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The Autonomy of the Parties' Free Will and its Limits when Selecting an Arbitrator

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Summary: The party autonomy, known as one of the basic principles in private law, is one of the fundamental pillars of arbitration and one of the fundamental differences between the arbitration procedure and the proceeding before the ordinary courts. Although a wide degree of party autonomy is provided to the parties in arbitration, this "freedom" is not boundless and is limited by a number of different limitations. This article point out limitations and diversity of national regulations in the matter of appointment of arbitrator.

Keywords: Party Autonomy, Arbitration, Arbitration Court, Arbitrator, Civil proceeding

1. Introduction

The arbitration process can be defined as a specific type of a civil process[1] or its separate counterpart[2], but it can also be considered as an independent judiciary that has its legal framework defined by the law of the particular state but with regard to international arbitration and its legal, economic and political implications, and that has a "supranational" meaning[3]. The parties expect a number of benefits that are associated with arbitration from this way of settling disputes. They rarely all occur at the same time, and they are rather an exception, and some cannot be considered an advantage in practice at all, or they are an advantage only under certain conditions, in particular disputes and, as a rule, only for one of the parties to the dispute.[4]

1 See also, for example, the Finding of the Constitutional Court dated 8 March 2011, Reference No. I. ÚS 3227/07, Clause 19. STAVINOHOVÁ, Jaruška, HLAVSA, Petr. *Civilní proces a organizace soudnictví* (Civil process and organization of the judiciary). Brno: Doplněk publishing house, 2003, p. 153–157.

2 BAUMBACH, Adolf, LAUTERBACH, Wolfgang, ALBERS, Jan, HARTMANN, Peter. *Zivilprozessordnung mit FamFG, GVG und anderen Nebengesetzen*. 73th edition. München. C. H. Beck, 2015, p. 2671.

3 LIONNET, Klaus. Rechtspolitische Bedeutung der Schiedsgerichtsbarkeit. In BERGER, Klaus Peter et al. (eds.). *Festschrift für Otto Sandrock zum 70. Geburtstag*. Heidelberg: Verlag Recht und Wirtschaft, 2000, s. 606. In this context, see also Resolution of the Constitutional Court dated 28 January 2009, Reference No. ÚS 37/08.

4 BERGER, Klaus Peter. *Internationale Wirtschaftsschiedsgerichtsbarkeit. Verfahrens-*

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In assessing the individual characteristics of the arbitration process, it is therefore necessary to consider whether a given typical feature is an advantage or rather a disadvantage for a particular dispute. Typical features of the arbitration process and the motive for choosing this out-of-court dispute resolution include the speed of proceedings, financial cost, non-publicity, unanimity, written form, selection of qualified arbitrators, process venues, process procedure, informality[5], and easier execution of foreign arbitration awards[6].[7] However, the central aspect, which fundamentally characterizes the arbitration process and represents one of the pillars of this out-of-court dispute resolution is the autonomy of the parties' free will.[8]

2 Autonomy of the parties' free will as a basic advantage of the arbitration processes

Autonomy of the parties' free will, which we know as one of the basic principles at the level of private law[9], has its procedural counterpart, especially in the arbitration process. If a person possesses the autonomy of free will within the

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und materiellrechtliche Grundprobleme im Spiegel moderner Schiedsgesetze und Schiedspraxis. Berlin, New York: Walter de Gruyter, 1992, p. 6 with other references, for example, casts doubt on the automatic time and financial advantage of the arbitration process and limits it practically to high-value disputes. Similarly, e.g. LÖRCHER, Gino. The New German Arbitration Act. *Journal of International Arbitration*, vol. 15/1998, issue 2, p. 86.

5 In this context, in the early 1990s, Berger asks whether the adjustment of the arbitration process is capable of reconciling the procedural interests of the parties, whether the arbitration process, which its typical element of informality, is not gradually becoming a more formalistic and confrontational process governed by a procedural strategy, more usual for general courts. See BERGER, Klaus Peter. *Internationale Wirtschaftsschiedsgerichtsbarkeit…,* p. 9 et seq. Given the latest developments, and rather a more strict approach to the issue, it is becoming easier to agree with that. Similarly, for example, MÜNCH, Joachim. Die Privatisierung der Ziviljustiz – Von der Schiedsgerichtsbarkeit zur Mediation. In Stiftung Gesellschaft für Rechtspolitik, Trier, Institut für rechtspolitik an der Universität Trier. *Bitburger Gespräche Jahrbuch 2008/I: 50. Bitburger Gespräche zum Thema "Privatautonomie in der transnationalen Marktwirtschaft - Chancen und Gefahren*". München: C. H. Beck, 2009, p. 182.

6 Especially with regard to the worldwide accepted New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded on 10 June 1958 in New York, Decree of the Minister of Foreign Affairs No. 74/1959 Coll.)

7 See also, for example, BLACKABY, Nigel, PARTASIDES, Constantine et al. *Redfern and Hunter on international arbitration*. 5th edition, New York: Oxford University Press, 2009, p. 31 et seq.

8 Similarly, for example, LIONNET, Klaus, LIONNET, Annette. *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*. 3rd edition. Stuttgart: Richard Boorberg Verlag, 2005, p. 55; SCHWAB, Karl Heinz, WALTER, Bernard. *Schiedsgerichtsbarkeit. Kommentar*. 7th edition. München: C. H. Beck a Helbing & Lichtenhahn, 2005, p. 1.

9 MELZER, Filip, TÉGL, Petr et al. *Civil Code - large commentary. Volume I* - Sections 1-117. *General provision*s. Prague: Leges, 2013, p. 265.

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material arrangement of his/her relations or relationships, he/she should be free to decide on the enforcement of his or her rights[10].[11]

Despite the existence of numerous bilateral and multilateral international treaties governing arbitration and creating unifying instruments within their material scope, national legislation is still central[12]. While the unified regulation applies in particular to the issue of the recognition and enforcement of foreign arbitral awards, national provisions govern the basic issues of arbitration such as arbitrability, the person to act as the arbitrator, the course of the arbitration process, etc. The differences in national legal regulations thus necessarily affect the degree of autonomy of the parties' free will. In this Article, the difference in national rules on the autonomy of the parties' free will in the choice of the arbitrator will be substantiated by the German arbitration rule contained in the Zivilprozessordnung[13] (hereinafter referred to as the "ZPO").

In the arbitration processes, the parties are not subject to a fixed procedure in advance, which they would have to undergo, but they may jointly form it themselves. It is the arbitration process that gives parties the choice of, among other things, the language or languages in which the process will be conducted[14] as well as where and when the process will be conducted[15], how the evidence will be carried out, etc. One of the most important manifestations of the autonomy of the parties' free will, however, is the choice of "their own" arbitrator[16], who best suits the party/parties, and who is the most trustworthy for them with respect to previous meetings, experiences or references.[17]

10 MÜNCH: *Die Privatisierung der Ziviljustiz – Von der Schiedsgerichtsbarkeit zur Mediation…,* p. 195.

11 Similarly, for example, the judgment of the Bundesgerichtshof of 3 April 2000, Reference No. II ZR 373/98.

12 In this context, it is necessary to reject the views admitting the so-called denationalized arbitration process. At the latest in the recognition and performance of a foreign arbitration award, particular national adaptations will have to be taken into account.

13 The German Code of Civil Procedure - Zivilprozessordnung in der Fassung der Bekanntmachung vom 5. Dezember 2005 (BGBl. I P. 3202, ber. 2006 P. 431, 2007 P. 1781) zuletzt geändert durch Gesetz vom 21.11.2016 (BGBl. I P. 2591), hereinafter referred to as ZPO.

14 See Section 1045 Subsection 1 of ZPO.

15 See Section 1046 Subsection 1 of ZPO.

16 However, not everybody considers designating arbitrators by the dispute party one of the fundamental characteristics and rights in the arbitration process. See PAULSSON, Jan. Moral Hazard in International Dispute Resolution. *Transnational Dispute Management*, vol. 8/2011, č. 2, p. 11: *„But there is no such right. Moreover, if it existed, it would certainly not be fundamental."*

17 Similarly, concerning the importance of choosing the right arbitrator, see Lord HACKING, David. Arbitration is only as good as its Arbitrators. In KRÖLL, Stefan M., MISTELIS, Loukas A., VISCASILLAS, Pilar Perales, ROGERS, Vikki M. *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 223 et seq.

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As it can be seen from what has been said above, this article will mainly focus on the autonomy of the parties' free will and its limits in the choice of the arbitrator, in the context of the Czech and German legal regulations.

3 Autonomy of the parties' free will and the person to act as arbitrator – a Czech and German comparison

With regard to appointing the arbitrator, the arbitration process is fundamentally different from proceedings before the ordinary courts. In civil legal proceedings, the judge for disputes arising pursuant to Section 7 Subsection 1 of the Civil Procedure Code from private law conditions is designated in accordance with the provisions of Section 36 Subsection 1 of the Civil Procedure Code on the basis of the work schedule, and the parties to the dispute cannot change the designated judge by their arrangement[18]. A different judge other than that designated by the work schedule or the senate may resolve the matter only if the absence of a judge or a panel is reasonable[19]. In the arbitration process, on the other hand, it is the parties that decide on who will be designated as the arbitrator, and how will s/he be designated, or appointed.

3.1 Conditions for the performance of the arbitrator's position in the Czech Republic

The Arbitration Act does not make any special requirements concerning the person of the arbitrator, as it is the case with the judge. The first condition, which must be fulfilled by a person, is stated in Section 1 (a) of the Arbitration Act defining the material scope of the Arbitration Act, stating that this law regulates the *"decision-making of property disputes by independent and impartial arbitrators*". Other prerequisites for the performance of the arbitrator's function are then regulated in Section 4 Subsection 1 of the Arbitration Act. On the basis of this provision, an arbitrator may be a "*citizen of the Czech Republic*[20]*, who is of full legal age*, *without criminal record and fully capable, unless a special regulation stipulates otherwise*." The arbitrator under this provision may be any natural person – a citizen of the Czech Republic who has reached eighteen years of age and has become fully capable of acquiring legal rights for himself/herself by acting legally, and of committing him/herself to legal obligations, i.e. of acting legally (Section 30 Subsection 1 in conjunction with Section 15 Subsection 2 of

18 See also PŘIDAL, Ondřej. In SVOBODA, Karel, SMOLÍK, Petr, LEVÝ, Jiří, ŠÍNOVÁ, Renáta et al. Civil Judicial Code. Comment. C. H. Beck, 2013, pp. 139 et seq. (Section 36).

19 The work schedule also determines the alternate in accordance with Section 42 Subsection 1 (d) of Act No. 6/2002 Coll., on Courts, Judges, Lay Judges and the State Administration of Courts and on Amendments to Certain Other Acts (The act on Courts and Judges), as amended. See also, for example, KOCOUREK, Jiří. *Zákon o soudech a soudcích. Komentář* (Law on Courts and Judges. Comment). Praha: C. H. Beck, 2015, p. 105 et seq.

20 For private relations with an international element, it is permissible for the arbitrator to be a foreigner in accordance with Section 118 of the the Private International Law Act.

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the Civil Code[21]), and who has not been convicted of a criminal offense unless s/he is regarded as if s/he has not been convicted (Section 4 Subsection 2 of the Arbitration Act)[22].

The law does not lay down other conditions regarding the person of the arbitrator. However, the parties to the dispute could have negotiated other special conditions in the arbitration agreement and only the one who would meet both the statutory conditions and the conditions laid down by the arbitration agreement could become the arbitrator. Provisions limiting the choice only to a person of a particular nationality, citizenship, or religion would also be admissible[23]. While such conditions are sometimes placed in context with discriminatory restrictions, such tendencies should be rejected[24].

Apart from the fact that the Arbitration Act positively defines the conditions to be fulfilled by a person who wants to become an arbitrator, Section 4 Subsection 1 of the Arbitration Act furthermore stipulates that the fulfilment of the conditions laid down does not in itself mean that a particular person may be the arbitrator in a particular dispute, as a special regulation may provide otherwise, that is, the performance of the arbitration may be prohibited even if the conditions for the function of the arbitrator are otherwise fulfilled. The Act on Courts and Judges, the Act on the Constitutional Court and the Act on the Public Prosecutor's Office shall be deemed to be a special regulation under Section 4 Subsection 1 of the Arbitration Act, which directly refers to this provision, regulating the incompatibility of the arbitrator's function with other activities.

Act No. 6/2002 Coll., On Courts and Judges, in its provision of Section 80 Subsection (b) defines the basic conditions for the performance of judicial activity and provides for the incompatibility of this function with that of the Arbitra-

21 Act No. 89/2012 Coll., The Civil Code, as amended.

22 Effective until 30 November 2016, Section 4 of the Arbitration Act contained Subsection 3, which regulated the conditions for the performance of the arbitrator's position for the settlement of disputes arising from consumer contracts, and which, in accordance with consumer protection placed higher demands on the arbitrator in the case of the settlement of so-called consumer disputes.

23 However, see also the opposite view of the Court of Appeal for England and Wales, which declared invalid an arbitration agreement requiring that all arbitrators be members of the Ismail community; see Judgment of 22 June 2010 in the matter of Sadruddin Hashwani v. Nurdin Jivraj, [2010] EWCA Civ 712. See also the Supreme Court judgment of 27 July 2011 in the same case, [2011] UKSC 40, which abrogated the abovementioned and very discussed decision; BĚLOHLÁVEK, Alexander. The extent of autonomy in the constitution of the arbitration forum or the decision in the matter of "Jivraj" as an eruption in established arbitration axioms. In DÁVID, Radovan et al. (Edp.). *Dny práva – 2010 – Days of Law*. Brno: Masaryk University, 2010, p. 2046 - 2183.

24 See also, for example, PFEIFFER, Thomas. Pflicht zur diskriminierungsfreien Schiedsrichterauswahl? - Eine Skizze. In KRONKE, Herbert, THORN, Karsten. *Grenzen überwinden - Prinzipien bewahren: Festschrift für Bernd von Hoffmann zum 70. Geburtstag*. Bielefeld: Ernst und Werner Gieseking, 2012, p. 1047 et seq.

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tor: *"The judge is required, in his or her personal life by his behaviour, to ensure that s/he does not impair the dignity of a judge's function and does not threaten or distort confidence in the independent, fair and equitable decision-making of the courts. In particular, the judge may not act as the arbitrator or mediator to resolve a legal dispute, to represent the parties to the court proceedings or as the agent of the injured party or person involved in judicial or administrative proceedings, except for the legal representation and cases involving the representation of another party to the proceedings in which the judge himself/herself is the participant."*

In the same way, the prohibition on the performance of the function is also laid down for public prosecutors in Act No. 283/1993 Coll., On the Public Prosecutor's Office, namely in Section 24, Subsection 2 (e).

In Section 4 Subsection 3 of Act No. 182/1993 Coll., On the Constitutional Court does not refer directly to the arbitrator, but in view of the wording of the provision, and given the fact that this specific provision refers to the Arbitration Act, it is conceivable that a judge of the Constitutional Court cannot act as an arbitrator either: *"The performance of the judge's function is incompatible with any other paid or other gainful activity except for the administration of his/her own property, scientific, pedagogical, literary and artistic activities, unless such activity prejudices the function of the judge and its significance and dignity and does not threaten confidence in the independence and impartiality of the Constitutional Court's decision"*.[25]

The significance of these provisions concerning the incompatibility of the performance of certain activities with the function of the arbitrator lies in particular in ensuring the credibility, impartiality and independence of the judges and prosecutors. However, the question is whether this should be done absolutely without any exceptions, or, on the contrary, the presence of judges in the arbitration process would be beneficial to their experience and knowledge.[26]

3.2 Conditions for the performance of the arbitrator's function - Germany

It has already been noted that the different national arrangements for arbitration may differ, and of course that difference also affects the degree of autonomy of the parties' free will. For example, German arbitration regulations may not be more distinct from the Czech regulations concerning the person of the arbitra-

25 Concerning this provision, see also FILIP, Jan, HOLLÄNDER, Pavel, ŠIMÍČEK, Vojtěch. *Zákon o Ústavním soudu. Komentář* (Act on the Constitutional Court. Comment). 2nd edition. Prague: C. H. Beck, 2007, p. 17–28; WAGNEROVÁ, Eliška. In LANGÁŠEK, Tomáš, DOSTÁL, Martin, POSPÍŠIL, Ivo, WAGNEROVÁ, Eliška. *Zákon o Ústavním soudu s komentářem* (Act on the Constitutional Court with a Comment). Prague: Wolters Kluwer, 2007, p. 10 et seq. (Section 4).

26 MOTHEJZÍKOVÁ, Jitka. Úloha národních soudů – podpora nebo dohled? (The role of national courts - support or supervision?) *Evropské a mezinárodní právo* (European and International Law), 1998, Issue 1, p. 43–54

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tor. It fundamentally differs in that it does not specify any specific conditions, such as Section 4 Subsection 1 of the Arbitration Act, whose fulfilment would be linked to the performance of the arbitrator's function and which would be a prerequisite for the performance of the arbitrator's function. Similarly, there is a difference as to the incompatibility of the arbitrator's function with other activities, as well as on who can perform the arbitrator's function. The fact that the 10th Book of the ZPO does not contain any specific conditions within the meaning of Section 4 Subsection 1 of the Arbitration Act does not imply that no requirements are specified concerning the arbitrator in German law. However, these are conceived and defined differently than in the Arbitration Act and result mainly from the character of the arbitrator's activity and from the links that arise between the arbitrator and the parties.

Since the 10th Book of the ZPO is based on a truly wide range of parties' autonomy, and the German legislator, even with regard to the person of the arbitrator, did not specifically lay down the conditions for the performance of the arbitrator's function, the arbitrator may be both a natural and a legal person, a national or a foreign national according to the German ZPO[27], because there are no restrictions contained in the law in this respect[28]. Although Baumbach/Lauterbach/Albers/Hartmann state in the commentary that the the arbitrator may be "nur eine natürliche Person", that is, only a natural person, but rightly adds immediately that a legal person may also be designated by the parties as the arbitrator. The expression "natural person only" must be interpreted in such a way that the arbitrator's activity may or may not be exercised by a particular individual in a particular dispute, in particular with regard to the impartiality and independence of the arbitrator, which is the golden thread of the provisions of the 10th Book of the ZPO, despite all the parties' autonomy. Therefore, if the parties to the dispute agree on appointing a legal person as an arbitrator, but they do not indicate which particular person from that legal person is to be the arbitrator, it is then necessary to interpret the expressed will in such a way that the arbitrator is to be a natural person who is, on the basis of law or the internal order is typically entitled by the given legal person to represent the legal entity externally, or who is meant by the will of the party. There may be several persons who can represent a legal entity in law, which would also mean that they were all designated as arbitrators. However, this condition is not recommendable and in this case, the parties should rather bind the arbitrator's function to specifying

27 In this respect, the Czech and German arrangements are the same and in line with international instruments. See also, for example Article III of the European Convention on Commercial Arbitration, Decree of the Minister of Foreign Affairs No. 176/1964 Coll., or Article 11 (1) of the UNCITRAL Model Law, while emphasizing the autonomy of the parties.

28 See also SCHWAB/WALTER: *Schiedsgerichtsbarkeit…,* p. 72; BAUMBACH/LAUTERBACH/ALBERS/HARTMANN: *Zivilprozessordnung…,* p. 2678.

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mechanisms such as how many persons from the respective body of the company should be chosen, how they should be chosen, etc.

According to the 10th book of the ZPO, the arbitrator can also be persons who have not reached the age of majority because the law does not contain any restrictions in this respect. In the version effective until 31 December 1997, the ZPO initially contained a provision that minors may be refused as arbitrators[29]. However, the question of a minor must be interpreted in accordance with another condition necessary for the performance of the arbitrator's function, and that is the conclusion of a contract between the arbitrator and the parties, the so-called *receptum arbitrii*. A minor can only be an arbitrator if s/he has the capacity to conclude such a contract[30]. For this reason, a person ineligible for legal action cannot be an arbitrator because s/he can under no circumstances conclude *receptum arbitrii*. According to the German BGB, a person who has not reached the seventh year of age or a person in a mental state of a non-transitory nature[31] is considered such a person. An administrative body or, for example, a court may also be the arbitrator, but not as a body in itself, but only if it can be inferred by the interpretation that the party had in mind the head of such a body, but who then would not act as a body, but only as a private person. In fact, it is not possible for a body exercising public authority to enter into that position in the private law relationship between the arbitrator and the party to the dispute[32].

However, it also follows from the above that in accordance with the 10th Book of the ZPO, a judge or an official may also be appointed as the arbitrator, which is a completely different approach than that which can be seen in the Czech law. The relevant German legislation, however, provides for the prior consent of these persons' superior as a necessary condition. Such a condition is imposed on judges by Paragraph 40 of the Deutsches Richtergesetz - DRiG (German Law on Judges); for officials, such an obligation is required by the provision of Section 99 of the Bundesbeamtengesetz (Law on Federal Officials). In the case of judges, the performance of the function of the arbitrator may be permitted only if both parties to dispute have appointed him/her, or if s/he has been appointed by a third party[33], and the authorization will be refused if the judge

29 See also Section 1032 Subsection 3 of the ZPO, in the version applicable until 31 December 1997: *„Minderjährige, Taube, Stumme und Personen, die infolge Richterspruchs die Fähigkeit zur Bekleidung öffentlicher Ämter nicht besitzen, können abgelehnt werden."* (Minor, deaf and dumb persons, and persons who are unable to exercise public office by a court decision may be refused.)

30 See also the provisions concerning the eligibility of a person in German law: Section 104–113 of the BGB.

31 See Section 104 BGB.

32 See also SCHWAB/WALTER: *Schiedsgerichtsbarkeit…,* p. 72; SCHÜTZE, Rolf A. *Schiedsgericht und Schiedsverfahren*. 5th edition. München, C. H. Beck, 2012, p. 32.

33 Therefore, it is not possible for a judge to be appointed as the arbitrator only by one party, even if, for example, the other party has given its consent with such an appointment. See also the Decision of the Berlin Court of Appeal (Kammergericht Berlin) of 6 May 2002,

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deals with the matter at the time of the decision-making process concerning the granting of permission, or could deal with it[34]. Thus, even with judges, the only limitation to the performance of the judge's function remains threatening the necessary impartiality and independence[35].

As it has already been shown, the German approach to the compatibility of the arbitrator's function with another activity is quite different from Czech law, and this is also true of judges of the Federal Constitutional Court (Bundesverfassungsgericht) whose status is governed by the German Federal Constitutional Court Act (Gesetz über das Bundesverfassungsgericht - BVerfGG). Even in the BVerfGG, as in Section 4 Subsection 3 of the Act on the Constitutional Court, we find a provision on the incompatibility of the activity of the Federal Constitutional Court judge with a different professional activity than that of a teacher at a German higher education institution, in which event, the judicial activity at the Federal Constitutional Court takes precedence to the activity of a higher education teacher.[36] The purpose of this provision is to strengthen the independence of the judge and ensure that's/he focuses in particular on judicial activity. However, since, in accordance with Sections 2 and 3 in conjunction with Section 69 of the DRiG, the German Judges Act also applies to the judges of the Federal Constitutional Court if that does not contradict their special status, the question arises, consequently, whether they are admitted to serve as arbitrators. In view of the meaning of the term "professional activity" as an activity for the creation and acquisition of means of subsistence with a view to doing so permanently[37] and in the light of the foregoing, the provisions of Section 40 of the DRiG can also be applied to judges of the Federal Constitutional Court, and therefore, a judge of the Federal Constitutional Court can be an arbitrator, in which event, the relevant authority for granting permission would be the plenary of the Federal Constitutional Court[38]. If such permission would not be granted or was granted without justification, for there was, for example, the possibility that the judge in question should deal with the case in the course of the arbitration award, it would not be a breach of the condition for the performance of the arbitrator or

Ref. No. 23 Sch 1/02. See also the completely contrary view of the Federal Court of Justice (Bundesgerichtshof) in the Decision of 10 March 2016, Ref. No. 99/14, points 18 et seq., which authorizes the appointment of a judge as the arbitrator by one party only, and it proceeds primarily from the autonomy of the parties' free will and the meaning and purpose of Section 40 Subsection 1 of the DRiG.

34 See Section 40 Subsection 1 of the DRiG; see also, for example, the Decision of the High Court in Stuttgart (OLG Stuttgart) of 15 November 2007, Ref. No. 1 SchH 4/07.

35 See also the Decision of the Bundesgerichtshof of 10 March 2016, Ref. No. I ZB 100/14.

36 See Section 3 Subsection 4 of the BVerfGG.

37 See, for example, the judgment of the Federal Constitutional Court (Bundesverfassungsgericht) of 17 February 1998, Ref. No. 1 BvF 1/91; the Judgment of the Federal Constitutional Court (Bundesverfassungsgericht) of 11 June 1958, Ref. No. 1 BvR 596/56.

38 For more information, see HEINRICHSMEIER, Paul. In BURKICZAK, Christian, DOLLINGER, Franz-Wilhelm, SCHORKOPF, Frank. *Bundesverfassungsgerichtsgesetz*. Heidelberg: C. F. Müller GmbH, 2015, p. 85–92 (Section 3).

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such an arbitrator he could discuss the case and issue an arbitration award. Otherwise, the parties to the dispute, which are not to blame for this fact, would bear the negative consequences[39].

However, as in the Czech Republic, parties or, for example, arbitration institutions may determine and require additional prerequisites for the performance of the arbitrator's functions. Typically, this is done by permanent arbitration bodies. For example, the Arbitration Court of the Deutsche Institution für Schiedsgerichtsbarkeit (DIS) stipulates that the presiding arbitrator or the sole arbitrator must have a legal education, he must be a lawyer ("*Jurist*"), even though the derogating agreement of the parties is permissible[40].[41]

3.3 Way of appointing the arbitrator

The parties have a great deal of autonomy in the way of appointing the arbitrator, which is limited only where the legislator sees the threat to the principle of the equality of the parties and neutral justice. In this sense, it is essential that each party designate its "arbitrator" or that both parties be involved in the appointment of the arbitrator, since the appointment of a single arbitrator by only one party is generally unacceptable. In general, it is not possible to allow only one of the parties to designate an arbitrator, thereby infringing the principle of equal treatment and limiting the autonomy of the party's free will that could not exercise one of its fundamental rights in arbitration, namely appointing an arbitrator. Such an arrangement would conflict with, for example, the provision of Section 1034 Subsection 2 of the ZPO, which prohibits one party from taking precedence over the constitution of the arbitral tribunal, or gives the disadvantaged party the opportunity to apply to the court in such a case to appoint the arbitrator independently of the agreement of the parties already made favoring only one party, or independently of the appointment already made[42]. Such an application for the appointment of an arbitrator by a court must be filed no later than two weeks after the party has become aware of the composition of the arbitral tribunal (Sec-

39 See also the Decision of the High Court in Stuttgart (OLG Stuttgart) of 16 July 2002, Ref. No. 1 Sch 8/02; BGH, the Decision of the Federal Court of Justice (Bundesgerichtshof) of 10 March 2016, Ref. No. I ZB 99/14; SCHÜTZE: *Schiedsgericht und Schiedsverfahren...*, p. 32; WIECZOREK, Bernhard, SCHÜTZE, Rolf A. *Zivilprozessordnung und Nebengesetze. Elfter Band. SectionSection 916–1066*. 4th edition. Berlin/Boston: Walter de Gruyter, 2014, p. 451. The opposite view, however, is held by SCHÜTZE: *Schiedsgericht und Schiedsverfahren*…, p. 73.

40 See Section 2 Subsection 2 of the Arbitration Rules of the DIP.

41 The question of lawyers, or non-lawyers in the arbitration process, see, for example, SCHWARZ, Franz T., KONRAD, Christian W. *The Vienna Rules: A Commentary on International Arbitration in Austria*. Alphen aan den Rijn: Kluwer Law International, 2009, p. 127.

42 In accordance with Section 1062 Subsection 1 of the ZPO, the Higher Regional Court (Oberlandesgerich), in whose district the place of arbitration is located, would be competent in this matter.

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tion 1034 Subsection 2 of the ZPO)[43]. Originally, the German ZPO affected such an arrangement disadvantageous to one of the parties ex lege by invalidating the arbitration agreement[44]. However, this provision was not (and it must be stated that it was correct) adopted into the current arbitration processes[45].

We do not find any similar explicit provision in the Arbitration Act, but also according to the Czech legislation, an arrangement disadvantageous to one of the parties in the constitution of the arbitral tribunal would not be admissible because it would be contrary to the generally accepted principle of equality of parties[46]. This does not mean, however, that both parties have to actively propose a particular arbitrator; it can only be left to one party. The German ZPO in Section 1036 Subsection 2 expressly speaks about participating ("*Mitwirken*") in the appointment[47]. However, it is not permissible for a particular person to become the arbitrator without the other party's consent. Thus, for example, it will not be permissible for the person of the arbitrator to be named in conditions that would only be referred to[48].

3.4 Odd v. even number of arbitrators

The fundamental difference with regard to the number of arbitrators between the German and Czech regulations lies in whether the number of arbitrators must always be odd, or whether their number is wholly dictated by the parties. While the 10th Book of the ZPO does not have any provisions on this and there may be any even or odd numbers of arbitrators, the final number of arbitrators must always be odd according to Article 7 (1) of the Arbitration Act. The previous regulation of the arbitration process in the Czech Republic also allowed an odd number of arbitrators.[49] Thus, for example the Arbitration Rules of the German Maritime Arbitration Association (GMAA) are in accordance with the German regulation; these Arbitration Rules are based on a standard number of

43 However, the proposal to appoint the arbitrator by a court differently from the disadvantageous arrangement of the parties does not mean that the arbitration process cannot be commenced or continued and that an arbitration award cannot be made. See also Section 1034 Subsection 2, third sentence of the ZPO.

44 See also Section 1025 Subsection 2 of the ZPO, in force until 31 December 1997.

45 For reasons for non-acceptance see DEUTSCHER BUNDESTAG. *Drucksache 13/5274* [online]. dipbt.bundestag.de, 12 July 1996 [cit. 1 July 2017]. Available on <http://dipbt.bundestag.de/doc/btd/13/052/1305274.pdf>., p. 34.

46 Specifically, in the Arbitration Act, see the provision of Section 18. To unilaterally appoint the arbitrator from a different point of view, see the Decision of the Supreme Court of 11 May 2011, Ref. No. 31 Cdo 1945/2010, or the legal sentence to the Decision of the High Court in Prague of 28 May 2009, Ref. No. 12 Cmo 496/2008.

47 See, for example, VOIT, Wolfgang. In MUSIELAK, Hans-Joachim. *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz*. München: Verlag Franz Vahlen, 2012, p. 2463 et seq.

48 SCHWAB/WALTER: *Schiedsgerichtsbarkeit*…, p. 76.

49 See also Section 15 of Act No. 98/1963 Coll. on Arbitration in International Trade and on the Performance of Arbitration Awards.

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two arbitrators, which would be in conflict with the Czech Arbitration Act. Even though the German regulation allows for an even number of arbitrators, it is far more appropriate to keep an odd number as this, unlike the even number, reduces the possibility of a stalemate in the equality of votes, even if the even and the odd number cannot completely prevent such a situation if one of the arbitrators gives up their voting rights. The above-mentioned GMAA Arbitration Rules also takes this option into account when in Section 4 Subsection 1 it orders two arbitrators to immediately appoint a third arbitrator as the chairman if they cannot agree on the decision. At the same time, however, the odd number of arbitrators, unless it is the sole arbitrator, contributes to a certain extent to the objectivity of the decision because it is decided by a majority of the arbitral tribunal and each of the members of the arbitral tribunal has one vote, even though the differing arrangements of the parties are allowed, as shown below.

3.5 The presiding arbitrator versus other members of the arbitral tribunal

However, the differing position of the presiding arbitrator does not only apply to the course of the process, but it may also apply to the voting on the arbitration award. In general, the majority of arbitrators decide, and the presiding arbitrator has a substantially equal vote with all the other arbitrators. In this section the Czech and German regulations coincide - Section 25 Subsection 1 of the Arbitration Act, or Section 1052 Subsection 1, the second sentence of the ZPO. Contrary to the Czech legislation, however, the German legislator again gives the parties the opportunity to adjust the voting on the arbitration award differently according to the autonomy of their free will - Section 1052 Subsection 1, first sentence of the ZPO[50]. Thus, the parties may agree that in the event of an equality of votes, the vote of the presiding arbitrator will be decisive, and his/her role can therefore be crucial even with regard to the decision on the matter[51].

4 Conclusion

The arbitration process is a special process in which judicial principles are combined with party interests, confidentiality with transparency, and autonomy of the parties with impartiality, etc. It is precisely the principle of the autonomy of the parties' free will to represent one of the most important aspects of the arbitration process and gives the parties the necessary freedom to organize the proceedings in such a way as to best suit their interests. Above all, this freedom is behind the success of the arbitration process and has made it a major way to resolve disputes in international trade.

50 LACHMANN, Jens-Peter. *Handbuch für die Schiedsgerichtspraxis…*, p. 417.

51 In this context, it is not entirely correct to conclude that, in the event of an equality of votes, the vote of the presiding arbitrator is decisive, see KLATTE, Saskia. *Unabhängigkeit und Unparteilichkeit von Schiedsrichtern in zwischenstaatlichen und gemischten Verfahren*. München: Herbert Utz Verlag, 2014, p. 35.

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On the other hand, this freedom is not, and cannot be, unlimited. Despite the widely understood autonomy of the parties' free will, there are certain limits that can be set differently in different jurisdictions.

By comparing the Czech and German regulations on the choice of an arbitrator, one can conclude that the different legal systems differ considerably from one another. It turns out that the German legislature favours the autonomy of the parties' free will much more than the Czech Arbitration Act. The consistent autonomy of the parties' free will, as applied by the German legislator, leaves the parties with a decisive influence on the definition of the persons whose arguments are to be discussed and decided by the arbitrators, while the Arbitration Act imposes certain obstacles on this freedom. According to the ZPO, for example, the parties have the possibility to negotiate an even number of arbitrators, while the Czech Arbitration Act does not allow them to do so. It is also possible for the parties to adjust the position of the chairman of the arbitral tribunal, not only in matters concerning the management of the proceedings, which is also permissible under the Arbitration Act, but also in the cases of voting on the arbitration award. This may make the role of the presiding arbiter according to the 10th Book of the ZPO much more important than that according to the Czech law.

In conclusion, while the German regulation is very benevolent in the positive sense of the word, there are minimal conditions in the Czech Arbitration Act, which are not so strict and limiting with respect to the selection in the end, however, compared to the German legislation, they seem to be rather protective, and for example, with regards to the exclusion of judges from arbitration, maybe also negative.

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