UNIVERSITY OF ESSEX **DISSERTATION**

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LLM/MA IN: International Trade and Maritime Law
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DISSERTATION TITLE The Role of the arbitral institutions to preserve the integrity of arbitral proceedings with specific reference Istanbul Arbitration Centre Rules

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DISSERTATION

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I. INTRODUCTION

International commercial arbitration is a settlement of dispute which is based on the agreement[1] of the parties and a contract by the authority of arbitrators.[2] In other words, arbitration is a process and a consensual agreement between parties who submit a dispute to a non-governmental decision-maker, selected by or for the parties, ostensibly provides for a neutral, private and efficient forum to resolve their disputes.[3] Furthermore, arbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system and facilitate the enforcement

[1] The first international agreement on the legal and procedural order of international commercial arbitration was the Protocol of Geneva in 1923. The Geneva negotiations purposed to introduce arbitration as an alternative dispute solving mechanism. The protocol was ratified only 24 states.

[2] Peter Behrens, '' Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits'' (1993) Baden-Baden, 14

[3] Ronan Feebily, 'Neutrality, Independence and Impartiality in International Commercial Arbitration, a Fine Balance in the Quest for Arbitral Justice' (2019) 7(1) PENN ST JL & INT'L AFF 88, 89

of arbitration award.[4] International commercial arbitration has expanded in recent years parallel to the increase in international trade, investment and disputes arising therefrom. In this perspective, international arbitration rules, mechanisms and institutions have been developed.[5]

Arbitration process provides many advantages such as the humble cost of proceedings, saving from time, the less formal character of procedure, the subsequent relaxation of rules or evidence and provide parties more practical, efficient and neutral dispute resolution when compared to state court litigation.[6] The fact that arbitration proceedings are not conducted in public is one of the essential reason for which parties choose arbitration, namely, international arbitration is considerably more private and often more confidential.[7] Arbitral hearings and the parties submissions or tribunals awards are virtually closed to the public and confidential.

Moreover, international arbitration, which gives parties wide latitude regarding the type of arbitration to choose, may be either ‘’ institutional’’ or ‘’ ad hoc’’.[8] By virtue of the party autonomy, parties have to make an early decision regarding whether their international arbitration should be "institutional" or "ad hoc".[9] There are significant differences between these two forms of arbitration, theoretical and practical.[10]

Institutional arbitration is conducted in accordance with institutional rules.[11] An administrative body overseen such arbitration which is responsible for several important aspects of the arbitration including, e.g., constitution of the arbitral tribunal, fixing of the arbitrators' compensation, scrutinizing the arbitral award and other matters.[12] In contrast, ad hoc arbitration is not conducted under the auspices or such supervision, the parties establish their own rules of procedure and subject only to the parties' arbitration agreement and applicable national arbitration laws.[13] Institutional and ad hoc arbitration have their particular advantages.[14] Institutional arbitration is conducted under a standing set of procedure rules,

[4] Jan Paulsson and Georgios Petrochilos, UNCITRAL Arbitration, (KLI 2018),55
[5] Arbitration law differs from country to country. Most of the developed countries have arbitration laws that permit and regulate both national and international commercial arbitration. Some countries enacted their own laws as the procedures of arbitration and some adpoted commonly accepted rules and procedures as a model law. Such as Australia, Bulgaria, Canada, Russia and Turkey adopted UNCITRAL Model Law.
[6] Amy J. Schmitz,’ Untangling the privacy paradox in arbitration’ (2006) 54(5) UKLR 1211, 1211
[7] Kyriaki Noussia, Confidentiality in Commercial International Arbitration: A Comparative Analysıs of the Position Under English, US, German and French Law (1st edn. Springer 2010), 9
[8] W. Laurence Craig, ‘Some Trends and Development in the Laws and Practice of International Arbitration’ (2016) 50 (special issue 2016) TILJ 699, 700
[9] Feebily(n 3), 88
[10] Kinga Timar, ‘The Legal Relationship between the Parties and the Arbitral Institution’ (2013) 2013 ELTE L.J. 103, 107
[11] Jeffrey Waincymer, Procedure and Evidence in International Arbitration, (1st edn. WK 2012) ,211
[12] Timar(n 10) , 108
[13] Christian Bühring-Uhle, Lars Kirchhoff& Gabriele Scherer, Arbitration and Mediation in International Business(1 st edn. KLI 2006), 38
[14] Feebily (n 3), 89

supervised by professional staff and services, wherein parties can avail a well-tried and tested set of arbitration rules coupled with assistance from professional expertise who are familiar with these rules.[15] On the other hand, ad hoc arbitration is more flexible (may be shaped to meet the wishes of parties and the facts of the particular dispute) and more confidential.[16] Moreover, ad hoc arbitration is to be said less expensive (since it avoids institutional fees-in exchange for being forced to bargain with arbitrators for their fees).[17] If parties are cooperative in ad hoc arbitration valuable time is not taken to go through the administrative (and often bureaucratic) procedures of an arbitral institution and avoid the inconvenience of time limits that may be imposed by the institution.[18]

In Turkey and in many other countries, local chambers of commerce and specific centres formed arbitral bodies and rules, and offered their supervisory service to local and international parties alike. There are three prominent commercial arbitration institutions established in Turkey: The Istanbul Chamber of Commerce Arbitration Centre[19], the Istanbul Arbitration Centre[20] and the Union of Chambers and Commodity Exchanges of Turkey[21]. TOBB Rules is the only one which follows the general structure and context that the major international arbitration institutions have between arbitration rules of the three institutions of Turkey. The wording and structure of the TOBB Rules is mostly similar to the ICC Rules of arbitration. Moreover, even the concepts of scrutiny of the award by the institution or the terms of reference which are thought to be exclusive to the ICC Rules, have been adopted by the TOBB Rules. This influence of the ICC Rules could be seen as a result of TOBB's title as the representative of ICC in Turkey. In addition, the articles under the TOBB Rules which appears to be adopted from the ICC Rules, create a significant and even unlikely change in interpretation by using the words “procedural omissions” instead. ITO Arbitration Rules, on the other hand, can be easily distinguished on a prima facie examination from the other rules of arbitration. This is mostly due to the way the rule is structured. Also ITO incorporates its rule about other alternative dispute resolution procedures under the same regulation and document with the arbitration rules. The ITO rules are lack a number of provisions concerning some important aspects of the arbitration that most other institutional rules incorporate; such as arbitrations

[15] Tibor Varady, John J.Barcelo III, Stefan Kröll &Arthur T. Von Mehren (eds), International Commercial Arbitration a Transnational Perspective (6th edn. WAP 2015), 48
[16] Bühring-Uhle, Kirchhoff& Scherer(13), 39
[17] Varady, Barcelo III, Kröll & Mehren (n 15), 49
[18] Unless a dispute arises, the content of an agreement to arbitrate will most of the time stay confidential between the parties. Therefore, it is not possible to obtain a certain statistic for a comparison between the number of agreements that provide for an institutional arbitration and ad hoc arbitration agreements.
[19] Hereinafter '' ITOTAM''
[20] Hereinafter '' ISTAC''
[21] Hereinafter '' TOBB''

with more than two parties and the independence and/or impartiality of the arbitrators. This may be the result of a presumption that the rules of ITO are more likely to be applied to national arbitrations. This presumption is even more evident in many different provisions of the rules, such as the selection procedure of the arbitrators, and the way the arbitrator lists are created.

Arbitral institutions could potentially have a prominent role in preserving the integrity of arbitral proceedings. This can be done with the help of an update of institutions' rules, which is also one of the important responsibilities of these institutions.[22] Furthermore, arbitral institutions could use their knowledge of the pool of available, independent and impartial arbitrators so as to provide that no arbitrator is appointed who might jeopardize the aim of pursuing time and cost-efficient arbitral proceedings by impartial and independent arbitrators.[23] Arbitral institutions may well sanction parties that misbehave in arbitrations under their rules.[24] Particularly, it is acknowledged that the "allocation of costs can be a useful tool to encourage efficient behaviour and discourage unreasonable behaviour" in international arbitration and encouraged by leading arbitral institutions.[25] Arbitral institutions could assume more delicate role by monitoring, supervising and sanctioning an arbitrator who misbehaves in arbitrations under the rules of the institutions. [26]

This thesis deals with the power and the duty of arbitral institutions to preserve the integrity of arbitral proceedings by upholding and enforcing ethical minimum standards in international arbitration and also highlights the significant role of arbitral institutions in holding the participants of an arbitration accountable. This objective can be achieved by arbitral institutions' role making function and by exercising their multifarious power at the time of appointment and during the conduct of arbitral proceedings. The qualities and ethical duties that is required in an international arbitrator will be discussed in the first section. In the second section, arbitral institutions rule enforcing role will be discussed by not appointing the arbitrator who may jeopardize arbitral proceeding and by sanctioning. In addition, thesis will give specific references to three Turkish Arbitral Institutions rules and to compare them with some of the major international arbitration institutions worldwide. Finally, thesis will explain

[22] Cristina Florescu, ' Arbitral Tribunal Power to Disqualify Unethical Counsel' (2015) 4(4) JEDEP 15,23
[23] Günther J.Hovath & Stephan Wilske (edn.), Guerrilla Tactics in International Arbitration (1st edn KLI 2013) , 186
[24] Stephan Wilske, 'Sanctions againts Counsel In International Arbitration - Possible, Desirable or Conceptual Confusion' (1995) 8(2) CAAJ 141, 143
[25] Timar (n 10), 108
[26] Hovarth & Wilske(n 23), 190

the ways and means at the disposal of arbitral institutions to preserve the integrity of arbitral proceedings and present a humble conclusion.

II- THE RULE MAKING ROLE OF ARBITRAL INSTITUTIONS

"Private dispute resolution among commercial men is as old as commerce itself."[27] In spite of its ancient history,[28]arbitration was regarded as a "bastard remedy" and arbitrators as "caricatures of their judicial siblings through the mid-nineteenth century in Europe and the United States.[29]

Arbitration agreement was routinely voided[30] and arbitral award was subject to intense judicial scrutiny, sometimes even rewriting prior to the twentieth century.[31] Today, the scene has changed. International arbitration holds an lofty status and is generally revered as vital to world trade.[32]Arbitration is believed the normal way so as to resolve international business disputes, and almost all international agreements contain arbitration clauses.[33]Any nation must adjust its laws to accommodate the demands of international arbitration if they are interested in participating in the global economy.[34] It is said that; ‘’International arbitration has transformed itself from a "bastard remedy" into the crown prince of international dispute resolution’’[35]In its new status, international arbitration needs articulated ethical norms to guide and regulate participating attorneys, parties, arbitrators.[36] In addition, international arbitration dwells in an ethical no-man's land.[37]Arbitration sets in a jurisdiction where neither party's counsel is licensed.[38] The effect of national ethical codes[39] is generally vague in extraterritorial area, as is the application of national ethical rules in a non-judicial forum such as arbitration.[40]

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[27] Craig, ‘’Some Trends and Developments in the Laws and Practice of International Commercial Arbitration’’, 705

[28] The ancient Sumerians, Persians, Egyptians, Greeks and Romans all had a tradition of arbitration. The development of a formal system of private dispute resolution is attributable to the medieval English courts of fairs and boroughs, which could adjudicate disputes between merchans and trades at markets and fairs.

[29] Thomas E. Carbonneau, ‘’Arbitral Justice: The Demise of Due Process in American Law’’ (1996) 70 TUL. L. REV. 1945, 1947

[30] Throughout the nineteent century, courts in the United States and England frequently invoked the doctrine of ‘ouster’ to void contractual arbitration clauses which they viewed ‘’ as unlawful circumventions of judicial jurisdiction and as denials of judicial justice.‘’

[31] For instance, court was permitted and routinely did revise legal determinations made by arbitrators in England.

[32] Stephen T. Ostrowski & Yuval Shany, ‘’Chromalloy: United States Law and International Arbitration at the Crossroads’’ (1998) 73(5) N.Y.U. L. REV. 1650, 1650

[33] Klaus Peter Berger, International Economic Arbitration, (1st edn. K.1993) 62

[34] William W. Park, ‘’National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration’’ (1989) 63(3) TUL.L.Rev. 647,680

[35] Catherine A. Rogers, ‘’ Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration’’, (2002) 23(2) MICH. J.INT’L L. 341, 350

[36] Ibid, 350

[37] Catherina Rogers, Ethics in International Arbitration (1st edn. OUP 2014), 96.

[38] William W.Park, ‘’National Legal Systems and Private Dispute Resolution’’ (1988) 82 AM. J. INT’L L. 616,628

[39] At this crucial point, it is worth pointing out that Turkey is one of those countries who are concerned about developments in this global area and has created its own international arbitration code in accordance with international arbitration principles, international conventions and international arbitration institutions’ rules and usages.

[40] Catherina Rogers, ‘’ Contex and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration’’ (2002) 39(1) Stan.J.Int’L L. 1, 75

Institutions have a potentially prominent position when it comes to incorporating ethical standards within the rules of arbitration.[41] Needless to say, their role of managing the process is very critical in ensuring that unethical behaviour is stamped out in arbitration.[42] To come up with a code of certain minimum ethical rules and obligations that bind all participants in arbitration under particular institutional rules is within the arbitral institutions' prerogative.[43] Actually, contemporary ethical rules should oblige arbitrators, parties, their counsel, experts and witnesses to comply with this code. Particularly, arbitral institutions may well support regulation of counsel conduct by formulating rules interested in their behaviour.[44] These rules should empower arbitral tribunals to discipline counsel with sanctions when counsel engages in unethical behaviour. Moreover, an arbitral institution could easily provide in its rules that Parties in arbitrations may only be represented by counsel who has assured the institution that he or she intends to abide by these rules.

A- Basic principles of ethics for commercial arbitrators:

Although the primary source for the obligations of an arbitrator is in the parties' agreement, in general, parties do not specify the particulars of the arbitrator's obligations but instead select a seat of arbitration and then incorporate one of the standard sets of institutional rules.[45] Thus, it is possible to examine the major arbitral institution rules, the specific ethical rules from the arbitral institutions as well as the laws that govern arbitration[46] and from this to synthesize the generally accepted ethical obligations of arbitrators.

a. Duty of Independence and Impartiality

The principle of that an arbitrator has a duty of independence and impartiality in international arbitration is a fundamental and universally accepted.[47] At first sight, ‘independent’ and ‘impartial’ seem virtually

[41] Hovarth & Wilske (n 23), 25
[42] Rogers, ‘‘Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration’’ 80
[43] Wiiliam W.Park, ‘‘National Legal Systems and Private Dispute Resolution’’,628

[44] Hovarth & Wilske (n 23), 25
[45] For example, the American Arbitration Association and the American Bar Association have collaborated to form The Code of Ethics for Arbitrators in Commercial Disputes. The International Bar Association has also created a code of Ethics for International Arbitrators. These two codes generally cover the same concerns. However, they differ in a few respects. The American Arbitration Association/American Bar Association code consists of black-letter canons with commentary that is similar to the American attorney code of ethics, and it is written in a "friendly" tone, while the International Bar Association code has a more statutory format written in a somewhat prohibitory tone.
[46] Following the lead of the UNCITRAL Model Law, several nations have enacted arbitration legislation which sets out the role of arbitrators.
[47] James Ng, ‘When the Arbitrator Creates the Conflict: Understanding Arbitrator Ethics through the IBA Guidelines on Conflict of Interest and Published Challenges’ (2015) 2(23) MCGILL J.D.R., 23

similar concept.[48] However, there is a distinction between the concepts of impartiality and independence. Impartiality is the absence of any bias in the mind of the arbitrator in favour of, or prejudiced against, a particular party or the matter in dispute.[49] On the other hand, the concept of independence is related to personal, financial, professional actual or past dependant connection or relationship with a party or the party's counsel.[50] Impartiality is needed to ensure that justice is done while independence is needed to ensure that justice is seen to be done.[51] Therefore, impartiality and independence are different concepts, as Bishop and Reed note; '' An arbitrator who is impartial but not wholly independent may be qualified. In selecting party-appointed arbitrators in international arbitration, the absolutely inalienable and predominant standard should be impartiality''.[52] A clearer example of the concept of independence can be found in the International Chamber of Commerce rules that require each arbitrator to disclose whether there pre-exist any kind of relationship, past or present, direct or indirect, with any of the parties or counsellors assisting them to the Secretary General that may affect their independence, including " any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration."[53]

While independence is determined by an objective standard, impartiality is quite subjective that it goes to the actual state of mind and where applicable, ensuing conduct of the arbitrator.[54]Therefore, a lack of impartiality can be difficult to prove.[55]Partiality is sometimes associated with bias[56]; while the reasonable anticipation of partiality by an arbitrator is identified with the reasonable apprehension of bias, consequently courts review the facts and circumstances in which the arbitrator exercised his or her functions before inferring whether there was bias, and the courts have consequently relied upon a finding of apparent bias rather than actual bias in determining arbitrator impartiality.[57] In addition, impartiality

[48] Bruno Manzanares Bastida, ' The Independence and Impartiality of Arbitrators in International Commercial Arbitration' (2007) 6 Rev.E-Marcatoria 1,3
[49] Chiara Giovannucci Orlandi,' Ethics for International Arbitrators' (1998) 67 UMKC L. Rev. 93,108
[50] Laurence Shore, ''Disclosure and Impartiality: An Arbitrator's Responsibility Vis-6-vis Legal Standards'' (2002) 57 J. DISP. RESOL. 34, 35
[51] Ng (n 47), 26
[52] Bishop D. Reed L., 'Practical Guidelines for Interviewing, Selecting and Challenging Party Appointed Arbitrators in International Commercial Arbitration' (1998) 14(4) AI 345, 350.
[53]INTERNATIONAL CHAMBER OF COMMERCE RULES OF ARBITRATION art.11.3 (2017) [hereinafter "ICC ARBITRATION RULES'].
[54] Leon Trakman, ''The Impartiality and Independence of Arbitrators Reconsidered' (2007) 10 INT.ARB. 999,1007

[55] Orlandi (n 49),94.
[56] Some arguments used to challenge an arbitrator; 'Arbitrator's comment that Portuguese people were liars' The Owners of the Steamship 'Catalina' and Others and The Owners of the Motor Vessel ' Norma'(1938) 61 LIL.Rep.360 , 'Arbitrator being a former official adviser of the government' Buraimi Oasis arbitration, ' Allegation of past partial behaviour of the arbitrator' Tracomin S A v. Gibbs Nathaniel (Canada) LTD and another [1985] 1 Lloyd's Rep. 586 , 'Conferring with a party by the party-appointed arbitrator' Sunkist Soft Drinks Inc. v. Sunkids Growers Inc. (1993) 10 F.3d 753 (11th Cir.), ' The arbitrator and another arbitrator are members of the same baristers, professional association or social organization' LCIA Reference no. UN97/X11(June 5, 1997), LCIA Reference no.81132(November 15,2008) and LCIA Reference no.1303 (November 22,2001).
[57] Trakman (n 54), 1007

must be demonstrated via some external behaviours which establish the arbitrator's state or frame of mind, like a professional or personal relationship with one of the parties that may reasonably give rise to a conclusion that an arbitrator was partial, if there is no such relationship, partiality may be demonstrated through the arbitrator's conduct.[58] Whether there are justifiable grounds for suspecting a lack of impartiality or independence is ultimately, as the English High Court reiterated recently, a matter that is 'classically appropriate for a case-specific judgment'[59].

In practice, "national courts and arbitral institutions generally base their decisions about impartiality entirely on 'appearances' and, in at least some significant number of cases, will disqualify presumptively unbiased arbitrators merely because the apparent risk (that is, the appearance) of actual bias is unacceptably great.''[60] In ''*Locabail (UK) Ltd v. Bayfield Properties Ltd*''[61], the case concerned a solicitor sitting as a deputy judge who discovered during the proceedings that his firm had acted in litigation against the ex-husband of one of the parties. The court held that the pecuniary interest involved in the case were not such nature to automatically disqualify the judge but that it had to be determined on the basis of the particular facts of the case whether there was a 'real danger of bias'. In the case, the court denied such a danger since the judge's knowledge of the case involving the ex-husband was limited and the judge's interest in the fees earned by his law firm from that case tenuous and insubstantial.[62] The English Court of Appeal stated explicit guidance on possible circumstances where a lack of independence by an arbitrator vis a vis one of the parties cannot be raised, including "previous political associations," previous memberships of "social or sporting or charitable bodies, "to act for or against any party, solicitor or advocate" involved in an arbitration and it is well accepted legal principle governing independence adjudication that no one should be a judge in his own cause.[63] Thus major shareholders

[58] Murray L. Smith, 'Impartiality of Party-Appointed Arbitrator' (1990) 6(4) Arb.Int'l 320,330

[59] In the ''W. Ltd. v. M. Sdn Bhd, [2016] EWHC (Comm)'' case; the sole arbitrator in that case was a partner of a law firm which regularly advised an affiliate of the defendant, which in turn earned significant remuneration for that work. On this basis, the claimant sought to challenge the award on the ground of apparent bias. It was common ground that the arbitrator himself had never done any work for the defendant and had, for the last ten years, operated effectively as a sole practitioner who did not concern himself with the affairs of the partnership. Ordinarily, that would be the end of the matter. However, IBA Guidelines, para. 1.4 includes as a condition to be disclosed circumstances in which '[t]he arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant income therefrom'. What was worse, para. 1.4 fell within the 'Non-Waivable Red List', which pertains to matters which trigger automatic recusal. Counsel for the defendants submitted that the IBA Guidelines were 'pretty emphatic', a very powerful factor', and even that a real possibility of bias had arisen 'because that is what we are told through Paragraph 1.4'. J. Knowles unhesitatingly gave short shrift to this argument.

[60] Silvano Domenica Orsi, ''Ethics in International Arbitration: New Considerations for Arbitrators and Counsel' (2013) 3 Arb.Brief 92,95. Historically, a lack of neutrality or indeed the appearance of impartiality were not requirements in some countries. In medieval Iceland, for example, arbitrators were neither required nor expected "to be neutral or impartial so long as they acted in moderation and remained effective." Moreover, eleventh century France saw parties selecting "relatives, friends or business associates" to arbitrate disputes involving property.

[61] *Locabail (UK) Ltd. v Bayfields Properties*[2000] 1 All ER 83

[62] *Locabail (UK) Ltd. v Bayfields Properties*[2000] 1 All ER 83

[63] *Locabail (UK) Ltd. v. Bayfield Properties Ltd*. [2000] QB 451 at [480] para. 25 (Eng.).

or directors of the parties are not suitable arbitrators.[64] On the contrary, minor shareholders may not give rise to lack of independence, since the value of which will not be significantly affected by the outcome of an arbitration.[65] In ‘’ *Laker Airways v FLS Aerospace*’’[66], it is discussed that whether a barristers who are appointed as arbitrators being in the same chamber as one of the parties counsel may be allowed or not and the English Court held that the fact that an arbitrator was from same chambers as counsel for one of the parties did not lead to justifiable doubts as to his impartiality or independence.

In general, though, independence and impartiality of the arbitrator are required in the institutional arbitral rules.[67] This is the case in the World Intellectual Property Organization,[68] London Court of International Arbitration[69], the United Nations Commission on International Trade Law Arbitration Rules[70], American Arbitration Association.[71]The majority of arbitral institutions and judicial decisions have adopted a standard of "justifiable doubts" for the arbitrator's independence or impartiality.[72] At the IBA Rules of Ethics for International Arbitrators,[73] which provides us with an explicit definition of these terms. According to Article 3 of these rules, "partiality arises where an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties."

Amongst the Turkish institutions, TOBB Arbitration Rules article 19(1) solely mention the impartiality of the arbitrators and avoid the use of the word “independence”. The TOBB Rules may be seen as an intended disregard of the test of independence and choice in favour of a more subjective criteria consciously. Nonetheless, this interpretation in favour of a more subjective test may give rise to an

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[64] Orsi (n 60), 96
[65] *AT & T Corporation and another Saudi Cable* [2000] 2 Lloyd’s Rep 127
[66] *Laker Airways v FLS Aerospace*[1999] 2 Lloyd’s Rep 45.
[67] The ICC is the noted exception. The ICC Article 11(1) 2017 provides that: "Every arbitrator must be and remain independent of the parties involved in the arbitration."
[68] World Intellectual Property Organization (hereinafter ‘’WIPO ARBITRATION RULES’’) art. 22 (2014).
[69] The London Court of International Arbitration (hereinafter ‘’LCIA’’). THE LCIA RULES arts. 5.3 (2014). Some decisions of LCIA regarding impartiality and independence; (Parties Not Indicated) LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No. UN96/X15, 29 May 1996; (Parties Not Indicated), LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No. 9147, 27 January 2000; (Parties Not Indicated), LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No. 1303, 22 November 2001; (Parties Not Indicated), LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No. 0252, 1 July 2002; (Parties Not Indicated), LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No.UN3490, 21 October 2005; (Parties Not Indicated), LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No. 81160, 28 August 2009.
[70] UNCITRAL Arbitration Rules (2013) art. 6(7), 12(1) [hereinafter 'UNCITRAL Arbitration Rules'].
[71] American Arbitration Association Rules art. 18 (2013) [hereinafter "AAA ARBITRATION RULES'].
[72] Most arbitration institutions adopt this standard. THE LCIA RULES art. 10 (2014), AAA Arbitration Rules art.17 (2013). In addition, England uses a stricter standard and requires a "real danger of bias" to be present. ‘AT&T Corp. v. Saudi Cable Co., 2 LLOYD'S REP. 127 (2000)’ (discussing and establishing the standard that arbitrators-and subsequently the award-may be challenged only if a "real danger of bias" exists).
[73] International Bar Association Rules of Ethics for International Arbitrators art.3 (1987) [hereinafter IBA Rules]. The International Bar Association **(**IBA) has published practice rules and guidelines for use in international commercial arbitration. IBA rules and guidelines are not binding but may serve as an important resource for practitioners and arbitrators.

unintended ambiguity. In the context of TOBB Rules, the independence of an arbitrator would be more likely to be interpreted as incorporating both the tests of independence and impartiality together. According to the Istanbul Arbitration Association's Code of Ethics[74] Rules articles 1(1), 2(1) and 3 as well as article 12 of the ISTAC Rules also contains detailed provisions regarding the independence and impartiality of arbitrators. ITOTAM Arbitration Rules art. 14 using either of the terms.

At first sight it may be thought that no valid distinction can be drawn between the concept of independence, impartiality and neutrality, but the neutrality of an arbitrator goes much further than the other two concepts.[75] The concept of neutrality reflects an objective status and is linked to the nationality of the arbitrator, also requires that the arbitrator is intermediate and equidistant in thought and action throughout the arbitral process.[76]

In addition, this is predicated on the assumption that an arbitrator who shares the same nationality, culture and language as one of the parties will be susceptible or sympathetic to that party and to their position in the arbitration, with obvious concerns for both the fairness of the process and ultimate award, as the acceptability of the award will be dependent on the quality, skills and credibility of the arbitrators who deliver it.[77] Nonetheless, it is common practice and foreseen in most arbitration rules that a sole arbitrator or a chairman should be a different nationality than either party, and it is submitted in such cases the exclusion of an arbitrator with the same nationality as either party is based more on the implied agreed qualifications of the arbitrator than on the basis of his perceived lack of impartiality.[78] On the contrary, impartiality requires an investigation to determine evidence of bias.[79] By virtue of the difficulties

[74] This Code has been prepared by the Istanbul Arbitration Association and sets forth the ethical rules the arbitrators must comply with. The decision-making process carried out by arbitrators will only be perceived as fair and just by all the persons and institutions involved provided that the arbitrators possess the qualities specified in the Code of Ethics and act in accordance with such Code through the arbitration proceedings. The main aim of this Code is to ensure the fair and proper conduct of the arbitration proceedings and establish a means to serve as a guide on how embody the intangible attributes required of arbitrators such as impartiality, independence, fairness, honesty, competence, conscientiousness, discreetness and prudence in practice. A cooperation protocol is signed between Istanbul Arbitration Centre (hereinafter ISTAC) and Istanbul Arbitration Association (hereinafter ISTA) so as to provide a multifaceted support to help build up a sectoral structure in arbitration area and to develop the arbitration culture in Turkey on 18 July 2018.

[75] Margaret L. Moses, The Principles and Practices of International Commercial Arbitration, (2rd ed. CUP 2016), 140
[76] Bastida (n 48), 5
[77] M. Scott Donahey, ''The Independence and Nationality of Arbitrators'' (1992) 9(4) J. Int'l Arb. 31, 32
[78] *Re The Owners of the Steamship '' Catalina" and The Owners of the Motor Vessel '' Norma"* [1938] 61 L1 L Rep.360.
[79] Rom K.L. Chung, ''Conceptual Framework of Arbitrators' Impartiality and Independence'' (2014) 80 ARB INT. 2, 3

in establishing in practice, the need to look for external behaviour that establishes the arbitrator's state of mind is necessary.[80]

A lack of neutrality does not automatically result in partiality, yet an arbitrator may not be deemed neutral if he or she is behaving partially[81] and the presiding arbitrator must be, and be seen to be, entirely neutral as well as impartial so parties from different nationalities will require the presiding arbitrator to have a different nationality.[82] The requirement that an arbitrator's nationality be different from that of the parties is reflected[83] in various international arbitration rules including UNCITRAL Arbitration Rules,[84] the AAA Rules,[85] LCIA Rules[86], the ICC Arbitration Rules[87] and the WIPO.[88]

Among the rules of the Turkish institutions, TOBB Arbitration Rules is the only set of rules that incorporate a limitation regarding nationality of arbitrator. TOBB Rules in article 17(2) follow the general approach by putting a default limitation on the nationality of the arbitrator and allowing an exception for an agreement of the parties. Under TOBB Rules, in cases where the parties are foreign nationals, the Council appoints the sole arbitrator or the chairman of the tribunal from a different country; unless the parties agree otherwise.

b) Duty of Competency

Arbitrators have a general obligations to resolve the parties' dispute includes an obligation to conduct the arbitral proceeding and the case with appropriate care so arbitrator has a duty of not to accept an appointment beyond her competency[89] which are specified some ethical rules.[90] Therefore, this can be said that there is a duty of due care.[91] In addition, there is a duty not to accept an appointment unless

[80] Hong-Lin Yu & Laurence Shore, Independence, ''Impartiality and Immunity of Arbitrators - US and English Perspectives'' (2003) 52 INT'L & COMP. L.Q 935, 936
[81] Feebily (n 3), 91
[82] Chung (n 78), 6
[83] Donahey (n 76),32
[84]UNCITRAL Arbitration Rules (Dec. 16, 2013) at 6.7
[85] AAA ARBITRATION RULES art. 12.4 (2014)
[86] LCIA Arbitration Rules art. 6 (2014)
[87] ICC Arbitration Rules art. 13.5 (2017).
[88] WIPO Arbitration Rules art. 20 (2014)
[89] Rogers, Ethics in International Arbitration, 96.
[90] IBA Rules of Ethics, Introductory Note and AAA/ABA Code of Ethics, Canon 1(B) (3)
[91] Rogers, Ethics in International Arbitration ,457. IBA Rules of Ethics R.2.3. (1987)

actually possessing the requisite skills, such as language,[92] experience[93], education[94] and unless the appointee is assured of being able to commit requisite time and resources to the arbitration, namely, unless able to accommodate the arbitration in his or her schedule.[95] These obligations also extend to a duty to decline appointment in arbitration for which a potential arbitrator is ill-prepared or ill-suited, whether by virtue of a lack of expertise or otherwise.[96] The arbitrator's duties of care and competency are in some respects similar to those imposed on other professionals, such as lawyers, architect or engineer.[97] In arbitration, the parties entrust an arbitrator with prominent task and they expect him to perform with due care.[98] This obligations include devoting the necessary time and attention to the case as well as addressing the evidence and submission with the skill and ability necessary to understand them.[99]

Among the Turkish institutions, Istanbul Arbitration Association's Code of Ethics is the only set of rules that includes duty of competency via Art. 2(2) and article 5.1(a).[100] Under rule 2(2), the prospective arbitrator should only accept appointment if he or she has sufficient knowledge of the language of the arbitration and is competent to resolve the dispute, otherwise the prospective arbitrator should decline the appointment.

c. Duty to Uphold the Integrity and Fairness of the Proceeding

[92] It is highly desirable that an arbitrator has an adequate working knowledge of the language in which the arbitration is to take place. If an arbitrator does not have a good knowledge of the language, it becomes necessary to engage an interpreter. Translating oral evidence accurately into another language is a very difficult task and it also adds considerably to the expense of the arbitral proceeding.

[93] It is becoming increasingly important for international arbitrators to show their awareness of the World of international trade relations and of the different traditions, aims and expectations of the people of that World.

[94] The most important qualification for an international arbitrator is that he/she should be experienced in the law and practice of arbitration. The AAA maintains a list of people experinced in arbitration from which arbitrators may be selected. The ICC does not maintain its own list of possible arbitrators, but relies upon its National Committees to put forward names.

[95] Henry Gabriel, Anjanette H. Raymond, ''Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards'' (2005) 5(2) WYO. L. Rev. 453, 457

[96] IBA ethics rules art. 2(2)(A prospective arbitrator shall accept an appointment only if heis fully satisfied that he is competent to determine the issues in dispute,and has adequate knowledge of the language of arbitration.)

[97] Datuk Sundra Rajoo, ''Importance of Arbitrators' Ethics and Integrity in Ensuring Quality Arbitrators'' (2013) 6(2) CONTEMP.ASIA ARB.J. 329, 332

[98] Alan Redfern, Martin Hunter, Costantine Pastarsides, Nigel Blackaby, Redfern and Hunter on International Arbitration (6th edn., OUP 2015), 268

[99] Gary B. Born, International Commercial Arbitration Volume II (2th edn., WK 2014), 1992

[100] According to provision; '' While the appointment of a prospective arbitrator is being considered, the prospective arbitrator may answer questions directed to him other by one of the parties or their representatives with the purpose of ascertaining whether he or she is suitable and qualified for the appointment. During such dialogue the prospective arbitrator may obtain information from one of the parties or their representatives regarding the general nature of the dispute but the most permit any discussion on the merits thereof. Any such communication must remain limited to the purpose of assessing whether any circumstances exist that could affect the arbitrator's competence with respect to the dispute in question as well we how much time the arbitrator should devote to the arbitration proceedings. An arbitrator should ensure that any party requesting contract with him or her limits the dialogue to this scope as well''.

The arbitrator is bound to conduct the procedure in a fair manner, uphold the integrity and treat both parties equally and respect their right to be heard.[101] It is important that an arbitrator not only uphold the integrity and fairness of the arbitration process, but also that the arbitrator give the appearance of doing so and these duties extend to all aspects of the proceedings.[102]Thus, an arbitrator should neither solicit appointment[103] nor accept an appointment if the arbitrator cannot conduct the arbitration promptly.[104] Arbitrator must take all reasonable efforts to prevent delaying tactics, harassment of the parties or other participants, or any other disruption of the arbitration process.[105]

If the parties set forth the arbitrator's authority in their agreement, the arbitrator's obligation include the duty generally to conduct the arbitration in accordance with this agreement that includes giving effect to provisions of the agreement regarding procedure(e.g., disclosure, hearings, evidentiary rules), timetables(e.g., time to render award).[106] In such a case, arbitrators should neither exceed nor fall short of the mandated authority.[107] The arbitrator is required to exercise authority completely and to abide by all provisions of the agreement.[108] This obligation is made express in some ethical rules and national laws.[109]

In addition, an arbitrator should not enter into any financial, business, professional, family or social relationship when serving as an arbitrator that would create a lack of impartiality or the appearance of a lack of impartiality.[110] This obligation may be extended for a reasonable time after the resolution of the case in circumstances in which there may be an appearance that the arbitrator was influenced by the anticipation or expectation of the relationship or interest.[111]

[101] Julian D.M.Lew , Julian A Mistelis, Stefan M Kröll, Comperative International Commercial Arbitration (1st edn., KLI, 2003), 282. UNCITRAL, art.18
[102] Gabriel, Raymond, 458.
[103] IBA Ethics Rules art. 2.4 (1987)
[104] Lew, Mistelis, Kröll, 280
[105] Born, International Commercial Arbitration Volume II, 1993
[106] Gabriel and Raymond(n 94), 458. ICC art.19, ICSID Rules, Art. 20(2), UNCITRAL art.19
[107] AAA/ABA Code of Ethics, Canon I(E).
[108] Rogers, Ethics in International Arbitration, 96
[109] ICC art.19, ICSID Rules, art. 20(2), UNCITRAL art.19
[110] IBA R. 3.2, 3.3 (1987).
[111] Gabriel and Raymond (n 94), 459

Among the Turkish Institutions, the most detailed provisions in ISTA Ethics Rules[112]which mentions not only fairness but also equality of arbitrations. The ISTAC Arbitrations Rules, Art. 19[113]entails such a duty only in terms of sole arbitrator. TOBB art. 26 and ITOTAM art. 21 also provide similar provisions.

d. Duty of Disclosure

To ensure compliance with the requirements of independence and impartiality, arbitrators are under a duty to fully disclose any personal interests or relationships with the parties or witnesses and update such disclosures, if circumstances change during the course of the arbitration.[114] Duty of disclosure is explicitly foreseen in most arbitration rules and laws.[115] In addition, the arbitrator's disclosure duty have a contractual aspect that follows from the implied term of the agreement between the parties and the arbitrator.[116] The rationale and character of the obligation explained in a U.S. state court decision as follows: '' It is beyond and question that an arbitrator has a duty of disclosure. Such a duty is predicated upon the enormous power, responsibility and discretion vested in the arbitrator and the very limited judicial review of the arbitrator's decisions. So often, significant sums of money at stake. And of course, an experienced arbitrator whose livelihood depends upon his reputation and skills, always recognizes there is a competitive market for such services. Thus, the duty of disclosure requires a certain degree of introspective reflection or what is commonly known as due diligence. While an arbitrator need not launch a full investigation into his past, an arbitrator must make a reasonable effort, consistent with the effort and care ordinarily exercised by a person who seeks to satisfy a legal obligation, to inform himself/herself of the interests, contracts, and/ or relationships that are required to be disclosed''.[117]

This duty encompasses to disclose all relevant facts[118] which they become known, any interests or relationships in the past or that involve family members, employers, partners or business associates.[119]

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[112] According to Article 1; '' The arbitrator shall conduct every stage of the arbitration proceeding independently and in a fair and just manner ans shall recuse him or herself on his or her own initiative where such conduct is not possible. The arbitrator shall treat the parties equally, fairly and equaitably and shall not represent any of the parties. To this end, the arbitrator shall not, either on behalf of or againsts, any party engage in any behaviour that could constitute a violation of the right to a fair trial or infringement of the right of defense of any one of the parties and shall avoid any expressions or actions that could create such an impression. ''

[113] Article 19 requires; '' The Sole Arbitrator or Arbitral Tribunal shall conduct the proceedings fairly and impartially, act in respect to the principle of the equality of the parties and ensure that each party has a full opportunity to present its case.''

[114]Rogers, Ethics in International Arbitration, 240

[115] AAA/ABA Canon 11 (2004, UNCITRAL Arbitration Rules art. 11(2013), ICC art. 11 (2017), IBA Rules of Ethics Art.3(2) and Art. 4.1 (1987), LCIA Art.5(3).

[116] Orlandi (n 49), 97

[117] *Karlseng v. Cooke*, 346 S.W.3d 85, 97

[118] The big question is what information is relevant and what is sufficient to justify an objection to the arbitrator. Due to different perceptions as to what facts may be relevant, some institutions prescribe in detail what types of information is required. Extensive guidelines can be found in Art. 4.2 of IBA rules of ethics.

[119] Ng (n 47), 26. AAA/ABA Canon II(A)(2) (2004)

In Saba Fakes v. Turkey[120] case, the arbitrator disclose that Turkey had appointed him to another ICSID Tribunal. The disclosing arbitrator was challenged and subsequently the challenge was dismissed.

Moreover, an arbitrator has an affirmative duty to inform herself of any possible conflicts of interest.[121] Arbitrators should use common sense to disclose those factors which objectively could be relevant, rather than remote or distant factors.[122] To apply a uniform acceptable test to all cultural environments is difficult, by virtue of the approach to challenges also has an influence on the extent of the disclosure requirements.[123] (paraf. Yap.kaynakların kontrolünü yap). The arbitrator's disclosure are intended primarily so as to enable the parties to ascertain whether prospective arbitrators satisfy applicable standards of independence and impartiality[124] as well as to exercise their challenge rights if they believe that these standards are not satisfied[125]. Therefore, disclosure helps to select the right arbitrator and avoids selecting an arbitrator who could subsequently be challenged by the other side on account of a conflict of interest.[126] In a LCIA case,[127] a prospective arbitrator disclosed that he was a partner in a firm that had previously advised the respondent in relation to the contracts which were the subject of the arbitration, even though the arbitrator had not been a member of that firm at the time when the advice had been given. Based on this disclosure, an LCIA division decided not to appoint the arbitrator.

The duty of disclosure is an ongoing duty for an arbitrator and arises whenever a prospective arbitrator is approached for appointment, continues throughout the proceedings until the arbitration terminated.[128]If new circumstances arise that may lead to any doubts as to an arbitrator's impartiality or independence, arbitrator should disclose once he becomes aware of them to the parties and to his fellow arbitrators.[129]Nevertheless, this rule should be applied realistically so that the burden of disclosure does not become so onerous that business people should not be discouraged who are best suited to decide disputes from becoming arbitrators.[130]The basis for disqualification due to a personal relationship with a party to the proceeding is different from disqualification for failure to disclose the relationship.[131]Even

[120] ICSID Case, ARB/07/20, *Mr.Saba Fakes v. Republic of Turkey*, Decision on the Claimant's Proposal for Disqualification of a Member of the Arbitral Tribunal of 26 April 2008.
[121] AAA/ABA Canon II(2)(B).
[122] Eastwood, ' A Real Danger of Confusion? English Law Relating to Bias in Arbitrators' (2001) 17 Arb Int 287, 298
[123] James H. Carter, 'Rights and Obligations of the Arbitrator' (1997) 52(1) DRJ 171, 172
[124] Orsi (n 60), 100
[125] Stephan Wilske, 'The Ailing Arbitrator - Identification, Abuse and Prevention of a Potentially Dangerous Delaying and Obstruction Tool' (2014) 7(2) CONTEMP. ASIA ARB. J., 300
[126] Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration (1st edn. KLI 2012) 95
[127] LCIA Reference No. UN 96/X15, Decision of 29 May 1996.
[128] Orsi (n 60), 100
[129] Yu, Shore (n 79), 940
[130] Peter Halprin, Stephan Wah, 'Ethics in International Arbitration' (2018)2018(1) Disp.Resol.87, 89
[131] Daele (n 125), 97

though, an arbitrator's relationship with a party might not be decisive, the failure to disclose the relationship would be sufficient for disqualification.[132]

Given the fact that all parties request, an arbitrator should withdraw after the disclosure.[133]If less than all the parties request the withdrawal, the arbitrator should do so unless specific procedures for challenging an arbitrator are set forth in the arbitration agreement.[134]Provided that the agreement sets forth procedures for removing an arbitrator, the procedures should be followed rigorously. Otherwise, withdrawal would not be mandatory, provided the arbitrator decides that the reason for the challenge is not significant,[135]that the arbitrator can act impartially,[136] and that withdrawal would cause un fair delay or expense to another party or would be contrary to the ends of justice.[137]

The leading American case on disclosure by arbitrators is '*Commonwealth Coatings Corporation v. Continental Casualty Company*'.[138]In the case at hand, one of the three arbitrator members of the tribunal had previously served as a consultant for one party.[139] In fact, he had worked for that party as an engineer. Upon his appointment, the arbitrator did not disclose his pre-existing business connections with the appointing party.[140]As soon as the other (losing) party became aware of this relationship, claiming the arbitrator's partiality, he asked the court to vacate the award. The Court held that arbitrators are required to disclose any interests or relationships which might give rise to partiality or the appearance of partiality and set put aside an award based on the principle of 'evident partiality' as the presiding arbitrator failed to a four to five-year consulting relationship with a party to the arbitration.[141] Nevertheless, the Court failed to provide a clear standard of impartiality and independence. While Justice Black said, "We should be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review", Justice White, in a concurring opinion, suggested that an arbitrator should not be automatically disqualified for having had a business relationship with a party if both parties are informed, or, if the parties are unaware of the relationship, but the relationship is trivial.[142]The fractured

[132] *Knickerbocker Textile Corp. v. Sheila-Lynn, Inc., 16 N.Y.S.2d 435* (1939)
[133] Carter (n 122), 58
[134] Daele (n 125), 80
[135] Stephan Wilske, 'The Ailing Arbitrator - Identification, Abuse and Prevention of a Potentially Dangerous Delaying and Obstruction Tool' ,301
[136] Daele (n 125), 81
[137] Lew, Mistelis, Kröll (n 100), 282
[138] *Commonwealth Coatings Corp. v. Cont'l Cas. Co*., 393 U.S. 145 (1968).
[139] Gabriel, Raymond (n 94), 461
[140] Gabriel, Raymond (n 94), 461
[141] *Commonwealth Coatings v. Continental Casualty Company*, 149
[142] Ibid at 151

Supreme Court decision has led to confusion in light of the diverging opinions of Justice Black and Justice White and it has gave rise to varied and inconsistent lower court decisions. In Commonwealth Coatings, the United States Supreme Court held for the first time that a duty of disclosure needs to be imposed upon the arbitrators.[143]

Among the Turkish institutions ISTAC art. 12(3) and ITOTAM art.14(2) and (3) mention duty of disclosure. However, the most detailed provisions in ISTA Ethics Rules art. 4.

e. Duty to Act in a Fiduciary Manner

Confidentiality which is the most prominent feature in the arbitral proceedings.[144] Some parties value confidentiality more than speed or economy.[145] Arbitration allows parties to resolve their disputes privately and with assurance that the substance of the proceedings will not be disclosed.[146]

Confidentiality generally addresses with the obligations of parties not to reveal information pertaining to the content of the process, evidence adduced and document produced, transcripts of hearing or award rendered.[147] In other words, confidentiality should preclude disclosure of any information or materials provided during arbitration proceedings, or disclosure and use of arbitral award in other arbitrations or state court proceedings.[148] The aim of the confidentiality is to prevent disclosure of information.[149] There is no domestic[150] and international consensus on the extent of confidentiality.[151]

The duty of confidentiality in relation to the arbitrator has not been viewed uniformly by all domestic courts.[152] Nonetheless, the predominant view is that arbitration a confidential process inherently and therefore arbitrators have a duty of confidentiality as a matter of course, whether express in the rules or

[143] Gabriel, Raymond (n 94), 416
[144] Gary B. Born, International Arbitration: Law and Practice (1st edn. KLI 2012), 199
[145] Rogers, Ethics in International Arbitration, 97
[146] Philip Rothman, 'Pssst, Please Keep It Confidential' (1994) 49(3) Disp. RESOL. J. 69,69
[147] Micheal Fesler, 'The Extent of Confidentiality in International Commercial Arbitration' (2012) 49
[148] Noussia (n 7), 26
[149] Brown A.C.,' Presumption Meets Reality : An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 16(4) AUILA 969,970
[150] Even though, English case law copes with confidentiality of arbitral proceedings, the English Arbitration Act 1999 makes any express reference to confidentiality and does not contain a provision on confidentiality. Yet, this omission was not regarded as an indication that confidentiality was not taken into consideration. The drafters of the English Arbitration Act 1996 finally decided against statutory provision for confidentiality in arbitration because of difficulties in the light of many exceptions and qualifications that would have to follow. Departmental Advisory Committee to conclude that the courts should be left to continue to work out its implications on a pragmatic case by case basis and also commenting that to do so might hurt English arbitration and create further litigation.

[151] Avinash Poorey and Ronan Feehily,' Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' (2017) Harv.Negot.L.Rev.275, 282
[152] Rogers, Ethics in International Arbitration, 96

not.[153] In addition, most national laws contain provisions expressly requiring that deliberations among member of arbitral tribunal be treated as confidential. Similarly, it is generally accepted that deliberations of the arbitrators are confidential in most of institutional rules[154] and by ethical or professional guidelines for conduct of international arbitrators. The arbitrator's confidentiality is less controversial or uncertain than in relation to the parties, presumably since the latter are the beneficiaries of the duty and thus the ones who can waive its entitlements.[155] An arbitrator has to preserve the confidential and private nature of the proceedings, namely, should keep all matters relating to the arbitration confidential and should never use confidential information for his own gain or personal advantage.[156] In addition, unless the parties give consent, an arbitrator is not allowed to communicate any detail or names.[157] Provided that an arbitrator has reached a decision, all parties should be informed of the decision before the decision is reported to anyone else.[158] If there is more than one arbitrator that decide the case, the arbitrator deliberations are not to be shared with anyone, since the confidentiality of the arbitral deliberations is central to the adjudicative character and integrity of the arbitral process.[159] Moreover, administrative rules govern confidentiality between the parties and the arbitrator and administrative body, yet not between the parties themselves.[160] An arbitrator has the responsibility and the power to maintain the privacy of the hearings and most institutional rules provide for the presumptive privacy of arbitral hearings.[161]The arbitrator may enforce this mandate by excluding from the hearing any non-parties or persons not essential to the proceeding, including witnesses not currently testifying.[162]

In order to provide a confidential arbitration, there are many institutional rules. Nonetheless, all institutional rules do not contain a provision concerning the confidentiality of the arbitration. The ICC Arbitration Rules is the first set of rules that comes to mind which does not explicitly provide for a

[153] Waincymer (n 11), 103
[154] IBA Ethics Rules 9, LCIA 30(2), WIPO Rules Art.76, ICSID Rule 15, ICC Art.22(3) and APPENDIX I – STATUTES OF THE INTERNATIONAL COURT OF ARBITRATION art. 6, ITO Arbitration Rules article 24(1) and ISTA Ethic Rules Art. 6.
[155] Redfern, Hunter, Pastarsides, Blackaby (n 97), 269
[156] AAA Canon VI(A)-(B).
[157] Rew, Mistelis, Kröll (n 100), 283
[158] Redfern, Hunter, Pastarsides, Blackaby (n 97), 270
[159] Waincymer (n 11), 104

[161] IBA R. 9 (1987), UNCITRAL RULES (2013) art.28(3), ICC Art.26 (2017), AAA Art.25, ICSID Rules Rule 32(2). LCIA Rules article 19(4) takes a slightly different approach and grants the discretion to make the hearings public to the arbitral tribunal as well as the parties. Under TOBB Rules art. 141 the publicity of the hearings is in theory harder to achieve: a mutual approval of the arbitral tribunal and the parties is required. ITOTAM art.32(5) states confidentiality as; ''Unless the parties agree otherwise, the hearings shall be confidential''.

[162] AAA R. 23 (2003)

confidential arbitration. This is a result of a conscious choice made by the ICC article 22(3) to leave the matter of confidentiality to the decision of the parties, arbitrators and local courts.[163]

Among the rules of the Turkish Institutions, TOBB Arbitration Rules article 33(2)[164] and ITOTAM art. 44[165] adopt a very similar wording to the ICC Rules and therefore bear the same consequences. The provisions that exists under both the ICC Rules, ITOTAM Rules and the TOBB Rules, do not entail a complete obligation of confidentiality by itself since they solely refer to trade secrets and "confidential information". Thus, the question of what should be deemed confidential is a matter that seems to be left to the discretion of the arbitral tribunal. Moreover, a party who is concerned about the disclosure of a document that contains trade secrets but at the same time bears value as an evidence, may well ask for such a document to be submitted solely to the tribunal or its chairman, without disclosing it to the other party. Nonetheless, this is suggested that such a procedure could place the arbitration procedure under the risk of violating the principle of due process, even in the presence of parties' consent; because due process is considered as a matter of public policy.[166]

E. Duty to Communicate

The duty to communicate is a duty which extends to all aspects of the proceedings, for instance, discuss the case with one party in the absence of the other.[167] It is important that an arbitrator communicates equally with the parties[168], hence the arbitrator should not participate in ex parte communications with parties unless the agreement of the parties otherwise provides[169] or except in unavoidable and justifiable circumstances; unless the communications concern purely procedural matters (of which the other party is then promptly informed), or unless the absent party failed to attend a meeting or hearing, having been

[163] Yves Derains, Eric A. Schwartz, Guide to the ICC Rules of Arbitration (2nd edn., KLI, 2005), 284

[164] Article provide that; "The Arbitral Tribunal shall take the necessary measures to maintain the commercial secrets and the confidential information belong to the parties that are evident in the file."

[165] According to Article 44; '' 1. The arbitral tribunal shall take appropriate measures to ensure the protection of trade secrets and confidential information disclosed during the arbitral proceedings. 2. The parties, arbitrators, members of the Arbitration Court, Secretariat personnel, witnesses, experts and everyone involved in the arbitration administered by ITOTAM in any capacity whatsoever, shall be obliged to keep the arbitral proceedings confidential. Persons acting on behalf of the parties during the proceedings shall also be obliged to keep the arbitral proceedings confidential.''

[166] Emmanuel Gaillard; John Savage (edt.) Fouchard, Gaillard, Goldman on International Commercial Arbitration (1st edn., KLI, 1999), 692

[167] Redfern, Hunter, Pastarsides, Blackaby (n 97), 269

[168] The UNCITRAL Arbitration Rules provide that the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, Article 15. ICC Rules contain provisions to a similar effect in Art. 22.4. However, ICSID Arbitrations Rules do not contain such a general statement, but detailed provisions ensure equality of treatment ;and if any party fails to appear present his case, a special default procedure must be followed. ICSID Arbitration Rules, Art.2.7. ISTA Ethics Rules art. 5.

given proper notice to do so.[170] Otherwise this would offend against the right to equal treatment.[171] For instance, The English appeal court stated that an arbitrator make an award against a party without having heard representation on its behalf, it is a breach of natural justice and misconduct for the purpose of the Arbitration Act 1950 and The Court stated that not only must the award be set aside, but the arbitrator ought to be removed from further conduct of the proceedings.[172]

However, parties will communicate with the prospective arbitrators, seeking to sound them out as to their qualifications and availability and as to selection of an appropriate presiding member in a multi-member tribunal. [173]This is a general rule that is also subject to arbitral rules that specifically provide for ex-parte communications and many institutional rules as well as the IBA/ AAA codes of arbitrator ethics forbid ex parte contracts.[174] When an institution is involved, parties will communicate via the institution in commencing the arbitration and formally selecting the tribunal.[175] This rule is subject to three explicitly defined and accepted exceptions; firstly, the arbitrator might communicate with a party concerning administrative issues[176], such as setting dates and times for hearings, if each party is informed of the communication and consulted in the determinations;[177] secondly, if a party with due notice fails to attend a hearing, the arbitrator might proceed with the case with the party that is present;[178]thirdly an arbitrator may discuss the case with one party if the parties request or consent to the discussion.[179] Moreover, provide that an arbitrator communicates in writing with a party, or receives written communication from a party, the arbitrator must provide the other party with a copy of the communication.[180] Where an arbitrator received a letter from a claimant but did not communicate this to a respondent, enforcement has been refused in this case.[181] Where an arbitrator conducted a meeting with one party alone but

[170] AAA Canon II(E) (2004); IBA R. 5.3 (1987).
[171] Doak Bishop, Margrete Stevens, 'The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy' 1,6
[172] *Modern Engineering v. Miskin* [1981] 1 Lloyd's Rep. 135,138
[173] Devlev F. Vagts, ' The International Legal Profession: A Need for More Governance' (1996) 90 AM. J.INT'L L. 250,259
[174] Sundaresh Menon, 'Adjudicator, Advocate, or Something in Between? Coming to Terms with the Role of the Party-Appointed Arbitrator' (2017) 34(3) JIA 347, 367
[175] Born, International Arbitration: Law and Practice, 135
[176] Nevertheless, the parties could give an arbitrator the right to communicate separately, perhaps on minor administrative matters where it is not necessary to have all parties present. Similarly, Rule 5.5. of IBA Ethics Rules indicates that substantial hospitality should not be accepted directly or indirectly from on a party.
[177] AAA Canon III(B)(6) (2004),
[178] Id. at Canon 1I(B)(6). UNCITRAL ARBITRATION RULES art. 28.2.
[179] AAA Canon III(B)(6)
[180] Canon Ill(C).
[181] Waincmyer (n 11), 254

provided a verbatim transcript to the other side, LCIA Court considered it to be a failure to act fairly between the parties.[182]

F. Duty to with due diligence

The duty of an arbitral tribunal to act with due diligence may be regarded as akin to exercising reasonable care and skill. One of the parties' objectives in agreeing to arbitrate is to obtain a speedy, efficient resolution of their dispute, therefore there is an obvious obligation upon arbitrator to carry out its task with due diligent. It is said; ' Justice delayed is justice denied'.[183]

Although historically procedural obligations concentrated on due process, fairness, independence and impartiality, over the time concerns have been raised with expense and delay in many arbitrations.[184] Many ethical codes[185] and some national laws impose express obligations on arbitrators to avoid unreasonable delay and expense, and a few sets of institutional rules or national laws endeavour to ensure that an arbitration is carried out with reasonable speed by setting a time limit for rendering an award.[186] Thus this is can be said that arbitrators should carry out their duties in a timely manner[187]. Whether this requirement is met is determined by the sound discretion of the arbitrator. These time constraints, however, are constrained by some arbitral rules that actually set out the time limits. In addition, sometimes arbitration agreement specifies particular time deadline or timetables for the arbitration. This obligation involves the duty to decline a nomination if the arbitrator is not sure of his or her capacity to meet prescribed deadlines.[188]

The duty of avoid any delay in the conduct of an arbitration should have a bearing at the appointment stage.[189]In addition, leading arbitral institutions have recognised the need to better ensure that arbitrators fully comply with their obligations of diligence and timeliness.[190] Particularly, ICC has

[182] Decision 10 (dated 13 February 2002) LCIA Court, reported in G.Nicholas & C.Partasides 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish' Arbitration International 23, no:1 (2007)
[183] Redfern, Hunter, Pastarsides, Blackaby (n 97), 268
[184] Waincymer (n 11), 87
[185] AAA/ABA Code of Ethics Canon I(F), IBA Rules of Ethics Art.1 and Art 7, ICC art.7
[186] Born, International Commercial Arbitration Volume II, 1995
[187] Redfern, Hunter, Pastarsides, Blackaby (n 97), 268
[188] AAA/ABA Canon I(B) (4), IBA Rules of Ethics Art. 2(3)
[189] Lew, Mistelis, Kröll (n 100), 283
[190] Born, , International Commercial Arbitration Volume II, 1997

establish a Task Force on minimizing costs and delay in ICC arbitrations.[191] Also other leading arbitral institutions consider an arbitrator's past record of timeliness in making future appointments.[192]

G. Duty Not to Delegate Duties and Complete the Mandate

The arbitrator should not delegate the responsibility to decide the case to another person, in other words, an arbitrator's obligations include the duty not to delegate his or her responsibilities or tasks to a third party.[193] Arbitrator's essential adjudicative functions such as the duty of deciding a case, attending hearings or deliberations, or evaluating the parties' submissions and evidence to others are personal and non-delegable duties.[194] In the Threlfall v. Fanshawe decision the arbitral tribunal commits that misconduct if it delegates decision to another.[195] Nonetheless, to obtain a range of assistance in connection with the arbitral proceedings from third parties common for arbitrators. Arbitrators may use clerical assistance in order to typing and organizing files, dealing with administrative matters; these tasks may be conducted either by secretarial or similar stuff.[196]

The primary obligation on an arbitrator is to make a final, binding, enforceable independent determination of a dispute which is described as *ne ultra petita partium.*[197] Even though most national laws and institutional rules permit arbitrators to resign from their positions, either with or without the consent of national courts or arbitral institutions, an arbitrator's duties include the duty to complete the mandate and provides limits on the power of an arbitrator to resign without good cause.[198] Arbitrator's acceptance of his or her appointment provides an implied undertaking so as to complete that mandate.[199] Therefore, resignation evaluates as a breach of this undertaking.[200] An arbitrator's resignation would generally be justified due to material changes in personal circumstances beyond the arbitrator's control, such as personal health or family problems requiring attention, incapacity, or conflicts of interest arising after commencement of the arbitration.[201] An arbitrator may well also resign where

[191] The Task Force report was revised in 2012.
[192] The revised 2012 ICC statement of acceptance requires prospective ICC arbitrators to state the 'number of currently pending cases in which they are involved'.
[193] Constantine Partasides,' The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' (2002) 18(2) Arb. Int'l 147,148. This duty widely reflected in ethical guidelines, national court decisions and commentary. For instance; in AAA/ABA Canon V(C), VI(B). The same duty is implicit in the IBA Art.2(3).
[194] Born, International Commercial Arbitration Volume II, 1999.
[195] *Threlfall v. Fanshawe* (1850) 19 LJQB 344
[196] Under some instutitional rules, this practice is permitted by restricting the secretary's duties. To illustrate, the ICC has issued 'Notes' regarding the appointment of secretaries which restrict and regulate the use of secretaries.
[197] Waincymer (n 11), 91
[198] Lew, Mistelis, Kröll (n 100), 281. AAA/ABA Code of Ethics, CANON I(H).
[199] ICC Rules Art. 11(5), ICSID Rules Art. 8(2)
[200] Born, International Commercial Arbitration Volume II, 2008
[201] Waincymer (n 11), 94. UNCITRAL Art.14(1).

some fraudulent or otherwise improper behaviour of the parties becomes known after acceptance of the appointment and also may include a change in professional circumstances(such as accepting a government appointment or an in-house legal position, or joining a new law firm, giving rise to an inescapable conflict or similar issue) or developments affecting the arbitrator's or the parties' counsels' law firm (such as conflicts or similar advertise).[202] The arbitrator's resignation may well have considerably adverse consequences for the parties. In particular, where a sole arbitrator is concerned, resignation may well cause substantial delays and expense for the parties that may need to repeat their submissions and will wait for new arbitrator to read the case. In the light of resignations' impact upon the parties, great care should be taken in invoking these grounds and should be discuss with the parties in advance, so alternative efforts should be undertaken to avoid the need for such a step.[203]

II- THE RULE-ENFORCING FUNCTION OF ARBITRAL INSTITUTIONS

Parties are allowed to choose the arbitrators or to choose a method for their selection in virtually all modern legal systems.[204] Party autonomy and consent have primary role in selection of arbitrators as with so many areas of international arbitration, the absence of agreement cannot be allowed to prevent or frustrate the arbitration.[205] There is main differences regarding arrangements for the appointment of arbitrators in terms of whether there is to be one or three arbitrators and in any case it is necessary to ensure that there is fairness in the appointment process.[206]

Therefore, arbitral institutions have a prominent role in the arbitrator appointment process. The role of arbitral institutions is particularly significant in the appointment process as well as in the control of arbitrators.[207] It is a truism that "arbitration is only as good as its arbitrators"[208] or, as Professor William W. "Rusty" Park expressed, "Just as in real estate the three key elements are 'location, location, location', so in arbitration the applicable trinity is 'arbitrator, arbitrator, arbitrator".[209]

A. The Outcome-Determinative Role of Arbitral Institutions in the Appointment and Control of Arbitrators

[202] Born, International Commercial Arbitration Volume II, 2009. AAA/ABA Code of Ethics, Canon I(H).
[203] Waincymer (n 11), 94
[204] Emmanuel Gaillard & John Savage(edn) (n 165), 453
[205] Waincymer (n 11), 256
[206] There are many different methods in which arbitrators can be selected; by direct agreement of the parties, by the modified inter-party processes including 'list system', by a professional institutions or arbitral institution, by a competent national courts, by existing arbitrators and by a trade or other association.
[207] Daele (n 125), 111
[208] Stephen R. Bond, 'The International Arbitrator: From the Perspective of the ICC International Court of Arbitration' (1991) 12(1) Nw. J. Int'l L. & Bus. 1, 5
[209] William W Park, 'Income Tax Treaty Arbitration' (2002) 10 GEO MASON L REV 803,813

a) The Outcome-Determinative Role of Arbitral Institutions in the Arbitrator-Appointment Process

The fact that whether arbitral institutions should have greater control over the appointment of arbitrators or not has been a controversial issue over the years. Some commentators took the position that it would be better if parties ceased to make their own appointments and the arbitral institution should control how the tribunal is constituted while respecting parties' criteria. [210] However, this idea is criticized by some commentators as; it would be suicidal for any arbitration institution to deprive parties of their right to select or at least nominate at least one arbitrator in reality.[211] Parties should continue to have a word in the constitution of the arbitral tribunal, at least on the international level. For example, any arbitrator who is nominated by the parties requires confirmation by the arbitral institution which is regularly controlled by the arbitral institution.

Arbitral institutions invariably have the power to appoint arbitrators under their own rules of arbitration and parties frequently agree to arbitrate in accordance with to institutional rules.[212] Different institutions adopt different methods for appointing arbitrators. For instance, The ICC Articles 11 through 13 provide that where there is to be a sole arbitrator and the parties fail to nominate him or her within 30 days from the communication of the Request for arbitration to the other party, he or she will be appointed by the ICC Court of arbitration.[213]

Even though arbitration is not to be conducted pursuant to institutions own rules, many of arbitral institutions are willing to offer their services as appointing authority.[214] Compared with professional societies and trade associations, the advantage of arbitral institution's involvement is their day-to-day involvement in and concern with international arbitration; they know what qualities to look for in the persons they nominate as arbitrators; and they maintain up-to-date records of persons who are active as arbitrators in international arbitrations.[215]

(a) An Arbitral Institution's Duty to Share Knowledge Relevant for an Arbitrator's Information with the Parties

[210] Jan Paulsson, ' Moral Hazard in International Dispute Resolution' (2010) 25(2) ICSID R: FILJ 339, 340
[211] Neil Andrews, 'The Roebuck Lecture 2017-Improving Arbitration: Responsibilities and Rigths' <www.ciarb.org.> (accessed 14.08.2019)
[212] One of the major reasons for parties to agree institutional arbitration is the role of the arbitral institutions in constituting the tribunal and removing or replacing arbitrators.
[213] Born, International Commercial Arbitration Volume II, 1663. UNCITRAL article 7 through 10; AAA Commercial Rules 12 through 16; LCIA Rules art.5(6) and art.7(1).
[214] Lew, Mistelis, Kröll (n 100), 245
[215] Jan Paulsson, The Idea of Arbitration (1st edn. OUP 2013), 152

The parties who wanted their cases to proceed as quickly as possible generally undermined this aim by selecting a 'top' arbitrator without first inquiring whether he or she had time available to permit case to be brought to a rapid conclusion.[216] Many arbitral institutions have responded to this issue particularly due to arbitration users complained about a real or perceived lack of time and cost efficiency in international arbitration.[217] In 2009, the ICC Court started to require prospective arbitrators agreeing to serve in ICC arbitral proceedings to disclose details confirming their availability as well as their pending cases and[218] to confirm that they can devote the time necessary to conduct the new arbitration diligently, efficiently and in accordance with the time limits stipulated in the ICC Rules of Arbitration.[219] According to article 13(1) of 2017 ICC Arbitration Rules, the ICC Court vaguely obliged to consider 'the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules'. Moreover, the ICC Court has decided not to confirm or appoint arbitrators because of their lack of availability.[220]

In certain jurisdictions[221], there is a tendency to appoint more or less exclusively elderly arbitrators since the fact that arbitrators are traditionally more mature in age is a delicate issue and international arbitration is dominated by relatively few grand old man.[222] As Jan Paulsson quite remarks, '' Individual reputations in this field grow only by the slow accretion of evidence of independence and fairmindedness in numerous instances when it really matters''.[223] Yet, with age not only experience and reputation but also a certain fragility and it would be unfair to accuse every elderly arbitrator or judge of not being able to diligently perform the given job since he or she has reached a certain age.[224] It is generally recognized that ability to conduct an arbitration according to the Institutional Rules has various facets, such as expertise, experience, qualifications and language but not physical and mental fitness.[225] On the contrary, Bond is stated that '' Law is one of the blessed professions in which age is considered to impart wisdom. Nonetheless, where an arbitration will obviously be complex and lengthy, a party may wish to

[216] Bond (n 207), 7
[217] Daele (n 125), 3
[218] Stephen Wilske, ' Crisis? What Crisis?- The Development of International Arbitration in Tougher Times' (2009) 2(2) CONTEMP. ASIA ARB. J. 187, 199
[219] Stephan Wilske, 'The Ailing Arbitrator - Identification, Abuse and Prevention of a Potentially Dangerous Delaying and Obstruction Tool', 281
[220] Kim M Rooney, 'The Secretariat's Guide to ICC Arbitration, Jason Fry, Simon Greenberg and Francesca Mazza; Arbitrating under the 2012 ICC Rules: An Introductory User's Guide, Jacob Grierson and Annet van Hooft' (2013) 7(1) DISP.RESOL.INT'L 88, 90. Dispute Resolution International. In LCIA art.5.4. has also made availability a requirement.
[221] English Arbitration Act known the most explicit rule in dealingwith an ' ailing arbitrator'. Under English Arbitration Act Art. 24, English Courts can remove unfit arbitrators, however, the English Arbitration Act does not prevent the appointment of unfit arbitrators or stipulate minimum requirements for suitable arbitrator candides.
[222] Yves Dezalay& Bryant G. Garth, 'Dealing in Virtue: International Commercial Arbitration and The Construction of a Transnational Legal Order' (1999) Soc.&Legal Stud. 8(4) 601, 602
[223] Paulsson (n 214),173
[224] Ibid, 602
[225] Rooney (n 219),95

try to determine whether the health of a potential co-arbitrator will allow him or her to function efficiently under conditions of stress, travel, etc.''[226]

Physical and mental fitness of arbitrator definitely be a criterion that parties who are interested in rapid and time efficient proceedings should consider, since some parties seeking to delay arbitration deliberately choose a busy or physically and mentally incapable of conducting the proceedings as required.[227] In this case, it is a pivotal question whether the arbitral institution should have power to restrain the parties from select this arbitrator or replace the arbitrator who is selected by parties or not.[228] The fact that the arbitral institutions virtually have much more information about the suitability, availability and physical or mental fitness of a candidate for being appointed as arbitrator in addition to what the candidate discloses voluntarily.[229] Thus, where an arbitrator candidate makes an incomplete disclosure regarding his or her relevant information, the arbitral institution should step in and insist that completes the statement of any relevant circumstances based on its own knowledge. Particularly in an arbitration that is involving a local and a foreign party (more relies on the arbitral institution to provide a level playing field by sharing its institutional knowledge with both parties).[230]

In the *Dustex*[231] case, a company tried to set aside an award by claiming that the presiding arbitrator ,who had selected by American Arbitration Association, had serious hearing problems, fell asleep and was confused and that caused him to ignore numerous legal objections and miss witness testimony. The Court brushed off all the contentions about the alleged physical and mental deficiencies of the chairman and simply stated that '' *Dustex* fails to articulate how its allegations actually prejudiced it to justify relief under the relevant section of the Arbitration Act''.

In another case[232] the chairman of the arbitral tribunal was diagnosed with an inoperable brain tumour and never informed the parties of this diagnosed. In 2013, the arbitral tribunal issued a decision in favour of Team Tankers and in January 2014 he passed away. The other party of arbitration set aside the arbitral award by arguing that he failed to disclose his condition. However, the Court dismissed since

[226] Bond (n 207) ,6
[227] Rooney (n 219), 96
[228] Bond (n 207), 8
[229] William W. Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 SAN DIEGO L. REV. 629, 669
[230] Ibid, 670
[231] A illustrative case reported in US. Ryan J.Foley, '' Company claims arbitrator couldn't hear, dozen off' (Yahoo Finance, 03.01.2014) <www.finance.yahoo.com> (accessed 15.08.2019)
[232] *Zurich American Insurance Company v. Team Tankers A.S.*

under limited grounds for challenge of an award under Arbitration Act there is no possibility but to try to equate non-disclosure of critical medical information with corruption.[233]

(b) An Arbitral Tribunal Should Show No Cronyism in the Appointment Process Arbitral institution should be cautious to prevent cronyism where appoint the arbitrators, i.e. awarding lucrative arbitrator mandates to friends or trusted colleagues. In the worst case, an arbitral institution's appointing committee considers such power to appoint arbitrators as a kind of self service by reserving the most interesting and lucrative mandates for members of the appointment committee.[234] In addition, following the call for more transparency in the appointment process of institutional arbitration, it is helpful provided an institution publishes the names of arbitrators on its homepage.[235]

B. The Outcome-Determinative Role of Arbitral Institutions in the Control (and Sanctioning) of Arbitrators

"Trust is good, but control is better"

Arbitral institutions rule making function is prominent, however, their control compliance of their rules and particularly sanction intentional breaches of its rules is even more important.[236]

(a) An Arbitral Institution Should Replace Arbitrators Who Are Unable or Unavailable to Perform Their Function

What is the effect of the arbitrators having failed to fulfil their obligations or not to perform their function[237] properly? For instance, an arbitrator may well not to disclose all relevant facts that objectively could affect his or her independence or impartiality; he or she may well fail to adopt an appreciate procedure or delay the proceedings by sloppy case management; or in extreme case he or she may well act in bad faith.[238]In other words, circumstances such as misconduct of the proceedings or the inability of an arbitrator to fulfil his/her functions can cause that arbitrator to be revoked and replaced by the relevant

[233] < www.freightwaves.com> (accessed 15.08.2019)
[234] The extreme case of the former President of the Romanian Chamber of Commerce and Industry (CCIR) who had exclusive authority to appoint arbitrators in all cases at the CCIR Court of Arbitration and obviously abused this position by soliciting a E 1 million bribe from a party to a case at his institution in exchange for the use of his influence on the arbitrators hearing the case; Marian Chiriac, 'Head of Romanian Chamber of Commerce Jailed' (balkaninsight.com, 18.06.2015) <https://balkaninsight.com/2015/06/18/romania-jails-officials-for-influence-peddling/>(accesed 15.08.2019)

[236] Jarred Pinkston, 'The Case for Arbitral Institutions to Play a Role in Mitigating Unethical Conduct by Party Counsel in International Arbitration' (2017) 32 CONN. J. INT'L L. 177, 181
[237] In many cases one of the parties may feel aggrieved that the arbitrators have failed them, since the procedure followed by the tribunal was not exactly what that party wanted; or arbitrators admitted or rejected evidence that one party considers it should not have had; or the arbitrator reached conclusions of law or fact and made an award, which a party feels is wrong.
[238] Lew, Mistelis, Kröll (n 100), 286

institution on its own initiative.[239] The reasons for the lack of performance of the arbitrator are irrelevant, they can be de jure or de facto.[240]

Generally, different institutional rules provide remedies dealing with those situations.[241] Under various institutional rules, the aim of such provisions is to prevent an arbitrator's actions or special circumstances to delay or cause misconduct of the proceedings; irrespective of whether he/she is negligent or not.

The normal remedy is the removal of arbitrator.[242]Violations of obligations of a judicial nature give rise to a right to have an arbitrator removed.[243]The violation of other duties such as the obligation of conduct the proceedings with the necessary care and diligence and to avoid undue delay, the same applies.[244] In the absence of replacement by the parties, the relevant body of the institution (such as the Council or the Court) is entitled to replace the arbitrator after taking the opinions of the parties and the arbitrators.[245] One of the pivotal question is the extent of the repetition of the arbitral proceedings after the removal and replacement of one of the arbitrators. The majority of institutional rules provide the discretion to decide on this issue to the newly appointed arbitral tribunal.[246] Among the Turkish Institutions, none of them contain any provisions concerning this issue under their arbitration rules. TOBB Arbitration Rules article 22(3) states that replacing one or more arbitrators shall not stop the time limit for rendering an award. Nonetheless, this provision seems to be only about the continuation of the time limit and not does not give any information regarding the procedure to be followed that concern the repetition of the hearings in case of a replacement of an arbitrator.

Many arbitral rules deal in more or less discrete manner with the physical and mental fitness of an arbitrator to serve in the envisaged arbitral proceedings.[247] Article 13(1) of the ICC Arbitration Rules allows the ICC Court to refrain from confirming arbitrator candidates who are unfit or lack the ability to conduct the arbitration in accordance with the ICC Arbitration Rules, which strive for cost- and time-efficient proceedings and to supplement these powers, Article 15(2) of the Rules allows the ICC Court to replace an unfit arbitrator on its own initiative when an arbitrator is prevented de jure or de facto from

[239] TOBB Arbitration Rules article 22(2); ICC Arbitration rules article 12(2); LCIA Arbitration Rules article 10, ITOTAM 18, ISTAC art.17.

[240] Park, 'Arbitrator Integrity: The Transient and the Permanent' ,656
[241] Wilske, 'Sanctions againts Counsel In International Arbitration - Possible, Desirable or Conceptual Confusion', 155
[242] Stephan Wilske, 'Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword' (2010) 3 CONTEMP. ASIA ARB.J.211, 216
[243] Wilske, 'Sanctions againts Counsel In International Arbitration - Possible, Desirable or Conceptual Confusion' 156
[244] Paulsson (n 214), 290
[245] Menon (n 173), 370
[246] ICC art. 12(4).
[247] Wilske, ' Crisis? What Crisis?- The Development of International Arbitration in Tougher Times' , 296

fulfilling his or her functions or when an arbitrator simply fails to discharge his or her mandate[248]; '' An arbitrator shall also be replaced on the Court's own initiative when it decides that the arbitrator is prevented de jure or je facto from fulfilling those functions in accordance with the Rules or within the prescribed time limits.''

According to The Secretariat's Guide to ICC Arbitration, Article 15(2) gives the ICC Court '' a power that enables it to fulfil one of its central functions: monitoring and policing the conduct of arbitrators''. The application of Article 15(2) is also described as not being '' a punishment for an arbitrator's poor performance, but rather a practical solution to further the parties' interests in a rapid and effective arbitration procedure''.[249]

The new LCIA Arbitration Rules deal with the issue of the fitness and availability of arbitrators in the most direct manner.[250] According to Article 5.4 of the LCIA Arbitration Rules, a candidate is required to furnish an undertaking confirming that they are " whether the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration." This means that pursuant to LCIA Arbitration Rules, an arbitrator is obliged to review and disclose whether he or she is able to ensure time-efficient proceedings and assuming that such disclosure is made, allows the institution to intervene early enough to prevent the appointment of an unsuitable candidate.

Moreover, the LCIA Arbitration Rules Art. 10.1 states that; '' The LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: (ii) that arbitrator falls seriously ill, refuses or becomes unable or unfit to act….''. The LCIA Arbitration Rules provide regulatory safeguards that are able to overcome the ensuring problems. Therefore, the Rules seem to have fully identified the issue of the ailing arbitrator.

The International Centre for Dispute Resolution Arbitration Rules 2014 in Article 14(4) provide that "An Administrator, on its own initiative, may remove an arbitrator for failing to perform his or her duties." The ICDR rules do not deal with arbitrators' availability or fitness directly beyond the usual requirements of impartiality and independence. Nonetheless, Art. 13(1) requires arbitrators to '' act in accordance with

[248] Paulsson (n 214), 290
[249] Rooney (n 219), 98. So far, the ICC Court has not applied Article 15(2). In one case, the arbitrator had promptly submitted a draft award upon being informed of the initiation of replacement proceedings against him and this draft award was of poor quality and consequently, the ICC Court decided not approve it but to proceed with replacement of the arbitrator.
[250] Wilske , 'Sanctions againts Counsel In International Arbitration - Possible, Desirable or Conceptual Confusion' , 297

the terms of the Notice of Appointment provided by the Administrator''. Moreover, in accordance with Article 15(1), "if an arbitrator resigns, is incapable of performing the duties of an arbitrator, or is removed for any reason and the office becomes vacant, a substitute arbitrator shall be appointed...." Even if the arbitrator is not necessarily of the same opinion, The ICDR Rules provide mechanisms for the replacement of the '' ailing arbitrator'' that is no longer capable of performing his or her duties.

(b) An Arbitral Institution Should Compensate Arbitrators in Light of Their Performance

Arbitrators contract result in reciprocal rights and protection as well as obligations.[251] One of the arbitrator principal right is right of remuneration. The arbitrator provides a private dispute resolution service for the parties according to agreed procedure and in exchange the arbitrator receives remuneration by way of fees.[252] In calculating the arbitrator's fee, virtually all institutional rules set forth varies methods being adopted.

UNCITRAL Rules authorizes the arbitral tribunal to initially fix the amount of its fees and Rules go on to provide that the appointing authority may 'comment' on or 'make any necessary adjustments' to the arbitrator's proposed decision regarding fees.[253] In addition, Rules provide for a binding adjustment by the appointing authority where the proposed fee is inconsistent with Art. 41(1). Therefore, the power to make such adjustment to the arbitrator's fee is exceptional and limited by the concept of an adjustment. Nevertheless, intended provide a meaningful check on arbitrator remuneration.

In the LCIA Rules, arbitral tribunal is allowed a substantial measure of influence over its remuneration. According to Art. 5(3), the LCIA's Schedule of Arbitration Costs provides that the tribunal shall agree in writing upon the applicable fee rates in accordance with said Schedule.[254] The arbitrators remain responsible for reporting the hours ,that they have worked, which then form the basis for the LCIA to fix arbitrators fees.[255]

The 2017 ICC Rules take a slightly different approach since it is minimizing the role of the arbitrator and the parties in fixing fee. The ICC Rules provide that the ICC Court will fix the arbitrator fee according to a fee scale.[256] Moreover, The ICC may consider several factors while setting the arbitrator fee such as

[251] Born, International Commercial Arbitration Volume II,2020
[252] Lew, Mistelis, Kröll (n 100), 285

[254] LCIA Rules Art.5(3)
[255] Born, , International Commercial Arbitration Volume II, 2020
[256] ICC Rules art.37.

diligence and efficiency of arbitrator, time spent, rapidity of the proceeding, complexity of the dispute and timeliness of the submission of the draft award.[257] Particularly, the ICC Rules contain strict time limits that arbitrators and parties must comply with. Indeed, arbitral tribunal is expected to render awards within six months from the drawing up of the Terms of Reference, or within the time limit fixed by the ICC Court for this purpose.[258] For example, The Scottish Arbitrator, Mr.John D. Campbell Q.C. had promised submit a arbitration award by Chrismas 2005. However, he did not issue award until five years later. The Chartered Institute expell him after a disciplinary proceedings and brought disciplinary charges against him. He admitted that he disregard of professional standards.[259] Where a membership in a specific institution is relevant for an arbitration practitioner, such a sanction may be quite efficient.

This may be said that if the award is submitted after expiry of the relevant time, arbitral institutions may lower the arbitrator's fees where all these institutional rules take into account, unless it is satisfied that the delay is attributable to factors beyond the arbitrators' control or to exceptional circumstances. As a consequence, arbitrators may well have a strong incentive to submit awards within the relevant time limit to avoid being penalized by a fee reduction. Obviously, this pecuniary incentive to submit awards in time, creates important peer pressure within the arbitral tribunal and the threat of lowered fees is may be a valuable tool to incentivize tardy or overly busy arbitrators to complete their task.

(c) An Arbitral Institution's Power to Blacklist Misbehaving Arbitrators

Where an arbitrator who has either grossly misbehaved or simply is not able to comply with his or her mandate, nothing prevents an arbitral institution from not confirming or appointing him or her.[260] Such kind of "blacklisting" could be for a certain period of time. To illustrate, a certain arbitrator would not be appointed or confirmed for a two or five-year period, or for their lifetime.[261] In Cofely v. Bingham case, a trend of repeat appointments by a party, coupled with evidence of partisan behaviour during the hearings, Hamblen, J. stated that apparent bias on the part of the arbitrator had been established. An important factor in the court's decision was the fact that the appointing party maintained a 'blacklist' of arbitrators, which presumably comprised arbitrators who, in that party's estimation, were unlikely to render a verdict favourable to it. Hamblen, J. said that the notion that an appointee could fall out of

[257] Art. 2(2) in conjuction with Appendix III(arbitration cost and fees).
[258] Wilske, , ' Crisis? What Crisis?- The Development of International Arbitration in Tougher Times', 214
[259] Paul Hutcheon, ' High-profile kicked out of disputes body' (heraldscotland.com, 05.02.2012) <https://www.heraldscotland.com/news/13046496.high-profile-qc-kicked-out-of-disputes-body /> (accesed in 18.08.2019)
[260] Menon (n 137), 355
[261] Ibid, 355

favour with the appointing party depending on the anticipated outcome of the case at hand would be a matter of some import for any person whose income depended on appointments.[262]

Clearly, where an arbitrator is convicted for bribery since his or her decision in institutional arbitration was mostly guided by bribes, he or she could reasonably be banned for his or her lifetime to act as arbitrator under the rules of this arbitral institution. Where an arbitrator was sentenced to jail[263] because of misleading an arbitral institution, the fact that he or she is blacklisted by the same arbitral institution should also not come as a surprise (even beyond the time he or she serves in prison).

Moreover, an arbitral institution could have power to publicize misbehaviour of arbitrators by making a public announcement of the name of a lazy, inapt arbitrator or otherwise misbehaving arbitrator on the arbitration institution's webpage or in its publications may be an efficient way to warn the prospective other users of such arbitrator's services and demonstrate to the public that this arbitral institution is enforcing the integrity of its proceedings.[264]

CONCLUSION

Arbitration is an ancient methodology for dispute solving particularly in commercial matters. International commercial arbitration institutions are independent bodies that provide supervisory services over the arbitral procedure and these institutions have their certain set of rules applicable to the arbitral procedure and some of the relationships between the parties. Moreover, during the last century, there is a tremendous improvement in the international commercial arbitration area, a good number of arbitration institutions have been constituted with different rules of their own to be applied to the arbitration procedure in cases where parties provides for that specific institution's supervision and the application of its rules in the arbitration agreement.

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[262] *Cofely Ltd. v. Anthony Bingham and another, [2016] EWHC 260 (Comm).*

[263] As an example, a Court in Malaysia has gone further than usual in convicting an arbitrator to prison for making a false statement of independence. A British arbitrator was sentenced to six months in prison for making a false declaration of independence. According to the Malaysian Court, the arbitrator misled the Kuala Lumpur Regional Centre for Arbitrator into appointing him as an arbitrator on the basis of a false statement of independence. The rules do not expressly state that the arbitrator must take a statement of independence. However, the rules provide at art.5 that an arbitrator may be challenged if circumstances exists that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess any requisite qualification on which the parties have agreed. The Rules provide that the appointing authority shall have to secure the appointment of an independent and impartial arbitrator. Aceris Law LLC, ' Arbitrator Independence: Arbitrator Convicted to Prison for False Statement of Independence (acerislaw.com,2016) <https://www.acerislaw.com/arbitrator-independence-arbitrator-convicted-prison-false-statement-independence//> (accesed in 18.08.2019)

[264] The Chinese Arbitration Association Taipei Rules art. 41 reads that; '' in the event that arbitral tribunal fails tor ender its award after the agreed upon date… the CAA shall announce the names of the arbitrators in the Association's publication.''

By virtue of arbitration is a form of adjudication that not only resolves the dispute between the parties who have selected this method of private adjudication but also serves the justice system, arbitrators are indisputably the most prominent element of arbitration. Arbitration proceedings may only be fair and equitable if carried out by impartial and independent arbitrators. Arbitrators are subject to various obligations and responsibilities before, during and after arbitration proceedings are concluded. Such obligations and responsibilities may result from the national laws that govern arbitration, any agreements between the parties or in the case of institutional arbitration, the applicable institutional rules. Nonetheless, the arbitrators' obligations are not limited to those set forth by aforementioned rules. Arbitrators are also subject to particular ethical obligations. Due to the judicial nature of the service they provide by resolving disputes and the legally binding nature of the award they render, alike judges, arbitrators are required to possess a highly-developed sense of ethics. Furthermore, the parties should make specific inquiries to ensure that a prospective arbitrator is able to and willing to give sufficient commitment to the case regarding priority or time and the person that is asked will need information so as to answer such questions. In addition, the parties should not expect a prospective arbitrator to make a realistic assessment or whether or not he can give the case efficient commitment without he is given this information. Moreover, arbitrators have certain moral or ethical obligations.[265]

Circumstances such as misconduct of the proceedings or the inability of an arbitrator to fulfil his/her functions can cause that arbitrator to be replaced by the relevant institution on its own initiative. The reasons for the lack of performance of the arbitrator are irrelevant, they can be de jure or de facto. The purpose of such provisions under various institutional rules is to prevent an arbitrator's actions or special circumstances to delay or cause misconduct of the proceedings; regardless whether he/she is negligent or not. In the absence of a challenge or revocation by the parties, the relevant body of the institution (such as the Council or the Court) is entitled to replace the arbitrator after taking the opinions of the parties and the arbitrators.

As regards to Turkish system, Turkish courts, parties and law-makers have been somewhat sceptical and uninterested in international commercial arbitration for a long time. However, increasing the awareness and knowledge of international and domestic arbitration is a priority in Turkey which include close contact with bar associations for vocational training of attorneys on arbitration, attempts to unify

[265] Redfern,Hunter, Pastarsides, Blackaby (n 97), 270

the Turkish Court of Appeal's chambers reviewing appeals of challenges to arbitral awards and studies to unify the Turkish legislation on domestic and international arbitration for ease of reference and application, which are more or less in the same vein bur regulated under two different pieces of legislation. Law-makers have taken a significant step by enacting the Turkish International Arbitration Act of 2001. This can be seen by the numbers of applications the three different Turkish arbitration institutions have been receiving throughout the years[266]. In spite of their alleged flaws, the three different arbitration institutions of Turkey not only a considerably step in favour of arbitrations but also show great promise.

As a consequence; arbitral institutions not only have the power but also have the duty to preserve the integrity of arbitral proceedings. These aim can be achieved by appropriate rule making and rule enforcement. Namely, an institution's mission in the management of the proceedings is to provide maximum administrative and organizational support so that the arbitrators can effectively and efficiently perform their own critical function.

[266] The statistics show that the ISTAC received 6% of the total number of applications for arbitration received from the commencement of its operations on 26 October 2015 to 31 December 2015. This number increased to 27% between 1 January 2016 and 31 December 2016 and to 40% the following year, between 1 January 2017 and 31 December 2017. The rate of the applications received only in the first two months of 2018 was 27%. <.http://arbitrationblog.kluwerarbitration.com/2016/03/04/istanbul-arbitration-centre/>

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