THE COMPETENT COURT TO HEAR LIABILITY CLAIMS AGAINST ARBITRATORS

Introduction

One of the most debated issues in international arbitration concerns the liability of arbitrators and its consequences. The matter is linked to the Janus-faced nature of the arbitrator, who might be regarded, on the one hand, as an impartial judge expected to deliver a binding award; on the other, as a party to a contract between him/her and the disputing parties, requiring the former to perform a service, in return for remuneration. Such a contract, which was first defined by Ditchev as the "arbitration contract", is to be kept distinct from the "arbitration agreement", which binds the parties to submit their dispute to an arbitral tribunal.

This distinction is crucial in order to recognize the source of arbitrators' obligations, *i.e.* the arbitration contract, and, therefore, to determine which court has jurisdiction to hear on liability claims against arbitrators. This paper addresses the criteria to identify the competent court to address such claims.

Para. 1 provides some introductory remarks on arbitrators' civil liability and criminal responsibility. Para. 2 focuses on the arbitration exception of EU Regulation no. 1215/2012 on jurisdiction (hereinafter, "Reg. Brussels I *bis*"), whose scope was recently addressed by the Paris Court of Appeal. In para. 3, the different choice of forum criteria are specifically addressed, also providing possible solutions to pursue more legal

certainty. Lastly, para. 4 tackles the liability of arbitral institutions resulting from arbitrators' misconducts, focusing on the competent judge to hear such claims.

Due to space constraints, this contribution does not focus on the applicable law. Nonetheless, it should be noted that the choice of a forum entails the application of the overriding mandatory norms of the *lex fori*.

1. The twofold nature of arbitrators' liability. Arbitrators' criminal responsibility

As highlighted by Fouchard, Gaillard and Goldman, since «arbitrators carry out a judicial function, they should benefit from protection similar to that enjoyed by judges, both during and after the proceedings». This immunity, whose extent varies significantly among different domestic legal systems, is usually excluded in case of gross negligence or willful misconduct only.

As a general rule, the parties are not entitled to challenge an award based upon arbitrators' liability claims, inasmuch as other legal remedies are provided. In this regard, the matter of arbitrators' liability is strictly linked to the debate concerning judges' liability in domestic legal frameworks.

However, since arbitrators are also parties to a contract, *i.e.* the arbitration contract, a fault committed in conducting the arbitral proceeding may also result in the breach of a contractual obligation. The court having jurisdiction on such claims has thus to be determined according to the ordinary choice of forum criteria.

It bears also noting that arbitrators may incur criminal responsibility too, should their conduct constitute a criminal offence pursuant to the relevant domestic legal system

(*e.g.* in case of corruption or breach of impartiality duties). If this circumstance occur, the competent court is determined by domestic criminal procedure. This usually entails the jurisdiction of the judge of the *locus commissi delicti, i.e.* either the seat of the arbitration or the place where hearings and deliberations were held.

2. The arbitration exception of EU Reg. Brussels I *bis*

In the identification of the competent court for claims relating to the liability of arbitrators, one cannot ignore Reg. Brussels I *bis*, constituting the reference standard for the choice of forum at the EU level. According to its Article 1(1), the Regulation «shall apply in civil and commercial matters whatever the nature of the court or tribunal», and its scope is confined to disputes between parties domiciled within the European Union. Furthermore, a number of EU Member States apply the procedural rules provided by the Regulation also to disputes falling outside its original scope *ratione personæ*, as long as it is applicable *ratione materiæ*.

Article 1(2)(d) stipulates that the Regulation does not apply to arbitration. This provision has to be read in parallel with Recital no. 12, according to which «[the] Regulation should not apply to any action *or ancillary proceedings* relating to […] the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure […]». The genesis of such an exception, which was already provided by the 1968 Brussels Convention, can be traced back to the Member States' will to fully preserve the treaties into force among them, as the New York Convention, as well as in the hope for a new European treaty on arbitration, which has never been adopted.

The scope of the arbitration exception was recently addressed by the Paris Court of Appeal, with special regard to arbitrators' liability (RG 21/07623, 22 June 2021). It is worth noting that, from the EU perspective, the decision of the French court may constitute an important interpretative element of the scope of the exception.

The case revolved around an arbitration between a Qatari company and the subsidiary for the UAE of the Volkswagen group. After the French *Cour de cassation* had set aside the award on the grounds that one arbitrator had breached his disclosure obligations, the losing party turned to the Paris *tribunal judiciaire* claiming for reimbursement of the arbitration costs. Interestingly, the court held that the claims against the arbitrator were outside the scope of the exception at issue, as the arbitrator's obligations arose from the arbitration agreement, and not from the arbitral proceeding itself.

The Paris Court of Appeal overturned the court of first instance judgment. Relying on Recital no. 12 of Reg. Brussels I *bis*, the court held that

> [l]'action visant à mettre en cause la responsabilité d'un arbitre après l'annulation d'une sentence arbitrale fondée sur le manquement de ce dernier son obligation de révélation est étroitement liée à la constitution du tribunal arbitral et à la conduite de l'arbitrage *puisqu'elle vise à apprécier si l'arbitre a exercé, conformément à ses obligations découlant de son contrat d'arbitre, sa mission, laquelle participe de la mise en oeuvre de l'arbitrage*.

The court made also reference to the EU Court of Justice decisions in *Marc Rich* and *Van Uden*.

3. The competent court to hear claims relating to the arbitration contract

The interpretation given by the Paris Court of Appeal, which is arguably in accordance with the *ratio legis* of Reg. Brussels I *bis*, implies that the judge having jurisdiction on arbitrators' liability-related claims has to be identified on the basis of the domestic rules of private international law (or, if any, of bilateral or plurilateral treaties on jurisdiction).

While the choice of forum criteria deeply depend on the different rules followed by each domestic judiciary, some common principles can be identified. First, the competent court has to be determined based upon the parties' agreement (except for a few exceptions, *e.g.* if an exclusive forum is envisaged). Should the parties, as usually happens, do not indicate such a court, private international law norms on choice of forum usually rely on the forum-defendant rule. According to the latter, the court having jurisdiction is the one of the place where the arbitrator is domiciled.

Nevertheless, the determination of the competent judge for some particular contracts follows specific rules, based on (*i*) a close link between the object of the contract and a particular forum or (*ii*) the existence of inalienable rights. For instance, in agreements for the provision of services, a number of national and supranational systems identify the court of the place where the services have to be provided as the competent one.

In order to determine the judge having jurisdiction to hear liability claims against arbitrators, an analysis of the nature of the arbitration contract is also needed. Within the debate on the latter, which cannot be thoroughly addressed in this contribution, three main interpretations have been developed. The arbitration contract can be qualified as (*i*) an agency agreement, (*ii*) an agreement for the provision of services, or (*iii*) a *sui generis*

contract. The third interpretation is the one mainly endorsed by international arbitration scholars.

The implementation of the forum-defendant rule in arbitration contracts raises some doubts, as the notion of "arbitrator's domicile" is blurred. The latter might refer both to the seat of arbitration – as the domicile of the arbitral procedure – or to the domicile of the arbitrator whose liability is debated. While the first interpretation results in a deeper legal certainty, since the seat of arbitration is often determined unequivocally by the parties in the arbitration agreement, the second one seems more in line with the *ratio legis* of the rule in hand. It is worth noting that the application of the second interpretation may mean that two different courts are contextually competent to hear claims on the liability of two arbitrators of the same arbitral tribunal. This would constitute a disproportionate procedural burden on the claimant.

For such reasons, in order to remove the legal uncertainties in the choice of forum and guarantee more predictability, it would be advisable for the parties, when submitting a dispute to an arbitral tribunal, to conclude an arbitration contract in writing with the arbitrators, determining in advance the competent court to hear on arbitrator's liability claims (*e.g.* by tackling this point in the terms of reference). Furthermore, in a perspective *de lege ferenda*, the exclusion from the arbitration exception contained in Reg. Brussels I *bis* of the narrow field of arbitrators' liability arising from the arbitration contract would ensure more legal certainty, at least on the EU level, and limit the so-called "forum shopping".

4. Arbitral institution's liability

In institutional arbitration, a triangular contractual relationship may be drafted between (*i*) the parties to the dispute, (*ii*) the arbitrators, (*iii*) and the administering institution. Should a number of circumstances occur, the breach of contractual obligations by the arbitrators may also result in liability claims against the arbitral institution.

As a general rule, the latter is not liable either for the activities undertaken by arbitrators or for any damage caused by them, even if the arbitrators have been appointed by the institution itself. However, it has been pointed out that negligence of the institution, in terms of *culpa in eligendo*, may be inferred by the arbitrator's gross misconducts. In this regard, the institution would be jointly and severally liable with the arbitrator in breach.

Whereas the agreement entered into between the parties to the dispute and the arbitral institution has been defined as either a mandate contract or a procurement one, the different facets of the duties and obligations arising from it lead to qualify such an agreement as a *sui generis* contract. Unless domestic rules on private international law provide differently, the claims on administering institution's liability in selecting the arbitrators have to be heard by the court of the place where the institution is located.

It is worth noting that the above-mentioned agreement might fall outside the scope of the arbitration exception of EU Reg. Brussels I *bis*, as it only regulates the provision of logistical and secretarial support to the arbitral proceeding. By adopting this interpretation, the EU rules on choice of forum would apply to the dispute, provided that (*i*) the dispute falls *ratione personæ* within the scope of the Regulation, or (*ii*) the

domestic rules refer to the criteria established by the Regulation to determine the competent court.

Concluding remarks

The nature of arbitrators' liability is affected by their twofold function, both as judges and contractual parties. Whereas arbitrators benefit from a degree of immunity similar to the one granted to judges in most domestic legal systems, they may nonetheless be sued for their breach of the obligations arising from the arbitration contract.

The competent court to hear on such liability claims has to be determined based upon the two following principles: (*i*) parties' choice of forum (unless domestic mandatory procedural norms must apply), and (*ii*) domestic and supranational norms on jurisdiction. According to most of the latter, the forum-defendant rule is to be applied.

Lastly, should gross misconducts occur arbitrators' liability could also result in the liability of the arbitral institution for *culpa in eligendo*.