

# ARTICLE

## THE CIVIL LIABILITY REGIME OF ARBITRATORS AND ARBITRATION INSTITUTIONS

| 22/06/21 | Marie Danis



Settlement of disputes by arbitration sometimes gives rise to subsequent litigation, after issuance of the award. Aside from annulment proceedings, parties may also seek to have the arbitrator and/or the arbitration institution found liable in connection with the arbitration process.

The civil liability regime of arbitrators and arbitration institutions has been regulated by the institutions themselves; the protection granted to arbitrators and internal bodies of arbitral institutions has been further strengthened in the latest version of their arbitration rules, as is the case of the International Chamber of Commerce ("ICC") [1] and the London Court of International Arbitration ("LCIA").[2]

### 1. Identification of the tribunal with jurisdiction to hear civil liability claims against arbitrators

The arbitrator is partially immune from civil liability. Similar to the immunity applicable to state judges, it is however limited to the arbitrator's mission to judge and does not extend to the arbitrator's other missions. In the latter case, the conditions applicable to arbitrators' civil liability in case of misconduct were recently addressed in French case law, in the context of an action initiated against an arbitrator whose award, issued in proceedings administered under the ICC Rules, had been annulled because the arbitrator failed to comply with his disclosure obligation. The arbitrator's obligation to disclose to the parties any circumstance that may affect his independence and impartiality indeed does not form part of his/her mission to judge and any breach thereof is not covered by immunity.

The Paris first instance tribunal and the Paris court of appeals recently issued conflicting decisions as to how to identify the tribunal with jurisdiction to decide civil liability claims against arbitrators.

Having first recalled that the Brussels I bis Regulation [3] is not applicable to arbitration proceedings in accordance with its Article 1, the Paris first instance tribunal ruled on 31 March 2021 that actions for civil liability of the arbitrator fall under the jurisdiction of the court with territorial jurisdiction where the arbitrator's mission was materially and essentially carried out, that is to say where the arbitrator provided the services – which would be, for this purpose, the place where the hearings and deliberations were physically held.

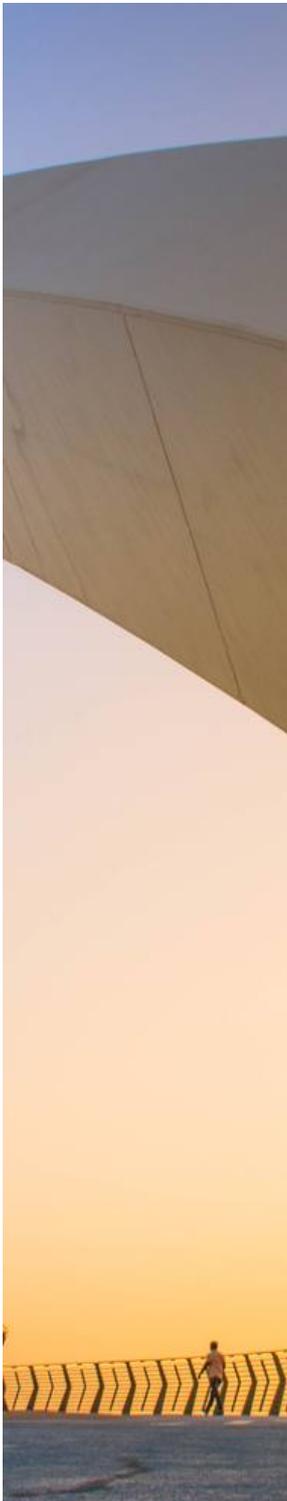
Such ruling acknowledges that the place where the arbitrator provides the services may be different than the seat of the arbitration as identified in the arbitration clause and recalled in the terms of reference of the arbitration, which governs notably the legal regime applicable to the conduct of the proceedings and to recourses against the award. It may also be different than the court identified in the applicable arbitration rules to hear disputes arising out of or in connection with the administration of the arbitration. [4] Yet as a consequence of this decision, the parties (who already provide for the seat of the arbitration in the arbitration clause) would also need to consider the opportunity to specify, by means of a specific jurisdiction clause in the terms of reference of the arbitration, the court that would have jurisdiction to hear an action for civil liability of the arbitrators in case of a breach of their contractual mission.

Yet this decision was immediately overturned on appeal by the Paris court on 22 June 2021, ruling that: "*the services rendered by an arbitrator consists in performing his mission to decide the dispute submitted to him by the parties and includes the mission to render an award at the seat of arbitration chosen by the parties or in agreement with them. Consequently, given the specific nature of the arbitrator's contract, which is closely linked to the arbitration agreement, the place of performance of the arbitrator's services must be found to be at the said seat, even if the arbitration proceedings and the arbitrators' deliberations could, by agreement between the parties, have taken place in other places*". [5]

This correction allows some predictability, in particular considering the increasing number of hearings held remotely, by videoconference. Remote hearings, that were implemented initially to reduce costs and then to an even greater extent in the recent months because of the Covid-19 pandemic, may indeed make it difficult to single out one place of performance of the services by the arbitrator. This is the classic case in international arbitration of an arbitrator working from one country, while the other members of the panel work in another and the parties, counsel and witnesses are also located elsewhere, including during the hearings or the deliberations.

### 2. Strict limits to the civil liability of arbitration institutions

The French courts also had the opportunity to clarify recently the type of misconducts that may give rise to civil liability of arbitral institutions. Ruling on 23 March 2021 [6] on claims that the ICC had failed to manage properly the transition



between two panel of arbitrators (the constitution of the first one having been found to be irregular), the Paris Court of Appeal confirmed that **only the most serious misconducts were excluded from the scope of the limitation clauses stipulated in their rules.** [7]

In particular, it was held that the ICC would not be held liable in the following circumstances:

- Proceeding directly to the constitution of the second arbitral tribunal;
- Requesting payment of an additional advance to cover the costs of the arbitration, in addition to the amount already paid to the tribunal first constituted and which issued an award;
- Failing to draw certain issues already presented to the first tribunal to the attention of the second arbitral tribunal before the award was made;
- Transmitting to the arbitral tribunal a request for rectification of the award two months after receiving it.

In so doing, the Paris Court dismissed the argument that such actions and decisions, which were discretionary in nature under the ICC Rules of Arbitration, constituted serious misconduct and could give rise to civil liability. In particular, the Paris Court held that:

- the ICC Court had discretion, when replacing an arbitrator, to follow or not the initial procedure of appointment of the members of the arbitral tribunal pursuant to Article 12(4) of the ICC Rules then in force;
- the ICC Court was allowed to readjust the amount of the advance on costs at any time during the proceedings pursuant to Article 30(2) and Article 1(10) of Appendix III of the ICC Rules then in force;
- drawing the attention of the arbitral tribunal to certain matters of substance when reviewing the draft award was merely an option pursuant to Article 27 of the ICC Rules;
- Article 29 of the ICC Rules does not set any specific time limit within which the Secretariat of the ICC Court is required to transmit to the arbitral tribunal a party's request for correction or interpretation of the award. In that respect, the judge found that transmitting the request for correction 2 months after receiving it was not excessive and that it did not reveal any intention of the ICC to delay the process.

This welcome clarification ensures that the institutions can continue to manage arbitration proceedings effectively while providing an adequate level of protection, equivalent to that offered in litigation, in case of serious misconduct of arbitrators and institutions.

[1] In its 2021 version, the ICC Rules state that: "*The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, ICC and its employees, and the ICC National Committees and Groups and their employees and representatives 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*" (Article 41). It already laid down, in its 1998 version, the rule that "*Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration*" (article 34).

[2] The LCIA Rules, as recently revised in 2020, also state that: "*None of the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice Presidents, Honorary Vice Presidents, former Vice Presidents and members), the LCIA Board (including any board member), the Registrar (including any Deputy Registrar), any arbitrator, any Emergency Arbitrator, any tribunal secretary and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration, save: (i) where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law*" (Article 31.1).

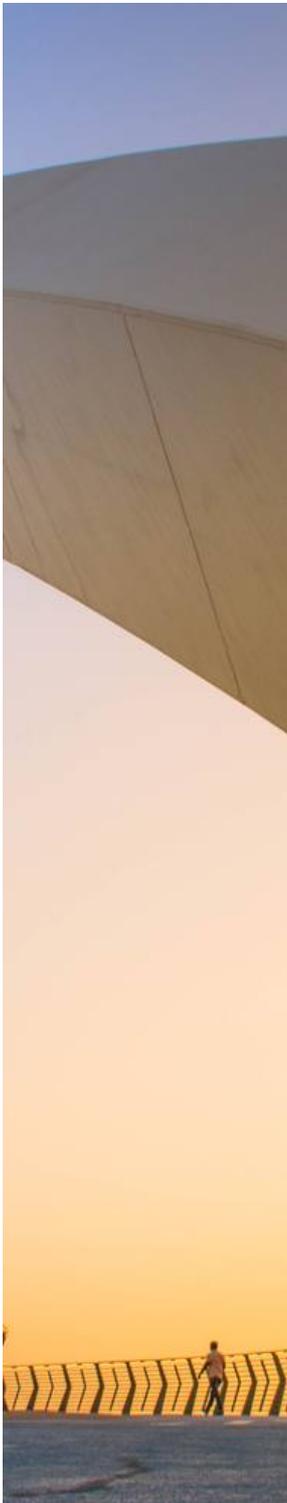
As for the other arbitration institutions favoured in practice, as shown in the 2021 study conducted by Queen Mary University and White & Case (available here <http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/>), the SIAC Rules (2016) provide for a comparable exclusion of liability under Article 38, as does the HKIAC Rules (2018, Article 46).

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[3] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Article 1 of these Rules provides: "*2. This Regulation shall not apply to: [...] d) arbitration*".

Article 7 states that: "*A person domiciled in a Member State may be sued in another Member State: (1) (a) in matters relating to a contract, in the courts for the*



*place of performance of the obligation in question; (b) for the purposes of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be : [...] in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided".*

[4] For ICC proceedings, such disputes would fall within the jurisdiction of the Paris court; for the LCIA, the courts of England and Wales, by virtue of the jurisdictional clauses which are stipulated in these rules:

Article 43 of the ICC Rules of Arbitration provides: "*Any claims arising out of or in connection with the administration of the arbitration proceedings by the Court under the Rules shall be governed by French law and settled by the Paris Judicial Tribunal (Tribunal Judiciaire de Paris) in France, which shall have exclusive jurisdiction* "

Article 31.3 of the LCIA Rules states: "*Any party agreeing to arbitration under or in accordance with the LCIA Rules irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to hear and decide any action, suit or proceedings between that party and the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice Presidents, Honorary Vice Presidents, former Vice Presidents and members), the LCIA Board (including any board member), the Registrar (including any deputy Registrar) any arbitrator, any Emergency Arbitrator, any tribunal secretary and/or any expert to the Arbitral Tribunal which may arise out of or in connection with any such arbitration and, for these purposes, each party irrevocably submits to the jurisdiction of the courts of England and Wales.*

[5] CA Paris, 22 June 2021, n°21/07623.

[6] CA Paris, 23 March 2021, n°18/14817. It confirms the judgment rendered on 12 February 2018 by the TGI of Paris in the same case (n°16/08752).

[7] The applicable version of the ICC Rules of Arbitration was the 1998 version, Article 34 of which stated: "*Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration*".

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