessrechtslehre*, had been taking shape in Europe since the end of the 19th century<sup>17</sup>.
- 9.20. Other proceedings are an organic part of the “legal process” (as a phenomenon conceived this broadly), such as proceedings before the Constitutional Court, administrative proceedings or proceedings before other governmental bodies (public authorities), disciplinary proceedings,

<sup>17</sup> JOSEF MACUR, *OBČANSKÉ PRÁVO PROCESNÍ V SYSTÉMU PRÁVA (Civil Procedural Law within the Legal System)*, Brno: Jan Evangelista Purkyně University in Brno 199 et seq. (1975).

*Cf.* also JOSEF MACUR, *SOUDNICTVÍ A SOUDNÍ PRÁVO (The Judiciary and Judicial Law)*, Brno: Jan Evangelista Purkyně University in Brno 45 et seq. (1988).

Similarly JOSEF MACUR, *PROBLÉMY VZÁJEMNÉHO POMĚRU PRÁVA PROCESNÍHO A HMOTNÉHO (Issues concerning the Mutual Relation of Procedural and Substantive Law)*, Brno: Acta Universitatis Brunensis 49 et seq. (1993). For a review and reflection on the latter-cited publication of Macur, see Viktor Knapp, *Úvahy o civilním procesu (Deliberations on Civil Procedure)*, 133 (9-10) *PRÁVNÍK* 807 et seq. (1994).

etc<sup>18</sup>. According to Prof. Weyr, the bedrock of legal proceedings as such is the creation of norms, i.e., primary, secondary, general or specific norms, whereas the normative process takes place either based upon autonomous or heteronomous principles<sup>19</sup>. In this understanding, the act of entering into a (private-law) contract, including arbitration agreements, is undeniably also a “norm”. Understanding the essence of the legal process on the most general level, i.e., “the process as such”, entails an analysis of all aspects and dimensions of various manners (kinds) and modalities of legal processes, i.e., also such as do not take place before the general courts (such as, e.g., civil court proceedings or criminal proceedings), but also before other bodies (forums) of the private-law realm (sphere). In its generalised form, the legal process presents itself not merely as a public-law collection of procedural rules – which is only one of several potential options (forms) of legal process – but also has a potential private-law level, e.g., in arbitration<sup>20</sup>. The above allows us to frame the hypothesis that

<sup>18</sup> Cf. JÁN DRGONEC, KONANIE PRED ÚSTAVNÝM SÚDOM SLOVENSKEJ REPUBLIKY (*Proceedings before the Constitutional Court of the Slovak Republic*), Šamorín: Heuréka 251 (2008).

Cf. Radovan Suchánek, *Vliv ústavního soudu na legislativní proces (The Influence of the Constitutional Court on the Legislative Process)*, in II. NOVÉ JEVI V PŘÁVU NA POČÁTKU 21. STOLETÍ. TEORETICKÉ A ÚSTAVNÍ IMPULZY ROZVOJE PŘÁVA (II. *New Legal Phenomena at the Beginning of the 21st Century. Theoretical and Constitutional Stimuli for the Development of Law*), Praha: Charles University in Prague 124 et seq. (A. Gerloch, M. Tomášek eds., 2010).

Similarly VIKTOR KNAPP ET AL., *TVORBA PŘÁVA A JEJÍ SOUČASNÉ PROBLÉMY (The Development of Law and Its Current Problems)*, Praha: Linde Praha 462 (1998).

See also MARIÁN ŠEVČÍK, *SPRÁVNE PŘÁVO PROCESNÉ (Administrative Procedural Law)*, Bratislava: EUROUNION 177 (2007).

Cf. LUBOMÍR KUBŮ, PAVEL HUNGR, PETR OSINA, *TEORIE PŘÁVA (Theory of Law)*, Praha: Linde Praha 25 et seq. (2007).

<sup>19</sup> FRANTIŠEK WEYR, *TEORIE PŘÁVA (Theory of Law)*, Brno-Praha: Nakladatelství ORBIS 133 et seq. (1936). The author states:

*Autonomous principle' here is meant to be understood as the principle whereby a given norm can only come into existence by way of a collaboration of subjects which binds the (future obliged party), i.e., in other words: through which the subject that is the creator of the norm becomes the subject bound by the pertinent obligation.*

See also VIKTOR KNAPP, *TEORIE PŘÁVA (Theory of Law)*, Praha: C. H. Beck 52 et seq. (1995).

<sup>20</sup> Even though Prof. K. Růžička is not a proponent of what is known as the contractual theory, which substantiates the legal character of the arbitration procedure, he does point out the significance and indeed the priority of the understanding of the parties with respect to the procedural approach (the procedural rules) in arbitration, over and above the UNCITRAL Rules or the Rules of Arbitration of the Arbitration Court.

Cf. Květoslav Růžička, *supra* note 9, at 154 et seq.

Similarly Květoslav Růžička, *K některým otázkám rozhodčího řízení (On Certain Issues concerning Arbitration)*, 44 (1) ACTA UNIVERSITATIS CAROLINAE IURIDICA-AKTUÁLNÍ OTÁZKY MEZINÁRODNÍHO PŘÁVA SOUKROMÉHO (*Current Issues of International Private Law*) 67 (1998). In this respect, the author writes: *Also in the case of international commercial arbitration, the parties are entitled to set rules of procedure for the arbitrators (in the absence of which, the arbitrators determine them themselves).*

the “legal process” (under the aspect of its general definition) should be understood as a category above the level of legal branches, as a category of interdisciplinary nature. Keeping this in mind, we find that certain types of legal processes have an explicitly (non-contentious) public-law character (such as e.g., civil court proceedings)<sup>21</sup>, whereas others can hardly be subsumed under the sphere of public law (e.g., arbitration proceedings – contractual arbitration). The fact is, arbitration also gives rise to additional – one might say, derived – problems, as we shall see in the following section of this paper.

### III. The Arbitrator: Selected Issues

- 9.21. Acting in the role or position of arbitrator within the context of dispute resolution qua arbitration is currently fraught with numerous questions and controversies. With a view to the weight and significance of arbitration proceedings and the nature of its results (in the form of an arbitral award), arbitrators find themselves in a position similar to that of a state judge. It is with some justification that we may call the arbitrator a quasi-judge who was appointed by the contractual parties. This postulate, made at the beginning of this analysis, essentially captures all relevant elements of the role and function of arbitrators within the context of arbitration proceedings, and along with other characteristics of arbitration, differentiates it from other forms of alternative dispute resolution (such as, e.g., mediation). This approach towards arbitration proceedings and towards the position of arbitrators was also expressed in the decision of the European Court of Justice in C-145/96 *von Hoffmann v. Finanzamt Trier*, which held that the “services of an arbitrator are principally and habitually those of settling a dispute between two or more parties”, which is why they cannot be put on the same level as a lawyer representing and defending the interests of parties<sup>22</sup>. The position of arbitrators is generally a controversial issue which has divided the professional community into two opposing camps. One camp understands the arbitrator to be in the position of a body unto whom the competence of courts has been conferred. This approach is characteristic for what is known as jurisdictional theory. The other ideological platform

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<sup>21</sup> V. Knapp has this to say concerning this issue:

*The court proceedings are therefore above all a formal procedure followed by the court as a body of state sovereignty. This ... emphasises the public-law character of proceedings, and it is precisely this public-law concept that is ... the key to resolving the interaction between civil procedural law (and indeed judicial procedure in general) and substantive law – loco cit. in footnote 15, p. 811*

See also František Štajgr, *Některé teoretické otázky civilního práva procesního (Certain Theoretical Issues of Civil Procedural Law)*, 15 (X) ACTA UNIVERSITATIS CAROLINAE. IURIDICA. MONOGRAPHIA 21 (1969). The author writes: ...*Civil procedure law belongs within the sphere of public law, and cannot belong anywhere else.*

<sup>22</sup> PHILIPPE FOUCARD, EMMANUEL GAILLARD, BERTHOLD GOLDMAN, *ON INTERNATIONAL COMMERCIAL ARBITRATION*, London: Kluwer Law International 560 (1999).

of legal theorists assumes that the arbitrator acts in the position of someone who has undertaken the task to render a service to the parties. This 'service' is the solution of the dispute which has arisen among the parties. Professional circles in these parts of the world rather identify with the latter position<sup>23</sup>. Of course, as is the case with most contested issues, and thus also with the issue of the arbitrator's role, one will find positions that elude the rigorous understanding of the arbitrator along the lines of the above-cited criteria.

- 9.22.** The selection and appointment of the arbitrator is a central, if not the most important, step in the arbitration procedure, which has far-reaching consequences and influences the entire further course of decision of the dispute<sup>24</sup>. The opportunity to determine one of the authors of the eventual decision is a defining factor of the arbitration system<sup>25</sup>. The option of having the arbitrator appointed by the contractual partners is generally accepted in all legislations which integrate the arbitration procedure into the system of dispute resolution.
- 9.23.** The opportunity to actively influence the choice of the individual (or even the entire arbitral body – tribunal) who is to decide the dispute in question is the most frequently discussed advantage of arbitration procedures. The parties are given the power to influence the resolution of disputes which arise between them in a very substantial manner when they are allowed to appoint a single arbitrator by mutual accord, or even “their own” arbitrator each. Conventional court proceedings prevent the parties to the dispute from exercising any influence whatsoever on the choice of who specifically is going to decide (or partake in the decision of) their dispute.
- 9.24.** The appointment of an arbitrator by mutual accord (consensus) of the parties subsumes two acts which must both (cumulatively) be accomplished: firstly, there is the elementary prerequisite of appointment that the parties have an understanding – consensus – regarding the identity of the arbitrator(s), and secondly, the appointee must accept his appointment. A different matter is the mechanism for establishing a whole arbitral tribunal, in that the selection of the individual arbitrators is followed by the election of a chairperson (presiding arbitrator) by the thus chosen arbitrators. In this case, the parties no longer have any influence

<sup>23</sup> For a more detailed account, see: Ján Husár, *Rozhodca v rozhodcovskom konaní (The Arbitrator in Arbitration Proceedings)*, in ARBITRAŽ I MEDIACJA JAKO INSTRUMENTY WSPIERANIA PRZEDSIĘBIORCZOŚCI: MATERIAŁY Z MIĘDZYNARODOWEJ KONFERENCJI NAUKOWEJ ZORGANIZOWANEJ PRZEZ ZAKŁAD PRAWA HANDLOWEGO I GOSPODARCZEGO WYDZIAŁU PRAWA UNIwersYTETU RZESZOWSKIEGO W RZESZOWIE W DNIACH 22-23 WRZEŚNIA 2006 ROKU, Rzeszów: Facultas Iuridica Universitatis Ressoviensis 63-73 (J. Olszewski, B. Sagan, R. eds., 2006).

<sup>24</sup> Douglas Earl McLaren, *Party-Appointed vs. List-Appointed Arbitrators: A Comparison*, 20 (3) JOURNAL OF INTERNATIONAL ARBITRATION 233 (2003).

<sup>25</sup> Doak Bishop, Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration* 14 (4) ARBITRATION INTERNATIONAL 395 et seq. (1998).

- on the choice of the third arbitrator, who in most cases will assume the position of the chairperson of the arbitral tribunal and who is chosen by the arbitrators, who were in turn appointed by the parties.
- 9.25. The above-mentioned partial acts of appointment must ultimately be fulfilled cumulatively, if not at the very same moment. A point of contention will be the moment in which the parties should enter into their agreement on the identity of the person entrusted with resolving their disputes, i.e., the moment in which the parties are to agree on the arbitrator. Several alternative situations may arise in practice. The name of the arbitrator may be contained in the agreement made between the parties itself, in the form of a provision which submits all disputes (or specific disputes) under the decision-making authority of the thus specified individual. If a dispute occurs, then this understanding will qualify as an agreement on the arbitrator (though the acceptance and consent of the appointee to act as arbitrator in the given dispute will still be required). At the same time, it is the undisputed right of the parties to agree, within the context of the arbitration clause contained in their main contract, merely on the fact that their disputes should be resolved before an institution of arbitration, whereas the remaining points will be further specified only in the event that a dispute actually arises. In such a case, the agreement will not contain, and need not contain, any direct specification of the concrete individuals who are to act in the “position” of an arbitrator. We believe that the latter alternative is more efficient in practice, given that it is clearly impossible to anticipate all future situations, so that it is more than unrealistic to rely on the continued availability of the individual appointed in the agreement, given the vagaries of human life<sup>26</sup>.
- 9.26. One of the basic prerequisites for acting as an arbitrator is that the person who is to resolve the dispute between the parties (or partake in the resolution of the dispute, in the case of several arbitrators who reach a decision on an arbitral tribunal) preserves his impartiality and independence.
- 9.27. In some countries, parties may challenge the choice of arbitrator and the arbitrator’s acts for the same reasons for which they may challenge the

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<sup>26</sup> A similar position has been taken by the Czech Supreme Court in its decision 33 Odo 135/2006 of January 31, 2008. In the light of this decision, *...it has now become apparent that it is not expedient to determine the identity of arbitrator/s as specific private individuals (i.e., by specifying their name, place of residence, date of birth, etc.) without at the same time determining a ‘substitute’ arbitrator, i.e., a mechanism for selecting an arbitrator for the event that the arbitrator initially specified by the parties did not, or could not, act in this position. If the individual who has thus been determined in the arbitration agreement does not act as the arbitrator, then it is, in the view of the Supreme Court, not permissible that a court should instead appoint the arbitrator. – Zbyšek Kordač, Pozor při určování rozhodců! (Beware of the Pitfalls in Appointing Arbitrators!)* Available in Czech at: <http://www.epravo.cz/top/clanky/pozor-pri-urcovani-rozhodcu-53952.html> (accessed on September 5, 2010).

acts of judges in deciding a dispute<sup>27</sup>. However, as Redfern and Hunter show, this analogy between the role of arbitrators and the role of judges should not be pushed to such extremes; the aforementioned authors emphatically point out the difference between the respective positions of arbitrator and judge in connection with the character and origin of their competencies and powers. Following tradition, they invoke the need to approach the position of the arbitrator and the position of the judge differently, calling the judge a “servant of the state”, and requiring that the judge’s duties and responsibilities be derived from this specific character of his work and role. However, in consideration of the essence of the arbitrator’s activity, which – as in the case of judges – lies in hearing and deciding disputes, we believe that there exists an undeniable analogy between arbitrator and judge in terms of the need to preserve impartiality and independence.

- 9.28.** The independence and impartiality of courts and judges is a topic that draws a lot of attention, also in the international forum – to wit, in the UN Basic Principles on the impartiality of the judiciary, adopted by the UN General Assembly in November 1985, in Recommendation R/94/12 of the Committee of Ministers at the Council of Europe of December 1994, and in the European Charter on the Statute of Judges (Judges’ Charter) approved by the Council of Europe in Strasbourg on 8-10 July 1998. The uncontested principles set out in these international documents and further elaborated upon in national laws and regulations cannot be fully applied to the “statute of arbitrators”. The judge is a “servant” of the state, which is why his conduct is subject to more stringent requirements. Judges must act such that the principle of an independent judiciary is not affected, and such that the public trust in an independent and impartial jurisprudence is being strengthened<sup>28</sup>. The way in which a judge behaves and presents himself is under closer scrutiny, given that he must control his conduct even in his private life and during off-duty activities, after taking off the judge’s gown, so that the trust in him is not being compromised. Various ethical codes of the judiciary impose obligations on their members regarding their civil life (e.g., the obligation to take into consideration their own trustworthiness in managing their own property and that of their families, or the prohibition of private activities which are in conflict with the dignity of the office of a judge and the trustworthiness of the judiciary, the obligation to set an example, through their civil life and their conduct in public, in terms of good social customs and personal dignity, and the obligation to keep away from company, places and individuals who might compromise them), the professional exercise of the judicial office (e.g., the obligation to refrain from prejudging; the obligation to treat participants

<sup>27</sup> ALAN REDFERN, MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION*, London: Sweet&Maxwell 199 (4<sup>th</sup> ed. 2004).

<sup>28</sup> Judicial Code of Ethics – accessible at <http://www.vlada.gov.sk> (accessed on September 7, 2010).

with patience, dignity and respect, the obligation to see to it that each and every decision be not only factually correct and lawful, but also that its explanation be transparent and compelling), and the obligations *vis-à-vis* one's own profession (e.g., the obligation to show respect and maintain good professional relations with other judges, the obligation to contribute to the creation and perfection of, and the adherence to, ethical rules in the interest of integrity and independence of the judiciary. By contrast, no demands of such breadth can be imposed on arbitrators, given that they are private persons outside their decision-making in the arbitration procedure, in no respect different from any private individual.

- 9.29. The independence of the judiciary is made manifest in the requirement to be guided only by the best of one's own knowledge and belief in exercising that office. The judge's decision-making must not be influenced by anyone or prone to any such outside influence<sup>29</sup>. We believe that the same construction can also be applied to the position of the arbitrator, who, for the intent and purposes of the case at hand, plays a role which is analogous to that of a judge. In this regard, the defining qualities of the terms impartiality and independence, respectively, are mutually dependent upon each other – one must be fulfilled for the positive existence of the other. Independence is a prerequisite for impartiality, and thus for a fair process, says Čipkár. The independence of the arbitrator is fundamental for observance of the obligation to be impartial in the procedure, and only an independent arbitrator will be able to decide a dispute with impartiality<sup>30</sup>. Similarly, Mokřý also points out the interdependence of these two postulates. He understands an impartial judge to be a person who is not dependent on the matter that is to be heard, the parties to the dispute or their legal counsel, in the sense that he is neutral *vis-à-vis* them, that he has no prejudices, sympathies or antipathies, that the parties are, in his eyes, wholly equal, and that neither of them has any *a priori* advantages, disadvantages, merits or faults<sup>31</sup>. This statement doubtlessly also applies to the impartiality of arbitrators. The contents of the term of impartiality of judges are also made manifest in the case-law of the European Court of Human Rights which held, in *Piersack vs. Belgium*<sup>32</sup>, that impartiality must be approached from two different angles<sup>33</sup>, in that

<sup>29</sup> JÁN ČIPKÁR, PROFESIJNÁ ETIKA PRÁVNÍKA (*The Lawyer's Professional Ethics*), Košice: Pavol Jozef Šafárik University in Košice 125 (2003).

<sup>30</sup> Emilio Cárdenas, David W. Rivkin, *A Growing Challenge For Ethics In International Arbitration*, in INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW, The Hague: T.M.C. Asser Institute 267 (T. Einhorn, P. E. Nygh, K. Siehr eds., 2004).

<sup>31</sup> Antonín Mokřý, *Nezávislost a nestrannost soudce – vzájemná souvislost a podmínenost pojmu (Independence and Impartiality of Judges – on the Interaction and Interdependence of Terms)*, 41 (8) PRÁVNÍ PRAXE 459 (1993),

<sup>32</sup> *Piersack v. Belgium* (dec.), No. 8692/79, 1 October 1982.

<sup>33</sup> Ernest Valko, Branislav Jablonka, *Právo na nestranný súd a jeho uplatnenie prostredníctvom námietky zaujatosti (The Right to an Impartial Court and its Enforcement through the Defence of Bias)*, 7 (6-7) JUSTIČNÁ REVUE 797 (2004)

a subjective aspect of impartiality must be applied as well as an objective aspect of impartiality. The former covers the personal beliefs of the judge who hears the case, his subjective attitude towards the matter. At the same time and cumulatively, the second, objective element of impartiality must also be present, which entails the provision of sufficient guarantees to rule out any doubt in this respect<sup>34</sup>. An arbitrator will not meet the criteria for impartiality if – as in the analogous case of judges – either element, i.e., the objective element or the subjective element, is not fulfilled.

- 9.30.** Trakman defines impartiality as a state of mind of the individual, whereas it is relevant how this state of mind is evidenced through the arbitrator's conduct which will demonstrate in one way or another that the criteria for impartiality are fulfilled or are not fulfilled. The independence of arbitrators (and its limitations) must be reviewed under the aspect of interpersonal relationships: if the arbitrator is professionally or personally related to any of the parties to the proceedings, or has family bonds or commercial connections to either party, then the requirement for independence on the part of the arbitrator is not met<sup>35</sup>. The arbitrator will not be considered independent, if his personal interests are tied to the interests of one of the parties, e.g., because he provides consulting to one of the parties for consideration in the course of the arbitration proceeding in which he is supposed to act as an arbitrator<sup>36</sup>. Goldman provides an interesting real-life example, in which the objectivity of an issued arbitral award was challenged on grounds of partiality and dependence of one of the arbitrators – whereas the arbitrator was found to lack independence after the issuance of the arbitral award because he was hired into employment by the party favoured by the award only one day later. In practice, it will often be complicated to determine whether a given arbitrator is “dependent” and “partial”, i.e., whether he fails to meet the basic postulates which are inseparably tied to the position of any person who is to decide on the rights and obligations of other persons.
- 9.31.** The Slovak Constitution and the Charter of Fundamental Rights and Basic Freedoms warrants that anyone has the right to assert his rights in a lawful manner in an independent and impartial court and, in specified cases, before other bodies of the Slovak Republic. The act on arbitration proceedings stipulates an analogous right to assert, in the spirit of the above, one's rights in an independent and impartial arbitration court or, as the case may be, before an independent and impartial arbitrator or arbitral tribunal. But who is this independent and impartial arbitrator? The provisions of said act which deal with the personal qualities of the arbitrator lacked any explicit requirements of an impartial and

<sup>34</sup> *Ibid.*

<sup>35</sup> Leon Trakman, *The Impartiality and Independence of Arbitrators Reconsidered*, 10 INT. ALR 999 (2007).

<sup>36</sup> PHILIPPE FOUCHARD, EMMANUEL GAILLARD, BERTHOLD GOLDMAN, *supra* note 22, at 565.

independent exercise of his office until the passage of the most recent amendment to the act on arbitration proceedings, i.e., Act No. 71/2009 Coll. In connection with the exercise of arbitration duties, the law currently in force now makes the further specification: *the person who accepts the position of arbitrator shall undertake to exercise this office impartially and with due professional care, such that the fair protection of rights and legitimate interests of the participants is warranted and that no infringement of their rights or legitimate interests occurs, and that no rights are being abused to their detriment.*

- 9.32.** Another reference in connection with the requirement of impartial and independent decision-making can be found in Section 6 (3), which requires the judge or other relevant person who appoints the arbitrator to oversee, among other circumstances, the guarantee of impartial and independent decision-making by the chosen arbitrator. Section 9 of the act on arbitration proceedings, which deals with the grounds for challenging an arbitrator, is a provision in which these necessary requirements for efficient and proper performance in the office of an arbitrator are implicit.
- 9.33.** Challenge of the choice of arbitrator is a mechanism as described further below which allows the “sanctioning” of the lack or absence of good judgment on the part of the arbitrator (in the sense of his impartiality and independence). The act on arbitration proceedings requires persons who were appointed as arbitrators to “plead” their lack of independence and impartiality, but immediately informing the parties of all circumstances because of which they should be excluded from hearing and deciding the case, in that there may be doubt of bias with a view to their relationship to the matter itself or to either party. This provision allows us to identify certain criteria which signal unwarranted conduct and relations of the arbitrator towards certain directions (i.e., in particular, the subject matter of proceedings, or one of the contractual parties). From the time of their appointment as arbitrators and throughout the arbitration proceedings, the person who acts as arbitrator must notify the parties of any bias on his part, except for cases in which he already informed the parties of the pertinent circumstances at an earlier point. On the other side, said statutory provision provides the contractual parties with the instrument of challenging an arbitrator by giving notice of their reservations against the arbitrator. It is inherent in the nature of the provision, however, that a party will not invoke bias on the part of “its arbitrator”, and that it will invoke bias only for reasons which “surfaced” (or of which the party learned) after the respective person was appointed as arbitrator. But even this ostensibly logical rule does not always apply one hundred per cent.
- 9.34.** Regarding the procedure for challenging arbitrators on grounds of partiality, the law allows the parties to agree on a *modus operandi* for submitting such challenges, either in the arbitration agreement itself or at a later point (though no later than before the arbitration proceedings

have actually commenced)<sup>37</sup>. Unless the parties agree otherwise, the arbitration court may continue proceedings while the challenge is being heard, though no arbitral award must be issued until the relevant authority (“selected person”, see below) or court decided on the challenge. As a rule, and where this is feasible, the decision on the exclusion of an arbitrator is made by his co-arbitrators. If the challenge is aimed against several members of the arbitral tribunal (i.e., at least two members), then the challenge is to be decided by the chairperson of the respective institution of arbitration. The alternative procedure for challenges which are aimed against the entire arbitral tribunal (or against the single arbitrator) follows logically from the above.

- 9.35.** In the event that the contractual parties have no agreement on how to proceed in the case of a challenge of bias, the act avails of a “default” provision under which that party that wishes to challenge an arbitrator shall send written notice, containing the grounds for challenge, to the selected person, within 15 days from the day on which it learned of the facts and circumstances which disqualify the arbitrator from hearing and deciding the case or which show that the respective person does not meet the criteria for acting as an arbitrator. If no selected person was indicated, then this notice shall be submitted to the court.
- 9.36.** Similarly, the Model Law does not address the issue of independence and impartiality of arbitrators, but includes this matter in the procedure for the “defence of bias”, the criteria and prerequisite for which is the existence of circumstances which give rise to justifiable doubts as to the impartiality and independence of the arbitrator<sup>38</sup>. Most international and domestic documents contain direct or indirect requirements with respect

<sup>37</sup> Initiation of arbitration proceedings:

*Sec. 16 of the Act on Arbitration Proceedings*

- (1) *Unless where the parties agree otherwise in the arbitration agreement (or at a later point prior to the commencement of arbitration proceedings), the arbitration proceedings in a given dispute shall commence,*
- a) if the arbitrators have not yet been appointed: as of the day of service of the claim upon the respective other contractual party;*
  - b) if the arbitral tribunal is composed of several arbitrators: as of the day of service of the claim upon the presiding arbitrator, and if the presiding arbitrator has not yet been appointed, then upon any of the arbitrators already appointed;*
  - c) if the arbitral tribunal consists of a single arbitrator: as of the day of service of the claim upon that arbitrator;*
  - d) if the dispute is resolved by a permanent arbitration court: as of the day on which the claim was submitted to that permanent arbitration court.*
- (2) *Upon the commencement of arbitration proceedings, the contractual parties become parties to the arbitration proceedings. The claimant is that party which filed the motion for commencement of arbitration proceedings (the “claim”). The defendant is that party against which the claim is aimed.*

<sup>38</sup> Article 12 of the Model Law: Grounds for Challenge (Defence of Bias)

- (1) *When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose*

to the decision-making of arbitrators in the sense of their impartiality and independence. However, the same documents often fail to provide a definition of what is to be understood by impartiality and independence of arbitrators, so that it is often the courts who “bring to life” specific terms in their decision-making practice.

- 9.37. The French Cour de Cassation, in the explanation for its judgment in *Ury v. Galeries Lafayette*, elaborates on independence in the sense of the arbitrator’s independence of thought –whereas the independence of thought is indispensable for exercising judiciary powers (irrespective of the source of this power) and an elemental trait of arbitrators<sup>39</sup>. Fouchard, Gaillard and Goldman, in analysing the judgments of French courts, have found cross-references to this decision; the Parisian Cour d’Appel repeated this opinion in several of its decisions, and it was also adopted by the authors of other decisions. Indeed, the French courts have in their case-law accomplished a definition of the independence of arbitrators: the independence of arbitrators is an indispensable requirement of their office, as of the moment of their appointment, their role is comparable to that of a judge, and any dependent relationship (especially towards any of the parties) is therefore not permissible<sup>40</sup>.
- 9.38. Also in the Slovak context, the decision-making practice of the courts fosters a clearer understanding of the contents of the terms ‘impartiality and independence of the judiciary’ (which, *per analogiam*, apply also to arbitrators). A ruling of the Slovak Constitutional Court addressed the independence of judges: *The existence of independence must be determined under the subjective aspect, i.e., based on the personal beliefs and the conduct of the specific judge in the given matter; but also under the objective aspect, i.e., by determining whether the judge provided sufficient guarantee to be able to rule out any doubt in this respect*<sup>41</sup>. Similarly, we find analogous approaches in the case law of courts in other countries.

#### IV. Concluding Observations

- 9.39. In recent years, the boom in international commercial arbitration has also prompted theoretical research in the field of arbitration proceedings. In this respect, we have noticed attempts among academic lawyers

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*any such circumstances to the parties unless they have already been informed of them by him.*

(2) *An arbitrator may be challenged only if exist circumstances that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.*

<sup>39</sup> PHILIPPE FOUCHARD, EMMANUEL GAILLARD, BERTHOLD GOLDMAN, *supra* note 22, at 562.

<sup>40</sup> *Ibid.*, 565.

<sup>41</sup> Ruling of the Slovak Constitutional Court III ÚS 16/2000 of June 15, 2000, Collections of Rulings and Resolutions of the Slovak Constitutional Court, 2000.

and scholars to form, cultivate and develop a doctrine of (not only international) commercial arbitration, going as far as to create a new legal field (branch) of sorts, known under the moniker “arbitration law”. This may indeed be a kind of new legal discipline, a hybrid with elements of several more generally recognised (and, in a sense, “canonised”) legal fields.

- 9.40. The vibrant domestic, but especially foreign publishing activity concerning various aspects of commercial arbitration (known as arbitration studies) bear witness to the relevance, topicality, variety and breadth of scope of the pertinent scholarly and legislative matters (especially under the aspect of *de lege ferenda*). Students across university faculties of law, too, have been showing exceptional interest in the issue. Thanks to the initiative of various committed college teachers, special courses and scientific seminars which focus on international commercial arbitration studies have come into existence at such faculties<sup>42</sup>, and remarkable scholarly results have been achieved in this field, also as regards the exchange with international contacts.

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### Summaries

**FRA** [*Les procédures d'arbitrage : une opportunité de résolution des litiges à jamais perdue?*]

*La pratique de la procédure d'arbitrage se développe, en accord avec la situation sociale et politique, en tant qu'aspect important de la vie commerciale dans un grand nombre de normes juridiques, à tel point qu'il est devenu courant de voir les contractants se « promettre » mutuellement que les litiges, générés par leurs rapports commerciaux, ne seront pas examinés dans le cadre d'une procédure judiciaire mais soumis à un organe spécifique, un tribunal d'arbitrage ou un arbitre ad hoc.*

*L'institution arbitrale, en tant qu'élément du système d'examen des litiges et alternative à la procédure judiciaire, pose, devant ses participants potentiels, le dilemme du choix de la méthode d'examen des litiges parmi celles qui sont proposées.*

*Trancher, de manière univoque, le dilemme du choix de la méthode d'examen des litiges n'est pas simple. Il n'est pas aisé d'arriver à une conclusion finale afin de savoir quelle direction prendre dans la recherche de solution d'un litige par les parties qui s'opposent, quelle forme de solution recommander comme étant « idéale ». Emprunter, au sens métaphorique, la voie classique des procédures judiciaires (dans une certaine mesure la plus sûre) ou prendre un nouveau « tournant » et s'exposer ainsi au risque de résolution du litige par une voie alternative.*

**CZE** [*Rozhodčí řízení - permanentně nevyužitá šance v řešení sporů?*]

*Praxe rozhodčího řízení se vyvíjí v souladu s historickým a sociálně politickým pozadím jako důležitý aspekt obchodního života v řadě právních systémů do té míry, že je v současnosti již běžnou praxí, že si smluvní strany navzájem „slibují“, že jejich spory vzniklé v rámci jejich obchodních vztahů nebudou řešeny v rámci soudního řízení, ale budou předloženy zvláštnímu orgánu, stálému rozhodčímu soudu, případně rozhodci ad hoc.*

*Institut rozhodčího řízení jako součást systému řešení sporů a alternativa k soudnímu řízení před tribunály ставí před jeho potenciální účastníky dilema, který ze způsobů řešení sporů, jež jsou k dispozici, využít.*

*Jednoznačně rozhodnout toto dilema možnosti volby ve prospěch některého ze způsobů řešení sporů není jednoduché. Jednoduché není ani udělat celkový závěr o tom, kterým směrem je vhodné se vydat při řešení sporu jeho protistranami, která forma řešení sporů je „ideálnější“, a proto doporučeníhodná. Je otázkou, zda se na pomyslné křižovatce při řešení sporu vydat klasickou, v určitém směru i jistější cestou soudního projednávání sporu, nebo zda se vydat po nové „odbočce“ a podstoupit tak nástrahy experimentálního řešení sporu alternativní cestou.*

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**POL** [*Postępowanie arbitrażowe – niewykorzystana szansa rozstrzygnięcia sporów?*]

*Opracowanie poświęcone jest problematycznym kwestiom postępowania arbitrażowego, których wciąż jeszcze nie udało się rozstrzygnąć z mocą ostateczną. Autorzy zwracają również uwagę na niektóre szczególnie negatywne tendencje w procesie ustawodawczym regulacji prawnej postępowania arbitrażowego na Słowacji. Tym samym próbują przybliżyć szerszym międzynarodowym kręgom specjalistów kierunki regulacji prawnej postępowania arbitrażowego na Słowacji i rozpocząć ewentualną dyskusję merytoryczną na temat utrzymujących się problemów w postępowaniu arbitrażowym.*

**DEU** [*Das Schiedsverfahren - eine permanent ungenutzte Chance zur Streitbeilegung?*]

*Der Beitrag befasst sich mit bestimmten Problemfragen des Schiedsverfahrens, die noch immer ihrer endgültigen Beurteilung harren. Die Autoren heben außerdem einige besonders negative Tendenzen in der slowakischen Gesetzgebung für die Regulierung der Schiedsgerichtsbarkeit hervor. Damit wollen sie nicht zuletzt der breiteren internationalen Fachwelt die Ausrichtung des slowakischen Rechts zum Schiedsverfahren näher bringen und womöglich eine fachlich relevante Diskussion zu den fortwährenden Anwendungsproblemen „in punkto“ Schiedsverfahren auslösen.*

**RUS** [*Арбитражное производство - шанс в разрешении споров утрачен навсегда?*]

*В статье рассматриваются спорные вопросы арбитражного (третейского) разбирательства, которые все еще окончательно не разрешены. Среди прочих аспектов авторы подчеркивают некоторые особо сильные отрицательные тенденции в законодательном процессе*

праворегулирования арбитража в Словакии. Авторы также стремятся более широко ознакомить международных специалистов с направлением праворегулирования арбитражного разбирательства в Словакии, и, таким образом, возможно, открыть профессиональную дискуссию по сохраняющимся проблемам применения арбитражного (третейского) разбирательства.

**ES** **[El procedimiento de arbitraje: ¿oportunidad permanentemente desaprovechada en la resolución de litigios?]**

*El estudio trata de las cuestiones problemáticas relativas al procedimiento de arbitraje, cuestiones que no terminan de ser resueltas con perentoriedad. Entre otras cosas, los autores destacan algunas tendencias marcadamente negativas en el proceso de la reglamentación legislativa del arbitraje en Eslovaquia. De hecho, los autores intentan acercar al amplio público internacional especializado el encaminamiento de la reforma legislativa, relativa al procedimiento de arbitraje en Eslovaquia y, eventualmente, iniciar un debate científico en torno a los problemas subsistentes de la aplicación del procedimiento de arbitraje.*