The competent court to hear liability claims against arbitrators

I/ Introduction

At the very mention of the word 'arbitration', someone's first thought is the absence of national court participation, since it is a private mechanism for dispute resolution, selected and in a way controlled by the parties. Nevertheless, the settlement of disputes by arbitration may sometimes give rise to subsequent litigation before a national court, after the issuance of the arbitral award. Apart from the post-award remedy of annulment, parties may also have liability claims against arbitrators.

II/ Setting the scene: the arbitrator's liability in a nutshell

In order to define the arbitrator's liability, we shall primarily consider the dual nature of arbitration, which is contractual by origin but judicial by purpose and procedure. Hence, the arbitral mission has as well a dual nature: a '*contractual'* one, as the arbitrator is employed by the parties in order to provide his/her services in return for remuneration; a '*jurisdictional'* one, as the arbitrator is granted the power to render a final decision that has a binding, *res judicata* effect. As a result, we are dealing with two "opposing" forces: on the one hand, the arbitrator shall enjoy judicial immunity and should not in principle be held liable on account of what he/she have ruled; on the other hand, the arbitrator is a service provider, paid by the parties for resolving their dispute and thus any breach of the terms of his/ her *receptum arbitri* shall result liability for wrongful acts causing damages to the parties.

As regards the legal grounds for arbitrator's liability, they may vary from one legal system to another. Nonetheless, some generally acknowledged grounds are the lack of impartiality and independence, the non-disclosure of conflicts, the unjustified resignation, the causation of significant delays in the proceedings and the breach of arbitral confidentiality. In such instances,

the relationship of trust between the arbitrator and the parties may be considered as frustrated and the latter may fill liability claims, in order to obtain satisfaction for the damages caused by his/her infringement. From then on, the identification process of the competent court to hear the claim is set in motion.

III/ The identification of the competent court through a three-stage process

Stage 1: identification of the proper rule of law on jurisdiction

When the liability claim dispute is purely internal by nature with no trans-frontier factors involved, the identification of the competent court does not appear to be very complex; the national court, by applying the relevant rules on jurisdiction, will examine if it has subject-matter and territorial jurisdiction over the liability claim and will decide accordingly. The situation becomes more complicated when the claim concerns the potential liability of a member of an international arbitration panel and thus the dispute contains cross-border elements. In such a case, the national court must primarily ascertain whether it has international jurisdiction to hear such a dispute.

In the quest for answers, the national judge will probably resort to the ordinary methods of private international law. In this respect, the court's competence will be determined in accordance with the available rules of law ('*règles matérielles'*) destined to be used (and) for such international matters. Typically, those rules on jurisdiction are based on connecting factors aiming to identify whether the dispute is connected to the forum State; they might be either of internal (e.g. Art. 46 of French CPC) or of supranational origin (e.g. Brussels I bis EU Regulation, international Conventions, such as the HCCH 2005 Choice of Court Convention). The court, on the basis of the facts of the case, must assess which rule of private international law on jurisdiction should be applied in order to ascertain its international jurisdiction on the matter.

Stage 2: examination of two preconditions of essence

During the course of the aforesaid step, there are two "preconditions" that the court should assess, before turning to the application of the ordinary private international law rule on jurisdiction. The first one is to ensure that the agreement between the arbitrator and the parties does not contain a clause conferring jurisdiction on a national court for the resolution of disputes, including liability claims.

The second precondition is particularly addressed to EU Member States' courts, regarding the *ratione materiae* applicability of Brussels I bis in such a claim. Since Brussels I bis expressly excludes arbitration from its scope in Art. 1(2)(d), the question that naturally arises is whether a liability claim against an arbitrator automatically falls within this 'arbitration exception'.

In effect, a definite answer cannot be given, without addressing some respective arguments. On the one hand, one may argue that a liability claim against an arbitrator is actually based in the agreement between him/ her and the parties and therefore distinct from the arbitration; the arbitration exception covers merely the arbitration proceedings, not other aspects surrounding it, such as the hiring of the arbitrators. In this context, Art. 1(2)(d) kicks in only if the parties and the arbitrator have expressly selected arbitration as the mode of resolving disputes resulting from their engagement. According to this line of argument, Brussels I bis applies and therefore an EU Member State court, dealing with such a claim raised against an arbitrator domiciled in an EU Member State, shall determine whether it has international jurisdiction in accordance with it.

On the other hand, it might be argued that such a reasoning is unconvincing. The arbitrator's obligations such as of impartiality, of independence or of disclosure aiming to assess whether the arbitrator has exercised, in accordance with his/her duties his/her mission, are closely related to the constitution of the arbitral tribunal and therefore the conduct of the arbitration. In this regard, any consequent liability claim shall be considered as falling within the 'arbitration exception' of Brussels I bis.

For all these reasons, there is no room for *a priori* answers; it depends to the approach that will finally be followed.

Stage 3: application of the proper rule of law on jurisdiction and of its criteria

As previously mentioned, private international law rules on jurisdiction are typically based on connecting factors, such as the domicile of the parties, the place of contracting, the place of performance, the place of supply of services, etc. For the purposes of this analysis, we will take as an example the Suisse and the French private international rules on jurisdiction. Both of them, are primarily adopting the defendant's domicile or, in the absence of such domicile, the place of habitual residence of the defendant as a criterion for determining the competent court (Art. 112 para 1 Swiss CPIL, Art. 46 French CPC); subsidiarily they are providing as competent over actions arising from contracts the court of the place of performance of the service (Art. 113 CPIL, Art. 46 CPC).

In light of the above, except for the general criterion of the domicile of the defendant, the court located in the place of performance has jurisdiction to hear claims arising from contracts. In this respect and if we were to accept, for the sake of the argument, that such a contract exists between the arbitrator and the parties, the very next question that arises is the following: for the purposes of a liability claim against the arbitrator, which place is considered as that of provision of the arbitrator's services?

One option is to consider that the arbitrator provides his/ her services in the location selected by the parties as the seat of arbitration. When the location designated as seat of arbitration is identical to the one that it is selected as the venue where the arbitration proceedings will be physically conducted, then the answer is straightforward: in this location the arbitrator performed his/her services and, in accordance with the relevant rule of jurisdiction setting as criterion the place of performance of the service, its court is competent to hear any liability claims against the arbitrator.

Nevertheless, that's not always the case. In practice, the place where the arbitration proceedings are physically conducted may be different than the seat of the arbitration, as identified in the arbitration clause and then recalled in the terms of reference of the arbitration. Then, the place where the arbitrator's services are effectively executed is different than the seat of the arbitration. The situation can be even more complicated when the arbitrator is working from one country, while the other members of the panel, the parties, their counsels and the witnesses are respectively located elsewhere, including during the hearings or the deliberations. Following notably the Covid-19 pandemic, the conduct of the hearings remotely, by videoconference became the norm. On these occasions, it is significantly more difficult to single out one place of performance of the arbitrator's services.

In those more complicated cases, one option might be to determine the place of provision of the service by identifying the place where the arbitrator has effectively carried out, in a preponderant way, his/ her intellectual service. In this context, it appears reasonable that the place of provision of the intellectual services will be pointed out through the method of an 'indicative list of criteria' (method of '*faisceau d'indices*'): it may be taken into account the place where the hearings, the deliberations and the meetings between arbitrators were physically held, or even the amount of time spent in a specific location for the purposes of the arbitration proceedings.

The aforementioned reasoning appears at first glance reasonable. Nevertheless, a careful reading reveals its weak spots. First of all, it demonstrates that the choice of the venue where the arbitration proceedings will be physically conducted can actually trigger legal consequences: the mere fact that the arbitrator has provided his/her intellectual services in a venue situated in a different location than the seat of arbitration can grand jurisdiction to the courts of this place to hear liability claims against arbitrators. Such an approach contradicts the rule that the venue is just an operational and geographical choice and in no case a legal construct with its own set of legal consequences. Another drawback of this criterion appears when we are imagining a

scenario where the liability claims are raised, for example, against all the members of the arbitral tribunal. The intellectual service criterion may lead us to different competent courts for each arbitrator, in cases where the panel was located in different places. This may cause difficulties in both directions: on the one hand, the claimant may find himself in the predicament of bringing his actions before different courts located in different countries; on the other hand, the fact that the liability claims will be brought respectively before different courts may finally lead to different solutions for the members of the same panel.

Nonetheless, the criterion 'of the place where services were provided' might be interpreted otherwise. It may validly be alleged that, if we take into consideration the arbitrator's dual mission, the service provided by the arbitrator is not merely contractual, but also partly adjudicatory. Thus, the arbitrator's service consists in the accomplishment of his/her mission of settling the dispute submitted to him/ her by the parties and includes that of rendering an award at the seat of arbitration, as identified in the arbitration clause. From this perspective, it is expected by the parties that the arbitrator's services are going to be typically provided in the seat of the arbitration; the national court of the seat of the arbitration must be therefore the sole competent to rule on a liability action raised against the arbitrator.

IV/ By way of epilogue: time for a new approach?

In light of the above, it is tempting to argue that the existing private international law rules on jurisdiction are sufficient for identifying the competent court to hear liability claims against arbitrators. Nonetheless, the foregoing considerations have also demonstrated that the existing private international law criteria are open to many (mis)interpretations, causing situations of legal uncertainty. It appears therefore prudent, let alone reasonable, to introduce a new solution for determining the court having jurisdiction over a liability claim against the arbitrator.

The direct granting of jurisdiction to the national court located in the seat of the arbitration appears to be the optimal solution, for several reasons. Firstly, it is ensured that, in case of liability claims against more than one arbitrator of the panel, the latter will be tried before the same court. The risk of irreconcilable judgments resulting from separate proceedings is thus avoided and a level of legal certainty is achieved. Secondly, through this approach the competent court is easily identified, serving thus the whole spirit behind arbitration, which is, among others, the resolution of a dispute without unnecessary expenses or delays. Last but not least, the attribution of jurisdiction to the court of the seat contributes to the fulfillment of the promise of international arbitration, which is to offer neutrality of adjudication. This is not merely achieved by the appointment of a neutral and independent panel of arbitrators, but also by choosing a neutral seat for the arbitration. The choice of the seat has the essential consequence of granting jurisdiction to the local courts to supervise the arbitration proceedings. In this respect, a neutral seat shall mean, *inter alia*, neutral courts to decide about claims that are closely related to the conduct of the arbitration proceedings, including the performance of the arbitrator's mission. It seems therefore reasonable to consider that the court of the seat must be, in terms of neutrality and for the purposes of the arbitration and the parties' will, the only competent to hear any liability claims raised against arbitrators.