Vilnius University Faculty of Law

Department of Private Law

Assem Ussembayeva

II study year, LL.M International and EU Law programme Student

Master's Thesis

Legal Status and Liability of the Arbitrator

Supervisor: Dr. Eglė Zemlytė

Vilnius

2019

TABLE OF CONTENTS

INTRODUCTION....3

PART I....11

1. LEGAL STATUS OF ARBITRATOR....11

1.1. REGULATORY FRAMEWORK....11

1.2. RELATIONSHIP BETWEEN THE PARTIES AND ARBITRATOR/S....14

1.2.1. APPLICABLE LAW TO THE RELATIONSHIP BETWEEN THE ARBITRATOR AND THE PARTIES....17

1.3. ARBITRATOR'S POWERS/RIGHTS AND DUTIES/OBLIGATIONS....18

1.3.1 Powers of Arbitrators....19

1.3.2 Duties of Arbitrators....21

1.3.2.1. Duties Imposed by the Parties....22

1.3.2.2. Duties Imposed by Law....23

1.3.2.3. Implied Duties....25

1.3.2.4. Ethical Duties....25

1.4 REMEDIES AND SANCTIONS....26

1.5. REQUIREMENTS FOR THE ARBITRATOR....26

1.5.1. Mandatory Requirements....27

1.5.2. Specific Requirements....27

1.6. INDEPENDENCE AND IMPARTIALITY OF THE ARBITRATOR....31

1.6.1 Independence....32

1.6.2. Impartiality....33

1.6.3. Neutrality....33

PART II....35

2. ARBITRATOR'S LIABILITY....35

2.1. ISSUES WITH THE ARBITRATOR'S LIABILITY....35

2.2. ARBITRATORS AS ADJUDICATORS – DUAL ROLE....37

2.2.1. Arbitrators Adjudicatory Function....38

2.2.2. Functional Distinctions between Arbitrators and Judges....39

2.3. NATURE OF THE LIABILITY OF THE ARBITRATOR....40

2.3.1. CONTRACT....40

2.3.1.1. Nature of the arbitrator's contract....42

2.3.2. TORT....45

2.4. CONDITIONS FOR THE LIABILITY OF ARBITRATOR 47
2.4.1. Misconduct 47
2.4.2. Fault 48
2.4.3. Causal link 49
2.4.4. Damage 49
2.4.5. Annulment of the arbitral award as a condition for arbitrator's liability 50
2.5. IMMUNITY 52
2.5.1. The Arbitrator's Liability under National Arbitration Regimes 52
2.5.2. The Arbitrator's Liability under the Arbitrators Contract 55
2.5.3. Doctrine 55
2.6. CASE LAW 56
CONCLUSION 61
LIST OF REFERENCES 62
SUMMARY 68

INTRODUCTION

Arbitrators have a very important role in arbitration and society, as well. Individuals may become arbitrators by fulfilling certain qualifications. When they are appointed to their positions, they need to be as concerned with the parties' perception or approval of the job that they do. However, their retention does not depend on public support, and thus makes them less accountable to the public. Added to that is the fact that most countries have not established professional standards or licensing requirements for arbitrators that exist in other professions. Yet, regardless of all these facts, arbitrators enjoy immunity which in most of the countries correspond to the immunity of judges who are public servants.

This thesis will address the most relevant issues related to arbitrator's legal status and liability. Additionally, the thesis will provide a general characteristic of arbitrators' rights and obligations, relationship with the parties and other relevant issues in order to highlight general principles of their liability and immunity.

Finally, the thesis will answer the research questions defined below, based on the methodology which the author found most appropriate for this kind of research work and considering the mandatory requirements and guidelines for writing the thesis. The methodology section is also part of this introduction.

➢ Relevance of the Topic

Arbitration has become a very popular method for dispute resolution in international commercial relations. Namely, arbitration is a worldwide recognized as an efficient, economical, confidential and neutral forum. Parties chose arbitration as a dispute resolution mechanism for international disagreements because of the said characteristics, but also due to the fact that it provides many flexibility and freedom, both for the parties and arbitrators. Therefore, in the era of a global economy, foreign investments, and numerous international trading agreements, arbitration has become one the most preferable option for dispute settlement. Consequently, the arbitration undoubtedly found its place in the international dispute settlement system.

However, like many other legal concepts, the arbitration has its own disadvantages. One of many is the risk that arbitration can be subject to the party manipulation and misconduct of

the arbitrators. Therefore, nowadays, the arbitration suffers a respective dose of reputational crisis. Namely, the arbitration process has come under increasing attack through civil actions of against arbitration.[1] Additionally, the case law and practice demonstrate that there are many failures and misconduct of the arbitrators during arbitration process.

The literature on the legal status and liability of arbitrators, and, in particular, international arbitrators, is plentiful but not always entirely clear. The first difficulty for those approaching the issue is to identify what the authors mean when they discuss the legal relationship between the parties and the arbitrator. Then, some authors claim that the arbitrator should enjoy absolute powers and immunity like the national judge. Finally, the regulations on international commercial arbitration are not harmonized yet which causes a sort of legal uncertainty in this field.

The recent case in the Netherlands showed that the arbitrator can be held liable for the procedural error[2]. Namely, the president of an arbitral tribunal failed to give the award to his fellow colleagues for co-signature, and he was the only person who signed it eventually, although the Dutch Civil Code stipulates that the award must be signed by all members of the arbitral tribunal. Therefore the Dutch Supreme Court issued a decision on the personal liability of the president of an arbitral tribunal.[3] This decision confirmed that it is possible under exceptional circumstances to hold arbitrators personally liable on the basis of the Civil Code.[4]

Nevertheless, the procedural errors are not the only arbitrator's misconduct. In practice we can find that arbitrators are involved in fraud, they fail to render a timely judgment, etc. Additionally, the arbitrators could be held liable for damages for breach of contract, and even be accused of committing the crimes.

Even though some authors claim that arbitrators' liability is a taboo and controversial issue, some national jurisdictions and scholars do not hesitate to address it very seriously. Namely, clarification and examination of the legal status of the arbitrators and their liability could be beneficial not only for the parties and arbitration institutions but for arbitrators in person, as well. Regarding the relevance of this issue, it should be mentioned that the Club Des

---

[1] FRANK, D. S. The Liability of International Arbitrators: Comparative analysis and proposal for qualified Immunity. *New York Law School Journal of International and Comparative Law, 2000,* Vol. 20, p. 1- 59, p.2

[2] LOVELLS, H. *Greenworld revisited: arbitrator liable for procedural error,* [interactive] [reviewed in 1 December 2019.]. Available at <https://www.lexology.com/library/detail.aspx?g=d7fd72d8-8021-4b0a-836b-0515ab2c4fda >

[3] *Ibid.*

[4] *Ibid.*

Juristes[5] issued in 2017 a very detailed and comprehensive report[6] on the arbitrator's liability. This report confirms awareness and concerns regarding challenges that affect arbitration.

"Empirical and anecdotal evidence confirms that the rate of (arbitrator) challenge has been increasing since the early 1990s."[7] "Whether these challenges are genuinely motivated or tactical, their growing impact on the legitimacy and efficacy of the entire arbitral process is undeniable."[8] The said data confirm that the value of international arbitration is currently being questioned. Additionally, scholars claim that arbitration is experiencing a reputational crisis. The main causes of the current arbitration crisis should be found in the vague nature of the legal status of arbitrators and the scope of their liability. Namely, arbitrators exercise a judicial function and therefore act, on the one hand, as judges. As such, they enjoy immunity in the same way that state judges are, and consequently they have not be held liable for what they have ruled on. On the other hand, the arbitrators are also the service providers (contractual liability). As such, they should be held liable when they have not executed or have badly executed the service promised. Hence, in front of the judges who are dealing with the cases on arbitrator's liability, there is a very complex task. This particularly due to the fact that a judge has to define the legal ground/basis for the arbitrator's liability which is not an easy mission. Namely, the legal nature of arbitrator's relationship with the parties and his/her judicial activity which corresponds to the judicial activity of the state judges, disable judges to hold arbitrator liable.

Having in mind all above said, the originality of the topic is undeniable, particularly due to the lack of harmonized rules in the fields, even though the international arbitration exists almost more than one century. In addition, current reputational crisis of the international arbitration requires some answers, explanations and potential changes regarding defining the arbitrators' legal status and their liability.

---

[5] <http://www.leclubdesjuristes.com/>

[6] The Club Des Juristes, *Report on The Arbitrator's Liability*, 2017, [reviewed in 1 December 2019.]. Available at <https://www.leclubdesjuristes.com/wp-content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf>

[7] MA, W. J. M. Procedures for Challenging Arbitrators: Lessons for and from Taiwan. *5 Contemp. Asia Arb. J.* 2012, p. 295.

[8] *Ibid.*

- **Scientific relevance of the topic**

Firstly, the outcome of this research will provide legal scholars with an overview of the factors which determine the legal status of the arbitrators. Secondly, this research can enrich ongoing discussion among scholars on the legal status and liability of arbitrators. Further, the other researchers may rely upon this thesis in their future works related to international commercial arbitration. Additionally, the topic is written in the moment of the reputational crisis of the arbitration, so it can help the experts in the field to find the solutions for overcoming this crisis. Furthermore, the outcome of this research can help scholars in disciplines outside the law such as sociology, anthropology or psychology to understand the position of the arbitrator when they decide dispute settlement, and particularly to compare their role with the position of state judges.

- **Social relevance of the topic**

As far as the social relevance of this research is concerned, its outcome can illuminate the Arbitral Institutions on the institutional arbitration rules and give indications on whether a change of these rules could be considered. Furthermore, national legislators can use this research to evaluate the national regulatory framework for arbitration and consider potential amendments. Finally, this research can help businesses and companies in their understanding of the legal status and liability of arbitrators. Namely, party autonomy principle allows the parties to choose the arbitrator. Therefore, the parties should be familiar with the legal position of the arbitrators and powers and duties. Consequently, in accordance with the outcome of this research, companies as parties in a dispute can be introduced with potential options for challenging the arbitrators in the case of their unlawful behavior.

- **Aim, tasks and object**

The thesis will tend to give some new insights on the legal status of arbitrator and his/her liability based on the deep analysis of the doctrine and relevant regulations. Additionally, the thesis will strive to investigate the consequences of unlawful behavior of arbitrator and whether there are better solutions for arbitrator's liability then the current legal framework for international arbitration suggests.

The current law has been vague and often contradictory in reference to the status of the arbitrator. Also, we have the different approaches to the arbitrator's liability in the common and civil law systems. Is he a judge, a quasi-judicial officer, a referee? Should he be subject to laws applying to judges or those applying to administrative officers and jurors? Why should arbitrators be granted immunity? Such questions are engendered by the law itself. It is important for arbitrators as individuals and as a profession to seek clarity in the definition of their legal status.

Before the liability of arbitrators is examined, the legal status of the arbitrator must be explained. Namely, there are different opinions among scholars on the legal nature of the arbitral mission and the legal status of arbitrators. Additionally, the arbitration agreements and the regulations are not consistent regarding this matter. Therefore, there are several issues which will be examined in the thesis and which are in conjunction with the legal status of arbitrators and their liability: i) absolute v. limited liability of arbitrator; ii) the nature of the liability of the arbitrator (contractual or tort); iii) the nature of the contract arbitrator acts upon (service agreement or something else); iv) annulment of the award as the necessary (unnecessary) condition for arbitrator's liability; v) conditions of the liability of arbitrator (unlawful behavior; fault; causal link; damages).

The object of the present study includes nature of parties' relationships with arbitrator, his or her rights and duties, remedies and sanctions for arbitrator's breach of obligations under international, institutional and national regulations.

➢ Research Questions

The following research questions should be answered in this thesis:

1) Which factors determine the legal status of the arbitrator? 2) Should arbitrators be held liable for their misconduct, or should immunity continue to protect them from liability for their misconduct? To what extent can the arbitrator be held liable for her/his misconduct?

➢ Methodology

Classical Legal Method

For the research questions, Basic Monodisciplinary Doctrinal Legal Research will be the guiding methodological perspective. Basic Monodisciplinary Doctrinal Legal Research aims mostly to interpret legal rules and to provide means for a normative assessment, as well as for the formulation of recommendations on the further development of the law[9]. Consequently, this research will be descriptive, explanatory and evaluative[10].

Before studying the status of the arbitrator, a number of materials relating to arbitration law had to be collected from various sources. In this thesis the overview of the whole regulatory framework which governs the international commercial arbitration will be presented. However, this research will rely on the New York Convention[11] and the UNCITRAL Model Law.[12] The most relevant provision of the ICC Report (2006)[13] will be taken into account and the analysis of the arbitrator's liability will be based on recent Report on Arbitrator's Liability issued by ad hoc Committee of the Club des Juristes, in 2017. This report contains general principle of arbitrator's liability and it is drafted based on the comparative analysis of the arbitration national regulations and the case law. In addition, the arbitration rules of the top three leading arbitral institutions in the world[14] will be assessed: **(i)** International Chamber of Commerce International Court of Arbitration (ICC) - ICC Rules (2017);[15] **(ii)** London Court

---

[9] MCCONVILLE, M., and CHUI, W.H. *Research Methods for Law*. Edinburgh University Press, 2007.
[10] SMITS, J.M. *The Mind and Method of the Legal Academic*. Edward Elgar, Faculty of Law, Maastricht University, Netherlands, 2012.
[11] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
[12] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
[13] ICC Commission on International Arbitration. *Final Report on the Status of the Arbitrator*. Report of the Working Party on the status of the arbitrator [interactive]. [reviewed in 26 November 2019]. Available at: < http://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0009.htm#TOC_BKL1_2_1 >
[14] These are top three arbitration institutions, according to the following source: AHMEDOV, A., Born's Finest: 19 Leading Arbitral Institutions of the World Published on March 18, 2015 [interactive]. [reviewed in 26 November 2019]. Available at: <https://www.linkedin.com/pulse/borns-finest-19-leading-arbitral-institutions-world-aibek-ahmedov/>
Additionally, some other sources showed that these three institutions are among the most preferable for the parties.
[15] ICC Arbitration Rules, In force as from 1 March 2017 and Mediation Rules, In force as from 1 January 2014 [interactive]. [reviewed in 1 December 2019]. Available at <https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf >

of International Arbitration (LCIA) - LCIA Rules (2014);[16] and **(iii)** American Arbitration Association and International Center for Dispute Resolution (ICDR AAA) - IDRP Rules (2014)[17].

The comparative analysis of the national laws on regulation will not be carried out because of the lack of harmonization in this field and due to the fact that each national system provides its own rules with different approaches to status of arbitrators and their liability. However, state courts mostly decide on arbitrator's liability by applying national law. Therefore, the recent doctrine which refers to national arbitration regulation will be analysed. This doctrine, which will be taken into account, addresses the arbitration national regulations of the both common law and civil law countries.

Additionally the recent and mostly quoted and discussed cases the by scholars on arbitrator's liability will be assessed in the thesis. These cases are as follows:

(i) Raoul Duval Case - TGI Paris, May 12, 1993 (Raoul Duval), *Rev. arb*., 1996.411, and Paris, October 12, 1995, *Rev. arb*., 1999.324, note Ph. FOUCHARD). In the judgment and the ruling, handed down in the *Raoul Duval* case, the judges considered that *"the contractual nature of the link that connects the arbitrator with the parties justifies that his liability be evaluated under common law conditions* […]" and *"that the arbitrator cannot avoid common law principles of liability by imposing* […] *proof of serious misconduct that he may have committed."* That being said, the judges did not expressly reserve the case of misconduct committed during the exercise of the judicial mission.

(ii) Austrian Supreme Court Case 2016 - In the case at hand the arbitrators' contract provided for liability of the arbitrators only in cases of gross negligence and if the award was successfully set aside on the basis of Section 611 of the Austrian Code of Civil Procedure.

(iii) *Puma v. Estudio 2000* - On 15 February 2017, the Spanish Supreme Court declared the two arbitrators professionally liable for excluding their colleague

[16] LCIA Arbitration Rules (2014) [interactive]. [reviewed in 1 December 2019]. Available at <https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf>

[17] International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) Rules Amended and Effective June 1, 2014 Fee Schedule Amended and Effective July 1, 2016[interactive]. [reviewed in 1 December 2019]. Available at <https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf>

from the deliberation procedure, and obliged them to pay Puma € 1’500,000.00 plus legal interests.

(iv) *Flock v. Beattie 2010 ABQB 193 (CanLII), Court of Queen’s Bench of Alberta* - The arbitrator claimed immunity from the lawsuit.

In order to answer the research questions, the author of the thesis will also rely on, textbooks and journal articles of prominent scholars, and prominent scholars.

The mostly quoted books in this thesis are fundamental and comprehensive works on international arbitration. Moreover, these textbooks, among other, examine basic principles of the international arbitration, particularly chapters on the legal status and liability of an arbitrator are quoted. These books are: (i) The Principles and Practice of International Commercial Arbitration (2008), by Moses, M.L.; (ii) International Commercial Arbitration and the Arbitrator’s Contract. (2010), by Onyema, E. (iii) Redfern and Hunter on International arbitration, by Nigel Blackaby and Constantine Partasides QC with Alan Redfern Martin Hunter (2015).

Regarding the journal articles, the author of the thesis tended to refer to the most recent ones, including the articles of Mr. Tadas Varapnickas, who is PhD in Law, Vilnius University Faculty of Law, with a dissertation on arbitrator’s liability. In addition, he is an assistant lecturer on contract law at Vilnius University Faculty of Law.

PART I

1. LEGAL STATUS OF ARBITRATOR

1.1. REGULATORY FRAMEWORK

According to the ICC report (1996), defining a status for international arbitrators depends on three elementary principles: **(i)** the arbitrator's relationship with the parties and the arbitration institution, **(ii)** rights and obligations of the arbitrators **(iii)** remedies and sanctions.[18] Even though these three principles are significant, for the purpose of the defining status of international arbitrator and examination of these three principles, it should be also taken into account the regulatory framework which governs international arbitration in general. In addition, the presentation of the regulatory framework for international is relevant for the analysis of the liability of arbitrators. Namely, the liability of arbitrators does not depend only on the applicable national law, yet other rules should be also taken into account.

Many laws may influence the legal status of arbitrator. Unlike judges of national courts, the position of arbitrators and determination of their legal status is more complex. On the one hand, the national judges act within one jurisdiction. They enjoy respective state protection and immunity, and their powers and duties are clearly defined by national regulations. On the other hand, the legal status of arbitrators, particularly in international arbitration, depends on many factors. Namely, the powers, duties, and jurisdiction of an arbitral tribunal and arbitrators arise from a complex mixture of the will of the parties, the law governing the arbitration agreement, the law of the place of arbitration, and the law of the place in which recognition or enforcement of the award may be sought.

Below is a general overview of the relevant legal sources which govern arbitration and other pertinent issues that derive from arbitration rules, including their powers and duties and liability of arbitrator and his/her relationship with parties.

According to Margaret L. Moses, the best way of presenting the regulatory framework for arbitration is the form of an inverted pyramid.[19]

---

[18] ICC Commission on International Arbitration. *Final Report on the Status of the Arbitrator*. Report of the Working Party on the status of the arbitrator [interactive]. [reviewed in 26 November 2019]. Available at: < http://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0009.htm#TOC_BKL1_2_1 >

[19] MOSES, M.L. *The Principles and Practice of International Commercial Arbitration.* Cambridge University Press, New York, 2008, p. 5

On the bottom of the inverted pyramid is the arbitration agreement. Namely, the arbitration agreement is the basis of any consensual arbitration, so that there cannot be an arbitral reference in the absence of a valid and enforceable arbitration agreement.[20] Therefore, all other sources of international commercial arbitration without a valid arbitration agreement would be irrelevant.

Further, above the arbitration agreement are the arbitration rules chosen by the parties. These rules, which apply to the arbitrations of all the parties who choose them, may be varied in a particular case by the arbitration agreement.[21] Namely, party autonomy is a fundamental principle of arbitration. Therefore, the parties are free to choose the rules which will be applicable to the arbitration. These rules come to the stage when the parties did not agree how to regulate some particular matter in writing. If the parties have chosen the applicable law, conflict rules will generally confirm their choice.[22] However, following the parties' choice may lead to disregarding other laws, and, in some cases, this may result in an award that is invalid or unenforceable[23].

At the next level of the pyramid are the national laws.[24] Both the arbitration law of the seat of the arbitration (the *lex arbitri*) and substantive laws will come into play, and they are likely to be different national laws.[25] Therefore, the parties should be cautious when they determine the seat or place of arbitration. Most likely, parties want an "arbitration friendly" regime, that is, one that will not unduly interfere with the arbitral process. If any court intervention is needed or occurs during or after the arbitration, the local law governing arbitrations will have a significant impact on the proceedings.

Many countries have adopted as their arbitration law the UNCITRAL Model Law on International Commercial Arbitration.[26] The UNCITRAL Model Law is designed to assist States in reforming and modernizing their laws on the arbitral procedure so as to take into account the particular features and needs of international commercial arbitration**.** It reflects

---

[20] ONYEMA, E. *International Commercial Arbitration and the Arbitrator's Contract*. Routledge, Oxon, 2010, p. 8.
[21] MOSES, M.L. *The Principles and Practice of International Commercial Arbitration.* Cambridge University Press, New York, 2008, p. 6.
[22] CORDERO-MOSS, G. *Why Arbitration Needs Conflict of Laws Rules*. Institute for Transnational Arbitration (ITA) [reviewed in 31 October 2019.]. Available at <http://arbitrationblog.kluwerarbitration.com/2018/10/17/why-arbitration-needs-conflict-of-laws-rules/>
[23] *Ibid.*
[24] MOSES, M.L. *The Principles and Practice of International Commercial Arbitration.* Cambridge University Press, New York, 2008, p. 6.
[25] *Ibid.*
[26] *Ibid.*

worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.[27]

International arbitration practice is also an integral part of Moses' pyramid. Namely, prominent arbitration institutions and the distinguished arbitrators have developed, through their long-standing practice, respective principles for resolving international disputes. Additionally, some of these practices have been codified as additional rules or guidelines.[28] There are, for example, rules that have been developed by the International Bar Association on the Taking of Evidence and on Rules of Ethics. The IBA has also produced Guidelines on Conflicts of Interest in International Arbitration (see Appendix G). The American Arbitration Association and the American Bar Association have also produced a Code of Ethics for Arbitrators. UNCITRAL has produced Notes on Organizing Arbitral Proceedings, etc.[29]

Finally, at the top of the inverted pyramid are pertinent international treaties.

The most important ones are: (i) the New York Convention of 1958 (the 'New York Convention') and (ii) the International Centre for Settlement of Investment Disputes (ICSID) Convention of 1965 (the 'ICSID Convention');

For most international commercial arbitrations, the New York Convention will be the relevant treaty because it governs the enforcement of both arbitration agreements and awards, and because so many countries are parties to the Convention. In addition to the New York Convention, three other important conventions are the Inter-American Convention on International Commercial Arbitration (the Panama Convention), the European Convention on International Commercial Arbitration, and the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "Washington Convention" or the "ICSID Convention").

Thus, as seen above, the regulatory framework for international commercial arbitration includes private agreements, agreed-upon rules, and international practice, as well as national laws and international conventions. Although parties have substantial autonomy to control the arbitration process, the supplementation and reinforcement of the process by both national and international laws help ensure that the process functions in a fair and effective manner. The

[27] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, [reviewed in 31 October 2019.]. Available at <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration>

[28] MOSES, M.L. *The Principles and Practice of International Commercial Arbitration.* Cambridge University Press, New York, 2008, p. 7.

[29] *Ibid.*

regulatory framework also gives parties confidence that they will have a reasonable method of recourse when problems develop in their international business transactions.

1.2. RELATIONSHIP BETWEEN THE PARTIES AND ARBITRATOR/S

The nature of the relationship between the parties and arbitrator/s is quite a controversial issue. Depending on the type of arbitration (ad hoc or institutional arbitration), several different relationships could occur, including the relationship between an arbitrator and arbitration institutions. Consequently, these various relationships directly affect the determination of the core relationship we analyse in this chapter, i.e. parties – arbitrator relationship.

Additionally, the legal nature of the relationship between the parties and arbitrator determines the legal status of the arbitrators, and, also, the legal status of arbitrators affects the nature of the relationship between the party and arbitrator. Therefore, these two issues are connected and converged.

Furthermore, the question of the legal nature of the relationship between the parties and the arbitrator/arbitration institution is often raised in the context of liability issues.[30] Indeed, one of the most important implications of the qualification of the relationship as a contract is the application of the general rules of contractual liability to any misconduct by the institution.[31]

The qualification of the legal relationship between the parties and arbitrators depends on the question of whether this relationship is a contract or not. Therefore, the academic community developed a few theories about the arbitrator-party relationship. The most quoted

---

[30] KINGA, T. *The Legal Relationship between the Parties and the Arbitral Institution* [interactive]. [reviewed in 1 December 2019.]. Available at <https://eltelawjournal.hu/wp-content/uploads/2014/03/ELJ_Separatum_timar.pdf >, p. 107.
[31] *Ibid.,* p. 108.

ones are the contractual and status theory. Additionally, the ICC in the Final Report (2006) on the Status of the Arbitrator expressed its approach to this issue.

Regarding contractual theory the legal relationship between the parties and arbitrator is qualified as a contract. According to the "contractual theory", the parties enter into a private agreement for dispute resolution services provided by a private individual according to contractually agreed terms.[32] The contractual relationship between the parties and the arbitrator exists apart from the arbitration agreement, and its formation, performance and expiration… occur[s] gradually and informally.[33] Proponents argue that this conception is most in line with the fundamental principle of party autonomy and view arbitrators as "service providers and effectively agents of the parties.[34]

In their 1989 second edition of Commercial Arbitration Mustill and Boyd were the main proponents of the argument that the nature of the relationship between the arbitrator and the parties could derive from the arbitrator's status.[35] They identified some key problems with the alternative contractual analysis.[36] For example, how did the contractual analysis fit with the powers of the court in relation to removal of an arbitrator?[37]

Under this "status theory", arbitration is viewed as a "judicial substitute" - with arbitrators.[38]

However, the pure status theory has since been broadly rejected by most commentators (even Mustill and Boyd accepted that there was scope for consensual terms alongside status).[39] The trouble is that contractual theory neatly explains the finer details of the relationship, particularly regarding the fees and remuneration for arbitrator. The arbitrator will also

---

[32] SHARMA, A. *The Contractual Relationship between the Institution and Arbitrator* [interactive]. [reviewed in 1 December 2019.]. Available at <https://www.researchgate.net/publication/330364849_The_Contractual_Relationship_between_the_Institution_and_Arbitrator >
[33] *Ibid.*
[34] *Ibid.*
[35] GEARING, M. *The relationship between arbitrators and parties: is the pure status theory dead and buried* [interactive]. [reviewed in 1 December 2019.]. Available at <http://arbitrationblog.kluwerarbitration.com/2011/06/17/the-relationship-between-arbitrators-and-parties-is-the-pure-status-theory-dead-and-buried/>
[36] *Ibid.*
[37] *Ibid.*
[38] SHARMA, A. *The Contractual Relationship between the Institution and Arbitrator* [interactive]. [reviewed in 1 December 2019.]. Available at <https://www.researchgate.net/publication/330364849_The_Contractual_Relationship_between_the_Institution_and_Arbitrator>
[39] GEARING, M. *The relationship between arbitrators and parties: is the pure status theory dead and buried* [interactive]. [reviewed in 1 December 2019.]. Available at <http://arbitrationblog.kluwerarbitration.com/2011/06/17/the-relationship-between-arbitrators-and-parties-is-the-pure-status-theory-dead-and-buried/>

generally be bound to conduct the arbitration in accordance with the parties' agreement (although this may be limited by national law provisions providing that the arbitrator must adopt procedures suitable to the circumstances of the case). The parties may also jointly agree to remove an arbitrator. These issues are best accommodated by contractual theory. At a broader level it is also not hard to support a contractual analysis as underlying the relationship. When an arbitrator accepts an appointment he or she agrees to resolve the dispute between the parties and the parties in turn agree to remunerate the arbitrator for this, having the same role and therefore the same status as judges.[40]

In its Final Report, the ICC working group concluded that the predominant view is that arbitrators and parties are indeed bound by a special contract ("*receptum arbitrii* "). Namely, the following is clearly stated in this report:

"In every case, the arbitrator and the parties are bound by a specific contract. The subject matter of this receptum arbitrii, sometimes referred to as the 'contract of investiture', is the arbitrator's performance of a very special task: to settle the dispute between his contracting parties."

If the arbitration is administered by a permanent arbitration centre, two other contractual relationships are concluded: one between the parties and the arbitration institution, and the other between the institution and the arbitrator."

Therefore, the contracting parties to the arbitrator's contract are the disputing parties and the arbitrator, while the arbitrator concludes his/her contract with the arbitration institution under institutional references[41], if the arbitration is administered by a permanent arbitration centre.

Finally, it is equally rare that the relationship between the arbitrator and parties is solely capable of a private contractual analysis for the reasons already suggested by Mustill and Boyd. It is no surprise therefore that many jurisdictions have interpreted the relationship as a hybrid one. The English Court has said that it has found it impossible to divorce the contractual and status considerations and that: "*in truth the arbitrator's rights and duties flow from the conjunction of those two elements*." Many jurisdictions have adopted this approach, recognising that there is a contract in place but that it is a sui generis contract – a contract

[40] *Ibid.*

[41] ONYEMA, E. *International Commercial Arbitration and the Arbitrator's Contract*. Routledge, Oxon, 2010, p. 60

which is overlaid with a special adjudicatory function which is public in nature. And this also could be the reason why the ICC uses the term the "special contract" in its final report.

1.2.1. APPLICABLE LAW TO THE RELATIONSHIP BETWEEN THE ARBITRATOR AND THE PARTIES

For examining the legal status of the arbitrators and their liability it is always necessary to define and determine which law will be applicable to the relationship between the arbitrator and the parties.

Although the convention and the laws are silent, the arbitration doctrine provides quite a clear answer to this question.[42] According to Born, "*the better view is that arbitrators' status, rights and obligations are the result of a contract which operates within, and incorporates, a specialized legal regime – that regime being the international and national law framework governing the international arbitral process."*[43] Most of the authors also believe that this contract between the parties and the arbitrators should be qualified as a *sui generis* contract.[44] Given the arbitrators and the parties' contractual relationship, the law governing the arbitrator's contract would also govern the issue of arbitrators' liability.[45] Therefore, in order to determine what law will apply to the civil liability of arbitrators, it is necessary to determine the law applicable to the arbitrator's contract.[46]

ICC report 1996 provides respective guidance regarding the applicable law to the relationship between the arbitrator and the parties. Consequently, provisions of applicable law will also affect the legal status of arbitrator. In that respect there are several solutions. Namely, according to the ICC report, one of the following law could be applicable to the relationship between the arbitrator and the parties:

(i) Law of the seat of arbitration;

(ii) Law agreed by the parties or the arbitrator;

(iii) Law of the domicile of each arbitrator;

---

[42] VARAPNICKAS, T. *The Law Applicable to Arbitrators' Civil Liability from a European Point of View* [interactive]. [reviewed in 1 December 2019.]. Available at <http://arbitrationblog.kluwerarbitration.com/2019/03/25/the-law-applicable-to-arbitrators-civil-liability-from-a-european-point-of-view/>

[43] *Ibid.*

[44] *Ibid.*

[45] *Ibid.*

[46] *Ibid.*

(iv) Law of the seat of the arbitral institution (in case of an institutional arbitration);

(v) Others.

The analysis of the replies reveals three clear stages:

- in the first place, it is up to the parties (and the arbitrator) to determine the law applicable to their relationship-even if they do not often make use of this possibility;

- if no such choice is made, the law of the seat of arbitration should be chosen;

- lastly, but subject to reservations owing to the resultant problems of split procedures, the law of the domicile of each arbitrator is applicable.

There is marked opposition by the correspondents to recourse to the law of the headquarters of the arbitration institution.

Lastly, it was noted that the law governing the relationship between the parties and the arbitrator may be determined by a national judge who will follow the rule of conflict of laws.

The first task of the arbitrators in the proceedings is to clarify the relevant issues and to determine all relevant facts in the dispute. The next step which should be taken by arbitrators is to apply the relevant rules and laws which were chosen by the parties or to apply some other rules or laws depending on choice-of-law rules. However, it is not always clear which law should be applied in the arbitration and this will most likely happen when the arbitration agreement is not properly drafted.

International arbitration, unlike its domestic counterpart, usually involves more than one system of law or of legal rules. Indeed, it is possible, without undue sophistication, to identify different systems of law that, in practice, may have a bearing on an international arbitration.

1.3. ARBITRATOR'S POWERS/RIGHTS AND DUTIES/OBLIGATIONS

An arbitral tribunal established to determine an international dispute operates in an entirely different context from that of a judge sitting in a national court.[47] Namely judges most likely enjoy the full protection of the state mechanism, and they can rely on all state bodies during the proceedings. Conversely, the powers and duties of the arbitrators most likely depend on the will of the parties and the procedural rules of the arbitral institutions.

[47] BLACKABY, N., et al. *Redfern and Hunter on International Arbitration*. the United States of America: Oxford University Press, 2015; p. 305.

1.3.1 Powers of Arbitrators

Parties expect from the arbitral tribunal and arbitrators to carry out their tasks properly and effectively. In order to render valid and enforceable award, international arbitration law provides the respective scope of powers of arbitrators. The powers of an arbitral tribunal and arbitrators are those conferred upon it by the parties within the limits allowed by the applicable law, together with any additional powers that may be conferred automatically by operation of law.[48] These powers are established to enable efficient and fair arbitration proceedings.

The arbitrator dealing with an international commercial dispute has important powers. He/she has power to order pleadings and particulars, to fix dates for hearings, to grant postponements, to proceed with a hearing in the absence of a party duly notified, to order discovery, to order inspection of documents, property and premises, to order security for costs, to appoint experts, to delegate duties to secretaries, to refer costs to be taxed and consult with other persons and adopt their views as his own (after having formed his own judgment).[49]

All modern international arbitration rules give arbitrators broad powers to get the factual and legal information they need to take correct decisions. Arbitrators can generally order the parties to produce documents, question witnesses, conduct site visits, inspect property, engage factual and legal experts to assist them and otherwise establish procedural rules that allow them to get material information.

According to the ICC Arbitration Rules[50] the function of the ICC is to ensure the application of the Rules of Arbitration of the ICC Commerce, and it has all the necessary powers for that purpose. As an autonomous body, it carries out these functions in complete independence from the ICC and its organs. Its members are independent from the ICC National Committees and Groups.

Having in mind the quoted provisions of the ICC Rules, the arbitrators have a broad power to ensure the application of the ICC Rules. Additionally, the ICC Rules ensure the independence of an arbitration institution, its organs and all members of arbitration.

According to the ICDR rules, arbitrator has the power to order or award any interim or conservancy measures that the emergency arbitrator deems necessary, including injunctive

---

[48] *Ibid.,* p. 306.
[49] JARVIN, S. The sources and limits of the arbitrator's powers. *Arbitration International*, 1986, p. 140–163.
[50] ICC Commission on International Arbitration. Arbitration Rules, Article 1 of the Appendix I – Statutes of The International Court of Arbitration. [reviewed in 3 November 2019]. Available at <https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/>

relief and measures for the protection or conservation of property.[51] Then, arbitrator can assess and determine finally the allocation of the costs associated with applications for emergency relief.[52] Finally, the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s), or with respect to whether all of the claims, counterclaims, and setoffs made in the arbitration may be determined in a single arbitration.[53] Then, the tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part.[54]

The LCIA Arbitration Rules gives the power to an arbitrator to may appoint one or more experts to report in writing to the Arbitral Tribunal and the parties on specific issues in the arbitration, as identified by the Arbitral Tribunal.[55] Then, according to Art 23 of these rules the Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement.[56] The Arbitral Tribunal shall also have the power to decide by an award that all or part of the legal or other expenses incurred by a party (the "Legal Costs") be paid by another party.[57]

According to Blackaby, there are several categories of the powers which are common for the arbitrators.[58]

Firstly, arbitrators establish the arbitral procedure. Then, they determine the applicable law and seat. Further, where the language of the arbitration is not established by the arbitration agreement and the institutional rules do not provide for the determination of this question, the arbitral tribunal must determine the language(s) to be used in the proceedings.

As we already mentioned, in order to issue an accurate and fair decision, arbitrators have a broad scope of procedural powers. They are entitled to require from the parties the production of the documents which has to be disclosed in the proceedings. Additionally, they have the power to require the presence of witnesses under the control of the parties. Furthermore, arbitrators have the power to appoint their own experts who will assist them during arbitration

---

[51] Art. 6.4 of the ICDR rules.
[52] *Ibid.*, Art. 6.8.
[53] *Ibid.*, Art. 19.1.
[54] *Ibid.*, Art. 19.2.
[55] Art. 21.1 of the LCIA Arbitration Rules.
[56] *Ibid.,* Art 23.
[57] *Ibid.,* 28.3.
[58] BLACKABY, N., et al. *Redfern and Hunter on International Arbitration*. United States of America: Oxford University Press, 2015; p. 305-314.

and help them to clarify certain issues that are out of the scope of the law. For example The *PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment* provide for the establishment of a specialized list of arbitrators considered to have expertise in this area. The Rules also provide for the establishment of a list of scientific and technical experts who may be appointed by arbitral tribunal as expert witnesses pursuant to these Rules.[59]

During the course of an arbitration, it may become necessary for the arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, to respect procedural rights, and otherwise to maintain the status quo pending the outcome of the arbitration proceedings. Therefore, arbitrators are entitled to issue the interim measures during the arbitration proceedings. The different types of interim measures are available: (i) Injunctions, (ii) Security for costs, (iii) Applications for the preservation or detention of property, (iv) Active interim measures, and (v) Passive interim measures.[60] The provision of these interim measures is essential in making the arbitration process – as well as the outcome of the arbitration – more effective, as they provide parties with the security and or relief that allow them to continue with the process.[61]

1.3.2 Duties of Arbitrators

Arbitrators should proceed quickly, efficiently and fairly in order to render a valid and enforceable award. Additionally, an arbitrator is a guardian of arbitration who enjoys full trust and confidence by parties. Therefore, arbitrators must be independent and unbiased.

The arbitration rules which are examined in this thesis provide some of the following arbitrator duties.

The ICC Rules impose their own obligations upon arbitral tribunals such as to confirm their availability, to draw up terms of reference, to make an award within a defined period of time, and to submit the award in draft form to the ICC's Court for scrutiny.[62] Namely,

---

[59] Art 27 Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or The Environment

[60] Kinds of Interim Measures in Arbitration, 2016, [interactive] [reviewed in 4 November 2019.]. Available at <http://expert-evidence.com/kinds-of-interim-measures-in-arbitration/>

[61] *Ibid.*

[62] BLACKABY, N., et al. *Redfern and Hunter on International Arbitration*. the United States of America: Oxford University Press, 2015; p. 305-314.

according to Article 11.2 of the ICC Rules, before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence.[63]

ICDR rules prescribe respective duty of arbitrator regarding the confidentiality. Namely, confidential information disclosed during the arbitration by the parties or by witnesses cannot be divulged by an arbitrator.[64]

LCI Rules strictly lays down an arbitrator's duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.[65]

According to the scholars[66], the duties of an arbitrator may be divided into three categories: (i) duties imposed by the parties; (ii) duties imposed by law; and (iii) ethical duties. It is a useful discipline for an arbitral tribunal to draw up for itself a checklist of its specific duties, whatever their origin. Such a list will differ from case to case, since it must allow for the impact of different rules of arbitration and for the differing laws applicable to each case.

Additionally, the theory recognizes the implied duties of arbitrators. Some of the implied duties can be also permeated through the above three categories.

1.3.2.1. Duties Imposed by the Parties

Most of the arbitrators' duties and powers derived from the arbitration agreement. These duties and powers are imposed by the parties. Therefore, each arbitrator should read the arbitration agreement in detailed in order to check whether she/he can comply with the respective duties. Consequently, depending on the type of arbitration and the subject matter of the dispute, some specific duties which are not set up by the regulations and institution rules can be imposed by the parties.

The procedural rules of the arbitration institutions contain provisions on arbitrator's duties. According to Blackaby[67] these duties also fall within this category. As we have seen above, according to the ICC rules, arbitrators are obliged to respect these duties, in order to ensure the application of the procedural rules.

---

[63] Art. 11.2.
[64] Art. 37.1.
[65] Art. 14.4.
[66] BLACKABY, N and MOSES describe the duties of the arbitrators in their textbooks.
[67] BLACKABY, N., et al. *Redfern and Hunter on International Arbitration*. the United States of America: Oxford University Press, 2015; p. 320.

1.3.2.2. Duties Imposed by Law

Unlike duties imposed by parties, there are other duties of arbitrators that are imposed by law. For instance, the law may require an arbitral tribunal to decide all procedural and evidential matters, to treat the parties fairly and impartially, or to make the award in a particular form.[68]

(i) Duty to act with due care

The arbitrator must accurately apply the law. The obligation to follow the mandate and act with due care suggest that a tribunal must come to the most correct conclusion.

Duty to act with due care is a standard of professional behaviour linked to the lawyers, accountants, engineers, architects and other professions that require the next level of skills and responsibility. However, this term is not always clear and it should be interpreted on a case-by-case.

Professional liability of the arbitrators is still under question. Namely, arbitrators and arbitral institutions relied upon arbitrator's immunity rules (similar to state judges' immunity). Therefore, some scholars claim that arbitrators do not have liability insurance like some other professionals.[69] Nevertheless, some national regulations, specifically, article 21.1 of the Spanish Arbitration Act (2003) imposes a mandatory obligation for arbitrators to obtain insurance.[70] The Spanish Act considers that arbitral institutions should provide insurance directly to arbitrators arbitrating pursuant to the institutional rules.[71]

A rigid categorisation of the source of an arbitrator's obligation to act with due care risks obscuring the real debate: whether it is appropriate, as a matter of policy, to accord immunity, or partial immunity, to arbitrators. Public policy in this context is mainly concerned with the independence and integrity of the decision-making process, which could be jeopardised if, as a result of liability, arbitrators were to be subject to reprisals by disappointed parties.[72]

---

[68] *Ibid.*

[69] PERALES VISCASILLAS, M.P. *Liability Insurance in Arbitration: The Emerging Spanish Market and the Impact of Mandatory Insurance Regimes* [interactive] [reviewed in 1 December 2019.]. Available at <http://arbitrationblog.kluwerarbitration.com/2014/01/08/liability-insurance-in-arbitration-the-emerging-spanish-market-and-the-impact-of-mandatory-insurance-regimes/>

[70] *Ibid.*

[71] *Ibid.*

[72] BLACKABY, N., p. 324

Duty to act with due care could also mean that the arbitrator must act in good faith. If he acts in a bad faith, he will breach this duty. However, it is not easy to define bad faith. Nevertheless, the English judges tried to do that. Namely, according to the Judge Lightman stated during a tort action for abuse of authority by a public official in the course of his duties that bad faith was either "(a) "malice in the sense of personal spite or a desire to injure for improper reasons; or (b) knowledge of absence of power to make the decision in question."[73]

Some authors have attempted to define the actions that can be considered as characteristics of bad faith. According to Mustill & Boyd, *"the concept of dishonesty (or bad faith), to use the terminology of section involves, we consider, conscious and deliberate fault on the part of the arbitrator."*

(ii) Duty to act promptly

The arbitrator should act without delay. Failure to act promptly can be costly in the arbitration process. Therefore, arbitrators should be cautious when they accept to be engaged in the arbitration. The overworked, insufficiently diligent co-arbitrator who fails to propose dates within a reasonable timeframe, as a result of other proceedings in which he is engaged, is something which occurs very often. This is not the most serious breach, but it is perhaps the most widespread.[74]

(iii) *Duty to treat the parties equally*

Arbitrators should generally not seek to help one party over another, even to level the playing field.[75] Seeking to help one party over another is arguably inconsistent with an arbitrator's due process obligation to treat the parties equally and may well invite accusations of bias.[76]

---

[73] JARVIN, S. The sources and limits of the arbitrator's powers. *Arbitration International*, 1986, p. 140–163
[74] CJ Report, p. 90.
[75] KIRBY, J. How Far Should an Arbitrator Go to Get it Right? *Kluwer Law International B.V.* 2017, p. 193-199; p. 197.
[76] *Ibid.*

1.3.2.3. Implied Duties

The starting point for assessing the duties of an arbitrator in a particular case is the arbitration clause and the arbitration rules, if any, to which it refers.[77] The clauses and rules will reveal a number of matters which may imply duties of the arbitrators, such as the duty to go to the particular place which is the seat of arbitration, unless the parties dispense with it; the duty to use a particular language; the duty to administer the proceedings in accordance with particular rules; and the duty to plan the proceedings and the arbitrators' available time in such a way that the award can be made within the prescribed time limit or within a reasonable time.[78] The parties may, in the arbitration agreement or by reference to a specific set of arbitration rules or to a specific arbitration institution, have prescribed other duties of the arbitrators. [79]

1.3.2.4. Ethical Duties

Most associations of lawyers have written codes of ethics that guide and govern their members, as do other groups such as accountants, doctors and journalists.[80] It is not surprising, therefore, that arbitrators' ethics have become the subject of increasingly detailed rules and codes in recent years.[81] These codes of ethics have also been supplemented and expounded upon by the provisions of arbitral rules, the procedures for selection and challenge of arbitrators, the standards that apply to review of final awards, as well as applicable national criminal laws, such as those that prohibit money laundering or corruption.[82] In other words, there are a range of sources that combine together to determine the ethical obligations of arbitrators.[83]

[77] NEWMAN, L.W., HILL, R.D. The Leading Arbitrators' Guide to International Arbitration - 2nd Edition, 2008
[78] *Ibid.*
[79] *Ibid.*
[80] ROGERS, A. C. *The Ethics of International Arbitrators, Bocconi University, Institute of Comparative Law*, 2013, p. 3, [interactive]. [reviewed in 1 December 2019.]. Available at: <http://cedires.be/index_files/ROGERS_The%20Ethics%20of%20International%20Arbitrators.pdf>
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*

1.4 REMEDIES AND SANCTIONS

Remedies and sanctions is the third principle which defines the legal status of the arbitrator, according to the ICC Report (1996). Given that this principle is mostly related to arbitrator's liability, the most relevant issues regarding this principle will be assessed in the second chapter of the thesis. However, some other aspects of "remedies and sanctions" which are elaborated in the ICC Report, such as the independence and impartiality of arbitrator will be discussed in this (first) chapter.

1.5. REQUIREMENTS FOR THE ARBITRATOR

Subject to certain conditions, when an arbitrator does not act with due diligence, or when his personal qualities and experience fall short of the expectations of the party or parties who nominated him, he may be dismissed.[84] Therefore, in international arbitration, the choice of arbitrators may be the most important single task parties face.[85] Before appointment by the LCIA Court, each arbitral candidate shall furnish to the Registrar (upon the latter's request) a brief written summary of his or her qualifications.[86] Even though the LCIA Arbitration Rules do not prescribe which qualification the arbitrator must possess, the quoted provision undoubtedly indicates the significance of the arbitrator's qualifications.

There are many questions which parties should take into account when they select the arbitrators. Will the person be organised and efficient? What is his or her ability to handle complex arbitration issues? Does he or she have sufficient knowledge of the applicable substantive law? Is he or she likely to be a consensus builder? What kind of approach does he or she have to contractual interpretation? Many of these questions can be answered only by experienced arbitration practitioners familiar with the community of international arbitrators and the manner in which they conduct proceedings.

According to the regulatory framework for arbitration and academic works, we can divide the requirements and qualifications of arbitrators in two groups. The first group is consisting of mandatory requirements that arise out of arbitration rules and national

---

[84] ICC Report, 1996.

[85] DRAHOZAL, C. R., *Arbitrator Selection and Regulatory Competition in International Arbitration law*, 2005 [interactive]. [reviewed in 1 December 2019.]. Available at: < http://ssrn.com/abstract=1905715>, p 3.

[86] Art. 5.4. of the LCIA Arbitration Rules.

regulations. The second group covers specific requirements which could be determined by the arbitration agreement or by the respective arbitration rules.

1.5.1. Mandatory Requirements

Mandatory requirements for arbitrators are legal capacity, independence, and impartiality.

In most arbitration systems, any natural person may be chosen to act as an arbitrator, the only general requirement being that the person chosen must have legal capacity.[87] However, an arbitrator should be an expert in the field and should have significant experience and respective skills, in order to efficiently act in this capacity. These specific qualifications will be explained in detail, below, considering they are not precisely defined by the regulatory framework for administration and that they are still subject of the discussion among the scholars and legal professionals.

Further, most developed arbitration laws require that all of the arbitrators be independent and impartial. Likewise, these requirements are strictly prescribed by the ICC Rules[88], ICDR Rules[89], and the LCIA Arbitration Rules[90].

One of the fundamental expectations of any party to a dispute is that the individuals adjudicating the dispute will be independent and impartial.[91] The concepts of the impartiality and independence of arbitrators will be discussed in detail within the specific chapter of this thesis. Beside of independence and impartiality, the neutrality is considered as a necessary requirement for arbitrators.

1.5.2. Specific Requirements

Besides the mandatory requirements stated above, an arbitrator has to be an expert in the subject of the dispute and should have formal training in arbitration. These special qualifications are most likely related to the types of the dispute and to the content of the arbitration contract.

---

[87]BLACKABY, N., et al. *Redfern and Hunter on International Arbitration*. United States of America: Oxford University Press, 2015; p. 246.
[88] Art. 11.
[89] Art. 13.
[90] Art. 5.3.
[91] KUMAR, L., *The Independence and Impartiality of Arbitrators in International Commercial Arbitration* [interactive]. [reviewed in 1 December 2019.]. Available at: <http://ssrn.com/abstract=2428632>, p. 1.

A party can use its choice or input into the selection process to help ensure that, as far as possible, the tribunal will understand the context of the dispute, the relevant issues, and the party's procedural preferences.[92] The parties may agree upon certain criteria for the arbitrators, or for the presiding arbitrator, although they should take care not to narrow the field so far that there are difficulties in identifying potential candidates.[93]

Choosing arbitrators who will preside over the proceedings and issue an award is perhaps the most important thing a lawyer does with respect to resolving the client's dispute.[94] The skill, experience, and knowledge of the arbitrators will have a significant impact on the quality of the process and of the award.[95]

a. Arbitrator - lawyer

Many, but not all, arbitrators are lawyers. In most states, arbitrators are only required to maintain neutrality and have some expertise in the field of the dispute.[96] In its latest arbitration legislation, Spain, for example, repealed its former rule that the arbitrator must be a qualified lawyer where the dispute involves issues of law.[97] In 2012, Saudi Arabia removed the requirement that all arbitrators be male and have knowledge of Shari'ah law (although the presiding arbitrator in a panel of three is still required to hold a degree in Shari'ah).[98]

If specific industry knowledge is not crucial, however, parties will tend to prefer arbitrators with a legal background. However, many arbitrators and parties appreciate the significant contributions of experienced nonlawyer arbitrators who are also reasonably well versed in the relevant law.

b. Knowledge and Experience

---

[92] Guide to International Arbitration, [interactive]. [reviewed in 1 December 2019.]. Available at: <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017>
[93] *Ibid.*
[94] MOSES, M.L. *The Principles and Practice of International Commercial Arbitration.* Cambridge University Press, New York, 2008, p. 116.
[95] *Ibid.*
[96] BLACKABY, N., et al. *Redfern and Hunter on International Arbitration*. United States of America: Oxford University Press, 2015; p. 247
[97] *Ibid.*
[98] *Ibid.,* p. 248

One of the advantages of arbitration is that parties can choose decision makers who have knowledge and experience in the area that is the subject of the dispute.[99] Many, but not all, arbitrators are lawyers who have expertise in the certain branch of law.

In the discussion before the OECD regarding the selection of the arbitrators in Investor-State Dispute Settlement[100], Japan emphasised that the ability to choose an arbitrator with sectoral expertise in the matter in dispute is an important advantage of arbitration over a court system staffed by generalist judges. The parties will want to have arbitrators who will have specific sectoral expertise, such as expertise in the oil industry or in labour issues. The United States also emphasised the importance of the parties' ability to select arbitrators with specific knowledge.

c. Professors as Arbitrators

Particularly in fact-intensive cases, such as construction arbitrations, there is concern that professors will be too theoretical, will not focus on the facts, and may not have the skill set to deal with complex factual issues.[101] However, some prominent private and public international law professorsare very active in the arbitration and parties are very interested to choose them to arbiter their disputes.

d. Language Fluency

It is desirable, but not mandatory requirement, that arbitrator has ability to be fluent in a particular language, or sometimes in two or more languages.

e. Availability

Very well-known arbitrators can have very busy schedule. However, parties are most likely interested to choose this kind of arbitrators to decide their case. Nevertheless, when

---

[99] *Ibid.*

[100]Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview, 2018. [interactive]. [reviewed in 1 December 2019.]. Available at: <https://www.oecd.org/investment/investment-policy/ISDS-Appointing-Authorities-Arbitration-March-2018.pdf>

[101] MOSES, M.L. *The Principles and Practice of International Commercial Arbitration.* Cambridge University Press, New York, 2008, p. 116.

arbitrator accept the appointment by the parties, he or she has to be aware that each delay in arbitration process and decision making could be harmful for at least one of the party in a dispute.

f. Reputation

Reputation is the result of all your previous interactions with another person in a specific context.[102] Therefore, the reputation of the arbitrator will be most likely assessed as a result of his/her interaction with the party involved. If an arbitrator has a bad history (or reputation) in any past or pending cases involving a party, the arbitrator is unlikely to be appointed for a future dispute.[103]

Reputational concerns affect the credibility of arbitration. Therefore, the prominent arbitral institutions tend to develop mechanisms to select and monitor their recommended arbitrators, to reduce problems of reputation and bias.[104]

g. Specific qualifications

Qualifications that are agreed upon by the parties can be spelled out in the arbitration clause.[105] The parties could assert, for example, that all arbitrators must speak specific language or must have experience in some specific industry. There is a risk in being too specific, however, because if the arbitration agreement contains a laundry list of qualifications, it may be too difficult to actually find arbitrators who have all of the qualifications desired.

---

[102] DUARTE, M. *Reputation Arbitration: Building a Decentralized Reputation System for Arbitrators?* [interactive]. [reviewed in 1 December 2019.]. Available at: <http://arbitrationblog.kluwerarbitration.com/2018/07/26/reputation-arbitration-building-decentralized-reputation-system-arbitrators/>

[103] *Ibid.*

[104] *Ibid.*

[105] MOSES, M.L. *The Principles and Practice of International Commercial Arbitration.* Cambridge University Press, New York, 2008, p. 120.

1.6. INDEPENDENCE AND IMPARTIALITY OF THE ARBITRATOR

It is a generally accepted principle of international arbitration that arbitrators must stay both impartial and independent of the parties. Both requirements have been enacted in most arbitration laws and rules, as well as in codes of ethics. For instance, under Article 12 UNCITRAL Model, "Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."[106] Therefore, the lack of the arbitrator's impartiality or independence is the legal ground for challenging procedure against the arbitrator.

Article 11 (1) of the ICC Rules, "Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration". Article 13 (1) of the ICDR Rules and Article 5 (3) of the LCIA Rules lays down the same requirements regarding the arbitrator's legal status and role during the arbitration.

International institutions all over the world promote the perfect fairness of the arbitrator idea. Additionally, the international business community has the interest to entrust their disputes to the prominent and well-recognized professionals. However, professionalism, knowledge, and skills are not the sole characteristics of the arbitrators. Namely, one of the core principles of the arbitration law is that the individuals who decide on the disputes have to be independent and impartial. As arbitration is a form of adjudication, albeit a private one, it is important that the final outcome be the result of an impartial process in which all sides have been fully heard.[107]

It is for this reason that an arbitral award, like the judgment of a national court, may be subject to challenge if the adjudicating body was linked economically to one of the parties to the dispute, or lacked impartiality with respect to a party or the subject matter of the dispute.[108]

When scholars discuss the arbitrator's impartiality and independence they compare the position of the arbitrator with the position of the judge. However, unlike the arbitrators, national judges find the source of his power and auctoritas in the rules of the lex fori, these rules do not bind the international arbitrator due to the private character of the commercial arbitration.[109] Arbitrators are chosen or nominated and remunerated by the parties even if they

[106] Art 12 (1) and 12 (2) of the UNCITRAL Model.
[107] Czech (& Central European) Yearbook of Arbitration, Volume IV, 2014, Independence and Impartiality of Arbitrators, p. 268.
[108] KUMAR, L. *The Independence and Impartiality of Arbitrators in International Commercial Arbitration*. [interactive]. [reviewed in 1 December 2019.]. Available at: <http://ssrn.com/abstract=2428632 >
[109] *Ibid.*

do not act as a representative of that party.[110] Whereas the judge´s power derives directly from the state, the power of an arbitrator to decide a case results from a contractual relationship between the parties.[111] Thus, the arbitrators are 'acting as agents or mandataries of the parties'.[112]

Nevertheless, there is a long tradition in the analogy judge arbitrator.[113] Hoosac Tunnel Dock and Elevator Company v James W. O´Brian, for instance, claim that an arbitrator is a "quasi-judicial officer" and therefore the court ruled that impartiality, independence and freedom from undue influence from the arbitrator must be protected.[114]

Sometimes, it sounds easy and not difficult to put on the paper that the arbitrator must be independent and impartial. However, these two concepts are very different and sometimes overlap with some other legal concepts. Therefore, in this chapter, I will analyse these two concepts separately.

1.6.1 Independence

Independence ordinarily relates to relationships, for example, whether an arbitrator is professionally or personally related to one of the parties, or has a familial or business connection to or with that party.[115]

A professional relationship could include a relationship in which the arbitrator, or partner, has acted or is acting as counsel, an employee, an advisor or as a consultant on behalf of one party.[116]

A personal relationship could include, for example, a long standing friendship between the arbitrator and a party, or a solitary incident when it is discovered that the arbitrator shared a room with the counsel for one party.[117]

Independence also depends on the degree of such relationships.[118] The test of independence was best is; "Independence implies the courage to displease, the absence of any

---

[110] Czech (& Central European) Yearbook of Arbitration, Volume IV, 2014, Independence and Impartiality of Arbitrators, p. 272.
[111] *Ibid.*
[112] *Ibid.*
[113] KUMAR, L. *The Independence and Impartiality of Arbitrators in International Commercial Arbitration*. [interactive]. [reviewed in 1 December 2019.]. Available at: <http://ssrn.com/abstract=2428632,> p.1.
[114] *Ibid.*
[115] *Ibid.*, p 2.
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid.*, p 3

desire, especially for the arbitrator appointed by a party, to be appointed once again as an arbitrator."[119]

1.6.2. Impartiality

Arbitration necessarily requires a neutral third-party decisionmaker. Moreover, the opposite of impartiality is bias or partiality, which is a form of misconduct that is unexpected and unacceptable among such decisionmakers.[120] But the nature of impartiality is not nearly as simple as these maxims would suggest, particularly when it intertwines with notions of party preference and party autonomy.[121]

Impartiality relates to a state of mind, sometimes evidenced through conduct demonstrating that state of mind.[122] An arbitrator is partial towards one party if he displays preference for, or partiality towards one party or against another, or whether a third person reasonably apprehends such partiality.[123] Such partiality goes to whether it is reasonable to believe that the arbitrator will favour one party over the other for reasons that are unrelated to a reasoned decision on the merits of the case.[124]

These unrelated factors could include a relationship, such as the influence that a professional, business, or personal relationship might give rise to the reasonable belief that the arbitrator is partial.[125] It could also relate to the arbitrator's conduct in the absence of such a relationship, such as a statement during the course of an arbitration proceeding that persons of a particular nationality are liars, or that a member of an ethnic minority is in some way inferior.[126]

1.6.3. Neutrality

In addition to independence and impartiality there is another concept, namely that of "neutrality". The concept of neutrality is linked to the nationality of the arbitrator and, in such

---

119 *Ibid.*
120 ROGERS, C.A. The Ethics of International Arbitrators, *Bocconi University, Institute of Comparative Law (IDC),* 2013, p. 9.
121 *Ibid.*
122 KUMAR, L. *The Independence and Impartiality of Arbitrators in International Commercial Arbitration*, [interactive]. [reviewed in 1 December 2019.]. Available at: <http://ssrn.com/abstract=2428632,> p. 3.
123 *Ibid.*
124 *Ibid.*
125 *Ibid.*
126 *Ibid.*

case, parties from different nationalities will require the presiding arbitrator to have a different nationality.[127] According to the LCIA Rules[128], where the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitral candidate all agree in writing otherwise. The ICC Rules[129] prescribes that the "Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals". However, the concept of neutrality implies a subjective requirement as well. Arbitrators must be open minded, aware of cultural issues and without any prejudice as well as internationally minded.[130]

Arbitrators are neutral if and only if, they commit themselves to ground their reasoning on the valid rules of the legal system applicable to the case at hand and to justify their decisions on this basis only.[131] A neutral judge is one who agrees to analyse any matter that is subjected to her consideration from the legal point of view.[132]

Obligations of impartiality and/or independence are often embedded in broader standards, which determine how to establish and evaluate allegations of bias in the context of arbitral proceedings.[133] These tests are also variegated and apply at different stages and in different contexts.

---

[127] *Ibid.,* p.4.
[128] Art. 6.1. of the LCIA Rules.
[129] Art. 13.1. of the ICC Rules.
[130] KUMAR, L. *The Independence and Impartiality of Arbitrators in International Commercial Arbitration*, p. 4. [interactive]. [reviewed in 1 December 2019.]. Available at: <http://ssrn.com/abstract=2428632>
[131] PAPAYANNIS, D.M. *Independence, impartiality and neutrality in legal adjudication* [interactive]. [reviewed in 1 December 2019.]. Available at: <https://journals.openedition.org/revus/3546>
[132] *Ibid.*
[133] *Ibid.* p. 13.

PART II

2. ARBITRATOR'S LIABILITY

2.1. ISSUES WITH THE ARBITRATOR'S LIABILITY

The arbitrator's liability is one of the most controversial topic in arbitration law. On the one hand, the arbitrators are service providers[134] with contractual duties[135], while on the other hand, the parties appoint them to arbitrate and render the award on their rights and duties – judicial function of arbitrators. Even though parties subscribe arbitrators to act, they expect from them to be independent and impartial. However, some awards were challenged due to the party's allegations that arbitrator was bias and partial, during the arbitration procedure.[136] Namely, according to the most of the arbitration rules and national laws, any lack of independence and impartiality which is proved by the parties can lead to arbitrator's liability. Indeed, the lack of arbitrator's independence and impartiality is very difficult to prove.

Further, the lack of independence and impartiality are not sole wrongdoings of arbitrators that can lead to their liability. Namely, on one hand the arbitrators like judges may wrongly interpret some regulations or contract clauses, may even make some procedural errors, or breach some other duties result from their judicial role. Nevertheless, the arbitrator enjoys immunity, and depending on the scope and effects of the immunity, the arbitrator's liability should be assessed. On the other hand, they can breach their contractual duties that derive from arbitration contract. Consequently, there is a double ground of arbitrator's liability, firstly as a judge, then as a contracting party. Such a complex construction of arbitrator's liability could be explain through the concept of the "dual role"[137] of the arbitrators or a "quasi-judicial mandate"[138].

---

[134] VARAPNICKAS, T. *The Law Applicable to Arbitrators' Civil Liability from a European Point of View* [interactive]. [reviewed in 1 December 2019.]. Available at: <http://arbitrationblog.kluwerarbitration.com/2019/03/25/the-law-applicable-to-arbitrators-civil-liability-from-a-european-point-of-view/>

[135] ONYEMA, E. *International Commercial Arbitration and the Arbitrator's Contract*. Routledge, Oxon, 2010, p. 103.

[136] Swiss Federal Tribunal, First Civil Court, *24 November 2017, A. SA v. B. Ltd, No. 4A_236/2017, para. 3 and 4*

[137] CEVC, A. Civil Liability of Arbitrators. From *International Scientific Conference „EU and Member States – Legal and Economic Issues" in Osijek, 6-7 June 2019,* Faculty of Law, Josip Juraj Strossmayer University of Osijek, 2019, p. 405-421.

[138] FRANCK, D.S. The Liability of International Arbitrators: A Comparative Analysis and Proposal For Qualified Immunity, *New York Law School Journal of International and Comparative Law*, 2000, 20(1), p. 1-60., p. 46.

However, there are more other relevant issues regarding arbitrator's liability which are recognized by the academic community and legal professionals. What are the consequences if the arbitrator does not fulfil his obligations? To what extent can she/he be liable for his errors or misconduct? For which type of misconduct can he be held liable? What is the nature of arbitrator's liability?... etc.

Given that an arbitrator's potential liability plays a key role in the effective use of arbitration, commentators have suggested addressing this issue, but have not yet proposed specific statutory or regulatory solutions.[139] Ultimately, there is a startling lack of international harmonization regarding the scope of liability for international arbitrators.[140]

The scope and extent of the arbitrator's liability is governed, in institutional arbitrations, by the rules of the arbitral institution under which the parties have agreed to arbitrate, in ad hoc arbitrations, by the applicable national law.[141] The applicable national law also provides the framework for contractual agreements of the parties, intending to exclude or extend the arbitrators liability.[142]

International conventions and the UNCITRAL Model Law are silent on the matter as the latter viewed this issue too controversial to provide a satisfactory uniform approach.[143] Approaches adopted by national arbitration laws differ.[144] Most common law countries (USA, England, Australia) expressly grant immunity, some civil law countries expressly provide liability (Italy, Austria, Spain) while most do not deal with the subject.[145]

In this chapter we will address the arbitrator's liability for committed misconduct during arbitration process, the scope and effects of his/her immunity in that regard, and how the arbitrator's liability affects the validity of an award.

In order to determine whether and to what extent the arbitrators can be held liable for their misconduct the following issues should be examined. Firstly, it is necessary to examine how comparable is the position of the arbitrator and judge. Further, the nature of arbitrator's liability should be analysed. Then, it must be determined how compatible quasi-judicial immunity of the arbitrators is with their contractual relationship to the parties.

---

[139] *Ibid.*, p. 3.
[140] *Ibid.*, p. 3.
[141] PORNBACHER, K. and KNIEF, I. Liability of Arbitrators – Judicial Immunity versus Contractual Liability. From *Czech (& Central European) Yearbook of Arbitration - 2012: Party Autonomy versus Autonomy of Arbitrators*, Juris Publishing, Inc., 2012, p. 211-230, p. 213
[142] *Ibid.*
[143] *Ibid.*
[144] *Ibid.*
[145] *Ibid.*

2.2. ARBITRATORS AS ADJUDICATORS – DUAL ROLE

The question of liability relates to the dual nature of arbitration that is contractual by origin but judicial by purpose and procedure.[146] Arbitrators are contractually engaged to perform a service in exchange for remuneration.[147] Unlike judges they are chosen and paid for by the parties directly and may negotiate their terms or refuse to be appointed. Since they are employed by the parties, they are not subject to the same disciplinary control. Although their power stems from individual arbitration agreements, their final decisions have a binding, res judicata effect. As the state ensures the enforcement of the awards it requires that the arbitration proceedings meet certain minimum standards. Arbitrators act as "private judges" and they assume similar responsibilities - they are obliged to independence and impartiality.[148]

The dual nature of the arbitrator's role is particularly important for the examination of the arbitrator's immunity. According to parts of the doctrine, rules applicable to judges' immunity should apply to arbitrators due to the similarity of their functions.[149] However, an opposing part of the doctrine considers that, given the silence of the law, arbitrators' civil liability follows ordinary contractual or tortious civil liability.[150]

This is tantamount to saying that the arbitrator, who is contractually engaged by the parties to the dispute with a judicial mission to settle the dispute between them, must fulfil this mission of trust and assume the contractual liability.[151] As a private judge, the arbitrator is a contractual service provider.[152]

However, it is necessary to take into account the jurisdictional nature of the services provided to the arbitrator in order to define a well-developed, balanced and efficient legal regime. The dual nature of the arbitral mission justifies taking into account the jurisdictional specificity of the contractually vested mission: an arbitrator's liability cannot in principle be

---

[146] CEVC, A. Civil Liability of Arbitrators. From *International Scientific Conference „EU and Member States – Legal and Economic Issues" in Osijek, 6-7 June 2019,* Faculty of Law, Josip Juraj Strossmayer University of Osijek*,* 2019, p. 405-421.
[147] *Ibid.*
[148] *Ibid.*
[149] The Club Des Juristes, *Report on The Arbitrator's Liability*, 2017, [reviewed in 1 December 2019.].Available at <https://www.leclubdesjuristes.com/wp content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf > p. 122.
[150] *Ibid.*
[151] The Club Des Juristes, *Report on The Arbitrator's Liability*, 2017, [reviewed in 1 December 2019.].Available at <https://www.leclubdesjuristes.com/wp content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf > p. 122.
[152] *Ibid.* p. 16.

incurred on account of what they have ruled, except for serious personal fault, fraud, gross negligence or denial of justice.[153] But with regard to the expected service, alongside the content of the decision, the arbitrator is liable for her/his misconduct during the course of the arbitration proceedings.[154]

2.2.1. Arbitrators Adjudicatory Function

Adjudicators share certain core features.[155] Adjudication is a decision-making process that: (1) permits party participation by submitting evidence and offering reasoned arguments, and (2) requires an adjudicator to render a final and binding decision that is (a) supportable based upon the record and (b) the adjudicator's independent judgment and legal analysis.[156] When adjudication is infected with partiality, it is not based upon reasoned application of applicable legal rules or premised upon the parties' proofs – but rather on a decision-maker's personal relationships, preconceptions, objectives and interests.[157]

Therefore, as a judiciary function, the arbitration includes interaction with the parties, hearings (when necessary), collection of evidence, rendering the binding decisions, and trust and beliefs of the parties that independent and impartial professional will decide their case. In addition, parties in both processes expect equal and fair treatment and the decision made by the highly-profiled lawyer which enjoys a significant reputation in society.

Finally, both judges and arbitrators enjoy immunity from suit for actions taken within their mandate. However, the scope of this immunity differs in the common law and civil law system, and depends on the theoretical approach to the legal nature of the relationship between the parties and the arbitrators.

[153] CEVC, A. Civil Liability of Arbitrators. From *International Scientific Conference „EU and Member States – Legal and Economic Issues" in Osijek, 6-7 June 2019,* Faculty of Law, Josip Juraj Strossmayer University of Osijek, 2019, p. 411

[154] The Club Des Juristes, *Report on The Arbitrator's Liability*, 2017, [reviewed in 1 December 2019.].Available at <https://www.leclubdesjuristes.com/wp content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf p. 16

[155] FRANK, D.S. The Role of International Arbitrators. *ILSA Journal of International & Comparative Law,* Vol. 12, p. 499-521, p. 505.

[156] *Ibid.*

[157] *Ibid.*

2.2.2. Functional Distinctions between Arbitrators and Judges

While a great deal of the literature suggests that arbitrators' urge to render neutral and impartial decisions reflects the "judicialization" of arbitration, arbitrators differ from judges in fundamental ways.[158]

Unlike arbitrators, state judges are bind by the precedents and their hearings are most likely public. Further, there are subtle differences in the mandate of arbitrators and judges.[159] Judges derive their jurisdiction and authority from the state; whereas arbitrators derive their jurisdiction from parties.[160]

Arbitrators and judges also differ as to whom they are ultimately responsible.[161] On the one hand states pay judges from the budget which is based on the taxes paid by litigants/citizens. On the other hand, the arbitrators are remunerated by the parties based on the service contract.

There are also distinctions related to the appointment process. Judges tend to be randomly assigned to cases, whereas parties have a hand in selecting their decision-makers.

Review process of their decision is also the element which makes difference between arbitrators and judges. In practice it is less complex to challenge the judgement than arbitration award. While arbitrators and judges are subject to different review processes, both processes provide an opportunity to evaluate their conduct. Typically, judges' determinations are judicially reviewable for substantive and procedural errors.[162] In contrast, while some jurisdictions do permit a limited evaluation of the legal merits of a tribunal's award, the international trend is to review the procedural aspects of an arbitrator's award.[163]

---

[158] FRANK, D.S. The Role of International Arbitrators. *ILSA Journal of International & Comparative Law,* Vol. 12, p. 499-521, p. 507.
[159] *Ibid.,* p. 508.
[160] *Ibid.*
[161] *Ibid.,* p. 509.
[162] *Ibid.,* p. 511.
[163] FRANK, D.S. The Role of International Arbitrators. *ILSA Journal of International & Comparative Law,* Vol. 12, p. 499-521, p. 511.

2.3. NATURE OF THE LIABILITY OF THE ARBITRATOR

Due to the contractual and judicial role of arbitrators, we can discuss on the arbitrator's liability for breaches of arbitrator's contractual obligations and breaches of duties regarding their judicial role.

Traditionally, civil law countries emphasize the contractual nature of the arbitrator's *receptum arbitri* and use this as a baseline for establishing potential liability.[164] In contrast, common law approaches tend to focus more upon the potentially tortious nature of an arbitrator's conduct as a violation of a duty of care.[165] Although some cases suggest that an arbitrator's contractual liability is broader than a professional duty of care, ultimately, both actions result in potential liability based upon a breach of duty.[166]

.

2.3.1. CONTRACT

Under the contract theory, arbitrators are experts whose liability should be based upon the terms of their appointment agreement with the parties.[167] The precise nature of the contract between the parties and the arbitrators is not yet settled, but even U.S. courts acknowledge that the parties' arbitration agreement creates the basis of an arbitrator's power and responsibilities.[168]

The breach of a term of the arbitrator's contract which is of a fundamental nature (in the sense of the term being categorized as a condition) by the arbitrator, will result in the disputing parties or institution acquiring the right in contract to terminate his contract through the removal of the arbitrator.[169] Where the arbitrator is in breach of a non-fundamental term (in the sense of the term being a warranty), the disputing parties or institution will acquire a right to sue the arbitrator for damages but not to terminate the arbitrator's contract.[170]

In addition is the interplay of the peculiar nature of the primary purpose of the arbitrator's contract, which is the rendering of a judicial service, and the consequent immunities imposed

---

[164] FRANCK D.S., The Liability of International Arbitrators: A Comparative Analysis and Proposal For Qualified Immunity, *New York Law School Journal of International and Comparative Law*, 2001, 1-60. p. 4.
[165] *Ibid.*
[166] *Ibid.,* p. 5.
[167] *Ibid.*
[168] *Ibid.*
[169] ONYEMA, E. *International Commercial Arbitration and the Arbitrator's Contract*. Routledge, Oxon, 2010. p. 119.
[170] *Ibid.*

in one form or the other on this contract.[171] From case law, it appears that national courts are willing to accept a claim for damages where there has been a fundamental breach of the arbitrator's contract.[172] It is acknowledged that the breach of a fundamental term of the arbitrator's contract may also result in the setting aside of the final award.[173]

Examples of fundamental obligations of the arbitrator are qualifications of the arbitrator, disclosure, impartiality and independence by the arbitrator and granting the parties fair hearing (observance of due process).[174] All other obligations of the arbitrator under the arbitrator's contract are warranties.[175]

Contractual liability affects the application and effectiveness of the arbitrator's immunity. This is why French law gives the parties the right to damages for the harm suffered each time the alleged misconduct is not intrinsically linked to the content of the arbitrator's judgment.[176] Namely, unlike common law countries, in most of the civil law countries, the arbitrators do not enjoy immunity when they breach the arbitration contract.

In many civil law jurisdictions, arbitrators are merely professionals whose liability is determined by the general principles of contractual liability contained within the civil code.[177] This approach usually bases liability on the terms of appointment rather than the functions an arbitrator performs.[178]

Liability of arbitrators could be directly indicated in the statutes. In contrast, if it is not the case, contract between the parties and the arbitrator is subject to private law. Therefore, the arbitrator could be held liable for breaching her/his contractual duties. One cannot forget that *"like all contracting parties, an arbitrator must perform the obligations to which they have subscribed."*[179]

---

[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid.*
[174] *Ibid.*
[175] *Ibid.*
[176] The Club Des Juristes, *Report on The Arbitrator's Liability*, 2017, [reviewed in 1 December 2019.].Available at <https://www.leclubdesjuristes.com/wp content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf p. 26
[177] *Ibid.*
[178] *Ibid.*
[179] The Club Des Juristes, *Report on The Arbitrator's Liability*, 2017, [reviewed in 1 December 2019.].Available at <https://www.leclubdesjuristes.com/wp content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf p. 6

2.3.1.1. Nature of the arbitrator's contract

The arbitrator concludes the arbitrator's contract when he accepts appointment either from the disputing parties or arbitration institution.[180]

The classification of the arbitrator's contract has posed a challenge to legal commentators with views varying as to (i) agency, (ii) service and (iii) an autonomous or independent contract.[181]

(i) Agency contract

Some authors and courts consider a contract of agency to be the closest to an arbitrator's contract since the arbitrators act as representatives of the parties.[182] The argument is that the arbitrator is appointed to act on behalf of the disputing parties in making a decision over their dispute pursuant to the arbitration agreement.[183]

According to the agency theory, arbitrators are agents of the parties, hired to resolve a dispute, and hence ought to be able to exercise powers delegated to them by their principals.[184] So long as the principals have the ability to exercise a certain power, they can delegate the power by contract to an agent.[185]

However, the agency theory obviously undermines the judiciary role of the arbitrator. The arbitrator can be said to act in the best interest of all the parties to the arbitration agreement, and not in the interest of only one party. Namely, as a party representative, the arbitrator capacity to decide independently and impartially will be under question. Moreover, if the arbitrator is the party representative, it would be very difficult to explain why arbitrators have an obligation to be impartial and neutral. This approach is also inconsistent as it fails to explain why arbitrators cannot reveal to the parties what they discussed when adopting the award since

---

[180] ONYEMA, E. *International Commercial Arbitration and the Arbitrator's Contract*. Routledge, Oxon, 2010. p. 84.
[181] *Ibid.,* p. 102.
[182] VARAPNICKAS, T. *The Law Applicable to Arbitrators' Civil Liability from a European Point of View* [interactive]. [reviewed in 1 December 2019.]. Available at: http://arbitrationblog.kluwerarbitration.com/2019/03/25/the-law-applicable-to-arbitrators-civil-liability-from-a-european-point-of-view/
[183] ONYEMA, E. *International Commercial Arbitration and the Arbitrator's Contract*. Routledge, Oxon, 2010. p. 103.
[184] GINSBURG, T. The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration. *John M. Olin Program in Law and Economics Working Paper No. 502*, 2009, p.7.
[185] *Ibid.*

normally parties' representatives have an obligation to provide reports on the actions undertaken for the principal.[186]

(ii) Service agreement

As the agency approach is not widely accepted, the consideration that the arbitrators are service providers is more readily accepted.[187] According to some scholars, arbitrators render intellectual services to the disputing parties for a fee so that the arbitrators, in common with other professionals, undertake to give the parties the benefit of their experience and knowledge, and to accomplish tasks such as investigating the case and hearing the parties within a certain period of time.[188] The arbitrators thus agree to provide services which constitute either best efforts undertakings or undertakings to achieve a particular result.[189]

Still, although the approach that arbitrators are service providers is tempting, the arbitrator's contract cannot be purely qualified as the contract for the provision of services since it would lose its judicial aspect which is inseparable from arbitrator's functions.[190] The supporters of this approach refuse to agree that arbitrators act as quasi-judges; in their opinion, this judicial function should not play any role when determining what type of legal relationship develops between the parties and the arbitrators. Having said that, it does not mean that rules for the provision of services cannot be applied mutatis mutandis to the arbitrator's contract. Through such a sui generis approach, it is not denied that arbitrators provide services to the parties, though it is also emphasized that the nature of these services is not ordinary but rather similar to the functions entrusted by the states to national judges.[191]

---

[186] VARAPNICKAS, T. *The Law Applicable to Arbitrators' Civil Liability from a European Point of View* [interactive]. [reviewed in 1 December 2019.]. Available at: <http://arbitrationblog.kluwerarbitration.com/2019/03/25/the-law-applicable-to-arbitrators-civil-liability-from-a-european-point-of-view/ >.

[187] *Ibid.*

[188] ONYEMA, E. *International Commercial Arbitration and the Arbitrator's Contract*. Routledge, Oxon, 2010. p. 103.

[189] *Ibid.*

[190] VARAPNICKAS, T. *The Law Applicable to Arbitrators' Civil Liability from a European Point of View* [interactive]. [reviewed in 1 December 2019.]. Available at: <http://arbitrationblog.kluwerarbitration.com/2019/03/25/the-law-applicable-to-arbitrators-civil-liability-from-a-european-point-of-view/>

[191] *Ibid.*

(iii) Arbitrator's contract as an autonomous contract

According to some authors, arbitration contract is neither agent contract, nor service agreement. Namely, due to the specific legal status of arbitrator and her/his dual role, the arbitration contract has a very specific nature which cannot be easily named and defined. Therefore, the authors of Fouchard Gaillard and Goldman declare that the arbitrator's contract shares the hybrid nature of arbitration because, 'its source is contractual, but its object is judicial'.[192]

***

In my opinion, an arbitration contract is a specific contract with the complex legal nature. Therefore, it would not be necessary to put some labels on this type of contract and set it under the respective category of contracts. In arbitration law, contractual freedom of parties is a fundamental principle and the parties should be free when they negotiate the terms and conditions of the arbitration. However, some other fundamental principles of arbitration must be taken into account when an arbitration agreement is drafted. Therefore, the contractual freedom of parties should not undermine the national laws on arbitration, arbitration institutional rules and international conventions on arbitration.

When we discuss the nature of the arbitration contract we should first consider the dual role of the arbitrators – judicial and contractual functions of an arbitrator. Namely, on the one hand, an arbitrator needs to render the award and provide the "judicial service". On the other hand, an arbitrator must be independent and impartial, and cannot work in the interest and on behalf of only one party. Therefore, in my opinion, an arbitration contract cannot be an agency contract. Namely, the agents mostly represent one party and work in its interest. In the arbitration process arbitrator represents both counter-parties. In the arbitration process arbitrator represents both counter-parties.

Indeed, the provision of services by the skilful and professional arbitrator who is paid for the provision of such services could fall under a service contract. However, the provision of services is not the only task of the arbitrator. Namely, an arbitrator decides on the rights and obligations of the parties involved and in some complex cases, the future of the different stakeholders can depend on the arbitrator's decision. In the arbitration process arbitrator represents both counter-parties.

[192] ONYEMA, E. *International Commercial Arbitration and the Arbitrator's Contract*. Routledge, Oxon, 2010. p. 103.

Given all the above said, my opinion is that an arbitration contract is a specific contract with the hybrid nature. In addition, the arbitration contract should not be put in some specific category of the named or unnamed contracts, particularly due to the specific legal status of the arbitrator and her/his particular relationship with the parties.

2.3.2. TORT

The main difference between tortious liability and contractual liability is the nature of duty. The duties in the torts are fixed by the law where the duties in the contracts are fixed by the contractual parties. Therefore, there is more structured and stricter in tortious liability than in contractual liability.[193]

The word "tort" was sometimes used, as it is today, to refer to the department of civil law that houses actions for assault, battery, fraud, libel, nuisance, and so forth.[194] Alternatively, it was used more broadly as a synonym for "wrong" or "trespass" in its biblical sense.[195]

Tort liability of arbitrators results, both from the arbitration contract and statutes (national regulations). Nevertheless, the arbitrator's tort liability is mostly related to her/his duty to act in a professional manner.

Even tough, there is no uniform approach in the theory whether arbitrators should have the same professional duty as the other experts or service providers, the parties expect the arbitrator to perform the task with due care.[196] This particularly due to the fact that the parties pay a huge amount of fees for arbitrators to act and issue the award.

The question of tortious liability and professional duty of care of the arbitrators goes to the heart of the relationship between the arbitrator and the parties.[197] As the practice of international arbitration becomes increasingly sophisticated and as the sums at stake grow in size, a party that has suffered loss as a result of an arbitrator's manifest lack of care may wish to seek to recover that loss from the arbitrator personally.[198] How can a breach by the arbitrator of the obligation to act with due care be sanctioned?[199] This will depend on the nature of the

[193] WINFIELD, P. H., *Winfield & Jolowicz on Tort,* Sweet & Maxwell, 16th ed, 2002.
[194] GOLDBERG, C. P. J. Twentieth Century Tort Theory. *Vanderbilt University Law School Law & Economics, 2002,* p. 5.
[195] *Ibid.*
[196] BLACKABY, N., et al. *Redfern and Hunter on International Arbitration*. the United States of America: Oxford University Press, 2015; p. 321.
[197] *Ibid.*
[198] *Ibid.*
[199] *Ibid.*

relationship with the parties.[200] There are two schools of thought: the first considers that the relationship between the arbitrator and the parties is established by contract; the second may be identified as the 'status school', which considers that the judicial nature of an arbitrator's function should result in treatment comparable to that of a judge.[201]

Tort liability is mostly related to the common law countries which considers arbitrators as judges. Namely, in this countries, arbitrators may be subject to tort liability resulting from their professional obligation to perform competently.[202] In England, members of a profession or skilled craft can be held liable for failing to exercise the level of skill and care normally exercised by persons of that profession.[203] It is presumed that, "every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of skill and care."[204] Similarly, in the United States, professionals can be held liable for breach of their professional duties if they fail to use the reasonable skill and diligence ordinarily exercised by a member of that profession."[205] Arbitrators, like other professionals, have a duty to behave competently in their capacity as arbitrators and can be liable for damages resulting from a breach of this duty.[206]

In civil law countries, like Germany, it is still possible to be liable for tortious acts that are not specifically addressed by the *receptum arbitri*.

***

It is indisputable that arbitrator's duties and liability could be defined both in the arbitrator's contract and in the legislations. The arbitrator's contract is a contract for the provision of services by the arbitrator and could contain other duties. Hence, an arbitrator should be held liable on the basis of this contract at least, for its breaches. Likewise, if the national legislation provides an arbitrator's duty to act in a professional manner, the arbitrators should act in compliance with that standard. Therefore, each damage which is caused by the arbitrator's professional negligence and which is related to its arbitration function should lead to the arbitrator's liability.

---

[200] *Ibid.*
[201] *Ibid.*
[202] FRANK, D. S. The Liability of International Arbitrators: Comparative analysis and proposal for qualified Immunity. *New York Law School Journal of International and Comparative Law, 2000,* Vol. 20, p. 1- 59, p.10.
[203] *Ibid.*
[204] *Ibid.*
[205] *Ibid.,* p. 11.
[206] *Ibid.*

Nevertheless, it is really difficult sometimes for courts to determine whether the arbitrator's liability derives from the contract or tort.

2.4. CONDITIONS FOR THE LIABILITY OF ARBITRATOR

Arbitrator is a human being. Therefore, it is possible that he/she makes mistakes like every other person. Even tough arbitrator needs to act with due care (theory and practice are not fully harmonized about this issue) and has the higher level of responsibility, like an every professional by acting in that manner, his/her decision could negatively affect parties' position and produce their dissatisfaction. However, arbitrator is obliged to respect law, procedures and arbitration rules. Further, every arbitrator must be impartial and independent. If circumstances that give rise to justifiable doubts as to an arbitrator's impartiality or independence exist in a specific case or that she/he fails to act in accordance with his/her duties, a party may challenge the arbitrator and also the award.

Since the potential liability of an arbitrator may originate basically in the breach of the arbitrator's duty it is important to define which potential duties arbitrator will have in a particular arbitration proceeding and how they are to be interpreted. There is no specific or a closed list of arbitrator's duties. However, the unlawful behaviour/misconduct of the arbitrators arise of breaching such duties and could lead to her/his liability.

2.4.1. Misconduct

With regard to the arbitrator's misconduct, there are basically two possibilities particular to the situation – by the arbitrator's active breaching of his stated duty or by nonfeasance (inactivity).[207] Therefore, there are two types of inappropriate behaviour by arbitrators: (i) affirmative misconduct and (ii) failure to act.[208] With intentional misconduct, an injured party

[207] JELONEK-JARCO, B., ZAWADZKA, J. The Influence of Violation of the Independence and Impartiality Rules on the Enforceability and Effectiveness of the Arbitral Award, From *Czech (& Central European) Yearbook of Arbitration - 2012: Party Autonomy versus Autonomy of Arbitrators*, Juris Publishing, Inc., 2012, p. 151 – 171, p. 155.
[208] FRANK, D. S. The Liability of International Arbitrators: Comparative analysis and proposal for qualified Immunity. *New York Law School Journal of International and Comparative Law, 2000,* Vol. 20, p. 1- 59, p. 11.

who has suffered damage as a result of an arbitrator's conduct has an action against the arbitrator.[209] In contrast, both parties have actions against an arbitrator for a failure to act.[210]

Basically, the claims may be brought for the following reasons: a) Claims for delay by arbitrators, b) Claims for failure to disclose conflicts of interest, c) Claims for being corrupt, d) Claims for negligence.[211]

2.4.2. Fault

As we see above, the arbitrator may be held liable both for intentional acts and negligence. The fault is the necessary condition for the arbitrator's civil liability under general rules of the civil liability.

The distinction between what is well judged, for which the arbitrator enjoys immunity, and the manner in which he made his decision, for which an arbitrator can be held civilly liable, is not always clearly evident. Therefore, except in cases of wilful misconduct or gross negligence, the parties cannot hold an arbitrator liable for rendering a bad judgment. However, when we consider other breaches that are likely to be covered by immunity, things are less certain.

In all legal systems arbitrators could incur liability for non-performance (for failing to render an award at all or in a timely manner). In civil law countries they could be liable not only for unjustified resignation and not fulfilling their obligations (at all or in a timely manner) but also for negligence since arbitrators (who are paid professionals) are obliged to perform their contractual duties with due care and skill. They could face liability for breaches of confidentiality or failing to conduct the proceedings according to the party's agreement (for example for issuing the award in the wrong place if it cannot be enforced in the country of the losing party).

---

[209] FRANK, D. S. The Liability of International Arbitrators: Comparative analysis and proposal for qualified Immunity. *New York Law School Journal of International and Comparative Law, 2000,* Vol. 20, p. 1- 59, p. 11.
[210] *Ibid.*
[211] JELONEK-JARCO, B., ZAWADZKA, J. The Influence of Violation of the Independence and Impartiality Rules on the Enforceability and Effectiveness of the Arbitral Award, From *Czech (& Central European) Yearbook of Arbitration - 2012: Party Autonomy versus Autonomy of Arbitrators*, Juris Publishing, Inc., 2012, p. 151 – 171, p. 156.

2.4.3. Causal link

Existence of the causal law derives from general rules on contractual and tort liability. Sometimes, it could be a high burden for a claimant to meet in order to establish a causal link that demonstrating that a respondent's liability primarily led to the claimant's injuries.

The damage of the party must be caused by the arbitrator's acts or omissions.[212] Thus, a plaintiff bringing a claim for damage would have to prove the elements of act, intent, causation, and harmful consequence, while a negligence plaintiff was required to establish duty, breach, cause in fact, proximate cause, and injury. Legal analysis of these elements in turn would require the deployment of concepts such as reasonableness, foresight, directness, etc.

The literature on the arbitration does not specifically deal with the causal link as the mandatory element for arbitrator's civil liability. However, general rules on tort and contracts should be applied in that regard, and the party should establish a causal link between arbitrator's misconduct and actual damage that it suffered.

2.4.4. Damage

As we could see above, the arbitrators can therefore be liable in tort or in contract.

The general clause in the most of the civil law countries regarding the torts, provides that "a person who causes damage to another shall pay compensation for the loss".[213] He is released from this obligation if he proves that in the given situation he acted in a generally expectable manner.[214] Therefore, if the arbitrator causes damage to the party, he is obliged to pay the compensation for the party's loss. Nevertheless, he can be realised of such obligation, if he has acted in a professional manner during the arbitration process.

Damages are determined according to general rules and will generally cover the costs of the arbitration procedure[215]. The plaintiff cannot claim compensation in the amount of the value of the dispute as it does not reflect the damages incurred.[216]

---

[212] ICC Report, 2006.

[213] LIEBSCHER, C. & FREMUTH-WOLF, A.A. Arbitration Law and Practice in Central and Eastern Europe. Juris Publishing, 2011, p. HUN-49.

[214] *Ibid.*

[215] CEVC, A. Civil Liability of Arbitrators. From *International Scientific Conference „EU and Member States – Legal and Economic Issues" in Osijek, 6-7 June 2019,* Faculty of Law, Josip Juraj Strossmayer University of Osijek, 2019, p. 416.

[216] *Ibid.*

From a practical standpoint, it is difficult to establish the amount of damages for which the arbitrators will be liable.[217] Some authors sustain that in case of negligence, the liable arbitrator shall be liable only for the costs of the arbitration, including attorneys' and other arbitration fees.[218] In institutional arbitrations, the administrative institutions may also be held liable for damages, in cases of willful misconduct or negligence according to the general principle of civil liability.[219]

2.4.5. Annulment of the arbitral award as a condition for arbitrator's liability

Parties can be unsatisfied with the arbitral award. Therefore, like the party before state courts who are interested to challenge the court's judgment, the parties unsatisfied with the arbitral award may challenge it before state courts. Likewise, the parties can challenge the arbitrators, both before rendering the award or even after the award has been rendered. However, we should diverse the procedure for challenging the arbitral award and the procedure for determining the arbitrator's liability.

A challenge to an award (usually) takes place in the courts of the seat of the arbitration and it is an attempt by the losing party to invalidate the award on the basis of the statutory grounds available under the law of the seat.[220]There are different grounds for challenging the arbitral award. One of the grounds for challenging the arbitral award are procedural irregularities[221], such as unequal treatment of the parties, lack of the fair hearing, prevention of party from producing the respective evidence etc. Namely, the arbitrator is obliged to respect the principle of *due process of law*, and able parties to have a full opportunity to present their case, and treat them equally. Additionally, breaching of other arbitrator's duty can cause the procedure for challenging the arbitral award. However, the procedure for challenging the arbitral award is different than the procedure for determining the arbitrator's liability.

According to Article 34 of the UNCITRAL Model, the arbitral award may be set aside exclusively by a state court. An application for setting aside may not be made after (3) three months have elapsed from the date on which the party making that application had received

---

[217] DE PAIVA MUNIZ, J.T, et. al. *Arbitration Law of Brazil: Practice and Procedure.* Juris Publishing, 2011, p. 96.
[218] *Ibid.*
[219]*Ibid.*
[220] BLACKABY, N., et al. *Redfern and Hunter on International Arbitration*. The United States of America: Oxford University Press, 2015, p. 570.
[221] *Ibid.*, p. 586.

the award.[222] The application must be lodged within the prescribed time period and the burden of proof for setting aside the arbitral award is on the applicant. Namely, in practice, it is not easy to challenge and set aside the arbitral award, and these procedures require additional time and costs for the parties.

According to some authors, the annulment of the award is not in itself a case of liability.[223] Inversely, certain authors have claimed that the annulment of the award is a condition precedent to the arbitrator's liability.[224]

The arbitral institution rules, national arbitration regulations or the civil codes do not contain the provisions which define the annulment of the arbitral award as the precondition for arbitrator's liability. However, the party autonomy and the freedom of contract as one of the basic principles of the arbitration allow the parties to set up such a provision in the arbitration contract. Namely, the annulment of the award could be defined in the arbitration contract as a condition precedent to the arbitrator's liability.

Namely, the Austrian jurisprudence has dealt with this issue through the several cases, and one of them, I have analysed in the chapter 2.6 of this thesis. Namely, under Austrian case law, the successful setting aside of the arbitral award generally constitutes a *conditio sine qua non* for the liability of arbitrators except where the express case of Section 594(4) of the Austrian Code of Civil Procedure applies (an arbitrator who does not fulfill the duties assumed by acceptance of the appointment, or does not fulfill them in a timely manner, shall be liable towards the parties for all damage caused by his culpable refusal or delay).[225]

If we accept that the annulment of the arbitral award is the mandatory condition for the arbitrator's liability, this would mean that the arbitrators enjoy a broad immunity. Even though such an approach does not grant arbitrators an absolute immunity, in practice the annulment of the arbitral award as the mandatory condition for the arbitrator's liability could be an additional burden for the parties. Firstly, this could cause additional proceedings before the national courts. Secondly, even though there is strong evidence that there was an arbitrator's

---

[222] Art. 34 (3) of the UNICITRAL Mode

[223] The Club Des Juristes, *Report on The Arbitrator's Liability*, 2017, [reviewed in 1 December 2019.]. Available at <https://www.leclubdesjuristes.com/wp-content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf>

[224] *Ibid.*

[225] LUKIC, S & GRILL, A.K. Arbitrators' Liability: Austrian Supreme Court Reconfirms Strict Standards, 2016, [interactive] [reviewed in 28 december 2019.]. Available at <http://arbitrationblog.kluwerarbitration.com/2016/09/01/arbitrators-liability-austrian-supreme-court-reconfirms-strict-standards/>

misconduct, this would not automatically lead to arbitrator's liability, since the award must be annulled. Therefore, imposing this condition could lead almost to the absolute immunity of the arbitrators. Conversely, the requirement of successful setting aside proceedings bolsters the final and binding effect of arbitral awards which would be undermined if parties were left with an opportunity to re-litigate their cases by holding arbitrators liable for allegedly flawed decisions.[226]

2.5. IMMUNITY

Judges' immunity is founded upon the need to protect their independence and impartiality and freedom from undue influence.

The immunity or exclusion of liability of the arbitrator, fully or partially is based upon the immunity of judges.[227] This school of thought sustains that as much as the judge the arbitrator should remain immune from the pressures of the parties during and after the trial in order that they can make their decision with calmness of mind and see that justice be done.[228]

2.5.1. The Arbitrator's Liability under National Arbitration Regimes

National arbitration regimes are equally diverse in their approach to the subject of arbitrator immunity. This corresponds to the lack of uniformity in different national law systems also with regard to state court judge immunity. In light of diversity of national law approaches to the arbitrator's immunity, the drafters of the UNCITRAL Model Law concluded that a satisfying provision harmonizing the national arbitration statutes on the subject was not attainable. The UNCITRAL Model Law has therefore remained silent on the subject.

The vast majority of national arbitration regimes seek to protect arbitrators from civil liability, again with differences as regards the extent of such protection.

The extent of an arbitrator's immunity from liability varies then from country to country. It depends on the legislative provisions which have been passed and also on the agreement with the parties or the arbitration institution. It is possible to group the different approaches to immunity into three types. There are some countries which offer their arbitrators absolute

---

[226] *Ibid.*
[227] MULLERAT, R. The liability of Arbitrators: a survey of current practice. *International Bar Association Commission on Arbitration,* Chicago, 2006.
[228] *Ibid.*

immunity, some which offer them a limited or qualified form of immunity and others who offer no immunity whatsoever.

The arbitrator exercises a compulsory jurisdictional function and enjoys statutory powers.[229] In most common law jurisdictions, this leads to certain immunities, although the immunity may be qualified where the arbitrator has acted in bad faith.[230] It is common law jurisdictions that generally have supported this exclusion of liability for the arbitrators. The broadest immunity for arbitrators is granted in the United States, for instance, it is established in case-law that if a party believed the arbitrator performed something badly, party's "remedy was an action for review of the award.[231] Dissatisfaction with the result of an arbitration is not a sufficient ground to overcome an arbitrator's or the sponsoring organization's immunity".[232]

Civil law countries on the other hand focus on the contractual relationship between the arbitrator and the parties. This could in principle lead to liability according to ordinary law of contract. Some countries have included express provisions on liability.[233] The Spanish law states that arbitrators can be liable for damages caused by bad faith, fraud or recklessness.[234] A similar provision can be found in the Austrian arbitration law. Section 594/4 Zivilprozessordnung, provides that: "an arbitrator who does not or who does not timely fulfil his obligations … shall be liable to the parties for all damage caused by his culpable refusal or delay".[235]

Arbitrators currently enjoy immunity regarding their arbitral functions. The scope of this immunity, as we already said, depends on the applicable national laws and the arbitration institutional rules. So far, the US and most of the Common law countries guarantee nearly absolute immunity for arbitrators. However, this approach is broadly disputed by the scholars and other prominent experts from the field. In contrast, most other countries have forms of qualified immunity while others appear to have liability limited only by the terms of the *receptum arbitri* and the applicable law.

---

[229] BLACKABY, N., et al. *Redfern and Hunter on International Arbitration*. the United States of America: Oxford University Press, 2015; p. 321.
[230] *Ibid.*
[231] VARAPNICKAS, T. Issues of Arbitrator's Liability as Regards the Right to Fair Trial: What way to choose for policy-maker? 2016, Available at SSRN: <https://ssrn.com/abstract=2850893or http://dx.doi.org/10.2139/ssrn.2850893>
[232] *Ibid.*
[233] CEVC, A. Civil Liability of Arbitrators. From *International Scientific Conference „EU and Member States – Legal and Economic Issues" in Osijek, 6-7 June 2019,* Faculty of Law, Josip Juraj Strossmayer University of Osijek, 2019, p. 416.
[234] *Ibid.*
[235] *Ibid.*

Arbitrators should definitely not have the absolute immunity. Parties must have a remedy for an arbitrator's intentional misconduct and grossly negligent acts. Additionally, arbitrators are given treatment that is similar to judges and when making a decision "an error in law or fact" should never lead to liability. Regarding failures to perform the contractual duties, this should lead to the termination of the arbitration contract and arbitrator's civil liability under the national law rules. Because absolute immunity and complete liability are very questionable solutions, due to the dual nature of the arbitrator's role, qualified immunity could be the most desirable solution. The qualified immunity is the balance between the extreme rules on arbitrator's liability and should be accepted in the most of jurisdictions.

The vast majority of Institutional Rules provides for a partial exclusion of the arbitrator's liability, either in form of a guarantee of the arbitrator's immunity, or in a waiver of the arbitrators liability.[236] The common denominator seems to be that arbitrators will not be held liable for simple negligence with regard to their taking of legal decisions.[237]

The ICC Rules contain a waiver of liability which in principle even encompasses intentional acts, but only if is to be permitted under the applicable law. Article 41.1 of the ICC rules prescribes that the arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.

Further, the similar waiver of liability could be found in the LCIA Rules ("*Limitation of Liability*")[238] and ICDR Rules ("*Exclusion of Liability*")[239].

Article 16 of the UNCITRAL Rules *per se* excludes intentional wrongdoings from the waiver, providing that *save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration*.

---

[236] PORNBACHER, K. and KNIEF, I. Liability of Arbitrators – Judicial Immunity versus Contractual Liability. From *Czech (& Central European) Yearbook of Arbitration - 2012: Party Autonomy versus Autonomy of Arbitrators*, Juris Publishing, Inc., 2012, p. 211-230, p. 215.
[237] *Ibid.*
[238] Art. 31.1 of the LCIA Rules.
[239] Art. 38 of the ICDR Rules.

2.5.2. The Arbitrator's Liability under the Arbitrators Contract

National regulations, Institutional Rules and UNCITRAL Rules provide the framework for contractual provisions on the arbitrator's liability and which will be commonly found in arbitrator's contracts. Additionally, the contractual autonomy principle allows parties to limit or extent arbitrator's liability. However, most national laws provide for a mandatory minimum standard of liability, generally comprising intentional wrongdoing, which consequently cannot be excluded by the parties' agreement.[240]

2.5.3. Doctrine

The unanimous doctrine considers that the arbitrator's liability shall be limited. Sometimes, but not always, one refers to the idea of an "arbitral immunity."[241]

If the restriction, or immunity is admitted in principal, the controversy is on the ground for this limitation of the arbitrator's liability.

Certain authors have suggested applying by analogy the rules on the (limited) liability of judges (in reality, State liability for judges' activities).[242]

Other authors, inspired by German case law, consider that arbitral immunity comes from the implicit agreement between the parties providing that the arbitrator, when he carries out his jurisdictional mission, is only liable for fraud or serious misconduct.[243]

Certain authors analyse the question from a negligence standpoint – rather than from the breach of a contractual duty standpoint – and consider that the specific nature of an arbitrator's activity leads to a different evaluation of his "negligence" which could be evaluated like it is done so for a judge's negligence.[244]

---

[240] The Club Des Juristes, *Report on The Arbitrator's Liability*, 2017, [reviewed in 1 December 2019.].Available at <https://www.leclubdesjuristes.com/wp content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf. > p.136

[241] The Club Des Juristes, *Report on The Arbitrator's Liability*, 2017, [reviewed in 1 December 2019.].Available at <https://www.leclubdesjuristes.com/wp content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf, > p. 131.

[242] BERNET, M. and ESCHMENT, J. *Liability of Arbitrators under Swiss Law: Legal Basis and Limitations of Arbitral Immunity*, in: Schieds VZ 2016, Heft 4, pp.189-195, p. 193.

[243] *Ibid.*

[244] *Ibid.,* p. 194.

Lastly, certain authors propose the existence of an unwritten general principle of private law providing that the arbitrator is only liable in case of fraud or serious misconduct.[245]

Whatever the ground for limiting liability, the generally recognized effect is that the arbitrator is only held liable in case of fraud or serious misconduct.[246]

Furthermore, and even if all the authors do not expressly specify it, the limitation of liability only relates to the acts or omissions relating to the jurisdictional function, for example a wrong decision made about the merits.[247]

Regarding the acts and omissions unrelated to the jurisdictional function (that are sometimes, known as the arbitrator's "accessory" obligations), ordinary standards on liability seem to apply.[248] In particular, certain authors have expressly specified that the liability was ordinary (and not limited) in the cases of breach by an arbitrator of his duty to disclose, breach of his duty of confidentiality, and on termination of his mandate without due cause.[249]

2.6. CASE LAW

Raoul Duval Case - TGI Paris, May 12, 1993 and Paris, October 12, 1995, (Raoul Duval), Rev. arb., 1999

The UNCITRAL Model Law and most of the arbitration rule impose on an arbitrator a continuing obligation of disclosure of any conflicts of interest that may arise from the time of her/his appointment and throughout the arbitral proceedings.[250] However, the claims for failure to disclose conflicts of interest against the arbitrators are not unusual practice. One of such claim is the claim of Mr. Raoul Duval against the arbitrators before the French Court.

In this case, the chairman of the arbitral tribunal started working for one of the parties the day after the award was rendered. The chairmen failed to disclose this fact to the parties.

---

[245] *Ibid.,* p. 307.
[246] *Ibid.,* p. 307.
[247] KAUFMANN-KOHLER, G. and RIGOZZI, A. *International Arbitration: Law and Practice in Switzerland*, Oxford 2015, pp. 231-237, p. 236.
[248] The Club Des Juristes, *Report on The Arbitrator's Liability*, 2017, [reviewed in 1 December 2019.].Available at <https://www.leclubdesjuristes.com/wp content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf, > p. 132.
[249] Boog/Stark-Traber, p. 170.
[250] HWANG, M. et. al. Claims Aginst Arbitrators for Breach of Ethical Duties. From *Contemporary Issues in International Arbitratrion and Mediation.* Fordham Law School, The Fordham Papers, 2007, p. 225-246, p. 237.

The arbitral award was set aside on the ground of unlawful constitution of the tribunal. Duval then sued the arbitrator for loss caused by his conduct. The court held that the arbitrator was liable on a contractual basis to pay damages for the fees paid to the arbitrators and the arbitral institution, as well as cost incurred for the defense.

This case is therefore relevant due to the following: (i) a failure to disclose could render the arbitrator liable, based on their breach of contract, under the rules of civil contractual liability; (ii) dual role of the arbitrators – they perform the judicial mission, but they could be held liable for breaching the contractual duties; (iii) arbitrators do not enjoy absolute immunity, but serious misconduct was de facto required for this liability;[251] (iv) the duty of loyalty by which an arbitrator is bound seems to provide a ground for sanctioning the arbitrator, under common law rules, for breach of their duties of independence and impartiality.[252]

Finally, based on this case we saw that the French courts (civil law system) have found arbitrators liable to compensate parties for losses incurred through a breach of the duty of disclosure that leads to a successful challenge of the award.

Austrian Supreme Court Case 2016

In a recent decision, the Austrian Supreme Court determined that pursuant to Austrian law, an arbitrator can only be held liable for damages to one of the parties if the arbitrator's decision is overturned by a court and the party demonstrates that the arbitrator was grossly negligent.

The plaintiff, a company domiciled abroad (out of Austria), claimed the damage in the form of frustrated expenses for fruitless arbitration (attorney's fees, advances, arbitrator's fee and expert's fees) and determination of the arbitrators' liability for future damages. It accuses the arbitrators of intentionally manipulating the proceedings.[253] Namely, the parties agreed "Fast Track Arbitration". However, the members of the tribunal were changed during the

---

[251] The Club Des Juristes, *Report on The Arbitrator's Liability*, 2017, [reviewed in 1 December 2019.]. Available at <https://www.leclubdesjuristes.com/wp content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf> p. 32.

[252] *Ibid.*

[253] *Austrian Supreme Court Case,* Austrian Supreme Court, no. 2016 OGH 5 Ob 30/16x, 2017, [reviewed in 17 December 2019.]. Available at <https://rdb.manz.at/document/ris.just.JJT_20160322_OGH0002_0050OB00030_16X0000_000>

arbitration process and the plaintiff claimed that it happened without justified reasons. Therefore, this process lasted much longer than it was agreed in the arbitration agreement.

In the case at hand the arbitrators' contract provided for liability of the arbitrators only in cases of gross negligence and if the award was successfully set aside on the basis of Section 611 of the Austrian Code of Civil Procedure. Confirming well-established jurisprudence, which has been largely welcomed by the Austrian arbitration community, the Supreme Court reconfirmed its previous finding that an arbitrator's liability necessarily presupposes the successful setting aside of the arbitral award, unless the arbitrator plainly refused to issue an award or failed to comply with the duties resulting from the acceptance of the appointment altogether. Thus, under Austrian law, the successful setting aside of the arbitral award generally constitutes a conditio sine qua non for the liability of arbitrators except where the express case of Section 594(4) of the Austrian Code of Civil Procedure applies (an arbitrator who does not fulfill the duties assumed by acceptance of the appointment, or does not fulfil them in a timely manner, shall be liable towards the parties for all damage caused by his culpable refusal or delay).[254]

This case is very well-welcomed by the arbitration community of Austria. Namely, it confirmed the former practice of the Austrian courts that annulment of the award is the *conditio sine qua non* for arbitrator's liability. In my opinion, this approach of the Austrian courts and the provisions of the Austrian Code of Civil Procedure are too strict and should be amended. Namely, if the party has to wait setting aside the award, consequently, it must bear extra costs. Additionally, this could lead to unnecessary prolongation of the procedure for the determination of the arbitrator's liability. Therefore, the above-mentioned arbitration national rules of Austria and its case law give the arbitrators "indirect" absolute immunity, by imposing the annulment of the award as the conditio sine qua non for arbitrator's liability.

[254] LUKIC, S & GRILL, A.K. Arbitrators' Liability: Austrian Supreme Court Reconfirms Strict Standards, 2016, [interactive] [reviewed in 28 december 2019.]. Available at <http://arbitrationblog.kluwerarbitration.com/2016/09/01/arbitrators-liability-austrian-supreme-court-reconfirms-strict-standards/>

Puma v. Estudio 2000

In this decision, the Spanish Supreme Court has annulled an award on grounds that the tribunal was not properly constituted where an award was made without the presence or signature of the third arbitrator.[255]

Puma sought annulment of the award before Spanish Courts, alleging that the award violated public policy and ignored the Principle of Collegiality (one of the key principles of arbitration established in article 41 section 1 subsection f) of the Spanish Arbitration Law).

Back in 2010, an arbitral tribunal composed by Luis Ramallo García (chairman), Miguel Temboury and Santiago Gastón ordered Puma to pay € 98 million to Estudio 2000 for the wrongful termination of their distribution contract.

Notably, Mr. Gastón – appointed by Puma – did not sign the award. It was later revealed that he was not given a chance to deliberate. Even though he had a discrepancy regarding the compensation to be awarded to Estudio 2000, surprisingly, his fellow arbitrators met without notifying him, changed the content of the previously agreed project and finished writing the award. The arbitrators even managed to sign it and notify the parties that *same* day.

On 15 February 2017, the Spanish Supreme Court declared the two arbitrators professionally liable for excluding Mr. Gastón from the deliberation procedure, and obliged them to pay Puma € 1'500,000.00 plus legal interests.[256]

As the arbitrator designated by Puma did not hinder the process in any way, nor did he prevent the arbitrators from reaching a decision (the deadline for the arbitrators to issue the award had not yet passed) the arbitrators had no justification to issue an award without the third arbitrator having an opportunity to take part in the process.[257]

We saw here a very interesting situation where the members of the arbitral tribunal simply excluded one of the arbitral tribunal members from the deliberation process. This action undermined the process of enacting the fair and accurate decision by the arbitral tribunal. Additionally, the principle of collegiality is breached.

---

[255] HIRST, P. Arbitrators' Liability under Spanish Arbitration Law: Recent Developments, 2017 [interactive]. [reviewed in 5 December 2019.].<https://www.clydeco.com/insight/article/arbitrators-liability-under-spanish-arbitration-law-recent-developments>

[256] DE LA JARA, J.M. and OLÓRTEGUI, J., Puma v. Estudio 2000: Three Learned Lessons, 2017 [interactive]. [reviewed in 5 December 2019.]. Available at: <http://arbitrationblog.kluwerarbitration.com/2017/05/29/puma-v-estudio-2000-three-learned-lessons/>

[257] *Ibid.*

In my opinion, the Spain Supreme Court enacted reasonable and justified decision due to the fact that two other arbitrators acted in bad faith and caused the damage to the party involved. Therefore, they breached their professional duty and they could not enjoy immunity in this case.

Additionally, the procedural rules of the arbitration must be respected. Namely, if the award is not signed by all members of the arbitral tribunal, this should definitely lead to the annulment of the award.

Flock v. Beattie 2010 ABQB 193 (CanLII), Court of Queen's Bench of Alberta

An arbitration agreement required the arbitrator to provide his award no later than 60 days after the receipt of written submissions, but the arbitrator took nearly three years to do so. One of the parties to the arbitration sought to overturn the award and a new hearing was ordered before a different arbitrator. The other party subsequently sued the first arbitrator for breach of the arbitration agreement. The arbitrator claimed immunity from the lawsuit.

In its reasons for judgment, the Alberta Court of Queen's Bench adopted reasoning from the Québec Court of Appeal holding that an arbitrator was immune from both contractual and tort liability absent fraud or bad faith.[258] With neither established, the Court ultimately dismissed the claim against the arbitrator.[259]

This case confirmed the attitude of the common law countries' courts on the absolute immunity of the arbitrators.

[258] CAMERON, A., Understanding the Liability of Arbitrators, 2017 [interactive]. [reviewed in 5 December 2019.]. Available at: <https://www.lexology.com/library/detail.aspx?g=26f78b4a-9fe3-4b2e-ad0c-3933a3365a47>
[259] *Ibid.*

CONCLUSION

There are several key factors that determine the legal status of arbitrators that also indirectly affect the issues on the arbitrator's liability.

Firstly, the arbitrator's legal status depends on: the nature of his/her relationship with the parties. The vast majority of the civil law countries accept the "contractual theory" and consider the arbitrators as the contracting party which provides respective services to the parties. However, the judicial role of the arbitrator cannot be ignored. Therefore, the dual nature of the arbitrator's function is preferable by the author of this thesis. Even though, the authors from the US proposes reducing of the arbitrator's immunity from absolute to qualified by stressing their contractual obligations, and claiming that he/she should be held liable for consciously breaches of contractual obligations. The personal liability of arbitrators for his/her misconduct is very important, and if the national system grants arbitrator the absolute immunity the party's interest could be jeopardized. Namely, each person deserves the right to a fair trial. If the parties to the arbitration proceedings cannot sue the arbitrator for his/her unlawful behavior it would jeopardize the arbitration as dispute resolution method, as it allows arbitrators to abuse their power and escape liability.

Further, clear defining of arbitrator's duties and powers both in the arbitration contract and regulations is necessary. Namely, each ambiguous clause or provision regarding this issue could lead to the legal uncertainty and increasing numbers of the claims against arbitrators.

Regarding the liability of the arbitrators, national laws and arbitration rules, definitely must improve their rules on arbitrator's liability. However, in my opinion, the arbitrators cannot in principle be held liable for what they have ruled on, except if they have committed personal misconduct equivalent to serious misconduct or constituting fraud, gross negligence or breaching the rule of law. Additionally, the arbitrators should strictly respect procedural rules, and fulfil all necessary duties in that regard, regardless on the scope of the immunity which protects them.

LIST OF REFERENCES

A. Legal Acts

1. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);
2. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006;
3. ICC Arbitration Rules, In force as from 1 March 2017 and Mediation Rules, In force as from 1 January 2014 [interactive]. [reviewed in 1 December 2019]. Available at https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf
4. LCIA Arbitration Rules (2014) [interactive]. [reviewed in 1 December 2019]. Available at https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf
5. International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) Rules Amended and Effective June 1, 2014 Fee Schedule Amended and Effective July 1, 2016[interactive]. [reviewed in 1 December 2019]. Available at https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf

B. Text Books

1. FRANCOZI, M., et al. *European Community Trade Mark*. The Netherlands: Kluwer Law International, 1997;
2. MCCONVILLE, M., and CHUI, W.H. *Research Methods for Law*, Edinburgh University Press, 2007.
3. SMITS, J.M. *The Mind and Method of the Legal Academic*. Edward Elgar, Faculty of Law, Maastricht University, Netherlands, 2012.
4. MOSES, M.L. *The Principles and Practice of International Commercial Arbitration.* New York, Cambridge University Press, 2008;
5. ONYEMA, E. *International Commercial Arbitration and the Arbitrator's Contract. Routledge*. Oxon, 2010.

6. BLACKABY, N., et al. *Redfern and Hunter on International Arbitration*. The United States of America: Oxford University Press, 2015;
7. Czech (& Central European) Yearbook of Arbitration - 2012: Party Autonomy versus Autonomy of Arbitrators, Juris Publishing, Inc., 2012;
8. LIEBSCHER, C. AND FREMUTH-WOLF, A.A. *Arbitration Law and Practice in Central and Eastern Europe*. Juris Publishing, 2011;
9. DE PAIVA MUNIZ, J.T, et. al. *Arbitration Law of Brazil: Practice and Procedure*. Juris Publishing, 2011.

C. Articles from periodical publications

1. FRANK, D. S. The Liability of International Arbitrators: Comparative analysis and proposal for qualified Immunity. *New York Law School Journal of International and Comparative Law,* 2000*,* p. 1 – 59.
2. MA, W. J. M. Procedures for Challenging Arbitrators: Lessons for and from Taiwan. *5 Contemp. Asia Arb. J.* 2012.
3. JARVIN, S. The sources and limits of the arbitrator's powers. *Arbitration International*, 1986, p. 140–163.
4. TRULI, E. Liability v. Quasi-Judicial immunity of the Arbitrator: The Case Against Absolute Arbitral Immunity. *The American Review of International Arbitration (ARIA),* Netherlands*,* 2008.
5. HWANG, M. et. al. Claims Aginst Arbitrators for Breach of Ethical Duties. From *Contemporary Issues in International Arbitratrion and Mediation.* Fordham Law School, The Fordham Papers*,* 2007, p. 225-246.
6. BERNET, M. and ESCHMENT, J. Liability of Arbitrators under Swiss Law: Legal Basis and Limitations of Arbitral Immunity, in: Schieds, *VZ 2016, Heft 4*, p.189-195.
7. KAUFMANN-KOHLER, G. and RIGOZZI, A. International Arbitration: Law and Practice in Switzerland, *Oxford*, 2015, p. 231-237.
8. MULLERAT, R. The liability of Arbitrators: a survey of current practice. *International Bar Association Commission on Arbitration,* Chicago, 2006.
9. GINSBURG, T. The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration. *John M. Olin Program in Law and Economics Working Paper No. 502*, 2009, p. 1-14.

10. FRANK, D.S. The Role of International Arbitrators. *ILSA Journal of International & Comparative Law,* Vol. 12, p. 499-521.
11. ROGERS, C.A. The Ethics of International Arbitrators, *Bocconi University, Institute of Comparative Law (IDC),* p. 1-15 2013.
12. JARVIN, S. The sources and limits of the arbitrator's powers. *Arbitration International*, 1986, p. 140–163.
13. KIRBY, J. How Far Should an Arbitrator Go to Get it Right? *Kluwer Law International B.V.* 2017, p. 193-199.
14. CEVC, A. Civil Liability of Arbitrators. From *International Scientific Conference „EU and Member States – Legal and Economic Issues" in Osijek, 6-7 June 2019,* Faculty of Law, Josip Juraj Strossmayer University of Osijek*,* 2019, p. 405-421.

D. Court decisions:

1. Swiss Federal Tribunal, First Civil Court, *24 November 2017*, *A. SA v. B. Ltd, No. 4A_236/2017, para. 3 and 4;*
2. TGI Paris*, May 12, 1993* and Paris*, October 12, 1995, (Raoul Duval), Rev. arb., 1999;*
3. Spanish Supreme Court, *15 February 2017, Puma v. Estudio 2000;*
4. Flock v. Beattie 2010 ABQB 193 (CanLII), Court of Queen's Bench of Alberta.
5. Austrian Supreme Court Case, 2016, AOGH 5 Ob 30/16x, availiable at <https://rdb.manz.at/document/ris.just.JJT_20160322_OGH0002_0050OB00030_16X0000_000 >.

E. Electronic documents

1. LOVELLS, H. *Greenworld revisited: arbitrator liable for procedural error,* [interactive] [reviewed in 1 December 2019.]. Available at https://www.lexology.com/library/detail.aspx?g=d7fd72d8-8021-4b0a-836b-0515ab2c4fda
2. The Club Des Juristes, *Report on The Arbitrator's Liability*, 2017, [reviewed in 1 December 2019.]. Available at https://www.leclubdesjuristes.com/wp-content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf

3. AHMEDOV, A., *Born's Finest: 19 Leading Arbitral Institutions of the World Published on March 18*, 2015 [interactive]. [reviewed in 26 November 2019]. Available at: https://www.linkedin.com/pulse/borns-finest-19-leading-arbitral-institutions-world-aibek-ahmedov/
4. ICC Commission on International Arbitration. *Final Report on the Status of the Arbitrator*. Report of the Working Party on the status of the arbitrator [interactive]. [reviewed in 26 November 2019]. Available at: < http://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0009.htm#TOC_BKL1_2_1 >
5. CORDERO-MOSS, G. *Why Arbitration Needs Conflict of Laws Rules*. Institute for Transnational Arbitration (ITA) [reviewed in 31 October 2019.]. Available at http://arbitrationblog.kluwerarbitration.com/2018/10/17/why-arbitration-needs-conflict-of-laws-rules/
6. KINGA, T. *The Legal Relationship between the Parties and the Arbitral Institution* [interactive]. [reviewed in 1 December 2019.]. Available at https://eltelawjournal.hu/wp-content/uploads/2014/03/ELJ_Separatum_timar.pdf
7. SHARMA, A. *The Contractual Relationship between the Institution and Arbitrator* [interactive]. [reviewed in 1 December 2019.]. Available at https://www.researchgate.net/publication/330364849_The_Contractual_Relationship_between_the_Institution_and_Arbitrator
8. GEARING, M. *The relationship between arbitrators and parties: is the pure status theory dead and buried* [interactive]. [reviewed in 1 December 2019.]. Available at http://arbitrationblog.kluwerarbitration.com/2011/06/17/the-relationship-between-arbitrators-and-parties-is-the-pure-status-theory-dead-and-buried/
9. VARAPNICKAS, T. *The Law Applicable to Arbitrators' Civil Liability from a European Point of View* [interactive]. [reviewed in 1 December 2019.]. Available at http://arbitrationblog.kluwerarbitration.com/2019/03/25/the-law-applicable-to-arbitrators-civil-liability-from-a-european-point-of-view/
10. Kinds of Interim Measures in Arbitration, 2016, [interactive] [reviewed in 4 November 2019.]. Available at http://expert-evidence.com/kinds-of-interim-measures-in-arbitration/
11. VISCASILLAS, M.P. *Liability Insurance in Arbitration: The Emerging Spanish Market and the Impact of Mandatory Insurance Regimes* [interactive] [reviewed in 1 December

2019.]. Available at http://arbitrationblog.kluwerarbitration.com/2014/01/08/liability-insurance-in-arbitration-the-emerging-spanish-market-and-the-impact-of-mandatory-insurance-regimes/

12. ROGERS, A. C. *The Ethics of International Arbitrators,* Bocconi University, Institute of Comparative Law, 2013[interactive]. [reviewed in 1 December 2019.]. Available at: http://cedires.be/index_files/ROGERS_The%20Ethics%20of%20International%20Arbitrators.pdf

13. LAMANCE. K. *What Is Tort Law*? [interactive]. [reviewed in 1 December 2019.]. Available at: https://www.legalmatch.com/law-library/article/what-is-tort-law.html

14. CAMERON, A., *Understanding the Liability of Arbitrators,* 2017 [interactive]. [reviewed in 5 December 2019.]. Available at: https://www.lexology.com/library/detail.aspx?g=26f78b4a-9fe3-4b2e-ad0c-3933a3365a47

15. HIRST, P. *Arbitrators' Liability under Spanish Arbitration Law: Recent Developments*, 2017 [interactive]. [reviewed in 5 December 2019.].https://www.clydeco.com/insight/article/arbitrators-liability-under-spanish-arbitration-law-recent-developments

16. DE LA JARA, J.M. and OLÓRTEGUI, J., P*uma v. Estudio 2000: Three Learned Lessons* 2017 [interactive]. [reviewed in 5 December 2019.]. Available at: http://arbitrationblog.kluwerarbitration.com/2017/05/29/puma-v-estudio-2000-three-learned-lessons/

17. DRAHOZAL, C. R., Arbitrator Selection and Regulatory Competition in International Arbitration law, 2005 [interactive]. [reviewed in 1 December 2019.]. Available at:<http://ssrn.com/abstract=1905715>.

18. KUMAR, L., The Independence and Impartiality of Arbitrators in International Commercial Arbitration [interactive]. [reviewed in 1 December 2019.]. Available at: <hhttp://ssrn.com/abstract=2428632>.

19. Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview, 2018. [interactive]. [reviewed in 1 December 2019.]. Available at: <https://www.oecd.org/investment/investment-policy/ISDS-Appointing-Authorities-Arbitration-March-2018.pdf>.

20. DUARTE, M. Reputation Arbitration: Building a Decentralized Reputation System for Arbitrators? [interactive]. [reviewed in 1 December 2019.]. Available at:

<http://arbitrationblog.kluwerarbitration.com/2018/07/26/reputation-arbitration-building-decentralized-reputation-system-arbitrators/>.

21. LUKIC, S & GRILL, A.K. Arbitrators' Liability: Austrian Supreme Court Reconfirms Strict Standards, 2016, [interactive] [reviewed in 28 december 2019.]. Available at http://arbitrationblog.kluwerarbitration.com/2016/09/01/arbitrators-liability-austrian-supreme-court-reconfirms-strict-standards/

SUMMARY

The literature on the legal status and liability of arbitrators, and, in particular, international arbitrators, is plentiful but not always entirely clear. The first difficulty for those approaching the issue is to identify what the authors mean when they talk of the legal relationship between the parties and the arbitrator. Further, it is very difficult to specify which powers and duties the arbitrator will have in a particular arbitration proceeding due to the dual nature of her/his function (judge/contracting party). In addition, the concepts of the independence and impartiality of arbitrators are still not clearly investigated and defined. Finally, the regulations on international arbitration are not harmonized yet which causes a sort of legal uncertainty in this field.

Additionally, there is no uniform approach regarding the liability of arbitrators. Common law countries provide immunity to arbitrators based on equating their function to that of judges. On the other hand, civil law countries emphasize the contractual relationship between the arbitrators and parties and determine liability according to the ordinary law of contract. Despite different starting points, most jurisdictions accord a certain degree of immunity to arbitrators in the exercise of their judicial role to ensure the finality of arbitral awards and protect the independence and impartiality of arbitrators.

Nevertheless, this thesis will examine the key factors which determine the legal status of an arbitrator. Then, the issues regarding the arbitrator's liability will be examined. Finally, the thesis will investigate should immunity continue to protect arbitrator from liability for their misconduct, and if yes, to what extent?