

## **The Competent Court(s) to Hear Liability Claims Against Arbitrators**

Despite the rise of arbitration as the default mechanism for resolving transnational commercial disputes, there is surprisingly little legislative, judicial, or academic attention on the matter of regulating arbitrator liability. The UNCITRAL Model Law, which reflects worldwide consensus on key aspects of international arbitration practice, is silent on this matter. There is also no internationally binding instrument regarding arbitrator's liability, including when to recognize liability and which courts can hear and resolve such claims. This essay examines jurisdiction and proposes a solution that aims to balance the policy considerations behind international arbitration, the special need for reliability in cross-border business adjudication, and the enforceability of *in personam* judgments against arbitrators found guilty of intentional misconduct resulting in damage to the parties.

Two questions arise: (a) whether liability should in the first place be recognized, and (b) if liability can be recognized, which courts can competently decide such claims. Answering the first question requires an analysis of the legal framework governing an arbitrator's status. The latter question, on the other hand, will have to touch upon forum-selection considerations such as (a) minimum contacts, (b) personal jurisdiction over the defendant, and (c) the enforceability of any possible court award.

## **The status of an arbitrator: legal framework for liability**

Determining jurisdiction over arbitrator liability claims requires, first and foremost, ascertaining the legal framework defining the status of the arbitrator and his or her relationship to the parties to an arbitration. Is the arbitrator a contract partner providing expert dispute resolution services, or is he or she functionally analogous to a judge discharging a quasi-judicial mandate? Differences in the treatment of arbitrator liability across jurisdictions stem from the lack of consensus on this issue. On the one hand, many civil law jurisdictions consider the *receptum arbitri* as a contract for services, subjecting arbitrators to liability for breach of applicable contract laws and standards of care. On the other hand, common-law jurisdictions characterize the arbitrator's office as functionally analogous to that of a judge, and from such position of public responsibility generally grants qualified (or, in the case of the United States, full) immunity to arbitrators.

Although the civil law treatment of party-arbitrator relationship as purely contractual is attractive in terms of consistency in legal theory and effects, such characterization does not adequately reflect the transnational character of international arbitration. While arbitrators perform an adjudicatory service under a private agreement, describing the *receptum arbitri* as purely contractual does not consider certain non-contractual aspects of international arbitration and the transnational juridical effects of an international arbitration award under treaties such as the New York Convention.

It would, however, be inaccurate to fully subscribe to the common law characterization of arbitrators as functionally equivalent to judges and accord the former privileges enjoyed by the latter as a consequence. Arbitrators differ fundamentally from judges in terms of their mandate: arbitrators derive their authority from an agreement of private parties, while judges are public functionaries who derive their jurisdiction from and are backed by the state's *imperium*. From these fundamentally different sources of authority stem other distinctions such as the duty to vindicate mandatory laws, the binding effect of forum rules of procedure, and remuneration.

The better approach is to adopt a hybrid view of treating the arbitrator-party relationship as a contract *sui generis*, i.e., one that incorporates a special legal regime with binding, transnational legal effects. Certain aspects of arbitrator rights (e.g., remuneration, right to cooperation) and duties (e.g., confidentiality, duty to disclose) could only be explained in terms of a contract between the arbitrator and the parties. At the same time, the discharge of an arbitrator's office cannot be characterized as solely the provision of services since the enforcement mechanism under the New York Convention and most national arbitral laws provide for transnational enforceability and very limited forms of review.

Consistent with our characterization of an arbitrator as performing a quasi-judicial mandate under a *sui generis* contract, he or she should be entitled to immunity from liability claims arising from the performance of adjudicatory functions. However, liability may be recognized when it is based on: (a) failure to render an enforceable award (which defeats the

object of the contract); and (b) intentional misconduct characterized by bad faith or gross negligence (which could affect the validity and enforceability of an award).

### **Court(s) of competent jurisdiction**

Having clarified the legal status of an arbitrator and when liability could arise, we now turn to the question of jurisdiction. There are various remedies for an arbitrator's malfeasance or nonfeasance, including civil liability claims, loss of right to remuneration, termination of contract, prohibition on further appointments, criminal liability, or annulment or non-recognition of an award due to wrongful conduct that affects an award's validity and enforceability. For our purposes, we limit the discussion to jurisdiction over civil liability claims.

Because civil liability suits are usually *in personam* actions requiring jurisdiction over the defendant, and because the actors in international arbitration are likely to have multiple nationalities and different places of habitual residences, determining the court with jurisdiction will require the application of choice-of-forum rules with focus on personal jurisdiction. Choice-of-forum rules justify a state court's exercise of personal jurisdiction if there is a reasonable basis for it, i.e., if the jurisdiction is based on some minimum contacts that "will not offend traditional notions of fair play and substantial justice." Following this criterion, the courts with jurisdiction over arbitrator liability claims, in order of preference, are: (a) courts of the forum expressly chosen by the parties; (b) courts of the seat of

arbitration; (c) courts of the place of performance; (d) courts of the domicile of the injured party; and (e) courts of the arbitrator's domicile. We will examine each forum choice *in seriatim*.

### ***Party-selected forum***

There is little reason to refuse recognition of forum-selection clauses in an arbitrator's contract, except in limited cases when it circumvents a mandatory protective policy. The parties' autonomy to freely bargain on the applicable law and venue that minimizes resort to biased or inaccessible courts includes the ability to select a convenient forum for arbitrator liability claims. Indeed, parties and arbitrators could be well advised to include forum-selection clauses in the arbitrator's contract, since much of the insecurity arising from inconsistent forum selection and choice of law could be avoided if parties include express choice of court and choice of law clauses governing arbitrator liability. However, since an arbitrator's contract is rarely contained in an instrument, it is more likely that there is no preselected forum, and the propriety of resort to other fora must be examined.

### ***Seat courts***

In the absence of a party-selected forum, the court with competent jurisdiction to hear liability claims would be the courts of the seat of arbitration. Seat courts have the closest and most natural connection with arbitrator liability suits, for the following reasons:

- 1) The law of the seat often governs arbitral procedure, and the organization of the arbitrator's office and his or her rights and duties are logically part of the procedural relationship within the arbitration;
- 2) Since the status of and immunity of arbitrators is partially modeled out of judges discharging an adjudicatory office, their liability should be determined by reference to the *situs* which allows them to perform such duties; and
- 3) The seat of arbitration is also often (although not always) the place of performance. It is not uncommon for arbitrators to hold proceedings, receive evidence, deliberate, and render awards in the arbitral seat.

Unlike other forum decisions, a seat court's judgment on arbitrator liability in the context of a vacatur or exequatur of an award may also have transnational effects under Article V of the New York Convention. Applying Article V, insofar as liability claims based on malfeasance or nonfeasance could affect the validity of the award, the courts of the country under the arbitration law of which the award is made must be accorded primary jurisdiction over the dispute.

### ***Place of performance***

The place of performance becomes relevant in cases where the proceedings are substantially carried out in another place that is not the arbitral *situs*. In France, for example, the Paris Court of Appeals recently ruled that civil liability actions against an arbitrator are under the jurisdiction of the courts of the place where the arbitrator's mission was materially

and essentially carried out. Consistent with the civil law treatment of arbitrator-party relations as contractual, the place where the services are effectively rendered, i.e., where the hearings and deliberations were physically held, would have jurisdiction over liability suits.

The increasing resort to remote hearings to reduce costs or comply with health protocols, however, makes it difficult to single out one place of performance, especially in the case of a three-member tribunal working from different countries, with the parties, their counsel, and their witnesses also located elsewhere. Modern developments in arbitral hearings may make pinning jurisdiction on the place of material performance increasingly untenable, and choice-of-court rules could revert to the arbitral seat as the place with the most significant contact in case of arbitral proceedings held remotely in multiple jurisdictions.

### ***Domicile of the injured party***

In default of the seat courts and place of performance, liability suits against arbitrators could be brought before courts of the domicile of the injured party, provided that said courts meet the minimum contacts test. Choosing the plaintiff's domicile as the forum will present a jurisdictional challenge in the case of a non-resident defendant-arbitrator. In determining jurisdiction over a non-resident defendant, the minimum contacts standard laid down by the U.S. Supreme Court in *International Shoe, Co. v. Washington* may be applied by analogy. Personal jurisdiction over a non-resident defendant may be exercised, so long

as that defendant has “sufficient minimum contacts” with the forum state to lead to a reasonable expectation on the part of the arbitrator of being haled into court in that forum.

### *Arbitrator’s domicile*

Personal jurisdiction over the defendant-arbitrator can be easily satisfied by bringing suit before the courts of his or her habitual residence. This approach is fairly straightforward and avoids thorny personal jurisdiction problems that could affect the validity and subsequent enforceability of a decision. This forum, however, should be resorted to only in cases of liability suits against a sole arbitrator. In the case of multi-member tribunals, choosing a forum based on an arbitrator’s domicile would lead to the undesirable result of exposing arbitrators to differing liabilities depending on the choice of law applied by their domiciliary courts. The multiplicity of fora will also implicate forum-shopping issues and the possibility of multiple reviews of the same arbitral conduct or award, thereby undermining the objective of finally and conclusively settling a commercial dispute.

### **Conclusion**

In the performance of their duties, arbitrators discharge not merely a contractual role as a service provider but a quasi-judicial role of administering justice and settling commercial disputes through non-reviewable awards that are binding across multiple jurisdictions. Thus, they have limited liability for damages arising from the discharge of their adjudicatory functions. Nevertheless, in cases where civil liability suits could be brought,



such liability claims must be heard in the first instance by the national courts of the seat of arbitration. In default of seat courts, the courts of the place of performance, followed by the courts of the domicile of the injured party, should be considered the appropriate forum. Courts of the arbitrator's domicile should be resorted to only when the liability claims are against a sole arbitrator. The availability of multiple fora is intentional since international arbitration involves actors across multiple jurisdictions. Establishing an order of preference aims to promote cross-border stability while balancing the juridical characteristic of *receptum arbitri* as a *sui generis* contract and the issue of personal jurisdiction and enforceability of what could likely be an *in personam* liability. Jurisdiction should, however, not be confused with applicable law, and in determining arbitrator liability, the application of appropriate choice of law rules must still be considered.

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