

Arbitrator and Arbitral Institutions
Liability and Insurance

Arbiter en arbitrage-instellingen
Aansprakelijkheid en verzekering

Thesis

to obtain the degree of Doctor from the
Erasmus University Rotterdam
by command of the
rector magnificus

Prof.dr. F.A. van der Duijn Schouten

and in accordance with the decision of the Doctorate Board.
The public defence shall be held on

Thursday 24 June 2021 at 15.30 hrs
by

Ahmed Fathy Mohamed El Shourbagy
born in Cairo, Egypt.

Doctoral Committee:

Promotors:

prof.dr. F.J.M. de Ly
prof.mr. M.W. Scheltema

Other members:

prof.dr. K. Heine
prof.dr.iur. B. van Zelst
prof.mr. G.J. Meijer

Table of Contents

Chapter 1	Introduction	5
	§1.01 General Research	5
	§1.02 Relevance of Research	9
	§1.03 Research Motivation	9
	§1.04 Research Objective and Problem Definition	10
	§1.05 Research Limitation	11
	§1.06 Selection Criteria.....	11
	§1.07 Research Structure	14
	§1.08 Research Methodology.....	14
CHAPTER 2	Contractual Liability, Arbitrators, and Arbitral Institutions	15
	§2.01 Definition of Arbitrators and their Relationships	16
	§2.02 Forms of Relationships in Which Arbitrators are Involved	27
	§2.03 The Contractual Nature of the Relationship (Classification of the Arbitrator Contract)....	36
	§2.04 Basic Effects of the Arbitrator’s Contract.....	42
	§2.05 Relationship Between the Arbitral Institution and Parties	51
	§2.06 Applicable Law to the Arbitrator’s Contract.....	59
	§2.07 Chapter Summary	62
CHAPTER 3	Arbitrator Immunity and Liability	63
	§3.01 The Nature of Arbitrator Immunity.....	65
	§3.02 Immunity Forms General Concepts	94
	§3.03 Civil Liability General Concepts	100
	§3.04 Acts of Misconduct Holding the Arbitrator Liable.....	133
	§3.05 Chapter Summary	142
CHAPTER 4	Immunity and Liability of Arbitral Institutions	143
	§4.01 Arbitral Institutions and Conventional Recognition	149
	§4.02 Private Major Arbitral Institutions	153
	§4.03 Immunity and Arbitral Institutions.....	161
	§4.04 Civil Liability of Arbitral Institutions	179
	§4.05 Chapter Summary	185
CHAPTER 5	Professional Indemnity, Insurance, and Arbitration.....	186
	§5.01 Defining Professional Indemnity Insurance (General Concepts)	190
	§5.02 Principles of Professional Indemnity Insurance	199
	§5.03 Acts that Cannot be Covered by Insurance	213
	§5.04 Scope of Available Insurance Coverage in the Insurance Market for Arbitral Institutions and Arbitrators’ PL (Interviews).....	217
	§5.05 Chapter Summary	236
CHAPTER 6	Summary, Conclusion, and Recommendations	237
	Bibliography.....	248



Preface

This dissertation is concerned with the liability of arbitrators and arbitral institutions and the possibility of insuring against their potential liability under the relevant regimes in both civil and common law systems. The thesis aims to test the application of professional indemnity insurance as a remedy to be used by the arbitrators and the arbitral institutions, and its influence on the success of the arbitral process. Thus, this thesis not only attempts a comprehensive analysis of the liability of arbitrators, arbitral institutions, and the principles of professional indemnity insurance, but also empirically investigates the existence of professional liability (PL) insurance in both the insurance market and among the arbitrators and arbitral institutions. The dissertation also evaluates insurance effectively as a remedy to overcome the arbitrators and the arbitral institutions' obscure consequences upon the proof of the liability thereto.

Chapter 1 Introduction

Chapter 1 Introduction

Ahmed F. El Shourbagy

§1.01 General Research

The tangible development of international trade and the regular increase of foreign transactions were accompanied with the frequent rise of international disputes. The consecutive rise of such disputes has burdened the courts with a huge backlog. As parties and counsel were frustrated with, *inter alia*, delays which is why, they resort to arbitration as a speedy, inexpensive, and effective dispute resolution method. Consequently, adopting arbitration as a method of amicable settlement was encouraged by the emergence of globalisation and the current liberalisation of international trade and investment. Moreover, litigation seems to be becoming more expensive and time-consuming. Judges often lack expertise in the area of commercial disputes, resulting in incorrect decisions and consequential appeals to higher forums. Courts usually disrupt commercial relationships as a result of adjudications being win-lose scenarios and not mutually acceptable decisions. Moreover, documents and evidence presented in court become public, and therefore, copies are available to anyone, disadvantaging the concerned parties. Thus, there was a need for an alternative dispute resolution method that could avoid the disadvantages of litigation and that possesses its own system that leads to the required results, especially in the field of international trade and commerce. Nowadays, arbitration is becoming increasingly popular, replacing courts in international commercial dispute resolution due to its characteristics and advantages in providing final awards and efficiency in business and trade relationships. The constant development of arbitration and the real intention to make it compete with and prevail over the state courts were reasons behind the emergence of institutional arbitration in addition to ad hoc arbitration. Therefore, disputing parties are not limited only to the choice of ad hoc arbitration but may also choose to conduct their arbitration under the rules of a specific institution.

Unlike litigation, arbitration is a private dispute resolution process *‘whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their powers from a private agreement,*

not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement'.¹

The aforementioned definition shines a light on the arbitrators represented as the pillar of the arbitral process since the arbitrators bring the arbitral agreement to life until the award is rendered. Additionally, the same definition highlights the fact that the authority and power of the arbitrators are derived merely from the parties and the scope of said authority is determined by the agreement thereof. Thus, a fundamental characteristic that distinguishes arbitration from litigation is the right of parties to appoint their own arbitrators who are specially qualified for the settlement of their dispute. Redfern and Hunter pointed out the importance of the arbitrators and their impact on the success of the arbitral process, noting that:

*'[o]nce a decision to refer a dispute to arbitration has been made, choosing the right arbitral tribunal is critical to the success of the arbitral process. It is an important choice not only for the parties to the particular dispute [] but also for the reputation and standing of the process itself.'*²

Having said that, the arbitrators are empowered to function through the parties' arbitral agreement; this agreement consequently gives rise to the arbitrator contract which governs the relation between the arbitrators and the disputing parties.³ This contract set forth the reciprocal rights and obligations of arbitrators and disputants parties. On one hand, said contract imposes obligations on the arbitrator, such as independence, impartiality, conducting the arbitration fairly, and rendering the award. On the other hand, it grants the arbitrators rights such as arbitral immunity and remuneration. Similarly, if the parties opt for an institutional arbitration contract, that would be concluded among the selected arbitral institution and the parties. Said contract would impose mutual rights and duties on the institution and the parties. Since the arbitrator contract and the arbitral institution contract are the outcome of the arbitral agreement, the risk of the consequence of any agreement as a practical matter is a law suit.⁴ Said law suit will be lodged against the arbitrators or the arbitral institutions due to the breach

1. Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 9.

2. Nigel Blackaby, Constantine Partasides & Alan Redfern, *International Arbitration* (6th edn, OUP 2015) 233.

3. Julian DM Lew, Loukas A Mistelis & Stefan M Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 276.

4. Elliott C. Kulakowski Lynne U. Chronister, *Research Administration and Management* (Jones & Bartlett Publishers 2008)372.

of one of their duties. In defending their position, the arbitrator and the arbitral institution would rely on the right of arbitral immunity. The right to arbitral immunity was the keystone for stimulating the interest to conduct this dissertation because it gives rise to relevant outstanding matters needed to be investigated as a direct outcome of said immunity given to arbitrators or arbitral institutions. Originally, arbitral immunity is given on the premise of function comparability of arbitrators to judges. The purpose of the arbitral immunity is to protect arbitrators from being harassed by the dissatisfied parties. This protection aims to maintain the integrity of the arbitral process by preventing frivolous claims against arbitrators, which may affect their independence by their fear of being sued, and thus influencing their decision. The concept of arbitral immunity was not limited to only arbitrators but also was extended to arbitral institutions where the institution acquires the immunity from the arbitrator functioning under its rules.

The recognition of arbitral immunity and the extent of said immunity given to arbitrators, either absolute or qualified, were dealt with in a dissimilar way in the civil law systems and common law systems. The two systems have major conceptual divergences in relation to the arbitral immunity. The nature of immunity is based on two sources: judicial immunity and contractual immunity. Judicial immunity is adopted by common law countries, thus granting absolute or nearly absolute immunity to arbitrators.⁵ This is due to their belief that arbitrators perform a quasi-judicial role.⁶ In contrast, civil law countries adopt the concept of contractual immunity where the arbitrators can set forth their immunity in terms of contract.⁷ This type of immunity is most likely found in institutional arbitration as one of the rules that parties agree upon by selecting a specific institution to run their arbitration under its aegis. Moreover, civil law jurisdictions deem the arbitral process a kind of professional business.⁸ Therefore, arbitrators are not covered with the same immunity of judges. The differences among the systems thereof show a debatable nature about the arbitral immunity and the inconsistent application of said immunity has brought to light the subject of the arbitrators and arbitral

5. Martin Maisner, 'Liability and Independence of the Arbitrator' in Alexander J Bělohlávek and others (eds), *Czech and Central European Yearbook of Arbitration Party Autonomy Versus Autonomy of Arbitrators* (JurisNet, LLC 2012) 164.

6. Susan D Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' (2000) 20 NY Sch J Intl & Comp L 1, 19.

7. Michel Hwang, Katie Chung & Fong L Cheng, 'Claims Against Arbitrators for Breach of Ethical Duties' in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Martinus Nijhoff Publishers 2007) 347.

8. Hazem Hebaishi, 'Should Arbitrator Immunity Be Preserved under English Law?' (2014) 2(2) Natl. Envtl. L Rev 45, 63.

institutions' liability because both are collateral. The doctrine of arbitral immunity is deemed an obstacle in lodging a civil liability legal action required to recover damages by the injured party upon the occurrence of arbitral misconduct by the arbitrator or the arbitral institution. The grounds of said obstacles could be reflected in different reasons; first, the grant of the immunity to arbitrators by analogy to judges does not result in the same consequences as when a judge is held liable. This is due to fact that, upon proof of a judge's liability, the disgruntled parties' can trigger the state liability, however, they cannot in the case of arbitrators' or arbitral institutions' liability. Despite the fact that the state recognizes the judicial nature of the arbitral process in its entirety through enacting arbitration acts and admitting the judicial nature to the award. Second, upon proof of the liability of arbitrators or arbitral institutions, due the failure of the immunity doctrine to dismiss the claim, parties would lack a source from which they can recover damages; additionally, arbitrators and arbitral institutions are not supported by a subsidiary shield in the case thereto. Third, due to the fact that the liability issue is considered a highly controversial matter, it has resulted in the absence of regulations on the conventional level to govern the 'misconduct or wrongdoing' of arbitrators and arbitral institutions. For instance, the United Nations Commission on International Trade Law (UNCITRAL) Model Law left the issue of regulating the arbitrators' misconduct and liability to national acts. Thus, taking into consideration the aforementioned reasons accompanied by the debatable status of arbitral immunity and the ambiguous perspective of the international community towards the subject of liability, this research was intended as an attempt to find a satisfactory remedy for arbitrators, arbitral institutions, and aggrieved parties. The main goal is to test the impact of professional indemnity insurance as a remedy to cover arbitrators' and arbitral institutions' potential liability. This professional liability (PL) insurance policy is deemed to be a tailor-made Error and Omission (E&O) policy. It aims to cover the arbitral acts of the arbitrators and arbitral institutions in their entirety, except those acts barred by means of the applicable law.

PL insurance coverage could be considered a method of balance and relief in the arbitration industry because on one hand the commitment of arbitrators and arbitral institutions to pay premiums to insurers to get insurance will make them keen to do their best to keep a low risk profile and avoid a premium increase upon the renewal of the insurance policy. Moreover, the arbitrators' and arbitral institutions' fear of losing the immunity coverage upon their -will gradually disappear when they know that they are supported by an alternative if their immunity is waived. Accordingly, the presence of a secondary shield would be reflected in their efficiency and the quality of their decisions. It is easy for parties to claim the liability of the arbitrator or the institution in case of misconduct which may be based on contractual liability

or tort liability according to the regime governing their relation. Therefore, one of the standard responses to such risks is to insure against liability. On the other hand, it will entrust arbitrants that they can recover any potential damages incurred on them by the fault of the arbitrator or the arbitral institution instead of being frustrated out of their fear of failing to invoke recovery.

§1.02 Relevance of Research

The introduction of section §1.01 shows significant relevance between the arbitral process and the potential liability of arbitrators, arbitral institutions, and the professional indemnity insurance coverage as a method of recovery. Notwithstanding said strong relevance, the UNCITRAL Model Law⁹ and the different national rules¹⁰ have excluded the liability of arbitrators with no reflection on acts that may hold arbitrators or arbitral institutions liable and any method of recovery upon its occurrence, such as an obligation for both to get insurance coverage. Said laws relied solely on arbitral immunity to potentially dismiss any claim against the arbitrators or arbitral institution. Moreover, the arbitral institutions subject to this dissertation also applied the same concept of excluding liability by incorporating immunity clauses and ignoring any acts that trigger their liability or the liability of arbitrators functioning under their rules. It is undisputable, as mentioned previously, that arbitration is founded on an agreement and the parties of the arbitral process may be exposed to risk by the arbitrator or the arbitral institution if they acted in bad faith or incompetently. As a result, there should be a method for parties to be compensated upon their injury. Adopting arbitration as a method of settlement shall create a clear frame for the issue of liability of both arbitrators and arbitral institutions in order to improve their performance and accuracy when they know they are still exposed to the risk of being held liable. This frame shall provide measures that the arbitrator and arbitral institutions could take to seek protection against their potential liability such as, professional insurance coverage, as a standard approach followed by different liberal professionals and institutions.

§1.03 Research Motivation

The demand for arbitration as a more flexible and easier alternative dispute resolution method, especially in commercial matters, leads people search for extra flexibility to accommodate the

9. *See* UNCITRAL Model Law on International Commercial Arbitration Rules 2010 (UNCITRAL Model Law).

10. *See*, for example, English Arbitration Act 1996, French Code of Civil Procedure 2011, (Decree 2011-48), Egyptian Arbitration Act 1994.

parties' needs. This thought evolved from parties' beliefs in the concept of party autonomy and their freedom of choosing the arbitrator, in case of ad hoc arbitration, or choosing to choose the arbitral institution that either assigns an arbitrator or runs the entire arbitral process subject to its rules. Arguments have been raised with respect to the possibility of the arbitrator or arbitral institution committing an error in the course of the arbitral process and whether they could be held liable or not. As a result, there is a need to find a solution for the issue of liability in order to provide arbitral parties with the right to be compensated when they suffer injury from an arbitrator's act of misconduct or an institution's wrongdoing. The approaches of the different legal systems in relation to liability and the absence of certain elucidation for the subject thereof have rendered this issue of great interest to be investigated. Moreover, the adherence of arbitrators and arbitral institutions to arbitral immunity and the demand of dissatisfied parties to recover their damages were motives for proposing through this dissertation the professional insurance coverage as a remedy that may resolve this outstanding matter.

[§1.04 Research Objective and Problem Definition](#)

The primary purpose of this study is to provide a clear understanding of the concept of liability of arbitrators, as well as of arbitral institutions in the laws of arbitration, and the possibility of getting professional insurance coverage for said liability. Therefore, a study of the insurance laws relevant to the concept of PL insurance is conducted to determine the possibility of applying the principles of said insurance coverage to arbitrators and arbitral institutions. Finally, a study is conducted in both the arbitration market and the insurance market. The former is namely within the arbitral institutions to find out whether they have coverage or not. The latter is within the underwriters and insurance brokers to learn whether they provide coverage for such a risk type. It is important to understand the subject of liability of arbitrators and arbitral institutions in relation to the origin and types in order to be able to identify a possible solution when it arises. Since arbitrators are subject to errors like judges and other professionals, there are questions regarding whether this mistake can be corrected by suing the arbitrator or the arbitral institution, and how this relates to other remedies the parties of the arbitration may have. The idea of suing arbitrators might ultimately make them refrain from arbitral practice. However, the introduction of the concept of insurance against liability of arbitrators and arbitral institutions may lead to different results. It is supposed to improve the performance of arbitrators and institutions by eliminating their fear upon the waiver of their immunity if liability arises. Moreover, it would encourage them to perform diligently and up

to the standards of an ordinary member of their profession by avoiding the increase in cost of getting insurance coverage upon the repetitive occurrence of liability. Consequently, the main objectives of this dissertation are to analyse arbitrator and arbitral institution liability and clarify types of liability against arbitrators and how the concept of insurance can help resolve the issue of arbitrators' and arbitral institutions' malfunction. In reaching the main objectives of this dissertation a number of research questions, listed below, shall be addressed:

- (1) What are the types of potential liability that arbitrators and arbitral institutions may bear?
- (2) What is the possibility of applying the principles of PL insurance against this kind of risk with respect to the insurance laws subject to this dissertation?
- (3) What is the approach of the arbitral institutions regarding professional insurance coverage, whether they have it or solely rely on the immunity doctrine?
- (4) Does the insurance market provide coverage for this risk profile in the form of tailor-made insurance policies?
- (5) What is the scope of coverage available if this risk profile exists in the insurance market?

§1.05 Research Limitation

A delimitation of this research is necessary to gain a clear view of the relevant issues and to avoid the dilution and generalisation of the research. Therefore, this dissertation focuses on two different legal families: the common law, represented and limited to England; and the civil law, represented and limited to France, Netherlands, Egypt, and the United Arab Emirates (UAE), concentrating on Dubai, in particular. Moreover, the dissertation analyses the extent of the application of insurance within the laws of the abovementioned countries. This analysis would lead to the concept of insurance because liability issues could be one way for arbitrators and arbitral institutions to consider insurance.

§1.06 Selection Criteria

As described in the previous sections, this study focuses on examining the concept of granting immunity to arbitrators as well as situations in which they are held liable. The research explores both common law and civil law approaches as the two basic approaches governing the worldwide legal systems, providing examples of national laws regulating the issue from both approaches. The criteria adopted in selecting these countries were as follows:

- (1) The different legal families of the common and civil law.
- (2) The jurisdictions where arbitration has existed for a long time represented by (England, France, and the Netherlands), as well as jurisdictions where arbitration has been newly adopted

and enacted via legislation, represented by (Egypt and Dubai), offer a comparative basis upon which to discuss the subject matter of this dissertation.

(3) The method in which immunity and liability are dealt with in the national acts of each legal family.

(4) The insurance laws of each nation and the possibility of applying PL insurance principles to arbitrators' and arbitral institutions' malpractice.

(5) The worldwide leading arbitral institutions are located in the selected countries, as shown herein under:

(a) *England*: The common law system was founded in England in the eleventh century. This system was later adopted by the United States (US).¹¹ England hosts the London Court of International Arbitration (LCIA) – one of the oldest leading arbitral institutions – that is used as a reference to see how it deals with liability and insurance against the liability thereof.

(b) *France*: Unlike the common law system, the civil law system is rooted in Roman Law as codified in the Corpus Juris Civilis of Justinian and later developed in Continental Europe and around the world.¹² The most well-known and influential example of a nation that employs the civil law system is France.¹³ The International Chamber of Commerce (ICC) is located in France and is deemed one of the top global arbitral institutions. The ICC will be used in this dissertation as a reference to civil law based arbitral institutions by offering its methods of addressing liability in comparison to the institution subject to the common law approach.

(c) *Egypt*: Similarly, Egypt adopts the civil law system like many other countries around the world. Although Egypt is a developing country, one of the significant regional arbitral institutions which provides its services throughout the Middle East is based in Cairo. This institution, the Cairo Regional Centre for International Commercial Arbitration (CRCICA), is used as a reference in this study as the research examines how it addresses the issue of arbitrator and arbitral institution liability and whether it uses insurance as a method to cover future liability claims.

11. Caslav Pejovic, 'Civil Law and Common Law: "Two Different Paths Leading to the Same Goal"' (2001) 32 Vict U Well L Rev 817, 819.

12. *Ibid.*, 818.

13. Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1966–1967) 15(3) Am J Comp L 419.

(d) *United Arab Emirates (Dubai)*: The UAE is a group of seven emirates established according to the UAE Constitution in 1971. Each of the seven emirates has their own laws in force, which remain effective unless they are revoked by any federal law. The UAE did not have a modern act on arbitration for more than two decades. The arbitration legislation, contained principally in Articles 203-218 of the UAE Civil Procedure Code, embraces Dubai as one of the seven emirates forming the country. However, there is a new arbitration act, based on the Egyptian arbitration law; its enactment was eagerly awaited by the arbitration community.¹⁴ The UAE modern arbitration act has finally been issued and has entered into force in June 2018, which repealed Articles 203-218 of the UAE Civil Procedures Law No. 11 of 1992.¹⁵ Dubai has transformed over the past three decades into a glowing developed region, becoming a distinguished hotspot for business and an extremely fertile environment for attracting investment not merely in the Middle East but worldwide. The great development of Dubai should be seen as a result of an extensive array of economic, institutional, political, and juridical factors which together have contributed to making Dubai one of the foremost countries targeted for business. Being a major centre for business that connects the East and the West, Dubai hosts the Dubai International Arbitration Centre (DIAC). The DIAC is one of the most active arbitral centres where a significant number of arbitral cases are handled under its aegis. The DIAC was selected as a subject of this study because, as an inevitable result of the huge number of cases the DIAC administers, it faces frequent liability claims and, accordingly, it offers a chance to examine the remedies the centre adopts to overcome potential liability claims.

(e) *Netherlands*: Given that this study is conducted under the auspices of the Netherlands, it is important to study its main arbitral institution, the Netherlands Arbitration Institute (NAI), in this dissertation. The Netherlands is a state of the European continent that uses a civil law-based system. The NAI, as one of the most qualified, well-reputed arbitral institutions, has reserved a place for itself among the top arbitral institutions in Europe and has extended its provision of services to an international level. This dissertation will investigate the position of the NAI in relation

14. Sami Tannous, Samantha Lord Hill & Amr Omran, 'National Report for the United Arab Emirates' in J Paulsson (ed.), *International Handbook on Commercial Arbitration* (2016) 1, 8.

15. United Arab Emirates Arbitration Act (Federal Law No. 6) 2018.

to liability and whether the NAI adopts insurance as a method to be protected against liability.

§1.07 Research Structure

The current study researches the circumstances in England, France, Egypt and Dubai concerning their perceptions of the concepts of immunity and liability of arbitrators and arbitral institutions and the possibility employing insurance coverage to handle liability issues. Chapter 2 analyses and emphasises the various relationships in which the arbitrators and the arbitral institutions are involved throughout the arbitration process. Chapter 3 discusses the nature of immunity granted to arbitrators and arbitral institutions, and addresses how potential liability may be borne by each. Chapter 4 investigates the immunity and liability of arbitral institutions in general and also focuses, in particular, on the arbitral institutions located in the countries subject to this dissertation.

Chapter 5 addresses professional indemnity insurance as a new method to be applied in arbitration malpractice. In so doing, it considers the extent to which professional indemnity insurance principles, arising from the laws investigated in this dissertation, apply to that type of risk. Moreover, Chapter 5 provides results of empirical research conducted on the selected arbitral institutions (insured party) and on the insurance brokers and underwriters. Finally, Chapter 6 contains a summary, concluding remarks, and recommendations.

§1.08 Research Methodology

This study is based on theoretical and empirical research that investigates whether arbitrators and arbitral institutions employ insurance coverage against their potential liability or rely solely on the arbitral immunity doctrines and the contractual immunity prescribed in their rules. The study also examines the available coverage and policy types designated for said risk profile in the insurance market. The theoretical analyses are library-based, drawing on the library of Erasmus University of Rotterdam. Also accessed are electronic databases such as Kluwer Arbitration, UNCITRAL Website, Westlaw, LexisNexis, and Hein online for cases and articles. The dissertation utilises a comparative approach between common law and civil law to address the issue of civil liability as a general concept and to understand the extent to which the principles of said liability apply specifically to arbitrators and arbitral institutions. The comparative approach extends also to cover PL insurance rules in the different legal systems thereof. This study refers to several international conventions, national laws, and arbitration rules, including the UNCITRAL Model Law and the ICC, LCIA, NAI, CRCICA,

and DIAC arbitration rules. Case law from both common and civil jurisdictions is examined for the purpose of demonstrating how the concepts of immunity and liability for both arbitrators and arbitral institutions are applied and discussing the problems such applications create. The analysis will cover case law dealing with insurance against the professional malpractice risk and the method of applying the same principles to the liability of arbitrators and arbitral institutions in both civil and common law, namely within jurisdictions subject to this research. The empirical part is based on direct structured interviews of both parties involved in liability insurance policies: the underwriters or brokers (insurers) are interviewed to collect data about the available insurance coverage for said risk profile, while the arbitral institutions (insured) are interviewed to learn whether they are applying a system of insurance against their liability and the liability of arbitrators. The interview questions are attached to the study as Appendix I and the interview answers are extensively presented in detail in Chapter 5.

CHAPTER 2 Contractual Liability, Arbitrators, and Arbitral Institutions

Chapter 2 Contractual Liability

Ahmed F. El Shourbagy

Parties to international commercial arbitration have a choice to resolve their dispute through arbitration which is accompanied by the involvement of a third party, the arbitrator. The parties are joined together by an arbitration agreement, to which the arbitrator is not a party. The nature of the relationship between the arbitrator and the parties is of great debate due to the mixed nature of the arbitrator status. Arbitrators are empowered to arbitrate through the parties' agreement; nevertheless, they are performing a judicial function. This debate has brought to the surface theories regarding the nature of arbitrator status. Courts have also participated in issuing judgments determining the nature of this relationship, thus framing the effects and consequences of the relationship. It is undisputable that by virtue of the arbitration agreement an implied link is constituted between the disputing parties and the arbitrator, and, based on this link, arbitrators owe duties and obligations vis-à-vis parties. In turn, they are remunerated for fulfilling these duties. Therefore, the breach of any of these duties by the arbitrator raises questions about their contractual liability based on their obligation to provide specific duties, even those judicial functions carried out by the arbitrator. The evolution of the arbitration industry brought a new participant to the market: the arbitral bodies and institutions

administering the arbitral process among the disputing parties and the arbitrators. Therefore, a new contractual relationship has arisen, generating the same potential contractual liability of the arbitral institution.

§2.01 Definition of Arbitrators and Their Relationships

Arbitration is a consent-based private dispute resolution mechanism. Consequently, parties have to agree to arbitrate their disputes for an arbitration to occur.¹⁶ This agreement to arbitrate disputes represents the foundation of the arbitration mechanism. It is said that the '*arbitration agreement is the foundation stone of the arbitration process*'.¹⁷ Without the arbitration agreement, no process can be found. The necessity for the existence of a valid arbitration agreement was acknowledged by national laws and international conventions. Article II(1) of the New York Convention defined the arbitration agreement as 'an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'.¹⁸ The UNCITRAL Model Law referred to the Arbitration agreement in Article 7(1) as:

an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.¹⁹

National laws, whether common or civil law based, subject to this dissertation have adopted definitions for arbitration agreement where these definitions reflect the essentiality of the arbitral contract as the source of creating the arbitral process. The English Arbitration Act 1996 described the arbitration contract as '*an agreement to submit to arbitration present or future disputes (whether they are contractual or not)*'.²⁰ The French Code of Civil Procedure 2011 has defined an arbitration clause as '*an agreement by which the parties to one or more*

16. Lew, Mistelis & Kroll (n3) 98.

17. Blackaby, Partasides & Redfern (n2) 12.

18. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Art. II(1) (New York Convention).

19. UNCITRAL Model Law, Art. 7(1).

20. English Arbitration Act 1996, Art. 6(1).

contracts undertake to submit to arbitration disputes which may arise in relation to such contracts'.²¹ Similarly, the Dutch Code of Civil Procedure 2015 that:

[t]he arbitration agreement mentioned in paragraph (1) includes both a submission by which the parties bind themselves to submit to arbitration an existing dispute between them and an arbitration clause under which parties bind themselves to submit to arbitration disputes which may arise in the future between them.²²

The Egyptian Arbitration Act 1994 refers to '*an agreement by which the two parties agree to submit to arbitration in order to resolve all or certain disputes which have arisen or which may arise between them in connection with a defined legal relationship, whether contractual or not*'.²³ The UAE Arbitration Act 2018 states that:

'[t]he arbitration agreement may be concluded before a dispute arises, either in the form of a separate agreement or as a clause within a contract, in relation to all or certain disputes which may arise between the parties. (2) the Arbitration Agreement may also be concluded after a dispute has arisen, even if an action in this respect has already been brought before a court. In such case, the agreement must determine matters included in the arbitration (3) a reference in a contract or any other document containing an arbitration clause constitutes an Arbitration Agreement, if the reference is such as to make that clause part of the contract'.²⁴

The aforementioned definitions show that an arbitration agreement brings parties into a contractual relationship through its different forms – generally, either a clause referring to arbitration in future disputes or a submission agreement referring to arbitration for existing disputes.²⁵ By establishing an arbitration agreement, parties agree to submit certain commercial matters to be resolved by arbitration, withdrawing the jurisdiction of courts.²⁶ Through this process, the concept of party autonomy '*l'autonomie de la volonté*' is established

21. French Code of Civil Procedure 2011 (Decree 2011-48), Art. 1442(2).

22. Dutch Code of Civil Procedure 2015, Art. 1020(2).

23. Egyptian Arbitration Act (Law No. 27) 1994, Art. 10.

24. United Arab Emirates Arbitration Act (Federal Law No. 6) 2018, Art. 5(1,2,3) (UAE Arbitration Act 2018).

25. Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 229,230.

26. Anders Reldén & Ola Nilsson, 'The Arbitration Agreement in U Franke' in A Magnusson and others (eds), *International Arbitration in Sweden: A Practitioner's Guide* (Kluwer Law International 2013) 53.

in the agreement of the parties to arbitrate.²⁷ The agreement gives the parties the freedom to choose either institutional arbitration or ad hoc arbitration, the place of arbitration, the appointment of arbitrators, the arbitration procedure, and the authority of the arbitrators.²⁸ As a result, and by virtue of this agreement, the relationship between the arbitrators and the disputing parties is constituted providing arbitrators the capacity to commence the arbitral process. The arbitrator can be defined as a private judge specialising in the subject matter submitted to arbitration.²⁹ The arbitrator's authority is constructed by virtue of the arbitral agreement within the limits of the applicable law.³⁰ Due to the critical role performed by the arbitrator, the arbitrator is sine qua non of the arbitral process.³¹ Arbitrators have rights and obligations vis-à-vis parties, the extent and nature of the law governing these rights and duties will be uncertain without investigating the content of the legal status binding the arbitrants to the arbitrator. It has been pointed out that understanding the legal nature of arbitration '*allegedly holds the key to the identification of the legal and non-legal yard sticks available to arbitrators in international trade disputes*'.³² The status of the arbitrators and their relationship to disputing parties and others are not regulated by provisions under conventions or national laws and arbitral institutions' rules. National laws and arbitration rules subject to this dissertation provided no reference to status and relationship thereof.

The New York Convention does not refer to any provisions originating or regulating the relationship between the arbitrator and the arbitrants or their mutual rights and duties.³³ Likewise, the European³⁴ and Inter-American³⁵ conventions do not refer to the status of arbitrators and their relationship to parties of arbitration. In fact, the only implied reference to the arbitrator's status is found in the International Centre for Settlement of Investments Disputes (ICSID) Convention, referring to the arbitrators' immunity.³⁶ Moreover, the

27. Kazutake Okuma, 'Arbitration and Party Autonomy' (2005) 38(1) *Seinan L Rev* 2.

28. Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' (2007) 24(3) *J Intl Arb* 327, 328.

29. Thomas E Carbonneau, 'Arbitral Justice: The Demise of Due Process in American Law' (1995-1996) 70 *Tul L Rev* 1945, 1946.

30. Blackaby, Partasides & Redfern (n2) 306.

31. Lew, Mistelis & Kroll, *Comparative International* (n3) 223.

32. Julian DM Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications Inc 1978) 51.

33. *See* New York Convention.

34. *See* European Convention on International Commercial Arbitration.

35. *See* Inter-American Convention on International Arbitration.

36. *See* ICSID Convention, Art. 21 ('The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Art 52, and the officers and employees of the Secretariat(a) shall

UNCITRAL Model Law does not incorporate any provisions related to the arbitrator's relationship to parties or the arbitrator's immunities or liabilities.³⁷ The national laws subject to this dissertation do not prescribe any provisions characterising the status of the arbitrator's relationship to arbitrants. The English Arbitration Act prescribes no provisions regarding an arbitrator's relationship to parties although it offered provisions regarding the arbitrators' and their obligations.³⁸ Similarly, the French,³⁹ Dutch,⁴⁰ and Egyptian⁴¹ Acts do not incorporate any provisions classifying the relationship between arbitrators and the parties to arbitration. The said acts however, adopted the term 'mandate' of the arbitrator without identifying the origin of the mandate. Unlike the aforementioned acts, the UAE Act did not adopt a reference to a mandate for the arbitrators to undertake in the course of the arbitral process; however, it conforms with the said acts by not including any provisions describing the nature of the relation among parties and arbitrators. The rules of the arbitral institutions located in the countries of jurisdictions subject to this study do not express any provisions for either the status of arbitrators functioning under their aegis or the arbitral institutions' relation to parties.⁴² The lack of provisions classifying the relationship between arbitrators and parties was substituted with scholarly work and case law, overcoming the gap existing in theory and identifying the juridical nature of arbitration.⁴³

[A] Theories Explaining the Nature of Arbitrators' and Arbitrants' Relationships

Four distinct theories have emerged regarding the juridical nature of arbitration: the jurisdictional, the contractual, the mixed or hybrid, and the autonomous theory. The debate in characterising the arbitration nature using these different theories has been described as a 'tempest in a teapot'.⁴⁴ With respect to these theories, commentators and courts have aimed to

enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity; (b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States').

37. See UNICITRAL Model Law Rules 2010.

38. See English Arbitration Act 1996.

39. See French Code of Civil Procedure 2011 (Decree 2011-48).

40. See Dutch Code of Civil Procedure 2015.

41. See Egypt Arbitration Act 1994.

42. See generally LCIA Rules 2020, ICC Rules 2021, and CRCICA 2011.

43. Born (n25) 2108.

44. Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (3rd edn, Juris Publishing Inc 2014) 61.

determine how arbitration, as a private transnational method for dispute settlement, connects to the legal system.⁴⁵ Thus, they are trying to clarify whether arbitration is subject to the national regime, international regimes, both or other legal systems.⁴⁶ Consequently, such classifications of the nature of the relationship of the parties with arbitrators can be adopted to determine the status of the arbitrators.

[B] Jurisdictional Theory

The jurisdictional theory adopts the concept of absolute supervisory powers and full control of the state in regulating any international commercial arbitration within its jurisdiction, pursuant to its national laws and courts.⁴⁷ The first half of the twentieth century saw Laine and other French commentators determining the bases from which the enforcement of international arbitral awards would be enforced, either subject to the procedures applicable to foreign judgments or that used for contracts.⁴⁸ Laine is of the view that the arbitration agreement is the source of the arbitrator's capacity, however, the task performed by arbitrators is judging, and as a result the product of the arbitrator is a judgment not a contract.⁴⁹ The jurisdictional theory does not deny that arbitration is a creature of the parties' agreement; the basic premise of the theory is that the validity of the arbitration agreement and the procedures have to be regulated by national laws. Furthermore, the laws of the seat of arbitration and the country where enforcement and recognition of the award is sought determines the validity of the award.⁵⁰ The *Del Drago* case showed support for the jurisdictional theory when the court held that a foreign award is equal or equivalent to a foreign judgment.⁵¹ One scholar has said that '*the effect of applying this theory is to allow arbitrators no greater freedom in the application of substantive law than judges have*'.⁵² Mann, as a follower of the jurisdictional theory, argued strictly in favour of the dominance of the state and its supervisory power to regulate the international

45. Lew, Mistelis & Kroll, *Comparative International* (n3) 72.

46. Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010) 32.

47. Lew (n32) 52.

48. Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, US, and West German Law* (Zurich Schulthess 1989) 51.

49. *Ibid.*, 53.

50. Hong Lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) *Contemp Asia Arb J* 255, 258.

51. CA Paris, 10 Déc 1901, *Clunet* 314 (1902) as cited in Lew, Mistelis & Kroll, *Comparative International* (n3) 76. See also Rubino-Sammartano (n44) 62.

52. Lew, *Applicable Law* (n32) 53.

commercial arbitration process, denying the autonomy of international commercial arbitrations regarding the law of the seat of arbitration. Mann holds the belief that:

In the legal sense [,] *no international commercial arbitration exists. Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law.*⁵³

Similarly, Mann expresses the idea that the substantial issues of a dispute are regulated by the municipal laws, disregarding the autonomy of parties with respect to the choice of applicable law. He affirmed:

*'[N]o one has ever or anywhere been able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law; even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects. Similarly, every arbitration is necessarily subject to the law of a given state. No private person has the right or the power to act on any level other than that of municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called the *lex fori*, though it would be more exact (but also less familiar) to speak of the *lex arbitri* or, in French, *la loi de l'arbitrage*.'*⁵⁴

The jurisdictional theory in practice would be a barrier to cross-border business and transactions which mostly prefer international commercial arbitration as a mechanism for dispute settlement founded and organised on the grounds of party autonomy. The application of the jurisdictional theory in relation to institutional arbitration is criticised due to the merging of the public and private function performed by the institution; therefore, it does not appear that the power of the modern arbitral institutions is fully emanating from the rising public recognition of arbitral institutions.⁵⁵ The theory is also recognised in some legal issues like arbitrators' immunity and their similar status to judges.⁵⁶

53. See Frederick Alexander Mann, 'The UNCITRAL Model Law "Lex Facit Arbitrium"' (1986) 2(3) *Arb Intl* 244.

54. *Ibid.*, 245.

55. Barbara Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (Springer 2016) 121.

56. Lew, Mistelis & Kroll, *Comparative International* (n3) 76, 77.

[C] Contractual Theory

The contractual theory contrasts with the jurisdictional theory, as it highlights that international commercial arbitration results from the disputing parties' 'free will to arbitrate through the arbitration agreement[.] [A]ccordingly, arbitration shall be conducted according to the parties' will'.⁵⁷ The idea that arbitration is a contract binds the parties to apply what is in the arbitration agreement without the interference of the state. Merlin has demonstrated that the arbitral award is nothing other than a direct result of the parties' agreement, and, in the absence of such agreement, arbitration is nonsense; thus, arbitration is a creature that exists only by virtue of the arbitral agreement.⁵⁸ Kellor confirmed the voluntary nature of arbitration as a mechanism generated by the freedom of the parties' will with no legal requirement.⁵⁹ Accordingly, the *lex fori* has minimal impact on the arbitral agreement and the award as '*national arbitration laws are only to supplement and fill lacunae in the parties' agreement as to the arbitration proceedings and to provide a code capable of regulating the conduct of arbitration*'.⁶⁰ The contractual theory does not deny the influence of national law on the arbitral process; however,

57. Lew, *Applicable Law* (n32) 54. See also *Reily v. Russell*, 34 Mo 524, 528 (1864) cited in Kenneth S Carlston, 'Theory of the Arbitration Process' (1952) 17 L. & Contemp. Probs. 631.

58. P Merlin, 'Recueil alphabétique de questions de droit' (vol 9, 4th edn, Tarlier Brussels 1829) 145.

An arbitral decision rendered in a foreign country, is it anything other than a contract? Is it not the consequence of the agreement to arbitrate, as a result of which the arbitrators have rendered it? Is it not tied essentially to this arbitration agreement? Does it not form with this arbitration agreement a single entity? What would it be without this arbitration agreement? It would only be a useless piece of paper, it would be nothing. It is the arbitration agreement that gives it its existence; it is from the arbitration agreement that it derives all its substance; it has, then, like the arbitration agreement, the character of a contract; and the precise truth is that it is only the performance of the mandate that the parties have entrusted to the arbitrators; it is even, to put it precisely, only an agreement to which the parties have bound themselves by the hands of the latter the arbitrators.

Samuel (n48) 434.

59. Frances Kellor, 'Arbitration in Action: A Code for Civil, Commercial and Industrial Arbitrations' (Harper and Brothers Publishers 1941) 7, 8. Kellor stated:

[A]rbitration is wholly voluntary in character. The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another. When such an arbitration agreement is made part of the principal contract, the parties voluntarily forgo established rights in favour of what they deem to be the greater advantages of arbitration.

60. Lew, *Applicable Law* (n32) 56. See also Samuel (n48) 47.

it rejects the supremacy power of the state over arbitration.⁶¹ It is noteworthy that court judgments in different jurisdictions have ruled in support of the contractual nature of arbitration. In *Roses*⁶² the French *Cour de Cassation* ruled, ‘*Arbitral awards that are based on an arbitration agreement constitute a unit with and share with it its contractual nature*’. Similarly, the House of Lords highlighted the contractual nature of arbitration and the supremacy of the parties’ autonomy. In *Fiona Trust and Holding Corp. v. Privalov*,⁶³ Lord Hoffman stated:

Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader’s understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

The contractual theory was criticised for distorting the real nature of arbitration and for not being compatible with the municipal laws and international treaties on the subject.⁶⁴ The theory was also criticised on the premise that it denied entirely the public facet of the arbitral process.⁶⁵ The absolute adoption of the contractual theory is not foreseeable, especially in countries where arbitral institutions are connected to the chambers of commerce and maintain connection to the state. The former Soviet Union and Eastern bloc countries are obvious examples where arbitral institutions were ‘*in sharp contrast to the hierarchical layers of administrative powers vested in the economic chambers that actually functioned as a mere transmission of state directives and control*’.⁶⁶ The arbitral institutions thereto were deemed as ‘para governmental organs’ with mandates to preserve independence in rendering decisions,

61. Onyema (n46) 36.

62. *Roses v. Moller et Cie*, cass, 27 July 1937, I Dalloz 25 (1938).

63. *Fiona Trust and Holding Corp v. Privalov* [2007] Bus LR 1719, 1723-724. See also *Bremer Vulkan v. South India* [1981] 2 WLR 141. Lord Diplock stated, ‘The arbitration clause constitutes a self-contained contract collateral or ancillary to the shipbuilding agreement itself’. *Ibid.*

64. Samuel (n48) 44.

65. Warwas (n55) 123.

66. Alan Uzelac, ‘Succession of Arbitral Institutions’ (1996) 3 Croatian Arb YB 71, 76.

while, nevertheless, staying within ‘the structures of political power’.⁶⁷ Therefore, institutional arbitration cannot be purely contractual.

[D] Hybrid Theory

The hybrid theory sought to merge the elements incorporated in the contractual and jurisdictional theories, developing a new basis for a relationship of a mixed nature between private and public law.⁶⁸ The theory was first introduced by Professor Surville and later developed by Professor Sauser-Hall.⁶⁹ Sauser-Hall argued that arbitration derives its effectiveness from the private agreement with regard to the choice of arbitrators and procedural rules governing the subject matter. However, it is subject to national laws with regard to validity of the submission to arbitration and the enforcement of the award.⁷⁰ According to Hall, arbitration is defined as ‘*a mixed juridical institution, sui generis, which has its origin in the [parties’] agreement and draws its jurisdictional effects from the civil law*’.⁷¹ Consequently, the validity of the conditions of the arbitral agreement depend mainly on private law; however, procedural law is applicable to the waiver of national court jurisdiction and the judging of the dispute involved in the arbitral process.⁷² Thus, according to hybrid theory, a private justice system is created by contract.⁷³ Professor Pieter Sanders is one of the supporters of the hybrid theory of arbitration, believing that both the contractual and jurisdictional nature complement the arbitration mechanism. Professor Sanders is of the view that:

‘On the one hand[,] arbitration must be based on an agreement of the parties to arbitrate; no arbitration can take place when there is not valid agreement of the parties to submit their difference to arbitration. If emphasis is laid upon this starting point and the line is drawn further, covering arbitral procedure and the award, it leads to the contractual theory on the nature of arbitration. On the other hand [,] emphasis may be put upon the quasi-judicial

67. *Ibid.*, 75.

68. Onyema (n46) 38. See also Lew, Mistelis & Kroll, *Comparative International* (n3) 79.

69. As quoted in Lew, *Applicable Law* (n32) 57, this theory was developed by Professor Sauser-Hall in ‘L’arbitrage en Droit International Privé’ (1952) 44(I) Ann Inst Dr Intern 469 and ‘L’arbitrage en Droit International Privé’ (1952) 47(II) Ann Inst Dr Intern 394 (describing the idea as ‘*Bien que puissant son efficacité dans l’accord des parties qui se manifeste par le contrat d’arbitrage, il [l’arbitrage] a un caractère juridictionnel impliquant l’application de règles de procédure*’). See also Samuel (n48) 60.

70. See *ibid.*, 57. See also Hong (n50) 274.

71. *Ibid.*

72. Samuel (n48) 61.

73. Lew, Mistelis & Kroll, *Comparative International* (n3) 80.

*character of arbitration. Arbitration is a judicial process. The arbitrators, once appointed, act as judges. Their function is to give a final decision on the differences submitted to them. Their decision has, in principle, the same effects as a judgement of a court. The dualistic character of arbitration has led to the intermediary view taken by those who adhere to what may be called the mixed arbitration theory: the character of the arbitrator is influenced both by its contractual origin and by the judicial process it involves.*⁷⁴

The same approach was asserted by Redfern and Hunter, pointing out that:

*'International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award which has binding legal force and effect and which, on appropriate conditions being met, the courts of most countries of the world will be prepared to recognise and enforce. The private process has a public effect, implemented by the support of the public authorities of each state expressed through its national law.'*⁷⁵

The hybrid theory was criticised by Rubellin-Devichi; using an exclusive jurisdiction clause analogy, she claimed that by virtue of the arbitration agreement a private jurisdiction is formed and municipal courts are excluded.⁷⁶ Moreover, Rubellin-Devichi criticised separating the contractual and jurisdictional elements of arbitration.⁷⁷ The reason justifying that, in the view of the opponent, is that the arbitral agreement operates and is still significant until the award is rendered; thus separation is not applicable.⁷⁸ The separation between the arbitral agreement and procedure from a practical stand point would result in a major disadvantage, as illustrated by Mustill, '*pill[ing] up the proper laws absurdly high*' such that it has the potential to produce '*four different legal systems which have to be considered*'.⁷⁹

74. Pieter Sanders, 'Trends in the Field of International Commercial Arbitration' (Extract from the 'Recueil des Cours', vol II, 1975) AW Sijthoff Leyden 233, 234.

75. Blackaby, Partasides & Redfern (n2) 11.

76. See Jacqueline Rubellin-Devichi, *L'arbitrage: Nature Juridique: Droit Interne et Droit International Privé* (Paris: Librairie Generale de Droit et de Jurisprudence 1965) 95. See also Samuel (n48) 61.

77. See *ibid.*, 17–18.

78. See Samuel (n48) 61–62.

79. *Black Clawson International Ltd v. AG Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446, 455. See also *ibid.*, (n48) 62. This case shows how under Sauser-Hall's scheme, which is essentially adopted in England, four different laws may be applicable, namely the *lex fori*, the proper law of the main contract, the proper law of the arbitration

It was pointed out that the effect of the hybrid theory acknowledges a strong connection, though not overwhelming, between arbitration and the place where the tribunal is located.⁸⁰ Consequently, arbitration could be defined as a contract that produces a procedural effect.⁸¹ Lastly, it is possible that international commercial arbitration is a hybrid system that exists de facto – as seen in the coordination of the jurisdictional approach of the New York Convention with the contractual approach of French law.⁸² Accordingly, '[i]nternational [c]ommercial arbitration is becoming more of a standardised, hybrid process, taking elements from both civil and commercial law traditions'.⁸³

[E] Autonomous Theory

The autonomous theory goes beyond the previous three theories by releasing arbitration from the contractual and jurisdictional theory, and considering arbitration an autonomous creature of the parties.⁸⁴ The core of the theory focuses on the function of arbitration and its purpose: thus, the contractual, jurisdictional, and mixed character of arbitration is not applicable.⁸⁵ Rubellin-Devichi, the founder of the autonomous theory, developed the theory as a rejection of the hybrid theory of arbitration on the grounds that both contractual and jurisdictional characters are autonomous.⁸⁶ Rubellin-Devichi contended that the contractual and jurisdictional features of arbitration are interconnected, though separating the procedural and contractual aspects is impossible and undesirable. Moreover, she observed that applying the rules of the procedure or the contract to any part of the arbitral process would prevent the development of arbitration.⁸⁷ Devichi added that applying the law of contract to the arbitration agreement and relating awards to judgments is inappropriate, as arbitral awards are not

agreement, and the procedural law of the arbitration. *See also* Rubellin-Devichi (n76) 111, for a similar view.

80. Lew, *Applicable Law* (n32) 58.

81. Rubino-Sammartano (n44) 63.

82. Lew, Mistelis & Kroll, *Comparative International* (n3) 80.

83. Margaret L Moses, *The Principle and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2017) 168.

84. Rubino-Sammartano (n44) 63.

85. Lew, Mistelis & Kroll, *Comparative International* (n3) 81.

86. Rubellin-Devichi (n76) 364–365 (illustrating that, '*Or l'arbitrage assume une fonction propre, en droit interne comme en droit international. Ce rôle particulier fait de l'arbitrage une institution autonome étrangère au contrat comme à la juridiction. ..., il faut admettre, croyons-nous, que sa nature n'est ni contractuelle, ni hybride, mais autonome*').

87. *Ibid.*, 17, 365.

judgments and arbitral agreements are not typical contracts.⁸⁸ The autonomous theory views arbitration in its entirety regardless of the jurisdictional and contractual parts. Thus, this theory places a greater emphasis on the purpose of the institution rather than its structure.⁸⁹ As a result, the denationalisation of arbitration would be acknowledged based on the recognition of arbitration as an autonomous institution, which would raise questions regarding the applicable law and matters of procedures and form.⁹⁰

Through the aforementioned theories, commentators tried to identify the nature of arbitration to determine the status of the arbitrator with respect to the parties. The fact is that the relationships in which the arbitrator is involved are not limited to the parties but also extend to other relationships either with arbitral institutions or third parties. In institutional arbitration, a legal relationship is formed, on one hand, between the arbitrators and the arbitral institutions and, on the other hand, between the parties and the arbitral institution. Another relationship that may exist is the relationship between third parties and arbitrators. This relationship occurs when an appointing authority other than the disputing parties appoints the arbitrator where the parties fail to agree upon the appointment of arbitrators, or in case both arbitrators failed to agree on the chairman of the arbitral tribunal.⁹¹

The aim of this chapter is to address the civil liability of arbitrators and arbitral institutions and determine its origin in order to determine the grounds upon which the parties can constitute their claim in case they need to trigger an arbitrator's or arbitral institution's liability. Civil liability cannot be determined unless the relationships the parties have with the arbitrators and arbitral institutions are defined.

§2.02 Forms of Relationships In Which Arbitrators Are Involved

The arbitrator is a vital part of the arbitral process; in fact, completing the arbitral process is impossible without the appointment of the arbitrator. Appointing an arbitrator to conduct the arbitration creates a de facto relationship between the arbitrator and the parties. Through this legal relationship, mutual rights and obligations are imposed among the parties of the arbitrator contract. The importance of presenting the different forms of relationships is to determine the legal status of every relationship and the effects of that relationship regarding the reciprocal

88. *Ibid.*, 17 ('Il est hors de question d'appliquer au compromis le régime des contrats et à la sentence celui des jugements. La sentence n'est pas un jugement, le compromis n'est pas un contrat comme les autres').

89. *Ibid.*, 18.

90. Lew, *Applicable Law* (n32) 60.

91. Klaus Lionnet, 'The Arbitrator's Contract' (1999) *Arb Intl* 15(2) 161, 166.

rights and obligations of the parties' subject to the arbitrator contract. Consequently, a determination of potential liability requires an understanding of the relationship, particularly the scope of such relationship, between the arbitrator and the parties in the arbitral reference.

[A] Relationship of the Arbitrators with the Arbitration Agreement Parties

It is undisputable that the arbitrator derives his judicial post by virtue of a contract to which he/she adheres in the performance of a clearly defined task in return of remuneration.⁹² However, determining the nature of the relationship between arbitrators and parties is challenging due to the different characterisations by theories developed to define the juridical nature of the arbitration.

[1] Relationship of Parties with Arbitrators Pursuant to the Status Theory

With respect to an arbitrator's status, the status theory maintains that the arbitrator is empowered to conduct the arbitration by possessing a power of delegation from the state.⁹³ Thus, the powers of arbitrators are drawn from the state by virtue of local law on the basis that it is in the public interest to permit private individuals to judge disputes upon the agreement of parties.⁹⁴ This approach was supported by Motulsky, who stated that: *'Arbitrators are individuals for whom a legal system permits to perform a function that is in principle reserved to the state'*.⁹⁵

Moreover, the state has a monopoly over the administration of justice in its territories and arbitration is considered a kind of exception granted by the state.⁹⁶ Based on that, status arbitrators are regarded as judges of a temporary nature, carrying out a public function derived from the national law.⁹⁷

In the same regard, Lord Michael Mustill and Stewart Boyd, QC, proponents of the status theory pursuant to the common law system, rejected the idea of basing the arbitrator-arbitrant relationship on contractual theory. They argued that:

92. Philippe Fouchard, 'Relationships Between the Arbitrator and the Parties and the Arbitral Institution' in ICC, *The Status of the Arbitrator* (1995) Intl Chamber of Commerce Intl Court of Arb Bull 6(1) 13.

93. Hong (n50) 261.

94. Carlston (n57) 635.

95. See Henry Motulsky, *Ecrits* (Daloz Paris 1974) 14 (cited in Samuel (n48) 55).

96. Samuel (n48) 55.

97. *Ibid.* See also Hong (n50) 261.

'[w]ith a little ingenuity[,] a contract between two persons could undoubtedly be devised. We suggest, however, that this would be a mistake. To proceed by finding a contract and then applying to it the ordinary principles of the law of contract will not produce a reliable answer unless a contract really exists to be found. Even in the extreme case of a massive reference, employing a professional arbitrator for a substantial remuneration, we doubt whether a business man would, if he stopped to think, concede that he was making a contract when appointing the arbitrator. Such an appointment is not like appointing an accountant, architect or lawyer. Indeed, it is not like anything else at all'.⁹⁸

Thereafter, Mustill and Boyd concluded that the status of the arbitrator is akin to a judge, noting, however, important differences between them, specifically in regard to the source of jurisdiction, procedural law, and remuneration. They determined the source of the former is the arbitral agreement, whereas the source of the latter is the general law of the state and national court rules.⁹⁹ In other words, it was said that a judge 'derives his nomination and authority directly from the sovereign', whilst an arbitrator 'derives his authority from the sovereign but his nomination is a matter for the parties'.¹⁰⁰ The European Court of Justice (ECJ) appears at odds with Mustill and Boyd's view in *Nordsee v. Reederei Mond*, ruling that: 'An arbitrator who is called upon to decide a dispute between the parties to a contract under a clause inserted in that contract is not to be considered as a court or tribunal of a Member State'.¹⁰¹

Furthermore, it was argued that the arbitrator's duty to act fairly reflects the interest of the sovereign state of arbitration; however, this interpretation will lead to an overlap of different enforcement regimes because the breach of this duty would be considered both a breach of state law and a breach of the contractual duty owed by the arbitrator to the parties.¹⁰² A further argument is that there is a similarity between the awards made by the arbitrators and their effects as a judgment made by judges in a national court; for example, the manner in which awards are enforced by courts where recognition or enforcement is sought is the same as the

98. Michael Mustill & Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd edn, Butterworth and Co Publishers Ltd 1989) 222–223.

99. *Ibid.*, 223 ('There is, however, need for caution ... the appointment of an arbitrator is not like any other act. It might be said that an arbitrator does resemble someone else: namely, a judge. In one sense, this is obviously true').

100. Lew, *Applicable Law* (n32) 53.

101. Case 102/81 [1982] ECR 1095.

102. Onyema (n46) 45.

manner in which courts make judgments.¹⁰³ A famous case that supports this approach is the *Del Drago* judgment where it was rightly pointed out that an award (like a judgment) is not self-executing.¹⁰⁴ Another court judgment supporting the status nature of the arbitrator in modern arbitration law is *AT&T Corp. & Anor v. Saudi Cable Co.* In that case, while discussing the impartiality and neutrality of arbitrators, Lord Woolf held that, ‘*The test under English law for apparent or unconscious bias in an arbitrator is the same as that for all those who make judicial decisions and is that to be found in the opinion of Lord Goff of Chieveley in R v Gough [1993] AC 646*’.¹⁰⁵

The status quo of arbitrators has been criticised for violating the concept of party autonomy, which dominates the entire procedural relationship of arbitration.¹⁰⁶ The arguments were based on grounds that the claim of creating the arbitrator office by statute places the arbitrator in a status higher than the parties. This argument is not valid because the arbitrator’s decision-making power is a result of the parties’ agreement and not of a legal relationship binding the arbitrator to parties.¹⁰⁷ Moreover, the parties have power over the arbitrator office as they can terminate the arbitrator mandate, which would not be possible if the office of arbitrator was a creature of the statute.¹⁰⁸ Opponents of the arbitrator quasi-judicial position raise questions about the liability and immunity of the arbitrator, given that the criteria applied to provide immunity to judges are derived from national law. However, determining the liability and immunity of arbitrators on the basis of the arbitration agreement with the disputing parties makes its source purely contractual.¹⁰⁹ Protagonists of the contractual theory added that the immunity enjoyed by arbitrators from liability is intended to protect the adjudatory function that the arbitrator performs in the arbitral process and is not intended specifically to protect the office of the arbitrators. In addition to all of the above, following the status theory would lead to practical difficulties in the law and practice of international arbitration. The theory overlooks the party autonomy effect on the position of the arbitrator, which would affect the arbitration industry by conveying the perception to the disputing party that submitting their dispute to an arbitrator would differ from submitting it to a national judge. Moreover, the issue of immunity,

103. Hong (n50) 255, 258. See also Lew, *Applicable Law* (n32) 53.

104. CA Paris, 10 December 1901, *Clunet* 314 (1902) as cited in Lew, *Mistelis & Kroll, Comparative International* (n3) 76.

105. *AT&T Corp & Anor v. Saudi Cable Co* [2000] CLC 1309, 1326.

106. *Lionnet* (n91) 163.

107. *Ibid.*

108. *Ibid.*

109. *Onyema* (n46) 46.

as well as the extent, exclusion, and insurance against potential liability, will demonstrate challenges in application when applying the office of judge to arbitrators.

[2] The Status of Arbitrators with Parties Pursuant to the Contractual Theory (Predominant Theory)

In contrast to the jurisdictional theory, the contractual theory aims to predicate the relationship between arbitrators and disputing parties upon the contract.¹¹⁰ The theory maintains that all phases of the arbitral process stem from the parties agreement;¹¹¹ thus, arbitrators are empowered to their office through a contract, and even the arbitral award has a binding contractual force.¹¹² Niboyet precisely illustrated that the arbitrator office is a direct result of the parties' agreement, contending that:

*'[a]rbitration awards have a contractual nature, as the arbitrators do not hold their power from the law or the judicial authorities, but from the parties' agreement (arbitration agreement or submission to arbitration). The arbitrator decides just as the parties could have done by agreement; the parties give the arbitrators a real mandate to decide in their place. The award is thus impregnated with a contractual character, and according to law, it appears to be the work of the parties, it must have, as with all agreements, lawful effect, and it must possess the authority of a final judgment.'*¹¹³

This theory involves two different approaches (classical and modern) with respect to arbitrators' status.¹¹⁴ Merlin,¹¹⁵ as a proponent of the classical theory, rejected the idea that arbitrators are akin to judges and that their authority and power are derived from the national law. Instead, he adopted the approach that the private will of the disputing parties is the source of the arbitrator's power and authority. Foelix adopted Merlin's idea and added that arbitrators are agents for both parties assigned by them to settle their dispute, thus their functions are to ascertain what parties have agreed.¹¹⁶ Foelix took the view that arbitration is analogous to a situation where a sales contract or lease leaves it up to a third party to determine the price or

110. See New York Convention, Art. II(I), which provides that a dispute must arise in respect of a defined legal relationship.

111. [2007] Bus LR 1719.

112. Lew, *Applicable Law* (n32) 54.

113. Jean Paulin Niboyet, *Traité de droit international privé français*, vol 6 (Recueil Sirey 150) 136, quoted in Lew, *Applicable Law* (n32) 55.

114. Samuel (n48) 33.

115. Merlin (n58) cited in Samuel (n48) 34. See also Hong (n50) 268.

116. Jean Foelix, *Traité du Droit International Privé* (2nd edn, Joubert Paris 1847) 462.

rent involved.¹¹⁷ Laine criticised the arbitrator's agent status on three grounds.¹¹⁸ First, he argued that the agent has no power to do something that his/her principal is not allowed to do, and parties cannot judge the merits of dispute impartially; otherwise, they would not need an arbitrator. The second reason is that an agent must fight for the interest of the parties appointing him/her, which is against the arbitrator's impartial and independent obligation. Finally, an arbitrator's authority is not akin to that of other agents and could be made irrevocable due to the fact that it would be impossible for an arbitrator to follow orders of his/her principal not to render an award. These flaws of the agent theory led French courts to refuse the concept of treating arbitrators as agents. The Paris Court of Appeal in *Pelfanian v. Nurit* set aside an award issued on the basis of a clause that states that disputes should be submitted to 'representatives' and counted it as an invalid arbitration agreement.¹¹⁹ The authors of the modern contractual theory maintained that arbitration remains private and contractual in nature, although arbitrators are not the parties' agents.¹²⁰ Bernard, one of the modern version theory authors, argued that the relationship between arbitrators and parties cannot fit into any of the established categories of contracts. However, it is a *sui generis* contract governed by rules fitting to it and should be dealt with in a manner compromising general principles governing contracts and the special nature of the arbitrator-performed function.¹²¹ The case law in both the common and civil law jurisdictions has recognised the existence of a contract between the disputing parties and the arbitrator. The French *Cour d'appel* in *Bombard* characterised the relationship between disputing parties and arbitrators as *sui generis* contract.¹²² Two well-known cases in England have demonstrated the contractual relationship between parties and arbitrators. In *Compagnie Européenne de Céréales S.A v. Tradex Export S.A*, Hobhouse pointed out:

117. *Ibid.*, 462–463.

118. See Samuel (n48) 36–37. See also Hong (n50) 269–270.

119. See *Pelfanian v. Nurit*, CA Paris (1Ch suppl) 24 mars 1992 (1993) 2 Rev Arb 299 ('*Considérant qu'un et elle stipulation est incompatible avec la notion même d'arbitrage, les arbitres, certes désignés par les parties, ne pouvant en aucuncas être constitués leurs mandataires*').

120. Samuel (n48) 39–40.

121. *Ibid.*, 41.

122. *Bompard v. Consorts C et autres*, CA Paris (1Ch A) 22 mai 1991 (1996) 3 Rev Arb 476.

*‘it is the arbitration contract that the arbitrators become parties to by accepting appointments under it. All parties to the arbitration are as a matter of contract (subject always to the various statutory provisions) bound by the terms of the arbitration contract.’*¹²³

This was followed by *K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd*, in which the vice chancellor held:

I find it impossible to divorce the contractual and status considerations: in truth the arbitrator’s rights and duties flow from the conjunction of those two elements. The arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement which becomes a trilateral contract: *Compagnie Européenne de Céréales S.A v. Tradex Export S.A* [1986] 2 Lloyd’s Rep. 301. Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status.¹²⁴

These court judgments were followed by a clear-cut judgment elucidating that the source of the connection between the arbitrator and the arbitrants is the contract alone. In *Jivraj v. Hashwani*, the United Kingdom (UK) Supreme Court held that: *‘It is common ground, at any rate in this class of case, that there is a contract between the parties and the arbitrator or arbitrators appointed under a contract and that his or their services are rendered pursuant to that contract’*¹²⁵.

The contract theory was criticised for failing to address the issue of arbitrator immunity. The immunity granted to arbitrators is a simple outcome of performing a quasi-judicial function that is necessary to protect them against further proceedings being brought against them during or after the arbitration process.¹²⁶ The fact is that immunity cannot emanate from the contract because immunity is granted by virtue of statute. Although there are contractual theory points of criticism, it is widely recognised that a contractual relationship exists between the arbitrator and the disputing parties.¹²⁷ This relationship between the arbitrator and the

123. [1986] 2 Lloyd’s Rep 301, 306.

124. [1992] QB 863, 85-86.

125. [2011] ICR 1004, 23.

126. Hong (n50) 270.

127. Lew, Mistelis & Kroll, *Comparative International* (n3) 276.

parties or the arbitral institution commences once the arbitrator agrees to carry out his/her mandate.¹²⁸

[3] *Comparative Overview on the Arbitrator's Status Pursuant to Laws Subject to This Study*

Different theories reflect various opinions regarding the legal nature of arbitration agreements. Thus, each legal system has adopted a theory in light of the legal nature of the relationship between the parties and the arbitration agreement. The common law approach represented in English law implements the status (jurisdictional) theory. The status theory adopts a quasi-judicial function of the arbitrator in the position of a judge. However, the relationship between arbitrators and arbitants is not explicitly addressed either in the Arbitration Act of 1950 or the recent one from 1996.¹²⁹ The English Arbitration Act provides certain statutory duties required of arbitrators. For example, Section 33 provides that the arbitrator is obliged to provide a fair settlement of the matters to be determined.¹³⁰ The parties are obliged to comply with the tribunal direction.¹³¹ Moreover, the English Arbitration Act stipulates that an arbitrator is exempted from being liable from any action in performing his/her function as an arbitrator unless the act is in bad faith.¹³² This reveals the prevalence of the arbitrators' status theory within the English Arbitration Act by considering the arbitrator as a judge, deriving his/her immunity from the statutory rules and not from the contractual agreement. Although the UK Supreme Court recognised the existence of a contract between the arbitrator and the parties in *Jivraj v. Hashwani*, the court also held that the arbitrator is not an employer in his/her relationship to the parties, illustrating the court's approach in providing the arbitrator the status of judge, even if the source of his/her role is the contract.¹³³ The court held that:

The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party. As the ICC puts it, he must determine how to resolve their competing interests. He is in no sense in a position of subordination to the parties; rather the contrary. He is in effect a 'quasi-judicial adjudicator'. Lord Clarke stated,

128. Klaus Peter Berger, *International Economic Arbitration* (Kluwer Law and Taxation Publishers 1993) 232. *See also* Fouchard (n92) 13. *See also* Lionnet (n91) 164.

129. *See generally* English Arbitration Act 1950. *See also* English Arbitration Act 1996.

130. *See* English Arbitration Act 1996, Art. 33.

131. *See* English Arbitration Act 1996, Art. 40.

132. *See* English Arbitration Act 1996, Art. 29.

133. [2011] ICR 1004, 23.

‘arbitrators are independent of the parties and must not act in such a way as to further the interests of one or other of the parties including the party which appointed him.’¹³⁴

The court concluded that even if the services rendered by the arbitrator to the parties are personal, they do not fall under the parties’ direction:

The dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.¹³⁵

In contrast, the English Arbitration Act included some provisions that seem to be constituted on the arbitrator contractual status theory; for example, under Section 28(2) an arbitrator can enforce his/her right to remuneration.¹³⁶

The civil law represented in the legal systems of France, the Netherlands, Egypt, and the UAE adopted the contractual theory in defining the legal nature of the relationship between the arbitrators and the parties. The French courts held that the mutual duties of arbitrators and parties towards each other are contractually based;¹³⁷ thus, arbitrators might be held liable to the parties if they fail to perform their duties.¹³⁸ Pursuant to French law, because arbitration is a private form of justice, the arbitrator does not become a judge, even for a short time, but remains an ordinary citizen, as a result of which ‘an arbitrator can incur liability under a regime more straightforward than that applicable to judge’.¹³⁹ The French *Cour de Cassation* has confirmed this approach by asserting that ‘as arbitrators assume no public office and can therefore not cause the state to incur liability under Article 505 of the code of civil procedure ..., an action for damages in respect of the performance of their functions can only be brought under ordinary tort or contract law’.¹⁴⁰ The Dutch legal doctrine deems the relationship that binds the arbitrators to arbitants to be legally governed as a service agreement pursuant to

134. *Ibid.*, 41.

135. *Ibid.*, 45.

136. See English Arbitration Act 1996, Art. 28(2).

137. See *Société Qualiconsult et autres v. Gro.upe Lincoln*, CA Paris (1Ch C) 19 déc 1996 (1998) 1 Rev Arb 121–123.

138. See Cass 1re Civ, 17 November 2010 (2011)(4) Rev Arb 943–945.

139. Gaillard & Savage, *International Commercial Arbitration* (n1) 590.

140. *Veuve J Houdet et Fils v. Chambrearbitrale de l’unionsyndicale de grains et farines de Bordeaux*, Cass 2e Civ, 29 Janv 1960(1960) Rev Arb 121 and observations by P Hébraud as cited in Gaillard & Savage, *International Commercial Arbitration* (n1) 590.

Articles 400–413 of Book 7 of the Dutch Civil Code.¹⁴¹ Nevertheless, applying the obligations of the service provider as set out in those articles would appear to have the effect of vacating the arbitrator function from any juridical nature.¹⁴² Similarly, the Egyptian legal doctrine interpreted the relationship between the arbitrator and the arbitrants on a contractual basis.¹⁴³ Egyptian law classifies the contract as a private one with a specific and private nature *sui generis* through its terms, conclusion, and effects, distinguishing it from any other type of contract under Egyptian civil law.¹⁴⁴ This specific nature arises from the subject of this contract that grants the arbitrator the power to issue an award similar to the state courts, although this falls under the national court’s supervision. Thus, it is an innominate contract that is hybrid in nature as it originates in an agreement; however, its subject is judicial as well as procedural.¹⁴⁵ The UAE follows the same civil law system, establishing the relationship between arbitrators and arbitrants on contractual grounds where arbitrators are remunerated in return for the service they provide, which is represented in the award that settles the dispute among the parties.¹⁴⁶

§2.03 The Contractual Nature of the Relationship (Classification of the Arbitrator Contract)

The classification of the arbitrator contract is disputed among different authors and authorities. Some authors are of the view that it is a contract of agency; however, such authors have failed to offer a valid characterisation of the arbitrator’s status under the arbitrator contract.¹⁴⁷ Other

141. Gerard J Meijer & Marike Paulsson, *National Report for the Netherlands* (2012), in Jan Paulsson (ed.), *International Handbook on Commercial Arbitration* (1984, updated 2012) 1, 31. *See also* Marc Ynzonides, Marnix Leijten & Bommel van der Bend, *A Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law* (Kluwer Law International 2009) 13 (‘If the arbitration is governed by Dutch law, an agreement of instruction (overeenkomst van opdracht) as referred to in Art 7:400 DCC is established between the parties and the arbitral tribunal. The parties instruct the arbitral tribunal to resolve their dispute by means of an arbitral award, for which service the parties will have to pay a fee to the arbitral tribunal’).

142. Dutch Civil Code, book 7, Arts 400–413.

143. Fathy Waly, *Arbitration in National and International Commercial Disputes: Theory and Practice* (1st edn, *Monsha’at Al Maaref*, Alexandria 2014) 361.

144. *Ibid.*

145. Ahmed Abdel Karim Salama, *Arbitration in Domestic and International Financial Transactions* (Dar El Nahda El Arabia 2006) 394–395.

146. Mercedes Torres Lagarde, ‘Liability of Arbitrators in Dubai: Still a Safe Seat of Arbitration’ (2015) 33(4) *ASA Bull* 780, 792.

147. *See* Hong (n50)266. The theory was criticised by Laine. *See also* Gaillard & Savage, *International Commercial Arbitration* (n1) 605 (‘[T]he specific object of a contract of agency is to confer a power of representation on the agent. The arbitrator does not

authors have argued that the arbitrator contract is closer to a contract for hire of services, pointing out that a contract of hiring services is wider in scope than the agency contract; thus, under this contract, arbitrators render intellectual services in return of remuneration, comparing arbitrators to other professions.¹⁴⁸ However, this view is inadequate because it overlooks the judicial role of the arbitrator;¹⁴⁹ although the arbitrator shall comply with the arbitration agreement and rules selected by parties, parties are not eligible to instruct arbitrators as to the way they conduct the proceedings or the content of the award they render.¹⁵⁰ The third approach considered the agreement as having a *sui generis* or hybrid nature.¹⁵¹ Philippe Fouchard argued that *‘the contractual relationship formed between the arbitrators and parties cannot be categorised as a known type of civil contract. This contract contains the mixed characters of arbitration contractual in source, judicial in object.’*¹⁵²

Gary Born has consistently supported the *sui generis* nature of the arbitrator contract. According to the learned author:

*‘[T]he proper analysis is to treat the arbitrator’s contract as a sui generis agreement. That is in part because this characterization accords with the specialized and distinct nature of the arbitrator’s mandate: as noted above, that mandate differs in fundamental ways from the provision of many other services and consists in the performance of a relatively sui generis adjudicatory function. It is therefore appropriate, and in fact necessary, that the arbitrator’s contract be regarded as sui generis.’*¹⁵³

The contractual approach recognises a contract between arbitrators and disputing parties. However, this contract is separate from the arbitral agreement; therefore, a contract will be concluded individually with every arbitrator regardless of their number, but not with the

“represent” the parties, and certainly not the party which appointed him or her’). *See also Pelfanian v. Nurit*, CA Paris (1Ch suppl) 24 March 1992 (1993) 2 Rev Arb 299.

148. *See* Gaillard & Savage, *International Commercial Arbitration* (n1) 606.

149. Born (n25) 2121.

150. Fouchard (n92) 16.

151. *Se Société Qualiconsult et autres v. Groupe Lincoln*, CA Paris (1Ch C) 19 Déc 1996 (1998) 1 Rev Arb 123 (*‘Considérant, enrevanche, que la fixation du montant des honoraires des arbitres ne fait pas partie de l’objet du litige; que cette fixation relève du contrat d’arbitrage, différent de celui qui lie les parties et qui fixe l’objet du litige’*).

152. Fouchard (n92) 16–17.

153. Born (n25) 2121. *See also* Fouchard (n92) 16; Gaillard & Savage, *International Commercial Arbitration* (n1) 605.

tribunal as a whole.¹⁵⁴ Since the arbitrator contract is separate from the agreement, the law governing the arbitrator contract will be different than the one governing the arbitral agreement.¹⁵⁵ Hence, the legal nature of the relationship between arbitrators and arbitrants is a matter of transnational law and not any particular national law.¹⁵⁶ As a result, the contract in which the arbitrator draws his/her power cannot exclude the application of the fundamental principles that govern the resolution of disputes before any forum.¹⁵⁷ Nevertheless, this separation does not mean there is an absence of a link between the arbitrator's contract and the arbitral agreement because the arbitral agreement terms, with regard to the appointment of arbitrators and the procedures applicable to their selection and nomination, shall be fulfilled by the parties while concluding the arbitrator contract.¹⁵⁸ Additionally, arbitrators under the arbitrator contract have a duty to abide by all the terms of the arbitral agreement; thus, it could be said that the arbitral agreement terms are incorporated in the arbitrator's contract.¹⁵⁹

[A] Forms of Contractual Appointments by Parties under the Ad hoc Reference

Based on the discussion of the two main theories (the status and contractual) regarding the legal nature of the parties, it is deduced that there is a contract connecting the arbitrator to the arbitrants, with no denial of the judicial role that emanates from that contract. It is important to discuss the forms of arbitrator appointments due to the crucial side effects in determining the commencement, structure, and termination of the *receptum arbitri*.¹⁶⁰ Appointment by parties is the best method of appointment; it ensures the parties' selection of persons who are appropriate and trustworthy in carrying out the arbitral process, leading to the mutual cooperation of parties during the proceedings in addition to voluntary enforcement of the award.¹⁶¹ Moreover, one of the major attractive aspects about arbitration is that it allows parties to submit their dispute to judges chosen by them rather than granting a third party the right to make that choice on their behalf.¹⁶² The first type in the ad hoc arbitration proceedings is the appointment of a sole arbitrator in which the parties jointly appoint the arbitrator who

154. Lionnet (n91) 164 ('[T]he arbitrator's contract is a separate contract between the appointing parties and the arbitrator, with the effect that where there are three arbitrators, three arbitrators' contracts are concluded').

155. Onyema (n46) 49.

156. Gaillard & Savage, *International Commercial Arbitration* (n1) 600.

157. *Ibid.*, 601.

158. Lionnet (n91) 164–165.

159. *Ibid.*, 165.

160. Berger (n128) 234.

161. Lew, Mistelis & Kroll, *Comparative International* (n3) 237.

162. Blackaby, Partasides & Redfern (n2) 240.

constitutes the arbitral tribunal; it is the simplest form of contract between the disputing parties and the arbitrator.¹⁶³ In this case, the power of party autonomy is applied through the mutual choice of the sole arbitrator.¹⁶⁴ Another way of choosing the sole arbitrator is the list-appointed method, where the disputing parties exchange a list of three or four persons of possible arbitrators to be appointed in an attempt to mutually choose the agreed-upon arbitrator.¹⁶⁵ After this process, the arbitrator is contacted by the parties to receive his/her acceptance, and then a contract is concluded between the disputing parties and the sole arbitrator. In ad hoc proceedings with three arbitrators (panel of arbitrators), each party will nominate an arbitrator and the two party-appointed arbitrators appoint the third arbitrator as chairman of the arbitral tribunal.¹⁶⁶ Thus, the party appointing its arbitrator is acting not only for itself, but also as an agent of the other party or parties in order to create the joint contractual liability of all parties involved in the proceedings.¹⁶⁷ In *Ury v. Galeries Lafayette*, the French *Cour de Cassation* held that:

*'[t]he appointment of each arbitrator is not a unilateral act, even when initiated by one party alone. [It] results from the common intention of the parties, who take into account the qualities of the person whom they call upon to judge their dispute.'*¹⁶⁸

Consequently, the contract with the arbitrator is concluded by both parties.¹⁶⁹ Arguments were made regarding the type of contract between the party-appointed arbitrators and the parties. Some claimed that an agent contract is constituted as each appointed arbitrator acts on behalf of the parties.¹⁷⁰ Another argument is that the arbitrators appointed by the parties are not agents, but instead act based on the arbitrator contract that already exists between the arbitrators and the parties.¹⁷¹ In the view of Emilia Onyema:

163. Onyema (n46) 85.

164. See Orkun Akseli, 'Appointment of Arbitrators as Specified in the Agreement to Arbitrate' (2003) 20(3) J Intl Arb 247, 248.

165. See D McLaren, 'Party-Appointed v List-Appointed Arbitrators: A Comparison' (2003) 20(3) J Intl Arb 233, 236. See also Blackaby, Partasides & Redfern (n2) 241.

166. See *ibid.*, 234. See also Lionnet (n91) 165.

167. Berger (n128) 234.

168. Gaillard & Savage, *International Commercial Arbitration* (n1) 575 (quoting Cass 2e civ, 13 avr 1972, JCP, Ed G, Pt II, No. 17, 189).

169. Lionnet (n91) 166.

170. Berger (n128) 234.

171. Onyema (n46) 93. See also Born (n25) 2119,2120.

*'[T]he party appointee does not act as agent of his appointing party but independently in fulfilment of a term (express or implied) of the arbitrators' contract applicable to him. This term is to fulfil the requirements of the arbitration agreement that the arbitral tribunal shall be composed of three arbitrators. In a nutshell, he is performing part of the function he contracted to perform under his arbitrator contract. In light of international arbitral practice which clearly shows that the party-appointed arbitrator never acts as agent of his appointing party, the proposition better represents this state of arbitral practice.'*¹⁷²

This is a non-complicated scenario when disputing parties attempt to cooperate to reach an agreement upon the appointment of the sole arbitrator or the party appointing arbitrators upon the agreement of a third arbitrator. However, this may not always be the case. Sometimes a party aiming to impede the arbitral process will not comply with his/her obligation to appoint an arbitrator or a party appointing arbitrator will refuse to agree on the chairman of the arbitral tribunal.¹⁷³ The consequence of this failure is the intervention of a third party to appoint the arbitrator, which would either be an appointing authority¹⁷⁴ or a national court.¹⁷⁵ As a result, the arbitration agreement and the applicable arbitration rules or acts generally prescribe that a necessary appointment is made by an appointing authority if the parties fail to do so within a certain period of time.¹⁷⁶ The appointing authority may be agreed upon by parties as a term of the arbitration agreement, or the agreement may be reached when the dispute occurs.¹⁷⁷ The appointing authority, in its attempts to assist the disputing parties, does not become a party to the arbitrators contract; it is, however, acting as an agent of the parties with two powers of attorney given explicitly by both parties when choosing that appointing authority.¹⁷⁸ Therefore, if a contractual relationship is created in that regard, it will be a contract of services between

172. *Ibid.*, 93.

173. Blackaby, Partasides & Redfern (n2) 240.

174. *See* UNICITRAL Model Law 2010, Art. 6(2) providing any party the right to request to the Secretary-General of the PCA to designate the appointing authority.

175. *See* English Arbitration Act, Art. 18(2) referring to the high court in Art. 105. *See also* French Code of Civil Procedure (Decree 2011-48), Art. 1451 referring to the (*juged'appui*) in Art. 1459 the President of a Tribunal de Grande Instance. *See also* Egyptian Arbitration Act 27 (1994), Art. 17(2), referring to the Cairo Court of Appeal in Art. 9.

176. Lew, Mistelis & Kroll, *Comparative International* (n3) 239.

177. *See* UNICITRAL Model Law 2010, Art. 6(1) ('Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at the Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority').

178. Lionnet (n91) 166.

the appointing authority and the parties, but not with the arbitrators appointed for and on behalf of the disputing parties.¹⁷⁹ It is undesirable for the appointment authority to be a party to the arbitrator contract, due to the risk exposure for potential liability and the excessive administrative tasks that would be incompatible to the fees paid at the time of the appointment.¹⁸⁰ Moreover, neither the arbitrator nor the parties would accept such an assumption of the appointing authority to become a party because the mandate of the arbitrator to arbitrate would be owed towards the appointing authority, which is a third party. Consequently, triggering the liability of the arbitrator by arbitrants would be impossible.¹⁸¹ The realistic view is that, in ad hoc arbitrations, where parties agree in their arbitral agreement on an appointing authority, two contracts may evolve – one is the arbitrator contract between the arbitrants and the sole arbitrator, and the other is a contract of services between the arbitrants and the appointing authority acting by its virtue on behalf of the parties.¹⁸² Thus, a direct contractual link is construed between the arbitrator and the parties. A further form of the appointment by third parties is when the arbitrator is appointed by a national court. Most national laws prescribe clearly in the appointment of arbitrator by a specific court when parties do not agree or failed to agree upon the preferred method of appointment.¹⁸³ National courts may also intervene upon the absence of will or ability of the appointing authority to appoint the arbitrator.¹⁸⁴ Courts of the seat of arbitration will have jurisdiction to appoint arbitrators if the arbitration seat was determined by the arbitration clause or the arbitral agreement, regardless of the law governing the merits and nationality of parties.¹⁸⁵ However, a problem may occur when neither the submission agreement nor the arbitration clause determines the seat of arbitration. *‘It may be possible to persuade a court to assume jurisdiction for example, on the basis that the law governing the substantive issues in dispute is the law of the country*

179. Onyema (n46) 87.

180. Lionnet (n91) 166. The PCA is paid an administrative fee of EUR 3,000 for simply acting as an appointment authority pursuant to the UNICITRAL rules as stated on their website. <<https://pca-cpa.org/en/services/appointing-authority/pca-secretary-general-as-appointing-authority/>>accessed 16 October 2019.

181. *Ibid.*

182. Onyema (n46) 89.

183. *See* English Arbitration Act, Art. 18(2) referring to the high court in Art. 105. *See also* French Code of Civil Procedure (Decree 2011-48), Art. 1451 referring to the (*juged’appui*) in Art. 1459 the President of a Tribunal de Grande Instance. *See also* Egyptian Arbitration Act 27 of 1994, Art. 17(2) referring to the Cairo Court of Appeal in Art. 9. *See also* Lew, Mistelis & Kroll, *Comparative International* (n3) 241.

184. Akseli (n164) 250.

185. Blackaby, Partasides & Redfern (n2) 243.

of that court; or on the basis that the respondent is within the jurisdiction of the court.¹⁸⁶ Once the assumption of jurisdiction by the relevant national court is confirmed, the court will assign an arbitrator and directly notify the nominated arbitrator or the disputing parties about his the arbitrator's identity and contact details.¹⁸⁷ The In this regard the court is not acting as an agent to the parties in making the arbitrator appointment; it is, however, acting under its statutory power to appoint an arbitrator pursuant to the arbitration clause or submission agreement similar to the enforcement of any other contract.¹⁸⁸ Therefore, the contract will exist directly between the arbitrators and disputing parties, with no relationship intervention with the court to the arbitrator contract.¹⁸⁹

§2.04 Basic Effects of the Arbitrator's Contract

The abovementioned forms of arbitrator appointments under the ad hoc reference show different methods of contractual links between the arbitrator and the arbitrants, either directly or indirectly. The existence of the arbitrator contract presumes effects among its parties. The integrity and reputation of arbitrators is the key to the success of the arbitral process, which in turn depends on their compliance with their obligations.¹⁹⁰

Therefore, parties of the arbitrators' contract should comply with the reciprocal duties set out by virtue of the contract to avoid being held liable in case of contractual breach. The arbitrator's obligations vis-à-vis parties emanates from the arbitrator contract and the judicial role the arbitrators perform.¹⁹¹

[A] Duty to Resolve Disputes Between Parties in a Judiciary Manner

The judiciary role that arbitrators perform is a result of their function to solve a dispute between two or more parties, which is not akin to services rendered by any other professional.¹⁹²

186. *Ibid.*, 256.

187. Onyema (n46) 89.

188. *Ibid.*, 90.

189. *Ibid.*

190. Paula Hodges & Joanne Greenaway, 'Duties of Arbitrators' in Julian DM Lew and others (eds), *Arbitration in England* with chapter on Scotland and Ireland (Kluwer Law International 2013) 293.

191. Born (n25) 2129.

192. *Bernd von Hoffmann v. Finanzamt Trier*, Case C-145/96 [1997] ECR I-4857 ('The services of an arbitrator, which are principally and habitually those of settling a dispute between two or more parties, do not fall within the category of those carried out by a lawyer, which are principally and habitually those of representing or defending the interests of a person, or of those carried out by a consultant, engineer, consultancy bureau or accountant,

Statutory provisions in many arbitration laws have provided mandatory procedural requirements for arbitrators to conduct the arbitral process in an adjudicative manner. The English Arbitration Act, in specifying the general duty of the arbitral tribunal, prescribes that the arbitral tribunal shall:

*(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*¹⁹³

The adjudicative functions of the arbitrators require them to treat the parties equally, granting them the same opportunity to present their case.¹⁹⁴ The adjudicative role of the arbitral tribunal is also highlighted by the UNICITRAL Model Law, which obliges the tribunal to treat parties with fairness and equality throughout the arbitral proceedings.¹⁹⁵ The New York Convention incorporates an implied term for equal treatment of parties, providing a provision as grounds for the refusal of the award recognition if the party was unable to present its case.¹⁹⁶ The obligation to act judicially extends beyond the scope of equal treatment of the parties, requiring that it is also imposed when the arbitral tribunal decides to render its decision on a matter not specifically raised by parties.¹⁹⁷ The aggrieved party that suffered financial loss due to the failure of the arbitral tribunal to act judicially may trigger the arbitrator's personal liability.¹⁹⁸ The arbitrator's adjudicatory obligation includes some relevant sub-obligations, such as the arbitrator's obligation to be impartial and independent, as well as his/her obligation of disclosure.¹⁹⁹

since none of the services principally and habitually provided as part of any of those professions concerns the settling of a dispute between two or more parties').

193. English Arbitration Act 1996, Art. 33(1a, b).

194. Fouchard (n92) 17.

195. See UNICITRAL Model Law 2013, Art. 17(1) ('Subject to these rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute').

196. See New York Convention, Art. V(1)(b) ('The party against whom the award is invoked ... was otherwise unable to present his case').

197. Blackaby, Partasides & Redfern (n2) 329.

198. *Ibid.*, 337.

199. Born (n25) 2132.

[1] *Duty to Act Impartially and Independently*

It is that two essential qualities of an arbitrator and his/her performed judicial function are to be impartial and independent.²⁰⁰ Impartiality of the arbitrator requires him/her to be unbiased or have no predisposition towards one of the parties.²⁰¹ The purpose is to protect the arbitrator, in reaching his or her decision, from being influenced by factors other than the merits of the case as presented by the parties.²⁰² The arbitrator is independent if he/she has no close direct or indirect relationship with one of the disputing parties in the arbitration or their counsel, whether the nature of this relationship is financial, professional, or personal.²⁰³ These duties are required not only at the time of appointment, but must be maintained throughout the arbitral proceedings.²⁰⁴ Arbitrator independence and impartiality are recognised universally by conventions and national laws. The New York Convention implicitly addressed the duty of impartiality and independence of arbitrators, allowing refusal if the arbitral tribunal, in conducting the arbitral proceedings, did not comply with the arbitral agreement or with the law of the seat.²⁰⁵ Therefore, the arbitrators must be impartial and independent to avoid an award refusal due to violating one of the duties imposed by the parties' arbitral agreement or the seat of arbitration law.²⁰⁶ The award may also be refused if it violates the public policy of the country where it is sought to be enforced.²⁰⁷ Thus, an award rendered by an impartial or independent tribunal will not be recognised in the country of enforcement if it is contrary to the public policy. However, it is difficult in practice to prove the impartiality of the tribunal during enforcement if the aggrieved party fails to prove it while setting aside the arbitral proceedings. The UNCITRAL Model Law has more explicitly addressed the obligation of impartiality and independence of the arbitral tribunal by stating that doubts of impartiality and independence are grounds for challenging the tribunal or for derogating a qualification set by the parties, which may be impartiality and independence.²⁰⁸ It is noteworthy that parties can

200. *Ibid.*, 1989.

201. Karel Daele, 'Challenge and Disqualification of Arbitrators in International Arbitration' Daele (ed.) (Kluwer Law International 2012) 366. *See also* IBA Code of Ethics, Art. 3(1).

202. IBA Guidelines on Conflicts of Interest, General Standards, pt. I, Art. 2(C).

203. Daele (n201). *See also* IBA Code of Ethics, Art. 3(1), 3(3).

204. Lew, Mistelis & Kroll, *Comparative International* (n3) 282.

205. *See* New York Convention, Art. V(1)(d).

206. *See* English Arbitration Act, Art. 33.

207. *See* New York Convention, Art. V(2)(b).

208. *See* UNCITRAL Model Law, Art. 12(2) ('An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or if he does not possess qualifications agreed to by the parties').

adopt the IBA Code of Ethics Rules as a term of their arbitral agreement to impose the obligation of neutrality and impartiality on the tribunal; thus, their liability can be triggered upon its breach.²⁰⁹ Similarly, in France, the obligations of impartiality and independence are found in statutory provisions by virtue of the civil procedures (*‘[T]he arbitrator should reveal any circumstance likely to affect his independence or impartiality before accepting his mission’*); moreover, the arbitrator must also promptly disclose any relevant circumstances that could occur after accepting his or her mandate.²¹⁰ Egypt has adopted the same statutory provision in the Egyptian Arbitration Act, providing that arbitrators ‘must disclose any circumstances which are likely to cast doubts on his independence or impartiality’; the arbitrator may also be challenged if serious doubts of impartiality or independence have occurred.²¹¹ Unlike the French and Egyptian law, the English Arbitration Act, in addition to stating the right of a party to challenge an arbitrator upon the rise of justifiable doubts as to his or her impartiality, has incorporated a mandatory procedural obligation for the tribunal to act fairly and impartially.²¹² However, the English Arbitration Act provides no statement regarding independence, which was justified on the basis that an issue of independence will not be raised unless there are justifiable doubts about impartiality; thus, addressing impartiality separately is unnecessary.²¹³ The Dutch Code of Civil Procedure did not impose any mandate on the arbitrator to act impartially or independently; however, the act provided parties the right to challenge the arbitrators upon the occurrence of said acts.²¹⁴ Similarly, the UAE Federal Law 2018 added new provisions dealing with the independence and impartiality obligation to

209. David Branson, ‘Ethics of International Arbitrator’ (1987) 3(1) *Arb Intl* 72, 74 (‘If parties wish to adopt the rules they may add the following to their arbitration clause or arbitration agreement: ‘The parties agree that the rules of Ethics for International Arbitrators established by the International Bar Association, in force at the date of the commencement of any arbitration under this clause, shall be applicable to the arbitrators appointed in respect of such arbitration’).

210. *See* French Civil Procedural (Decree 2011-48), Art. 1456. This article is applicable as well in International Arbitration by virtue of art. 1506(2) of the same law.

211. *See* Egyptian Arbitration Act 27 of 1994, Arts 16(3), 18(1).

212. *See* English Arbitration Act 1996, Arts 24(1), 33.

213. *See* Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill*, Ch 2, para. 101 (February 1996) (‘It seems to us that lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance. The latter is, of course, the first of our grounds for removal. If lack of independence were to be included, then this could only be justified if it covered cases where the lack on independence did not give rise to justifiable doubts about impartiality, for otherwise there would be no point including lack of independence as a separate ground’).

214. Dutch Code of Civil Procedure 2015, Art. 1033(1) (‘An arbitrator may be challenged if there are justifiable doubts as to his impartiality or independence’).

which the arbitrators must comply.²¹⁵ The act gives the parties the right to challenge arbitrators on the premise of breaching the obligations thereof.²¹⁶ The address of the impartiality and independence mandate in the new UAE Arbitration Act 2018 has filled in the gap in the former Arbitration Chapter in the UAE Civil Procedure Code 1992 related to the absence of the mandate thereof.²¹⁷ The absence of said provisions in the former Act of 1992 was the reason for the issuance of the Federal Law No. 7 of 2016, which amended Article 257 of the UAE Penal Code No. 3 of 1987. The amendment imposed criminal liability on arbitrators that fail to preserve requirements of integrity and impartiality. Article 257 of the UAE Penal Code reads:

‘Any person who issues a decision, gives an opinion, submits a report, addresses a case or proves an incident for the benefit or against a person, failing to maintain the requirements of integrity and impartiality, in his capacity as an arbitrator, expert, translator or investigator, appointed by administrative or judicial authority or selected by parties, shall be sentenced to temporary imprisonment.’²¹⁸

The fundamental drawback of this amendment was recognised, as arbitrators being intimidated have begun to reject arbitrations seated in the UAE. In fact, some arbitrators in the UAE resigned from their appointments following the enactment of the amendment.²¹⁹ However, the UAE repealed the potential criminal liability for arbitrators by issuing Federal Law No. 24 of 2018, which amended Article 257 of the UAE Penal Code No. 3 of 1987, a few months after the issuance of the UAE Arbitration Act 2018 addressing impartiality and

215. See UAE Arbitration Act (Federal Law No. 6) 2018 Art.10(4)) (‘When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing anything likely to give rise to doubts as to his impartiality or independence. An Arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the Parties and all the arbitrators unless they have already been informed of them by him’).

216. See *ibid.*, Art.14(1).

217. See UAE Civil Procedure Code (Federal Law No. 11) 1992.

218. UAE Penal Code, Art. 257, amended by Federal Law No. 7 of 2016.

219. Gordon Blanke, ‘Arbitration in the UAE: End of Year Round-Up – From the Penal Sanctioning of Arbitrators to the 2016 DIFC-LCIA Rules of Arbitration (Part 1)’ Kluwer Arbitration Blog, 17 January 2017 <kluwerarbitrationblog.com/2017/01/17/arbitration-in-the-uae-end-of-year-round-up-from-the-penal-sanctioning-of-arbitrators-to-the-2016-difc-lcia-rules-of-arbitration-part-1/>.

independence.²²⁰ Following the national laws, the rules of the LCIA,²²¹ ICC,²²² NAI,²²³ and DIAC²²⁴ arbitration institutions explicitly set forth the obligation of impartiality and independence, the need of the tribunal to comply with both, and the right to challenge the arbitrator upon such an occurrence. However, unlike the rules of the aforementioned arbitral institutions, the CRCICA Rules did not incorporate explicit provision so that arbitrators shall remain impartial and independent, being obligated only to report any circumstances raising doubts of independence or impartiality and grounds for challenge upon their occurrence.²²⁵ Additionally, the IBA Guidelines on Conflicts of Interest provide a well-structured detailed code of conduct regulating the ethics of arbitrators, including independence and impartiality as main obligations.²²⁶ Given the imposition of these obligations via law and parties' agreements, it is clear that such obligations are crucial to the process. These obligations emanate primarily from the arbitrators' status as private judges; however, they reveal the contractual obligations they must abide by once they accept their mandate.²²⁷

[2] Duty to Act with Due Care, Skill, Integrity and Diligence

While carrying out their task to resolve the dispute between parties, arbitrators must conduct the arbitral proceedings and decide the case attentively with due skill and professional integrity.²²⁸ The disputing parties empower the tribunal to accomplish a crucial duty in return for remuneration given that the tribunal performs with proper care and skill.²²⁹ Thus, an arbitrator's duty includes complying with the arbitral tribunal to conduct the proceedings

220. UAE Federal Law No. 24 of 2018 which amended Art. 257 of the UAE Penal Code No. 3 of 1987.

221. *See* LCIA Rules 2020, Art. 5(3) ('All arbitrators shall be and remain at all times impartial and independent of the parties'). *See also ibid.*, Arts 5(4), 10(1).

222. *See* ICC Rules 2021, Art. 11(1) ('Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration'). *See also ibid.*, Arts 11(2), 14(1), 22(4).

223. *See* NAI Rules 2015, Art. 11(2) ('An arbitrator shall perform his mandate independently, impartially and to the best of his knowledge and ability'). *See also ibid.*, Arts 11(3), 11(4), 11(5), 19(1).

224. *See* DIAC Rules 2007, Art. 9(1) ('All arbitrators conducting an arbitration under these Rules shall be and remain impartial and independent of the parties'). *See also* Art. 13(3).

225. *See* CRCICA Rules 2011, Arts 11(1), 13(1).

226. *See* generally IBA Code of Ethics. *See also* IBA Guidelines on Conflicts of Interest. 227. Fouchard (n92) 17–18.

228. Born (n25) 2136. *See also* IBA Code of Ethics, Art. 2(2); ABA Code, canon1(B)(3) (arbitrator should accept appointment only if 'he or she is competent to serve').

229. Blackaby, Partasides & Redfern (n2) 321.

appropriately and efficiently, as well as drafting and rendering the final arbitral award in the same manner. The duty has been described as follows:

*'[A]rbitrators must skilfully manage the discovery and motion processes and craft prehearing and hearing procedures that maximise efficiency and cost savings while taking into account sophisticated expert testimony, the needs of advocates, and the parties' right to a fair process and a proper resolution of their dispute. Arbitrators also must take due care in drafting and issuing a final arbitration award that will not be vulnerable to challenge in a state or federal court and must understand the limitations on their authority once an award is issued.'*²³⁰

Due care and skill includes the refusal of appointment by a potential arbitrator due to his or her lack of appropriate knowledge, language, or time.²³¹ The incomplete decision process for the parties' disputes by the arbitrator may entail contractual breach of duty of care to parties.²³² Arbitrators' due diligence is a requirement in performing their task; thus, an arbitrator who ceases to take part in hearings and deliberations in an effort to impede the proceedings in favour of the party that appointed him or her would be failing to act with due diligence, constituting a wrongful deliberate act.²³³ However, it is rare for the due diligence term to be expressed explicitly in this manner, as it is typically described under reasonable time limit expression.²³⁴ (Although the French Code of Civil Procedure does express the term explicitly.²³⁵) The duty also reflects the commitment of the arbitral tribunal to proceed promptly and efficiently to provide parties with a fair resolution within a reasonable period of time.²³⁶ Although they are related to the conduct of proceedings, these duties have a direct effect on the arbitrator's contractual status. Therefore, the arbitrator must comply with the legal and contractual time set by parties for the accomplishment of his/her duty.²³⁷ In sum,

230. James Gaitis, Carl Ingwalson Jr & Viven Shelansk, *College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (3rd edn, Juris Publishing 2014) 2.

231. See IBA Code of Ethics, Art. 2(2), 2(3). See also ABA Code, canon 1(B)(3,4).

232. Born (n25) 2137.

233. Fouchard (n92) 18.

234. *Ibid.*, 18.

235. See French Civil Code of Procedure (Decree 2011-48), Art. 1464 ('Both parties and arbitrators shall act diligently and in good faith in the conduct of the proceedings').

236. See IBA Code of Ethics, Art. 7. See also ABA Code of Ethics, canon 1(f). See also Franz Schwarz & Christian Konrad, *The Arbitrators in The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International 2009) 138.

237. Fouchard (n92) 18.

arbitrators must perform the task with professional integrity, taking into account applicable rules of ethics and professional duty.²³⁸

[3] *Duty to Complete the Mandate*

The arbitrator's duty to complete the mandate emanates from the contractual nature of the relationship that an arbitrator is not able to divest or resign during the course of arbitration without good cause.²³⁹ The justifiable reason for resignation is provided by some national acts.²⁴⁰ However, most national laws and institutional rules do not prescribe provisions for circumstances in which an arbitrator can withdraw properly.²⁴¹ One of the few national acts that has explicitly imposed liability upon the improper withdrawal of arbitrators without good cause was the former Arbitration Chapter of the UAE Civil Procedures Law No. 11 of 1992.²⁴² Affirming this approach, the Abu Dhabi Court of Cassation held that 'an action for compensation for wrongs committed by arbitrators, resignation for unacceptable reasons, shall be subject to the general principles of civil liability'.²⁴³ Regrettably, the current UAE Arbitration Act 2018 regrettably did not incorporate the article imposing liability upon the withdrawal of arbitrators without good cause among its new provisions.²⁴⁴ The idea is that the resignation of arbitrators is acceptable if it is based on proper grounds, such as the development of circumstances that prevent the arbitrator from accomplishing his or her mandate or reverse independence through no fault of his/her own.²⁴⁵ However, if an arbitrator unjustifiably withdraws from fulfilling the mandate, the arbitrator becomes exposed to damages, leading to the possible loss of immunity and liability claims.²⁴⁶ This is justifiable given that a weak cause for resignation would lead to undesirable consequences on the arbitral process, like considerable loss of time and money.²⁴⁷ The arbitrator's obligation to issue an award could be characterised as an *obligation de resultat* (obligation of results); thus, the aggrieved party

238. Born (n25) 2137.

239. Lew, Mistelis & Kroll, *Comparative International* (n3) 280.

240. See Italian Code of Civil Procedure Law, Art. 813(2). See also Portuguese Law on Voluntary Arbitration 2011, Art. 12(3).

241. Fouchard (n92) 18.

242. UAE Civil Procedure Code 1992, Art. 207(2) ('If an arbitrator, after having accepted his appointment, withdraws without good reason, he may be held liable for compensation').

243. Abu Dhabi Court of Cassation, Decision No. 219/18, 26 October 1997.

244. See UAE Arbitration Act (Federal Law No. 6) 2018.

245. Gaillard & Savage, *International Commercial Arbitration* (n1) 610.

246. Born (n25) 2155.

247. Lew, Mistelis & Kroll, *Comparative International* (n3) 280.

would be able to trigger the liability of the arbitrator on the grounds that the award is not rendered within the required period of time.²⁴⁸

[4] *Duty of Confidentiality*

The confidential duty of arbitrators is a result of the non-public nature of the arbitral process, which is dissimilar to the judicial procedure and is a main reason for selecting arbitration as a dispute resolution mechanism.²⁴⁹ The arbitrator must keep all the deliberations of the tribunal and the award contents confidential unless the parties permit him/her to release any information.²⁵⁰ The duty of confidentiality is seldom to be provided as a mandatory provision by national laws to be enforced on arbitrators.²⁵¹ The obligation of confidentiality extends not only to issues related to the proceedings or content of the dispute, but also any information or circumstances learned by the arbitrator during the proceedings.²⁵² Pursuant to some arbitral institution rules, confidentiality is imposed as a general obligation on the arbitral process and similarly to all the arbitral process participants.²⁵³ Moreover, the parties may provide confidentiality terms in their arbitral agreement, which are incorporated in the arbitrator contract.²⁵⁴ Therefore, the disclosure by the arbitrator of any information under the rules of

248. Hans van Houtte & Bridie McAsey, 'The Liability of Arbitrators and Arbitral Institutions' in Philipp Habegger and others (eds), *Arbitral Institutions Under Scrutiny* (2012) 40 ASA Special Series 147.

249. Alexander Belohlávek, *Arbitration Law of Czech Republic: Practice and Procedure* (Juris Publishing 2013) 470.

250. IBA Rules, Art. 9. *See also* ABA Code, canon 6.

251. *See* French Civil Code of Procedure, (Decree 2011-48), Art. 1464(4) ('Subject to legal requirements, and unless otherwise agreed by the parties, arbitral proceedings shall be confidential'.) and Art. 1479 ('The arbitral tribunal's deliberations shall be confidential'). *See also* Romanian Code of Civil Procedure, Art. 565(c) ('Arbitrators are liable, as prescribed by law, for the damage caused if they ... do not observe the confidential character of the arbitration, by either publishing or disclosing information acquired in their capacity as arbitrators without the parties' approval').

252. Belohlávek (n249) 471.

253. *See* LCIA Rules 2020, Art. 30(2) ('...Notwithstanding any other provision of the LCIA Rules, the deliberations of the Arbitral Tribunal shall remain confidential to its members and if appropriate any tribunal secretary, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26.6 and 27.5.'). *See also* HKIAC Rules 2013, Art. 42(1) ('Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement(s); or (b) an award made in the arbitration. 4(2) The provisions of Art. 42.1 also apply to the arbitral tribunal, any Emergency Arbitrator appointed in accordance with Schedule 4, expert, witness, secretary of the arbitral tribunal and HKIAC 42(4). The deliberations of the arbitral tribunal are confidential').

254. Born (n25) 2149.

these institutions or the agreement of parties would constitute a breach of a contractual obligation.²⁵⁵

[5] Party's Duties Towards Arbitrators

The primary duty of the parties towards the arbitrators is of a pecuniary nature.²⁵⁶ An arbitrator accepts appointment with the contractual obligations imposed on him/her to render a dispute resolution service for parties in return for remuneration.²⁵⁷ The right of arbitrators in remuneration emanates from the contractual nature binding him or her to the parties; thus, the basis of its calculation is a contractual issue to be negotiated and agreed upon by both parties and the arbitrator.²⁵⁸ However, few national laws expressly provide the arbitrators' right to remuneration.²⁵⁹ In ad hoc arbitration, parties set the fees directly with the arbitrator, while in institutional arbitration the remuneration of the tribunal is fixed by the institution.²⁶⁰ The arbitrators' remuneration may be reduced totally or partially if errors are committed by the arbitrator that reduced his/her performance below the contractual level owed.²⁶¹ The parties owe other moral duties to the arbitrator out of the judicial role they are performing; thus, arbitrators have the right to be treated in a cooperative and faithful manner by the parties.²⁶²

§2.05 Relationship Between The Arbitral Institution and Parties

In providing their arbitral services, arbitral institutions commence by maintaining an open offer to contract by publishing their rules for the public, which any interested party can accept.²⁶³ Gaillard and Goldman highlighted the way in which the contract comes to existence as follows:

255. *Ibid.*, 2002.

256. Fouchard (n92) 19.

257. Lew, Mistelis & Kroll, *Comparative International* (n3) 282.

258. Born (n25) 2167.

259. *See* English Arbitration Act 1996, Art. 28(1). *See also* Italian Code of Civil Procedure, Art. 814.

260. John Yukio Gotanda, 'Setting Arbitrators' Fees: An International Survey' (2000) 33 *Vand J Transnatl L* 779, 783.

261. Fouchard (n92) 20. *See also* Manuel Arroyo, *Arbitration in Switzerland the Practitioner's Guide* (Kluwer Law International 2013) 1429.

262. *Ibid.*, 20.

263. *See SNF SAS v. Chambre de Commerce Internationale*, CA Paris (1re Ch C) 07/19492, 22 January 2009 (2009) 1 *Rev Arb* 233, 234. The court held, '*La CCI parl'intermédiaire de la Cour internationale d'arbitrage est en offre permanente de contracter, qui est matérialisée par le règlement d'arbitrage qu'elle publie et dont tout intéressé peut accepter les effets*'. *Ibid.*

*'By drafting and publishing its arbitration rules, the arbitral institution effectively puts out a permanent offer to contract, aimed at an indeterminate group of persons ... but made under fixed conditions. By concluding their arbitration agreement, the parties accept that offer and agree to empower their chosen institution to organise and oversee the arbitration in the event that a dispute arises between them ... When the request for arbitration is submitted to the institution and it begins to organise the proceedings, the contract is perfected.'*²⁶⁴

This approach was also adopted by Melis, describing the formation of this contract as follows:

*'The arbitral institution, by publishing its rules and by recommending an arbitration clause, offers its services under its rules to a public which is only identified by categories, such as participants in international trade. [The contract between the institution and the parties] is deemed concluded on the date of the conclusion of the arbitration agreement between the parties and not the date of the request for arbitration ... These considerations lead to the conclusion that the contractual relationship is already existent, even if the arbitral will normally be aware of its existence.'*²⁶⁵

The ICC Commission on Arbitration's Final Report on the Status of the Arbitrator affirmed the contractual relation by stating 'the contractual relationship between the parties and each arbitrator, and the arbitration centre itself, is ultimately concluded at the moment that the last of the said contracting parties expresses its acceptance'.²⁶⁶ Consequently, the agreement of the parties to conduct their arbitration pursuant to the rules of a particular arbitral institution is deemed acceptance of the offer afforded by this institution.²⁶⁷ Hence, the refusal of the institution to render the arbitral services it has offered pursuant to its rules would bring about

264. Gaillard & Savage, *International Commercial Arbitration* (n1) 602.

265. Werner Melis, 'Function and Responsibility of Arbitral Institution' (1991) 13 *Comp L YB Intl Bus* 107, 112.

266. The ICC Commission on Arbitration, 'Final Report on the Status of Arbitrator' (1996) 7(1) *ICC Intl Court of Arb Bull*.

267. *République de Guinée v. MM R et O*, TGI Paris, 23 June 1988 (1988) 4 *Rev Arb* 657 ('Endésignant une institution permanente d'arbitrage comme centre organisateur de leur arbitrage, les parties ont fait de son règlement la charte convenue et acceptée de leur procédure, et, par là-même, lui ont confié la charge d'organiser les opérations d'arbitrage, en conformité à ses statuts et à son règlement, et le pouvoir de statuer sur des difficultés, sans pouvoir s'immiscer dans la mission juridictionnelle confiée aux seuls arbitres').

its liability for damages.²⁶⁸ Following the institution's acceptance of its appointment, either impliedly in distributing its rules or expressly after the appointment is made, the relationship between the parties and the institution (contractual in nature) would be concluded.²⁶⁹ The disputing parties generally appoint the arbitral institution in the arbitration agreement, forming a contractual link between the institution and the two disputing parties that the party initiated, putting in motion the already chosen mechanism.²⁷⁰ This approach was affirmed by the Paris court in *République de Guinée*. The court declared that the court of arbitration in Paris was competent to appoint arbitrators as the *République de Guinée* challenged the arbitrators appointed by the institution. The challenge was rejected by the Paris court. However, the *République de Guinée* applied for a stay of the arbitral proceedings until the Paris court decided its claim for annulment and termination of the arbitral agreement. Based on these claims, the Paris court held that the grounds of authority provided to an arbitral institution found its source in the intention of the parties and confirmed the contractual relationship.²⁷¹ Similarly, in *Cecobank* the Tribunal of the Grande Instance de Paris held that the submission of a dispute to a permanent arbitral institution and its acceptance of appointment constitute a contractual relationship between them.²⁷² The rules of most of the arbitral institutions prescribe provisions that set out the rights and duties of the institution. These provisions are deemed incorporated in the contract between the parties and the institution.²⁷³ Therefore, the arbitral institution owes duties by virtue of this contract to carry out its role with the care of '*pater familias or with due care of a professional*'.²⁷⁴ These duties might entail administrative roles such as notifications, keeping and serving the award, appointment of arbitrators and their challenge, and scrutiny of awards.²⁷⁵ These duties shall be rendered in a proper manner with the expected speed and

268. Melis (n265) 113.

269. Rubino-Sammartano (n44) 413.

270. *Ibid.*, 414.

271. *République de Guinée v. Chambre arbitrale de Paris et autres*, TGI Paris (1Ch 1s) interim injunctions 30 May and 30 October 1986 and judgment 28 January 1987 (1987) 3 Rev Arb 371.

272. *Ceskolovenska Obchodni Banka AS (Cekobanka) v. Chambre de Commerce Internationale saisine* ('*par unepartie, d'une institution permanente d'arbitrage selon les formalités prescrites par le règlement de celle-ci qui a accepté d'examiner la demande, se sont créés entre elles des liens contactuels comprenant notamment, à la charge de l'institution, l'obligation de constater, au regard et selon les modalités du dit règlement, devenu la loi des parties, l'existence prima facie d'une convention d'arbitrage*').

273. Born (n25) 2127.

274. Rubino-Sammartano (n44) 414.

275. Houtte & McAsey (n248) 161–162.

efficiency in accordance with the institution rules.²⁷⁶ Moreover, the institution specifies in its rules its remuneration in return for the services it provides²⁷⁷ in addition to waiver of liability.²⁷⁸ In return, parties owe an obligation to remunerate the institution in return for administering the arbitration under its auspices and in accordance with its rules.²⁷⁹ The contractual relationship between parties and arbitral institutions can be classified as a contract of agency or as a contract for provision of services.²⁸⁰ Such a classification is determined on the basis that the arbitral institution acts for and on behalf of the disputing parties in relation to third parties, while also acting as a principal by rendering certain services to disputing parties as set forth in the arbitration agreement.²⁸¹ Therefore, the more the arbitral institution is involved in the arbitral reference, the closer its status would be to a principle,²⁸² whereas the less the institution is involved, the less like an agent it would be.²⁸³ The legal acts performed by the institution on behalf of the parties would be considered services provided under an agency contract; thus, the institution would be acting as the parties' agent in appointing arbitrators, deciding the place of arbitration and maintaining a timetable.²⁸⁴ Acts related to purely management tasks carried out by the secretariat of the institution or the advice and supervision rendered in relation to arbitrators would be classified under an independent

276. See *SNF SAS v. Chambre de Commerce Internationale*, CA Paris (1re Ch C) 07/19492, 22 January 2009 (2009) 1 Rev Arb 233, 234 ('[L]a CCI doit organiser et administrer l'arbitrage et à cette fin fournir une structure propre à permettre un arbitrage efficace c'est-à-dire intervenant avec la célérités comptée, élaboré conformément aux règles choisies et susceptible de recevoir exécution').

277. See ICC Rules 2021, Art. 38; LCIA Rules 2020, Art. 28; NAI Rules 2015, Art. 53; CRCICA Rules 2011, Arts 42-45; DIAC Rules 2007, Appendix – Cost of Arbitration, Art. 2.

278. See ICC Rules 2021, Art. 41; LCIA Rules 2020, Art. 31; NAI Rules 2015, Art. 61; CRCICA Rules 2011, Art. 1; DIAC Rules 2007, Art. 40.

279. See *SNF SAS v. Chambre de Commerce Internationale* (2009) 1 Rev Arb 233, 234.

280. Gaillard & Savage, *International Commercial Arbitration* (n1) 603.

281. Onyema (n46) 111. See also *Chambre Arbitrale de Paris, Sociétés Carfa Trade Group et Omnium de travaux République de Guinée et autres*, CA Paris (1Chambre A) 4 May 1988 (1988) 2nd décision Rev arb, where the court refused to terminate the contract between the arbitral institution and the parties and classified it as a contract of agency in the interest of the parties 'd'un mandat d'intérêt commun'.

282. See LCIA Rules 2020, Art. 3 ('The functions of the LCIA Court under the Arbitration Agreement shall be performed in its name by the President of the LCIA Court (or any of its Vice Presidents, Honorary Vice Presidents or former Vice Presidents) or by a division of three or more members of the LCIA Court appointed by its President or any Vice President (the "LCIA Court")').

283. Onyema (n46) 112.

284. Eric Robine, 'The Liability of Arbitrators and Arbitral Institutions in International Arbitrations under French Law' (1989) 5(4) Arb Intl 323, 325.

contractor contract (principle).²⁸⁵ The two types of contracts have common features related to the performance of a task and undertaken by one party in another or several others' interest; however, they differ in means of representation: the principal is bound by the agent's acts and deeds, while the employer is not bound by the contractor's acts.²⁸⁶ However, the distinction between the institution's relationship with parties as an agent or contractor has no real importance regarding the liability of the arbitral institution. This lack of significance about the said distinction is due to the lack of court judgments on the contractual nature between the parties and the arbitral institution.²⁸⁷

[A] Relationship Between Arbitrators and Arbitral Institutions

When the parties decide to submit their dispute to an arbitral institution, the arbitral process would be held and administered under the auspices of this institution.²⁸⁸ Arbitral institutions are remunerated in return for the services rendered by it; however, the institution does not play any role in deciding the merits of the parties' dispute.²⁸⁹ Instead, the arbitral institution's role is to police the arbitral procedures.²⁹⁰ Contractual relationships take place between arbitral institutions, parties, and arbitrators when parties opt for institutional arbitration. Thus, a triangular contractual relationship is formed.²⁹¹ The relationship between the arbitrator and the institution stems from the existence of an initial relationship between arbitrants and arbitral institutions.²⁹² The arbitrator's contract with the arbitral institution is formed when the arbitral institution accepts to appoint or confirm the appointment of the arbitrator to exercise his or her role under its auspices and the arbitrator accepts the appointment to perform his or her task in accordance with the arbitral institution rules.²⁹³ In the words of Philippe Fouchard:

'This contract results of twofold consent: the consent of the centre which appoints or confirms the arbitrator, and by sending him a copy of its rules, informs him of the functions he will carry

285. *Ibid.*, 326.

286. *Ibid.*

287. *Ibid.*, 327.

288. Lew, Mistelis & Kroll, *Comparative International* (n3) 31.

289. Onyema (n46) 71.

290. Born (n25) 2127.

291. Gaillard & Savage, *International Commercial Arbitration* (n1) 601.

292. Rubino-Sammartano (n44) 417.

293. See Gaillard & Savage, *International Commercial Arbitration* (n1) 603. See also Rubino-Sammartano (n44) 417 ('The *institution* must appoint *the arbitrator*, giving birth to the "*contract to arbitrate*").

*out in the course of the said procedure; the consent of the arbitrator when he reads the said rules and agrees to fulfil a task in this context and under the centre's auspices.*²⁹⁴

Fouchard concluded, *'It is an innominate contract, in which each party, separately, undertakes to provide and does provide the other with intellectual service.'*²⁹⁵

Therefore, the arbitrator has an obligation to render the award to the institution not to the parties, because the institution will forward it to parties only upon the full payment of the arbitrators and arbitral institution fees.²⁹⁶ Hence, the arbitral institution owes the appointed arbitrator an obligation to pay his or her remuneration.²⁹⁷

[1] Forms of Arbitrators' Contract with the Arbitral Institution

The arbitral institution would be linked with the arbitrator when parties agree to arbitrate their dispute under the auspices of an arbitral institution. The rules of the arbitral institution may prescribe a subsidiary role for the institution in the process of appointing arbitrators if the parties fail to agree upon appointment, or it may provide a more active role for the institution, either by maintaining a list of arbitrators from which parties are free to select or by making the appointment of arbitrators by the disputing parties or the party-appointed arbitrators subject to its confirmation.²⁹⁸ The first form occurs where the rules of some arbitral institutions require that the nominated arbitrators by the parties are appointed subject to confirmation by the institution.²⁹⁹ Through that confirmation, the arbitral institution is practicing a power of control on the process of appointment.³⁰⁰ By way of example, the LCIA rules prescribe:

If the parties have agreed howsoever that any arbitrator is to be appointed by one or more of them or by any third person (other than the LCIA Court), that agreement shall be treated under the Arbitration Agreement as an agreement to nominate an arbitrator for all purposes. Such a nominee may only be appointed by the LCIA Court as arbitrator ... the LCIA Court shall

294. Fouchard (n92) 23.

295. *Ibid.*

296. Rubino-Sammartano (n44) 417.

297. *Ibid.*

298. Gaillard & Savage, *International Commercial Arbitration* (n1) 484.

299. See LCIA Rules 2020, Art. 5(7) ('No party or third person may appoint any arbitrator under the Arbitration Agreement: the LCIA Court alone is empowered to appoint arbitrators (albeit taking into account any written agreement or joint nomination by the parties or nomination by the other candidates or arbitrators)').

300. Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (Sweet and Maxwell 2007) 335.

*refuse to appoint any nominee if it determines that the nominee is not so compliant or is otherwise unsuitable.*³⁰¹

The ICC,³⁰² the NAI,³⁰³ CRCICA,³⁰⁴ and DIAC³⁰⁵ similarly incorporate in their rules the appointment of arbitrators subject to confirmation. Therefore, the arbitral institution can reject the appointment of a nominated arbitrator by disputing parties due, for example, to a lack of independence or impartiality.³⁰⁶ Accordingly, the performance of the arbitrator under the auspices of the institution requires an arbitrator agreement with the institution, in which the arbitrators agree to comply with the rules of the institution. Through this agreement, the institution forwards the guidelines for arbitrators, briefing the arbitrator of the administrative practices regarding matters related to the reciprocal rights and obligations.³⁰⁷ Following this

301. *See* LCIA Rules 2020, Art. 7(1).

302. *See* ICC Rules 2021, Art. 13(2) ('The Secretary-General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall be reported to the Court at its next session. If the Secretary-General considers that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court').

303. *See* NAI Rules 2015, Art. 16(1,2) ('The appointment of an arbitrator under the provisions of this section and Art. 36(4) shall be confirmed by the administrator after receipt of the statement referred to in Art. 11(4), unless the arbitrator, in the administrator's opinion, offers insufficient safeguards for sound arbitration').

304. *See* CRCICA Rules, Art. 8(5) ('In all cases, the Centre may, upon the approval of the Advisory Committee, reject the appointment of any arbitrator due to the lack of any legal or contractual requirement or past failure to comply with his or her duties under these Rules. The arbitrator in question and the parties shall be given the opportunity to express their views before this decision is taken').

305. *See* DIAC Rules 2007, Art. 9.5(a) ('If the parties have agreed upon a mechanism for appointment of the Chairman, that procedure shall be followed, subject to confirmation and appointment by the Centre, in the manner prescribed in this article. ... (b) In the absence of any agreed procedure, the two party nominated arbitrators shall agree upon the third arbitrator who shall act as Chairman, subject to confirmation and appointment by the Centre, as prescribed in this article. Art.9.7. ... The Centre may decline to appoint any nominee proposed by a party if it considers the nominee to be lacking independence, impartiality or otherwise unsuitable').

306. *See ibid.* *See also* Jan Paulsson, 'Vicarious Hypochondria and Institutional Arbitration' (1990) 6(3) *Arb Intl* 226, 242.

307. Melis (n265) 115. Dr Melis illustrated the process using the procedure under the Arbitral Centre of the Federal Economic Chamber in Vienna.

The rules made it a condition for a person who acts as arbitrator to conclude an arbitrator's agreement with the institution in which he expressly accepts the rules and the decisions of

method of appointment, the arbitrator's contract would be directly concluded by the arbitral institution, with no collateral contract existing directly between the arbitrants and the arbitrator.³⁰⁸ Most arbitral institutions maintain a list for arbitrators.³⁰⁹ This panel list of arbitrators aims to facilitate the disputing parties' process for appointing arbitrators.³¹⁰ Arbitrators seeking to be enlisted by the arbitral institutions must fulfil some requirements by providing personal data and references about their relevant experience, skills, age, competence, good reputation, and fees required to be added to the institution arbitrator list.³¹¹ Dr Onyema described three ways arbitral institutions enlist arbitrators. First, the arbitral institutions may notify the arbitral community of the opportunity to be added to their list; the arbitrators consider this tender made by the institution and submit an offer that should meet the acceptance of the institution requirements. Second, an institution may advertise its arbitration opportunities, forming an offer for a unilateral agreement. Finally, an arbitrator may initiate contact with a specific institution, providing details to be enlisted if a vacancy is available.³¹² Onyema concluded that: *'There is no contract (unilateral or bilateral) formed between the institution and prospective arbitrator by this means of enlistment'*.³¹³

It is worth mentioning that the list procedure would trigger the arbitral institution's liability if a person who resolved the dispute did not meet the required standards. Similarly, if the institution appoints the sole arbitrator without interference from the parties, the institution would be counted as a principal and would conclude a direct contract with the arbitrator. By contrast, if the parties jointly appointed the arbitrator in accordance with the rules of the institution, and the institution accepted the appointment, the contract concluded between the

the organs of the institution as binding. Together with the copy of this agreement, the centre transmits 'guidelines for arbitrators' which are a summary of its administrative practice concerning matters which are of relevance to the mutual relationship including the way of calculating fees and expenses.

308. Onyema (n46) 96.

309. Simone Hofbauer, et al., 'Survey on Scrutiny of Arbitral Institutions' in Philipp Habegger and others (eds), *Arbitral Institutions Under Scrutiny* (2012) 40 ASA Special Series 11.

310. Michael J Moser, *Business Disputes in China* (3rd edn, Juris Publishing Inc 2011) 77. See, for example, Art. 24 of CIETAC Rules ('CIETAC establishes a Panel of Arbitrators which uniformly applies to itself and all its sub-commissions/centres. The parties shall nominate arbitrators from the Panel of Arbitrators provided by CIETAC').

311. Hofbauer, Burkar, Bander & Tari (n309).

312. Onyema (n46) 97–98.

313. *Ibid.*, 98.

institution and the arbitrator would be a contract of agency.³¹⁴ Finally, the appointment of a panel of arbitrators is also a way to conclude a contract between the arbitrator and the institution; however, the contract is said to be either agency or principle according to the rules of appointment maintained by the institution. If the institution, by virtue of its rules, preserves the right of appointment of any arbitrator only to itself or when the disputing parties appoint two co-arbitrators, while the arbitral institution appoints the presiding arbitrator, no contract comes into existence between the parties and the arbitrator; instead, a direct contract exists only between the arbitrator and the institution.³¹⁵ Under different circumstances, the institution would be considered an agent for disputing parties if the parties nominate all three arbitrators with the arbitral institution confirming their nomination and appointing the arbitrator, or each party nominates one arbitrator to be appointed by the institution and the two party-appointed arbitrators nominate the presiding third arbitrator to be appointed by the institution.³¹⁶ Classifying the relationship between the arbitral institution and arbitrator could highlight the possibility of triggering the liability of arbitral institution by the arbitrator and vice versa.

§2.06 Applicable Law to the Arbitrator's Contract

Like any other contract, the arbitrator's contract shall have its grounds in a proper law specifying its terms and mutual rights and duties of its parties.³¹⁷ The arbitrator contract is often to be signed in a single agreement.³¹⁸ However, the agreement and the clear definition of its terms are made by parties to it, as ascertained in the applicable arbitration rules and laws.³¹⁹ The determinacy of the applicable law is crucial as it has a significant impact on the contractual relationship when a dispute arises regarding this contract.

[A] Choice by the Applicable Law to the Contract by Parties

Through party autonomy, parties are empowered to select in their contract the law governing their relationship.³²⁰ Thus, parties drafting the arbitral agreement have freedom to design a dispute settlement system of their choice.³²¹ By virtue of the arbitration agreement, the

314. *Ibid.*, 98–99.

315. *Ibid.*, 99.

316. *Ibid.*, 99–100.

317. Onyema (n46) 159.

318. Lew, Mistelis & Kroll, *Comparative International* (n3) 276.

319. Onyema (n46) 159.

320. Giuditta Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability* (Cambridge University Press 2014) 135.

321. Pryles (n28) 328.

arbitrator contract is entered in compliance collaterally with it, thus the choice of the parties' freedom to select the applicable law governing the arbitration agreement prescribed in Article V, paragraph 1 of the New York Convention 1958 similarly apply to the arbitrator contract.³²² The choice of law by the parties and the arbitrator seldom occurs in practice; instead, the applicable law is determined by relevant conflict of law rules, which usually refers to the law of the place having the closest connection with the facts of the dispute.³²³ The place of arbitration, the seat of the arbitral tribunal where arbitration takes place in accordance with its rules and the domicile of arbitrator, is often recognised as having the closest connection with the contract.³²⁴

[1] Law of Arbitrators' Domicile

The law of the arbitrators' domicile would be inadequate on the grounds of practice if an arbitral tribunal is designated a member of different domiciles, as the contract would be subject to different laws where the arbitrators reside.³²⁵ The European Community Regulation on the Law Applicable to Contractual Obligations 2008 (Rome I) governs the applicable rules in the Member States regarding the conflict of laws and jurisdictions.³²⁶ Pursuant to this regulation, the conflict of laws adopted shall be applied regardless of whether it is the law of a Member State.³²⁷ The Rome (I) regime is applicable to contractual obligations in civil and commercial matters; however, it excludes arbitration agreements from its application.³²⁸ The arbitrator and the arbitral institution are not subject to an arbitral agreement; however, contracts in which the arbitrators and the arbitral institutions render services pursuant to the agreement will fall under the Rome I regulations. The regulations confirm the party autonomy principle in selecting governance of the contract.³²⁹ In the absence of the parties' choice of the law governing the contract or when there is no express choice that could be derived from the contract, the regulation provides rules to fill in the gap and determine the law applicable to the contract.

322. Lionnet (n91) 169–170.

323. Lew, Mistelis & Kroll, *Comparative International* (n3) 278.

324. *Ibid.*

325. Lionnet (n91) 169.

326. *See* para. (2) of the preamble to Regulation (EC) No. 593/2008 of 17 June 2008 (Rome I), which was the Rome Convention of the Law Applicable to Contractual Obligations 1980.

327. Rome I, Art. 2.

328. *Ibid.*, Art. 1(2)(e).

329. *See* Rome I, Art. 3(1) ('A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract').

Given that the arbitrator and arbitral institution contracts involve provisions of services, they would be subject to Article 4.1(b), which prescribes ‘A contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence’. Accordingly, the law governing the arbitrator contract would be the law of his/her habitual residence or domicile, which leads to the same result when a tribunal is designated with arbitrators of different domiciles. The arbitral institution contract to be governed by the law of the place where the institution has its seat may be irrelevant in the case where the disputing parties have chosen to conduct the arbitration in another place.³³⁰ Furthermore, the law of the place where the contract was formed is suggested as a possible connecting factor to the arbitrator contract. The law of the juridical seat of arbitration may not necessarily be the law in which the contract is formed, as it may be the law of a neutral place but will most likely be the law of the arbitrator’s domicile, leading to the same result pursuant to the Rome I regulation discussed above.³³¹ Under an institution’s arbitration reference, it may be possible where an institutional requirement should be fulfilled by the arbitrators, which is attending the premises of their appointment; practically speaking, however, the institution sends the arbitrator, who accepts his/her mandate the necessary documents at his/her domicile and sends it back to the institution. Thus, the arbitrator contract would be subject to the law of the arbitrator’s domicile.³³²

[2] Seat of Arbitration

The seat of arbitration seems to be the most appropriate factor in determining the applicable law on the arbitrator’s contract.³³³ This is because the arbitral proceedings, pleadings, arbitrators’ place of deliberations, and the place where the award is rendered are closest to the arbitrator’s contract.³³⁴ Furthermore, in the view of Klaus Lionnet, this connector is sustained by Article V(1)(a) of the New York Convention on the law applicable to the arbitral agreement.³³⁵ However, the certainty of this connector may be eroded if the seat of arbitration is changed by the parties; thus, collaterally the law applicable to the arbitrator contract would change, making the arbitrator subject to unilateral changes of laws.³³⁶

330. Lew, Mistelis & Kroll, *Comparative International* (n3) 279.

331. Onyema (n46) 163.

332. *Ibid.*

333. Lew, Mistelis & Kroll, *Comparative International* (n3) 278.

334. Lionnet (n91) 169.

335. *Ibid.*

336. Onyema (n46) 163.

§2.07 Chapter Summary

This chapter presented theories defining the status of the arbitrator and forms of relationships the arbitrator is involved in, either with the parties or the arbitral institution in both the ad hoc and the arbitral reference. This chapter also addressed the relationship between the arbitral institutions and the disputing parties and the arbitrators, in order to determine the type of relationship, thus constituting the possible grounds of the potential civil liability of arbitrators and arbitral institutions. With respect to the common law represented in England, the laws subject to this dissertation adopted the status theory in classifying relationships between the arbitrator and the arbitrants. Although some English courts have recognised the contractual basis of this relationship, others continue to separate the contractual basis from the office of the arbitrator relating it to the office of judges. The civil law system applied in France, the Netherlands, Egypt, and the UAE adopted the contractual theory to classify the relationship between the arbitrators and the arbitrants. Furthermore, these countries consider that the arbitrators' office exists as a part of the procedural relationship within arbitration. Because the contractual basis is a dominant phenomenon in the relationship binding the arbitrators and parties, most judgments could not ignore mentioning the presence of a contract with regard to this relationship. That said, the argument centres on the notion that the status of arbitrator and the arbitrator office is the result of a contract relationship with reciprocal rights and duties between the parties of this contract. Similarly, the arbitral institution is linked through a contract to the disputing parties and arbitrators. However, this does not preclude the judicial function the arbitrator performs, as Fouchard stated:

*'Dispute resolution is not, strictly speaking, a "service". The arbitrators are certainly obliged to comply with the arbitration agreement and arbitration rules adopted by the parties, but the parties cannot go so far as to give "instructions" to the arbitrators as to the way in which the proceedings are to be conducted, let alone the content of their award.'*³³⁷

Accordingly, it seems that the most realistic view with regard to the abovementioned theories is the hybrid one. The hybrid theory does not separate the status nature from the contractual one. Therefore, the position of the arbitrator has a dual nature because the arbitrator has contractual obligations towards parties and would be held liable if found to be in breach of these obligations. At the same time, arbitrators are performing a judicial function; they have

337. Gaillard & Savage, *International Commercial Arbitration* (n1) 607.

to provide a separate and independent function, without being influenced by any of the parties during the arbitral proceedings. The relationship between the parties and the arbitral institution is also analysed in this chapter, showing obvious contractual relationships between disputing parties and the arbitral institution. The arbitrator is also connected to the arbitral institution with a contract. These contractual links are grounds upon which any of the trilateral parties of that relationship could trigger the liability of the others' contractual liability. Although the contractual link between these parties was recognised by several court judgments in the laws subject to this dissertation, the courts are unable to determine the exact nature of this contract.

CHAPTER3 Arbitrator Immunity and Liability

Chapter 3 Arbitrator Immunity and Liability

Ahmed F. El Shourbagy

Chapter 2 addressed the various relationships between the arbitrator and the parties that may be based on the contractual, status, hybrid, and autonomous theories. The theories show that arbitrators perform a role not dissimilar to that of judges. Since the relationship between the parties and the arbitrator is consent-based by virtue of a contract, either in ad hoc or institutional arbitration, the agreement sets mutual obligations on both the parties and the arbitrator. Upon failing to fulfil one of these obligations or duties, the arbitrator would be contractually liable vis-à-vis the parties. The problem of arbitrator liability emphasises the hybrid nature of arbitration because arbitrators derive their capacity to perform their role from a contract with the parties; thus, they owe the parties contractual obligations in addition to the judicial functions they exercise.³³⁸ Arbitrators are believed to perform a judicial function during the life of the arbitral process; thus, a question arises as to whether they should be provided with some immunity, similar to that granted to judges during and after proceedings. As a result, arbitrators could be excluded from liability arising from performing their judicial role. The principle of immunity as a general concept is based entirely on an analogy between judges and arbitrators.³³⁹ In common law countries, courts and authors adopted the term immunity to maintain the concept that due to the function carried out by arbitrators, which is judicial in nature, they cannot be held liable.³⁴⁰ The term is also used in civil law countries,

338. Lew, Mistelis & Kroll, *Comparative International* (n3) 287.

339. Yat-Sen Li, 'Arbitral Immunity: A Profession Comes of Age' (1998) 64(1) Arb 51.

340. Gaillard & Savage, *International Commercial Arbitration* (n1) 589.

where arbitrators may or may not be granted extension of immunity from legal actions similar to that enjoyed by judges.³⁴¹ Arbitrator immunity has a role in maintaining public policy by protecting the independence and integrity of the arbitrator in the decision-making process.³⁴² Public policy considerations sustaining the need for arbitral immunity are justified on the premise that arbitrators must be protected from parties dissatisfied with the award merits that may subsequently harass them with litigation.³⁴³ Protecting arbitrators from potential allegations by disgruntled parties on the basis of negligence is necessary since the latter act would be difficult to prove.³⁴⁴ Furthermore, arbitrators may be hesitant to undertake an arbitral reference if there was a potential liability to be borne.³⁴⁵ However, it has been argued that the fear of arbitrators from prospective liability is defective because arbitrators are professionals who receive significant remuneration in return for providing their arbitral services and are no longer volunteering with minimal paid fees.³⁴⁶ Finally, immunity guarantees the finality and conclusive nature of the arbitral award, which helps maintain the public interest.³⁴⁷ Some commentators believe that immunity should be founded on public policy, illustrating that immunity is a concession of the state to the arbitrators, in which the states weigh the wrongs incurred by such immunity against the arbitration benefits.³⁴⁸ Arguments have been raised against immunity on the basis that immunity may enhance negligence, taking into account that

341. *Ibid.*, 589.

342. *See Babylon Milk and Cream Co v. Horvitz*, 151 NYS 2d 221, 224 (NY SCt 1956) ('Considerations of the public policy are the reasons of the rule and, like other judicial officers, arbitrators must be free from the fear of refusals by an unsuccessful litigant they must of necessity be uninfluenced by any fear of consequence for their acts').

343. Elizabeth Wilhelm, 'How Far Is Too Far: "Reexamining the Continuing Extension of Arbitral Immunity to Arbitral Organisations"' (2006) 1 DispResol J 320, 323.

344. Murray L Smith, 'Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment' (1992) 8(1) Arb Int 17, 24. *See also Sutcliffe v. Thackrah* (1974) AC 727, 735. Lord Reid stated 'the immunity of arbitrators from liability for negligence must be based on the belief – probably well founded – that without such immunity arbitrators would be harassed by actions which would have very little chance of success'. *Ibid.*

345. *Lingood v. Croucher* (1742) 2 Atkyns 395, 397. Lord Chancellor held: '[I]t would be a very great hardship upon arbitrators if they should be harassed with suits, when they undertake such an employment without any gratification; and that allowing they are liable to such a bill, would effectually discourage persons of worth from accepting of being arbitrators'. *Ibid.*

346. Lew, Mistelis & Kroll, *Comparative International* (n3) 290.

347. *Arenson v. Arenson* (1977) AC 405, 422. Lord Simon of Glaisdale held: 'Finality and conclusiveness do not seem to me to be so characteristic of arbitration as to suggest that anyone not an arbitrator whose decision is final and binding is a "quasi-arbitrator" enjoying immunity from suit in negligence'. *Ibid.* *See also Moses* (n83) 162.

348. Hong Lin Yu & Eric Sauzier, 'From Arbitrator's Immunity to the Fifth Theory of International Commercial Arbitration' (2000) Intl ALR 114, 121.

arbitrators' disciplinary liability is unavailable and that alternative remedies, such as the annulment of the award and withholding remuneration, are insufficient.³⁴⁹ The lack of penalty imposed against the arbitrators' part if they breach their obligations could result in failure to fulfill their mandate under the arbitrators' contract.³⁵⁰ On the other hand, any potential liability that may be held against arbitrators would guarantee that parties are compensated for damages and would therefore be an incentive for the arbitrators to perform their duties with skill and due care. In the words of Lew, arbitrators shall have some liability:

*'for certain fundamental obligations implied into the contract between arbitrators and arbitants. After all arbitrators hold themselves out (some arbitrators canvass and seek appointments) as able to undertake certain types of arbitration and as having the requisite skill and expertise necessary for such disputes.'*³⁵¹

It is noteworthy that liability and immunity are two sides of the same coin: immunity is a shield against liability and liability is an attack on immunity. Therefore, this chapter will address the nature and types of immunity with regard to the legal systems under consideration. In this respect, arbitrator liability will be addressed with reference to the acts of misconduct that may give rise to the arbitrator liability. However, this chapter does not analyse valuation of damages issues and, in connection with this, does not discuss whether liability should lead to reduction of the remuneration of arbitrators.

§3.01 The Nature of Arbitrator Immunity

As will be discussed below, in some jurisdictions, the principle of immunity granted to arbitrators originated from the immunity of judges while performing their judicial role. The rationale behind arbitrator immunity is to protect arbitrators from being attacked by parties who are not satisfied by procedural decisions or decisions as to the merits of arbitral awards, triggering damages against them.³⁵² Thus, immunity provides arbitrators with independence and impartiality that should encourage their recruitment, as well as allow them to work in a secure manner without being wary of the consequences of their arbitral decisions during or

349. Blackaby, Partasides & Redfern (n2) 325. See also Franck (n6) 30.

350. Dario Alessi, 'Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability' (2014) 31(6) J Intl Arb 735, 782.

351. Julian DM Lew, 'Introduction' in *The Immunity of Arbitrators* (Lloyd's of London Press 1990) 2.

352. Hwang, Chung & Cheng (n7).

after the proceedings. This was explained in a widely quoted statement by a state court in New York:

*Arbitrators exercise judicial functions and while not eo nomine judges they are judicial officers and bound by the same rules as govern those officers. Considerations of public policy are the reasons for the rule and like other judicial officers, arbitrators must be free from the fear of reprisals by unsuccessful litigants. They must of necessity be uninfluenced by any fear of consequences for their acts.*³⁵³

This does not preclude concerns about immunity with regard to the performance of arbitrators' judicial functions if they are guaranteed not to be held liable for actions performed in relation thereto. However, some might wish arbitrators to have no immunity, as this would lead to better performance and secure the rights of arbitants who might bear damages from an arbitrator's wrongful conduct.³⁵⁴

Due to the controversial nature of arbitrators' immunity, international arbitration conventions like the New York,³⁵⁵ Inter-American,³⁵⁶ and European³⁵⁷ conventions do not contain any provision or reference addressing the arbitrators' immunity or liability. Nevertheless, the ICSID Convention³⁵⁸ incorporated a provision giving arbitrators absolute immunity via withdrawal of the jurisdiction of national courts and a subsequent inability to trigger civil liability. However, the subject of arbitrator immunity is dealt expressly by several national arbitration statutes, either 'negatively' by providing arbitrators specific immunities, or 'affirmatively' by limiting legal actions against arbitrators only in particular cases.³⁵⁹ The English Arbitration Act (1996) is a prime example of the negative category, providing specific

353. John M Townsend, 'Recourse Against the Arbitrator after the Arbitral Award: An American Perspective' in *ICC: The Status of the Arbitrator* (1995) 6(1) Intl Chamber of Commerce Intl Court of Arb Bull 115.

354. Lew, Mistelis & Kroll, *Comparative International* (n3) 290.

355. See New York Convention.

356. See Inter-American Convention on International Arbitration.

357. European Convention on International Commercial Arbitration.

358. Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington, 18 March 1965 Art. 21(a) ('The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity').

359. Born (n25) 2177.

immunities to arbitrators by virtue of Article 29.³⁶⁰ The prime example of the affirmative category is the Spanish arbitration law, which provides that arbitrators who fail to faithfully fulfil their duties are liable for the damages and losses incurred by reason of bad faith, recklessness, or fraud.³⁶¹ National arbitration laws, whether in common law or civil legal systems, have different approaches regarding the immunity of arbitrators. The common law legal system approach provides arbitrators with immunity on the premise that the function performed by them is judicial or quasi-judicial, based on the grounds that arbitrators have a commitment to render a final judgment like a judge.³⁶² The term *quasi* reveals that the function carried out by an arbitrator is performed ‘by one not a judge’, or ‘as an act or proceeding of or before an administrative tribunal ... not within the judicial power defined under the constitution’.³⁶³ Moreover, the term *judicial* is crucial because acts performed by arbitrators are judicial in nature, particularly the independence in rendering an award and the discretion in contemplating facts and law in reaching a decision.³⁶⁴ Consequently, granting arbitrators immunity is essential for administering justice in a speedy manner and crucial for supporting public policy. It is worth mentioning in this regard that the UNICITRAL Model Law does not contain any provision addressing arbitrator immunity or liability.³⁶⁵

360. See English Arbitration Act 1996, Art. 29 (‘[A]n arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as an arbitrator unless the act or omission is shown to have been in bad faith’).

361. See Spanish Arbitration Act (Law No. 60) 2013, Art. 21(1).

362. John Dyson, ‘The Proper Limits of Arbitrators’ Immunity. The Master’s Lecture, The Worshipful Company of Arbitrators, 13 March 2018’ (2018) 84(3) *The International Journal of Arbitration, Mediation and Dispute Management* 196, 200. See also Martin Domke, ‘The Arbitrator’s Immunity from Liability: A Comparative Survey’ (1971) 3 *U Toledo L Rev* 99. See also *Frank Calzarano v. Jonathan E. Liebowitz*, 550 F Supp 1389, 1391 (SDNY 1982) (‘An arbitrator is a quasi-judicial officer, under our laws, exercising judicial functions. There is much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity extends to him’).

363. Hazem Hebaishi, ‘Should Arbitrator Immunity Be Preserved under English Law?’ (2014) 2(2) *Natl. Env’tl. L Rev* 45, 46. See also Abimbola A Olowofoyeku, ‘Immunity of Quasi-Judicial Officers’ (1990) *J Prof Negligence* 2.

364. *Ibid.*, 46.

365. See UNICITRAL Model Law. See also ‘Report of the Secretary General on possible Features of a Model Law on International Commercial Arbitration’, UN Doc A/CN.9/207, 70 para. 70, XII YB UNICITRAL 75 (1981). See also ‘Report of the Working Groups on International Contract Practices on the Work of its Third Session’, UN Doc A/CN.9/216, paras 51–52, XIII YB UNICITRAL 287 (1982) (‘The drafters of the Model Law reached a conclusion that, due to the controversial nature in the national approaches to the matter, an acceptable approach to arbitrator immunity could not be found’).

By contrast, the civil law jurisdictions deem arbitrators akin to professionals providing services for fees by virtue of contractual appointment *receptum arbitri*; thus, they can be held liable for wrongful acts.³⁶⁶ Immunity would derive from a contract provision subject to the agreement between parties and arbitrators. The absolute immunity concept for the judiciary is not applicable on the basis of performing judicial acts.³⁶⁷ Judges under civil law jurisdictions do not enjoy absolute immunity; their liability can be triggered by erroneous or malicious acts by parties who suffer damages due to judicial errors.³⁶⁸ Arbitral immunity takes two forms: judicial immunity and contractual immunity. Whether judicial or contractual immunity is adopted in any given legal system is in accordance with their understanding of the origin of the immunity and the further development of the law on immunity.

[A] Origin of Judicial and Arbitral Immunity

Arbitral immunity finds its origin and basis in the doctrine of judicial immunity.³⁶⁹ It also reflects the resemblance of the arbitral process to the judicial one.³⁷⁰ Unlike civil liability, the origins of the concept of judicial immunity are deeply rooted in English common law. Specifically, the judicial immunity concept originated in the decisions of *Floyd v. Barker*³⁷¹ and the *Marshalsea*.³⁷² In *Floyd v. Barker*, an action was brought by a criminal defendant who had been convicted of murder by a jury and sentenced to death by Judge Barker, against the judge, the prosecutor, the jury, and the grand jury for conspiring illegally against him.³⁷³ The court ruled that when judges are practicing their judicial role, they are immune from suit regarding the damages incurred by their decisions.³⁷⁴ However, judicial immunity is limited to judicial

366. Christian Hausmaninger, 'Civil Liability of Arbitrators-Comparative Analysis and Proposals for Reform' (1990) 7(40) J Intl Arb 7, 19.

367. *Ibid.*, 13.

368. Franck (n6) 7.

369. Dennis R Nolan & Roger I Abrams, 'Arbitral Immunity' (1989) 11 Indus Rel L J 228, 229.

370. Michael D Moberly, 'Immunizing Arbitrators from Claims for Equitable Relief' (2005) 5(2) PeppDispResol L J 325.

371. (1607) 77 ER 1305.

372. (1612) 77 ER 1027.

373. *Floyd v. Barker* (1607) 77 ER 1305, 1306.

374. *Ibid.*, 1307 ('And the reason and cause why a Judge, for anything done by him as Judge, by the authority which the King hath committed to him, and as sitting in the seat of the King (concerning his justice) shall not be drawn in question before any other Judge, for any surmise of corruption, except before the King himself, is for this; the King himself is *de jure* to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath').

acts of the judge in matters over which he or she has jurisdiction.³⁷⁵ In *Marshalsea*, an action was brought against a judge by a judgment debtor who ruled against him, alleging that the judge had no jurisdiction over the subject matter and was therefore not immune from legal action.³⁷⁶ The court affirmed that a judge may be held liable for acts committed outside his jurisdiction.³⁷⁷ Similarly, in *Scott v. Stansfield* Kelly CB stated:

‘The question arises, perhaps, for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.’³⁷⁸

Therefore, judges could be held personally liable for acts done by them in the full absence of their jurisdiction.³⁷⁹ Consequently, judges’ personal, legislative and administrative acts are not

375. *Floyd v. Barker* (1607) 77 ER 1305, 1306 (‘[A J]udge ... cannot be charged for conspiracy, for that which he did openly in Court as Judge or justice of peace: and the law will not admit any proof against this vehement and violent presumption of law, that a justice sworn to do justice will do injustice; but if he hath conspired before out of Court, this is extrajudicial; ... and false and malicious prosecutions, out of Court ... amounts to an unlawful conspiracy’).

376. *The Marshalsea* (1612) 77 ER 1027, 1028–1029.

377. *Ibid.*, 1028 (‘When a Court has jurisdiction of the cause, and proceeds *inversoordine* or erroneously, no action lies against the party who sues, or the officer or minister of the Court, who executes the precept or process of the Court; but when the Court has no jurisdiction of the cause, the whole proceeding is *coram non judice*, and an action will lie against them, without any regard of the precept or process’).

378. *Scott v. Stansfield* (1867–1868) LR 3 Ex 220,223.

379. Michael R King, ‘Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability’ (1978) 20 Ariz L Rev 549, 553.

immune from suit.³⁸⁰ The English approach towards judicial immunity was similarly adopted and broadened by the American courts in *Bradley v. Fischer*. The court held:

*[J]udges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter.*³⁸¹

The judicial nature of the act was later defined by the court in *Stump v. Sparkman* by considering an act judicial if it is ‘normally performed by a judge’ and if the parties ‘dealt with the judge in his judicial capacity’.³⁸² However, the court adopted the expanded scope of the jurisdiction to immunise as many judicial acts as possible by stating ‘a judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the “clear absence of all jurisdiction”’.³⁸³ The application of this concept granted judges absolute immunity, and the rationale behind the emergence of that concept is to guarantee the finality of judicial decisions, protect the independence of judges, and prohibit parties from interfering and affecting the integrity of the judicial process.³⁸⁴ This shows that this concept enables the judges to proceed with the judicial process without having to ‘act with an excess of caution’.³⁸⁵ It suffices to highlight that the US courts have differentiated between judges’ judicial functions and non-judicial functions, such as administrative, legislative and executive acts. In 1879, in an ex parte Virginia case, the US Supreme Court ruled that a country judge, who was accused

380. Richard J Mattera, ‘Has the Expansion of Arbitral Immunity Reached Its Limits after *United States v City of Hayward?*’ (1996–1997) 12 Ohio St J DispResol 779, 781.

381. 80 US (13 Wall) 335, 351 (1872).

382. 435 US 349 (1978).

383. *Stump v. Sparkman*, 435 US at 356–357 (quoting *Bradley*, 80 US at 351).

384. See *Pierson v. Ray*, 386 US 547 (1967) (‘It is a judge’s duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation’). See also *Bradley v. Fischer* 80 US (13Wall) 335, 347(1872) (‘[A] judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful’).

385. *Forrester v. White*, 484 US 219, 223 (1988).

of discrimination by selecting jurors based on race, and was criminally charged as a result, did not enjoy immunity because the functions performed were ministerial in nature, not judicial.³⁸⁶ The courts first granted absolute immunity and later only qualified immunity in *Forrester v. White*, where a demoted probation officer sued a judge, alleging discrimination on the basis of the officer's sex. The Supreme Court stated that there is an '*intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform.*'³⁸⁷ The court justified that absolute immunity is '*strong medicine, justified only when the danger of [officials' being] deflected from the effective performance of their duties] is very great.*'³⁸⁸ Therefore, the court held that judges enjoy no absolute immunity but do enjoy qualified immunity for their administrative acts.³⁸⁹ The doctrine of judicial immunity has not been restricted only to judges, as it has been extended to individuals who may act in a judicial capacity. Courts have extended the doctrine to prosecutors,³⁹⁰ court clerks,³⁹¹ agency officials, and administrative law judges.³⁹² The rationale for protecting many types of individuals with judicial immunity was elucidated in *Ashbrook v. Hoffman*.³⁹³ The court stated:

'[T]he same policies which underlie the grant of absolute judicial immunity to judges justify the grant of immunity to those conducting activities intimately related to the judicial process ... On one hand is the policy that an official making quasi-judicial discretionary judgments should be free of the harassment of private litigation in making those judgments ... On the

386. *See Ex Parte Virginia*, 100 US 339, 348 (1879) ('The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution').

387. 484 US 219, 227.

388. *Ibid.*, 230 (citing *Forrester v. White*, 792 F2d 647, 660 (7th Cir 1986) (quoting Posner, J, dissenting)).

389. *Ibid.* ('This does not imply that qualified immunity, like that available to Executive Branch officials who make similar discretionary decisions, is unavailable to judges for their employment decisions'). *See also* Hausmaninger (n365) 10–11.

390. *See Imbler v. Pachtman*, 424 US 409, 420–429 (1976) (same concerns that regulate common law immunity of judges apply to prosecutors).

391. *See Wiggins v. New Mexico State Supreme Court Clerk*, 664 F2d 812, 815 (10th Cir 1981). The court clerks, servants, and agents were entitled to judicial immunity on basis of their need for the court to achieve its judicial duties.

392. *Butz v. Economou*, 438 US 478 (1978).

393. 617 F2d 474 (1980).

*other hand, a non-judicial officer who is delegated judicial duties in aid of the court should not be a lightning rod for harassing litigation' aimed at the court ... Thus, if 'acts alleged to [be] wrongful, were committed by the officer in the performance of an integral part of the judicial process,' ... then the official is absolutely immune from suit.*³⁹⁴

Investigations were raised regarding whether or not to extend the doctrine of judicial immunity to arbitrators. Arbitrators are neither judges nor public officials because they carry out a quasi-judicial function. As a result, they have been entitled to immunity similar to a judge's.³⁹⁵ Arbitral immunity was first recognised early in the nineteenth century in *Jones v. Brown*.³⁹⁶ In that case, an arbitrator who attempted to collect outstanding fees was confronted with a counter-claim charging him and his fellow arbitrators with corruption and fraud. The Iowa Supreme Court, noting that arbitrators 'are in a certain sense a court', held that arbitrators are clothed with the same immunity as the judiciary.³⁹⁷ A few years later, in *Hoosac Tunnel Dock and Elevator Co. v. O'Brien*,³⁹⁸ an action was lodged against an arbitrator who was alleged to have conspired with a tort claimant's attorney and to have 'fraudulently induced and persuaded' his two fellow members of a court appointed panel to 'unite in an award against plaintiff'. The Massachusetts Supreme Court held:

*'An arbitrator is a quasi-judicial officer ... exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of the opinion that the same immunity extends to him.'*³⁹⁹

The Anglo-American jurisprudence showed a common approach in establishing the principal of arbitral immunity by analogy with judicial immunity. Therefore, arbitrators' immunity from civil liability, either in England or the US, is based on indistinguishable public policy considerations.⁴⁰⁰ In England, the House of Lords in *Sutcliffe v. Thackrah*⁴⁰¹ raised public policy considerations for arbitral immunity. Lord Salmon stated, *'It is of great public*

394. *Ibid.*, 476.

395. Alvin B Rubin, 'Arbitrators' Immunity from Damage Claims' (1986) in *Arbitration Proceedings of the 39th Annual Meeting*, National Academy of Arbitrators 19, 21.

396. *Jones v. Brown*, 6 NW 140 (Iowa 1880).

397. *Ibid.*, 142.

398. 137 Mass 424 (1884).

399. *Ibid.*, 426.

400. *Lin Yu & Sauzier* (n348) 52.

401. (1974) AC 727.

importance that they shall all perform their respective functions free from fear that disgruntled and possibly impecunious persons who have lost their cause or been convicted may subsequently harass them with litigation'.⁴⁰² The same considerations were raised in the US in *Fongy v. American Airlines*.⁴⁰³ The court held that, '[t]he integrity of the arbitral process is best preserved by recognizing the arbitrators as independent decision makers who have no obligation to defend themselves in a reviewing court'.⁴⁰⁴ Furthermore, in *Tamari v. Conrad*, the court stressed the importance of arbitral immunity to encourage the recruitment of arbitrators, holding that '[i]ndividuals ... cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit'.⁴⁰⁵ Therefore, arbitral immunity is crucial for protecting the finality of awards, to ensure the independence of arbitrators, and to preserve their recruitment.⁴⁰⁶ Arbitral immunity is based on the functional comparability of arbitrator functions and judgments to those of a judge.⁴⁰⁷ Arbitral immunity applies to arbitral acts performed by arbitrators in the exercise of their functions over which they have some jurisdiction.⁴⁰⁸ Arbitral acts are described by analogy as broad as judicial acts according to Nolan and Abrams, paraphrasing *Stump v. Sparkman*: 'an arbitral act is one that is performed by an arbitrator and parties dealt with the arbitrator in his arbitral capacity'.⁴⁰⁹ Therefore, arbitral acts, which arbitral immunity is merely extended to cover, are those acts performed in course of a subject matter over which

402. *Ibid.*, 757.

403. 431 F Supp 1340 (ND Cal 1977).

404. *Ibid.*, 1343–1344. *See also* Asif Salahuddin, 'Should Arbitrators be Immune from Liability?' (2017) 33(4) *Arb Intl* 571, 577.

405. 552 F2d 778, 781 (7th Cir 1977).

406. Salahuddin (n404)572. *See also* Lin Yu & Sauzier (n348) 53. *See also* Dennis R Nolan & Roger I Abrams, 'The Arbitrators Immunity from Suit and Subpoena' (1987) in *Arbitration Proceedings of the 40th Annual Meeting*, National Academy of Arbitrators 149, 153.

407. Yassin Ahmad Alqudah and Abdullah Ahmed Alkhseilat, 'The Extent of the Arbitrator's Immunity from Civil Liability Compared to the Judge's Immunity (Comparative Study)' (2020) 11 *J Advanced Res L & Econ* 711, 715. *See also* *Corey v. New York Stock Exch*, 691 F2d 1205, 1211 (6th Cir 1982) ('The functional comparability of the arbitrators' decision-making process and judgments to those of judges and agency hearing examiners generates the same need for independent judgment, free from the threat of lawsuits. Immunity furthers this need').

408. 'Report on the Arbitrator's Liability: Ad hoc Committee, Les Club des Juristes (2017)' 133. <https://www.leclubdesjuristes.com/wpcontent/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf> accessed 17 October 2019. *See also* Mark A Sponseller, 'Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators' (1992–1993) 44 *Hastings L J* 421, 428.

409. Nolan & Abrams, 'Arbitral Immunity' (n368) 237.

the arbitrator has jurisdiction.⁴¹⁰ Pursuant to common law, absolute arbitral immunity shields arbitrators from claims brought by rendering an ‘*erroneous decision whether due to a clear factual mistake or an obvious legal error*’.⁴¹¹ Common law has noted a benchmark with the decision of the California Court of Appeal in *Baar v. Tigerman*.⁴¹² The court held an arbitrator liable due to his failure to render a timely award and refused to grant him immunity.⁴¹³ The court ruling raised to the surface justifiable doubts about the absoluteness of arbitral immunity.⁴¹⁴ Moreover, it reveals as well the non-identical functional comparability between arbitrators and judges, as a judge has no obligation to render a timely decision. The existence of arbitral immunity is in favour of the arbitants and public, not the arbitrator; thus, neither the arbitants nor the public would benefit from immunising an arbitrator who failed to perform his or her duty.⁴¹⁵ Accordingly, arbitrators shall not expect to be cloaked by immunity upon their failure to carry out their mandate.⁴¹⁶ The *Baar v. Tigerman* decision was a new approach toward absolute arbitral immunity by common law. It was followed by court rulings affirming the absoluteness of arbitrator immunity for acts conducted within the scope of the arbitral process. In *Austern v. Chicago Board Options Exchange, Inc.*,⁴¹⁷ the Court of Appeals expressly held ‘*that arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process*’.⁴¹⁸ In a recent decision, the US Southern District Court of New York, *Landmark Ventures, Inc. v. Cohen et al.*,⁴¹⁹ imposed sanctions on an attorney and a law firm for lodging a suit against an arbitrator. The decision seems to demonstrate, in addition to the immunity

410. See *Grane v. Grane*, 143 Ill App 3d 979, 983(1986). The court refused to dismiss a putative arbitrator from legal action alleging that he ‘fraudulently induced the plaintiff to sign the arbitral agreement’ on the basis that there was no jurisdiction without a valid arbitral agreement and, thus, immunity could not be cloaked to his preagreement conduct, ‘It is undisputed that an arbitrator immunity and authority derives from a valid arbitration’. *Ibid.* (citing *Wilcox Co. v. Bouramas*, 73Ill App3d 1046, 1050(1979) (‘[A]rbitrators authority is determined by arbitration agreement which serves to define and circumscribe his authority’). See also Nolan & Abrams, ‘Arbitral Immunity’ (n368) 237.

411. Peter B Rutledge, ‘Toward a Contractual Approach for Arbitral Immunity’ (2004–2005) 39 Ga L Rev 151, 152.

412. 140 Cal App 3d 979 (Cal Ct App 1983).

413. *Ibid.*, 980 (‘We decline to grant quasi-judicial immunity to an arbitrator who breaches his contract to render a timely award’).

414. Sponseller (n408) 428.

415. Nolan & Abrams, ‘Arbitral Immunity’ (n368) 253.

416. *Ibid.*

417. 898F2d882 (2nd Cir 1990).

418. *Ibid.*, 886.

419. 13 Civ 9044 (JGK) 2014.

shield for arbitrators, a new barrier that faces not only disgruntled parties seeking to sue arbitrators but also their counsel. In *Landmark Ventures, Inc. v. Cohen et al.*, the court dismissed an action brought by a losing party (Landmark) in arbitration conducted under the auspices of the ICC against the arbitrator (.Cohen) and the ICC, alleging unfair procedural decisions made by the arbitrator in addition to the ICC Court's refusal to correct the award and the assessment of additional legal fees and costs.⁴²⁰ The court based the dismissal on grounds of arbitral immunity and the agreement of the plaintiff to waive liability of the arbitrator by virtue of Article 40 of the ICC rules.⁴²¹ The arbitrator and the ICC moved for sanctions on the premise that the claims against both were of a frivolous nature.⁴²² The court imposed frivolous sanctions on the plaintiff's counsel and his law firm on the ground that any reasonable attorney must recognise that the claim is barred by arbitral immunity.⁴²³ The decision seems to be reducing the appeal of arbitration by possible disputants and their attorneys who may be hesitant to sue an arbitrator to avoid possible frivolous sanctions upon losing a suit against the arbitrator. This would result in creating a protection policy for arbitrators' possible misconduct, while discouraging attorneys, to avoid suing them due to fear of frivolous sanctions. It is noteworthy that jurisdictions free of immunity statutes rely on common law immunity.⁴²⁴ Unlike the common law approach, which grants arbitrators' absolute immunity, civil law jurisdictions have granted arbitrators with relatively broad immunity excluding fraud, gross negligence, and deliberate misconduct. This approach has been adopted by, for example,

420. *Ibid.*, 4–5.

421. *Ibid.*, 11 ('Based on the parties' contract, and the doctrine of arbitral immunity, Landmark has failed to plead a plausible claim against the Arbitrator or the ICC. Therefore, the motion to dismiss the Amended Complaint is granted').

422. *Ibid.*, 11–12.

423. *Ibid.*, 14. The court held:

[I]mposing Rule 11 sanctions when party to arbitration asserted a breach of contract claim against an arbitrator, noting, the claim was frivolous because any reasonable attorney would have recognised that such a claim was barred by arbitral immunity. ... Because the frivolous arguments were made by the plaintiff's Counsel, the Rule 11 sanctions should be imposed on the lawyer and law firm responsible for making those arguments.

Ibid. (citing *Weinraub v. Glen Rauch Sec Inc*, 419 F Supp 2d 507, 517 (SDNY 2005)).

424. Sponseller (n406) 434.

Swiss,⁴²⁵ Dutch,⁴²⁶ Spanish,⁴²⁷ Austrian,⁴²⁸ Italian,⁴²⁹ and German⁴³⁰ scholarly opinions⁴³¹ and legislation. Arguments were raised against the extension of immunity to arbitrators by analogy to judges. These arguments are based on the belief that arbitrators are unlike judges and, thus, should not be cloaked with the same immunity granted to judges. The arguments highlight that the appointment and selection, authority, and remuneration of arbitrators is subject to the

425. Philippe Bartsch & Dorothee Schramm, *Arbitration Law of Switzerland: Practice and Procedure* (Juris Net LLC 2014) 44 ('The prevailing view among legal scholars is that the arbitrators' liability should not go further than that of national judges: this liability, on the federal level, is limited to intentional misconduct and gross negligence'). *See also* Swiss Rules 2012, Art. 45(1) ('no liability for arbitrators unless the act or omission constitutes gross negligence or intentional misconduct').

426. Meijer & Paulsson (n141) 31 ('As is the case for judges, an error in law or fact will not lead to liability. Arbitrators can only be held personally liable if they have intentionally or deliberately acted recklessly; or if they have manifestly and gravely failed to recognise what the proper performance of their duties entails').

427. *See* Spanish Arbitration Act (Law No. 60) 2013, Art. 21(1) ('Acceptance obliges the arbitrators and, where applicable, the arbitral institution to comply faithfully with their responsibilities, being, if they do not do so, liable for the damage and losses they cause by reason of bad faith, recklessness or fraud ...'). *See* B Cremades & Asociados (trans), 'Judgment of the Spanish Supreme Court 102/2017, February 15, 2017, Liability of Arbitrators: The "Puma" Decision', 1, 2 <www.cremades.com/pics/contenido/398872_1.pdf> accessed 16 October 2020.

428. Franz T Schwarz & Christian W Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International 2009) 182 ('the fault must reach or exceed the level of gross negligence'). *See also* Austrian Arbitration Act (ZPO) 2014, Art. 594(4) ('An arbitrator who does not fulfil his obligation resulting from the acceptance of his appointment at all or in a timely manner, shall be liable to the parties for all damages caused by his wrongful refusal or delay').

429. Rubino-Sammartano (n44) 520. *See also* Italian Code of Civil Procedure 2006, Arts 813ter (2) ('[T]he arbitrators shall be liable only for fraud or gross negligence within the limits foreseen by Article 2, paragraphs 2 and 3, of Law No. 117 of 13 April 1988').

430. German Civil Code (BGB) 2002, s. 839 ('(1) If an official intentionally or negligently breaches the official duty incumbent upon him in relation to a third party, then he must compensate the third party for damage arising from this. If the official is only responsible because of negligence, then he may only be held liable if the injured person is not able to obtain compensation in another way. (2) If an official breaches his official duties in a judgment in a legal matter, then he is only responsible for any damage arising from this if the breach of duty consists in a criminal offence. This provision is not applicable to refusal or delay that is in breach of duty in exercising a public function. (3) Liability for damage does not arise if the injured person has intentionally or negligently failed to avert the damage by having recourse to appeal').

431. Report on the Arbitrator's Liability: Ad hoc Committee, Les Club des Juristes (2017)' 22.

<https://www.leclubdesjuristes.com/wpcontent/uploads/2017/06/CDJ_Rapports_Responsabilite%20de-1%20B9arbitre_Juin-2017_UK_web.pdf> accessed 17 October 2019. *See also* Born (n25) 2180.

contractual agreement of the parties, whereas judges are appointed and paid by the State.⁴³² Moreover, arbitrators are selected to arbitrate due to their technical experience in the subject matter of the dispute; accordingly, they are deemed experts rendering contractually based professional services.⁴³³ Thus, arbitrators owe an obligation to their clients to take reasonable due care and to exercise their skill and knowledge up to a level compared to that of the members of their profession.⁴³⁴ In *Baar v. Tigerman*, the California Court of Appeal expressly differentiated between judges and arbitrators, stating that judges gain their power from the Constitution, while arbitrators gain their power from private contracts.⁴³⁵ Independence is an essential aspect of a judge's function because it reflects democracy,⁴³⁶ while arbitration plays no such noble role;⁴³⁷ judges are bound by precedents, while arbitrators are not; trials are public while arbitration proceedings are private; judges are bound by law, while arbitrators may disregard it.⁴³⁸ The court concluded that arbitration 'remains essentially a private contractual arrangement'.⁴³⁹ Professor Nolan adopted the defensive point of view of an absolute immunity extension to arbitrators, maintaining the dissimilarity between the judicial and the arbitral process; however, ample safeguards exist to justify its extension to arbitrators, like judges.⁴⁴⁰ Nolan illustrated that because arbitration is a voluntary process, both parties are aware of its potential risks.⁴⁴¹ However, it is argued that many parties do not assume the hazard of an

432. Karl Pornbacher & Inken Knief, 'Liability of Arbitrators' Judicial Immunity Versus Contractual Liability' in Alexander J Bělohávek and others(eds), *Czech and Central European Yearbook of Arbitration Party Autonomy Versus Autonomy of Arbitrators* (Juris Net LLC 2012) 223. See also *Corey v. New York Stock Exch*, 691 F2d 1205, 1209 ('The submission of the parties replaces a statute or court order as the source of the arbitrators' power with regard to subject matter and procedural rules'). See also *E C Ernst Inc v. Manhattan Const Co of Texas*, 551F2d 1026, 1033(5th Cir1977) ('The arbitrator serves as a private vehicle for the ordering of economic relationships. He is a creature of contract, paid by the parties to perform a duty, and his decision binds the parties because they make a specific, private decision to be bound. His decision is not socially momentous except to those who pay him to decide. The judge, however, is an official governmental instrumentality for resolving societal disputes').

433. Hausmaninger (n366) 18.

434. *Ibid.*, 18.

435. 140 Cal App 3d 979, 984 (Cal Ct App 1983). See also Franck (n6) 9.

436. *Ibid.*, 984. See also Franck (n6) 9.

437. Sponseller (n406) 429.

438. *Baar v. Tigerman*, 140 Cal App 3d 979, 984 (Cal Ct App 1983).

439. *Ibid.*, 984.

440. Nolan & Abrams, 'Arbitral Immunity' (n368) 234.

441. *Ibid.*

arbitrator performing in a malicious or biased manner.⁴⁴² Moreover, Nolan disregarded the consumer adhesion contract that includes frequent arbitration clauses and also the compulsory arbitration clause that consumers need to agree to while buying products.⁴⁴³ Nolan further pointed out that the arbitrator, being part of the industry, would be familiar with its practices and rules of ethics, and would therefore be apt to comply with such precedent.⁴⁴⁴ Nevertheless, it was argued that being familiar with the industry practices and ethics does not make it binding and is ‘no substitute for the rules of precedent and the threat of appellate review’.⁴⁴⁵ Finally, Nolan asserted that arbitration is an adversarial process and that arbitral awards are subject to judicial review through annulment.⁴⁴⁶ He also acknowledged that it is difficult for parties to overturn a mistakenly rendered arbitral award.⁴⁴⁷ These arguments show that questions have been raised regarding the rationale for granting arbitrators the same immunity as judges and whether and to what extent they should be held liable for their actions in performing their functions.

[B] Contractual Immunity

Contractual immunity differs from judicial immunity: the latter is granted by virtue of the law, while the former arises solely from contract. It is noteworthy that autonomy of parties does not play any role with regard to judicial immunity and that the issue as to whether the arbitrator and the parties can waive judicial immunity has hardly been raised. On the other hand, contractual immunity is based on party autonomy, as reflected in the contract between the parties and the arbitrator. Arbitral immunity subject to the contractual approach is a term of the *receptum arbitri*, negotiable among the parties of the arbitrator’s contract limited by the public policy provisions of the national law.⁴⁴⁸ By virtue of an arbitrator agreement, a trilateral agreement is formed that binds the two disputants to the arbitrator.⁴⁴⁹ Therefore, arbitrators

442. Pierre Lalive, ‘Irresponsibility in International Commercial Arbitration’ (1999) 7 Asia Pac L Rev 161, 169 (‘When submitting to arbitration, both parties, under the *Applicable Law* or arbitration rules, have based their agreement on trust, on the implied and/or expressed condition that the arbitrators would fulfil their various duties honestly, fairly and diligently. That was their reasonable expectation. In other words, their acceptance of the arbitral risk did not cover the case of fraud, of corruption, nor (it would seem), cases of gross and inexcusable negligence’). *See also* Sponseller (n406) 437.

443. *See* Mattera (n378) 786 n 57.

444. Nolan & Abrams, ‘Arbitral Immunity’ (n368) 234.

445. Sponseller (n408) 437.

446. Nolan & Abrams, ‘Arbitral Immunity’ (n368) 234.

447. *Ibid.*, 234 n 37.

448. Hausmaninger (n366) 20.

449. *K/s Norjarl A/s v. Hyundai Heavy Industries Co Ltd* [1992] QB 863, 885.

derive their rights and are assigned their duties from the agreement in which they receive and undertake their capacity to perform their function in return of being remunerated.⁴⁵⁰ Arbitrators' contractual immunity is granted to arbitrators when parties to the arbitrator agreement agree on a term for waiving the liability of arbitrators.⁴⁵¹ However, two potential problems arise in the contractual immunity of arbitrators. First, in most civil law jurisdictions, deliberate wrongdoing and gross negligence cannot be waived by virtue of contract.⁴⁵² Second, the agreement of one party to a condition waiving the liability of the arbitrator does not mean that the other party has agreed to the same condition. In *Fal Bunkering of Sharjah v. Grecale Inc. of Panama*, an English commercial court concluded that the requests of one arbitrator for special terms of appointment were not binding to all parties.⁴⁵³ Therefore, the acceptance of an arbitrator to his or her mandate with a contractual immunity clause can only be enforced on the appointing party.⁴⁵⁴ Absence of a valid exemption from liability, arbitrators can be held liable for breach of contract in those jurisdictions where their relationship with the parties can be characterised as contractual and where no judicial immunity applies. Shielding arbitrators from liability is discussed herein under both as to ad hoc arbitration and institutional arbitration.

[1] Immunity in Ad Hoc Arbitration

In ad hoc arbitration, it is the parties' role to administer the arbitration proceedings independently.⁴⁵⁵ Therefore, parties are by choice to set their own rules or refer to the UNCITRAL Arbitration Rules to govern their arbitration.⁴⁵⁶ From a contractual immunity perspective, immunity arises from the origin and character of appointment, not by the duties that the appointee has to perform, or his/her methods of performing them.⁴⁵⁷ The first method

450. *Ibid.*, 885.

451. Houtte & McAsey (n248) 164.

452. Hausmaninger (n366) 1.

453. (1990) 1 Lloyd's Rep 369, 372–373. *See also* Franck (n6) 21.

454. Smith (n344) 25.

455. Blackaby, Partasides & Redfern (n2) 42. *See also* SundraRajoo, 'Institutional and Ad hoc Arbitrations: Advantages and Disadvantages' (2010) *The Law Review* 547, 551.

456. Moses (n83) 10. *See also* UNCITRAL Model Law, Art. 1(1) ('Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree').

457. *See* Lord Kilbrandon, *Arenson v Casson Beckman Rutley* [1977] AC 405,432. *See also* AIOkekeifere, 'The Parties' Rights against a Dilatory or Unskilled Arbitrator' (1998) 15(2) *J Intl Arb* 142.

for granting immunity could be via an ad hoc agreement in which a separate contract is concluded between the parties and arbitrators. Nevertheless, there is seldom a special separate contract between the parties and an arbitrator.⁴⁵⁸ Through this method of a separate agreement between arbitants and arbitrators, a waiver of liability may be granted to the arbitrator because the contract concluded defines the rights and duties under which both can benefit from and be committed to its provisions. However, this waiver of liability should be within the limits provided by the applicable law.⁴⁵⁹ The reason is that an immunity provision that may go beyond the limits of applicable law would create varied results across different jurisdictions.⁴⁶⁰ This variation of results emanates from the distinguished liability standards among different jurisdictions.⁴⁶¹ However, a German court has ruled that the absence of an explicit liability waiver does not mean that arbitrators are not immune because it seems to be an implied term of the arbitrators' agreement of appointment.⁴⁶² The second method arises through parties' assignment of the arbitrator's appointment to a body of arbitral institution rules that would govern their appointment.⁴⁶³ Thus, the liability-waiver provision rules of the arbitral institution are incorporated in the contract between the parties and the arbitrator.⁴⁶⁴ Several arbitral institutions provide their services as appointing authority on remuneration-based grounds,

458. Lew, Mistelis & Kroll, *Comparative International* (n3) 290.

459. See UNCITRAL Model Law, Art. 16 ('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').

460. David D Caron & Lee M Caplan (eds), *The UNCITRAL Arbitration Rules: A Commentary* (1st edn, OUP 2013) 328.

461. *Ibid.*

462. See 15 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 12. See also Hausmaninger (n366) 20.

463. Blackaby, Partasides & Redfern (n2) 241. See also Gaillard & Savage, *International Commercial Arbitration* (n1) 451.

464. Lew, Mistelis & Kroll, *Comparative International* (n3) 291.

including the LCIA,⁴⁶⁵ ICC,⁴⁶⁶ NAI,⁴⁶⁷ CRCICA,⁴⁶⁸ and DIAC.⁴⁶⁹ Accordingly, the limit and extent of liability is decided by virtue of rules governing the appointment. The arbitrants' will in this method is indirectly manifested by virtue of the applicable arbitration rules chosen by them in the arbitral agreement.⁴⁷⁰ The third method is when an appointing authority or national court takes charge of appointment. In the first situation, an appointing authority makes the direct selection of the arbitrators due to the absence of the party agreement regarding the appointment of the arbitrators.⁴⁷¹ In the absence of such an express means for the appointment in the arbitral agreement, the arbitration law of the seat of arbitration may refer parties to an appointing authority.⁴⁷² In ad hoc arbitrations conducted under the UNICITRAL Rules, the Model Law refers to the Secretary-General of the Permanent Court of Arbitration (PCA) to act as an appointing authority if parties did not agree on the method of appointing.⁴⁷³ However, in

465. Appointment Fee (payable in advance with the request for the LCIA to act as Appointing Authority: non-refundable): GBP 1,250. LCIA, 'Schedule of Costs' <www.lcia.org/Dispute_Resolution_Services/schedule-of-costs-appointing-only.aspx> accessed 20 Feb 2021.

466. See ICC Rules 2018 as appointing authority in UNCITRAL or other arbitration proceedings.

467. See NAI Rules for the Appointment of an Arbitral Tribunal in Ad hoc Arbitrations, Art. 2(1) ('The Rules shall apply if the parties only have agreed the appointment of an arbitrator, or arbitrators, or of an arbitral tribunal by the NAI, ...').

468. See Introduction of CRCICA Rules 2011 ('The present CRCICA Arbitration Rules are based upon the UNCITRAL Arbitration Rules, as revised in 2010, with minor modifications emanating mainly from the Centre's role as an arbitral institution and an appointing authority').

469. DIAC Rules 2007, Appendix – Cost of Arbitration, Art. 6(1) ('An application to the Centre to appoint arbitrators or to decide on a challenge on appointing an arbitrator in arbitration procedures which are not governed by these Rules shall be subject to paying non-refundable fees. The procedure for appointing an arbitrator or for deciding on a challenge of an arbitrator shall be governed by the DIAC Rules').

470. Crenguta Leaua, 'The Applicability of Party Autonomy in the Appointment of Arbitrators' in Alexander J Bělohávek and others(eds), *Czech and Central European Yearbook of Arbitration Party Autonomy Versus Autonomy of Arbitrators* (Juris Net LLC 2012) 138.

471. Richard M Mosk & Tom Ginsburg, 'Becoming an International Arbitrator: Qualification, Disclosures, Conduct and Removal' in Daniel MKolkey and others (eds), *Practitioner's Handbook on International Arbitration and Mediation*, (3rd edn, Juris Net LLC 2012) 372.

472. Onyema (n46) 86.

473. See UNICITRAL Arbitration Rules, Art. 6(1) ('Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority').

the latter situation, if there is no appointing authority provided by virtue of the relevant rules or the parties agreement, or if an appointing authority fails or refuses to act, parties can apply to the national court to appoint arbitrators.⁴⁷⁴ In the two previous situations, the law governing the immunity of arbitrators as a term of the arbitrators' contract in the absence of an express choice of applicable law by parties would be the law of the arbitration seat for the reason of having the closest connection to the arbitral proceedings.⁴⁷⁵ It is pointed out that:

*'[t]he terms of the arbitration agreement will revert to one where no appointing authority was nominated, so the disputing parties will fall back on the default arbitrator appointment method provisions under the lex loci arbitri or of the law or the rules applicable to the arbitration procedure.'*⁴⁷⁶

Consequently, the immunity as one of the arbitrators' contract provisions that is subsequent to the appointment process would be governed by the same rules applicable to the arbitral procedures.

[2] Immunity of Arbitrators in Institutional Arbitration

Unlike ad hoc arbitration, institutional arbitration is an administrated arbitral process that takes place through an institution.⁴⁷⁷ Arbitral institutions constitute and tailor their own rules under which the arbitral process runs where parties have agreed to arbitrate under its auspices.⁴⁷⁸ The rules of these institutions comprise a part of the contract concluded between the parties and the arbitrators.⁴⁷⁹ Consequently, these rules are applicable with regard to the appointment of the arbitrators and their rights and duties. A contractual nature emanates from these rules, as the institutional rules to some extent bind arbitants, arbitrators, the institution, and others who agreed to arbitrate pursuant to the institutional rules.⁴⁸⁰ As a result, if arbitrators were nominated under institutional rules, these rules would clearly influence the relationships with regard to the rights and duties between them and whoever is involved.⁴⁸¹ If these rules entail a

474. Mosk & Ginsburg (n471) 374.

475. Lionnet (n91) 169–170.

476. Onyema (n46) 87.

477. Rubino-Sammartano (n44) 14.

478. Born (n25) 190.

479. Lew, Mistelis & Kroll, *Comparative International* (n3) 291.

480. Patrik Schöldström, *The Arbitrator's Mandate: A Comparative Study of Relationships in Commercial Arbitration under the Laws of England, Germany, Sweden and Switzerland* (1998) 404.

481. *Ibid.*, 405.

waiver of liability for arbitrators who are exercising their functions within an arbitral institution, arbitrators would enjoy that waiver, as well as the contractual immunity deriving from these rules.⁴⁸² Most arbitral institutions providing arbitration services in both common and civil law countries follow the same approach of granting complete immunity to arbitrators appointed under their rules. Arbitrators are shielded under the LCIA,⁴⁸³ ICC,⁴⁸⁴ NAI,⁴⁸⁵ CRCICA,⁴⁸⁶ and DIAC⁴⁸⁷ rules from bearing liability. The institutions establish a waiver and exclusion of liability for arbitrators beforehand for any acts or omissions in connection with the arbitration. However, the LCIA and ICC immunity provisions provided by their rules, entitled ‘limiting of liability’, do not provide immunity for either deliberate misconduct or gross negligence; thus, both institutions limit the liability to the extent not prohibited by the applicable law. Unlike the previous two institutions, the CRCICA immunity provision, entitled ‘Exclusion of Liability’, excludes only wilful misconduct, with no reference to an exception to the extent that such exclusion of liability is prohibited by the applicable law. Thus, pursuant to this provision, CRCICA arbitrators’ liability could be waived in the case of gross negligence. The DIAC’s current waiver of liability incorporated in its rules is left with no exceptions to wilful acts or acts prohibited by the UAE applicable law. However, subject to the UAE Civil code, it is not possible to relieve a debtor from liability for fraud or gross negligence.⁴⁸⁸ It could be derived from the arbitrators functioning under the rules of DIAC that they are cloaked with absolute immunity. In light of the above, the right of arbitrator immunity and the extent of immunity under institutional arbitrations is governed by virtue of the institution rules.

[C] Comparative Analysis of Arbitrators’ Immunity Pursuant to Laws in This Study

This section explores arbitral immunity, its origin, and its extent within different national arbitration laws, rules, and international court decisions. Arbitral immunity under arbitration legislation subject to this dissertation and its case law is discussed below.

482. *See Landmark Ventures Inc v. Cohen et al*, 13 Civ 9044 (JGK) 2014. The court dismissed an action against an arbitrator in an arbitration conducted under the auspices of the ICC and one of the basic reasons in which the court based its dismissal is the waiver of liability provided by Art. 40 of the ICC rules which the party has agreed to it.

483. *See* LCIA Rules 2020, Art. 31(1).

484. *See* ICC Rules 2021, Art. 41.

485. *See* NAI Rules 2015, Art. 60.

486. *See* CRCICA Rules 2011, Art. 16.

487. *See* DIAC Rules 2007, Art. 40.

488. *See* UAE Civil Code (Federal Law No. 5) 1985, Art. 383(2).

[1] *Arbitrators' Immunity under English Law*

Pursuant to English law, arbitrators are not dissimilar from judges and are therefore granted the same level of immunity from potential legal actions against any wrongful acts or omission arising from being incompetent, indiscreet or negligent.⁴⁸⁹ Essentially, arbitrators are recognised by the English courts in a quasi-judicial position; thus, enjoying immunity from errors in law and fact. Arbitral immunity was upheld by English Courts in the early twentieth century in *Lendon v. Keen*.⁴⁹⁰ In that case, a county court judge set aside an award on the grounds of technical misconduct made by the arbitrator and ordered the arbitrator to pay the applicant's costs.⁴⁹¹ The court held:

*'[T]he learned county court judge could not or ought not in his discretion to have awarded costs against the arbitrator, we are of opinion that it is necessary to bear in mind the position of an arbitrator in law. He is in a quasi-judicial position, and as long as he is not guilty of any collusive conduct with one of the parties no action can be brought against him for mere incompetence to apply either the facts or the law applicable to the case before him.'*⁴⁹²

This case was later followed by two leading decisions by the House of Lords in *Sutcliffe v. Thackrah*⁴⁹³ and *Arenson v. Casson Beckman Rutley and Co.*⁴⁹⁴ In *Sutcliffe v. Thackrah*, the plaintiff appointed the defendants as architects and quantity surveyors in relation to a building contract in the Royal Institute of British Architects standard form. The defendants issued interim certificates to the builders certifying that the work was done to the required standard and that the specified amounts were due to them. Due to the negligence of the defendants, the amount certified was too high and the builders' work was defective. When the plaintiff could not recover the sums due from the builders (who had become insolvent), the plaintiff sued the defendants (architects) for damages incurred by their negligence and breach of duty in supervising the building of the house and in certifying for work that the builders had not done or had done improperly. The defendants were held liable in the first instance. However, the Court of Appeal reversed this judgment on the grounds of the defendant's entitlement to immunity as quasi-arbitrators. Consequently, the case reached the House of Lords and the

489. Lew, 'Introduction' (n350) 21.

490. [1916] 1 KB 994.

491. *Ibid.*, 994.

492. *Ibid.*, 999 (Sankey J).

493. [1974] AC 727.

494. [1977] AC 405.

judges refused to cloak defendants with judicial immunity, reasoning that a valuer shall carry out a judicial function to be considered a quasi-arbitrator. The House of Lords illustrated the necessity of this immunity. Lord Reid stated:

*I think that the immunity of arbitrators from liability for negligence must be based on the belief – probably well founded – that without such immunity arbitrators would be harassed by actions which would have very little chance of success. And it may also have been thought that an arbitrator might be influenced by the thought that he was more likely to be sued if his decision went one way than if it went the other way, or that in some way the immunity put him in a more independent position to reach the decision which he thought right.*⁴⁹⁵

Lord Salmon affirmed the same approach when he stated:

*‘It is well settled that judges, barristers, solicitors, jurors and witnesses enjoy an absolute immunity from any form of civil action being brought against them in respect of anything they say or do in court during the course of a trial. This is not because the law regards any of these with special tenderness but because the law recognises that, on balance of convenience, public policy demands that they shall all have such an immunity. It is of great public importance that they shall all perform their respective functions free from fear that disgruntled and possibly impecunious persons who have lost their cause or been convicted may subsequently harass them with litigation.’*⁴⁹⁶

Lord Salmon finally pointed out that arbitrators are akin to judges: ‘Since arbitrators are in much the same position as judges, in that they carry out more or less the same functions, the law has for generations recognised that public policy requires that they too shall be accorded the immunity to which I have referred’.⁴⁹⁷ Arbitrator immunity was also addressed in *Arenson v. Casson Beckman Rutley and Co.*⁴⁹⁸ In the said case, the plaintiff agreed in writing to sell shares back to his uncle (the controlling shareholder and chairman of a private company) upon termination at their fair value. The ‘fair value’ term was defined in the agreement as the value of the shares, as determined by the auditors of the company acting as experts and not as

495. *Sutcliffe v. Thackrah*[1974] AC 727, 736.

496. *Ibid.*, 757.

497. *Ibid.*, 758.

498. [1977] AC 405.

arbitrators, which shall be final and binding to all parties. A few months after the plaintiff transferred the shares back to his uncle, the shares in the company were offered to the public at a price that valued the same shares six times more than the earlier evaluation. The plaintiff brought an action against the auditors on the basis of negligence. The House of Lords asserted arbitral immunity while performing a judicial function. In this case, it was held that *'accountants shall not be cloaked with immunity for acting as valuers; ergo, they are not immune from negligence actions. The accountants' commitment to act fairly while doing the valuations does not grant them arbitrator capacity'*.⁴⁹⁹ Lord Simon of Glaisdale pointed out, *'It is, in my view, wrong in principle to freewheel by analogy from the arbitrator's immunity, as if it were not exceptional, and as if the primary rule were not one of responsibility'*.⁵⁰⁰ In rejecting the granting of immunity to the accountants in this case, Lord Simon noted, *'A person adversely affected by a negligent valuation (possibly for rich reward) is left without a remedy. He is, in fact, in a worse position than under a formal arbitration, where he has the right to demand a case to be stated for the opinion of the court'*.⁵⁰¹ The majority of Lords in this case ruled that the arbitrator had immunity. Lord Kilbrandon raised doubts about the reasons for granting arbitrators such immunity, distinguishing them from valuers in the instance case.⁵⁰²

499. *Ibid.*, 413 ('It does not necessarily follow that because a person is obliged to act fairly and honestly, he is for that reason alone in a judicial or arbitral situation and entitled to the immunity from suit conceded to such persons. The duty to act fairly and honestly which arises in the case of a judge, arbitrator or expert is the result of the position in which he is placed by the parties who seek his decision').

500. *Ibid.*, 419.

501. *Ibid.*, 421.

502. *Ibid.*, 430–431 ('The question which puzzled me as the argument developed was, what was the essential difference between the typical valuer (the auditor in the present case) and an arbitrator at common law or under the Arbitration Acts? It is conceded that an arbitrator is immune from suit, aside from fraud, but why? I find it impossible to put weight on such considerations as that in the case of an arbitrator (a) there is a dispute between parties, (b) he hears evidence, (c) he hears submissions from the parties, and that therefore he, unlike the valuer is acting in a judicial capacity. As regards (a), I cannot see any juridical distinction between a dispute which has actually arisen and a situation where persons have opposed interests, if in either case an impartial person has had to be called in to make a decision which the interested parties will accept. As regards (b) and (c), these are certainly not necessary activities of an arbiter. Once the nature and the limits of the submission to him have been defined, it could well be that he would go down at his own convenience to a warehouse, inspect a sample of merchandise displayed to him by the foreman and return his opinion on its quality or value. I have come to be of opinion that it is a necessary conclusion to be drawn from *Sutcliffe v. Thackrah*[1974] AC 727 and from the instant decision that an arbitrator at common law or under the Acts is indeed a person selected by the parties for his expertise, whether technical or intellectual, that he pledges skill in the exercise thereof and that if he is negligent in that exercise he will be liable in damages. If this conclusion were to be established

Lord Fraser shared the same doubts in seeing arbitrators as a class shielded from legal actions if mutual valuers are not.⁵⁰³ These doubts about the immunity of arbitrators took place at a time when no statutory regulation governed the arbitral immunity. Section 29(1) of the 1996 Arbitration Act removed any uncertainty. Section 29(1) prescribes, ‘*An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith*’.⁵⁰⁴ The 1996 Arbitration Act was followed with a Report on the Arbitration Bill, which was completed by the Departmental Advisory Committee (DAC) on Arbitration Law. The report shed light on how arbitral immunity is essential to the arbitral process as a whole. Thus, the issue of the arbitrators’ entitlement to immunity was supported by the committee members, who stated:

‘The reasons for providing immunity are the same as those that apply to Judges in our Courts. Arbitration and litigation share this in common, that both provide a means of dispute resolution which depends upon a binding decision by an impartial third party. It is generally considered that an immunity is necessary to enable that third party properly to perform an impartial decision-making function. Furthermore, we feel strongly that unless a degree of immunity is afforded, the finality of the arbitral process could well be undermined. The prospect of a losing party attempting to re-arbitrate the issues on the basis that a competent arbitrator would have decided them in favour of that party is one that we would view with dismay. The Bill provides in our view

by law, I do not think the consequences would be dramatic or even noticeable. It would become a generally accepted term of a reference to arbitration – because the referee would insist on it – that he be given by the parties’ immunity from suit for negligence at the instance of either of them’).

503. *Ibid.*, 442 (‘The main difference between them is that the arbitrator, like the judge, has to decide a dispute that has already arisen, and he usually has rival contentions before him, while the mutual valuer is called in before a dispute has arisen, in order to avoid it. He may be employed by parties who have little or no idea of the value of the property to be valued and who rely entirely on his skill and judgment as an expert. In that respect he differs from some arbitrators. But many arbitrators are chosen for their expert knowledge of the subject of the arbitration, and many others are chosen from the legal profession for their expert knowledge of the law or perhaps because they are credited with an expertise in holding the balance fairly between parties. It does not seem possible, therefore, to distinguish between mutual valuers and arbitrators on the ground that the former are experts and the latter are not. I share the difficulty of my noble and learned friend, Lord Kilbrandon, in seeing why arbitrators as a class should have immunity from suit if mutual valuers do not’).

504. *See* English Arbitration Act 1996, s. 29(1).

*adequate safeguards to deal with cases where the arbitral process has gone wrong.*⁵⁰⁵

The DAC report affirmed the mandatory nature of Section 29, stating that applying it as mandatory is a matter of public policy.⁵⁰⁶ Consequently, parties to arbitration cannot derogate it by virtue of their agreement.⁵⁰⁷ Due to scepticism regarding immunity for arbitrators, the DAC report in Section 29 attempted to exclude from immunity acts conducted in bad faith.⁵⁰⁸ The committee members illustrated the use of the bad faith term on the grounds that the *‘English law is well acquainted with this expression and although we considered other terms, we concluded that there were unlikely to be any difficulties in practice in using this test’*.⁵⁰⁹ The *Melton Medes Ltd v. Securities and Investment Board*⁵¹⁰ case was cited in the report as a reference for the bad faith criteria. The Court set the criteria of bad faith in the context of the tort of misfeasance in public office, stating, *‘[l]ack of good faith connotes 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’*.⁵¹¹ However, the analogy between the arbitrators and public officials is inappropriate because arbitrators do not hold public office. Thus, in their capacity as professionals, applying these criteria would be inadequate.⁵¹² The reason is that the tort of malfeasance in public office, as Clark explained in *Three Rivers District Council and Others v. Bank of England (No. 3)*,⁵¹³ is *‘clear public policy ... [intent] to achieve an honest and fair public administration, by encouraging public officers not to abuse their position and to compensate those who suffer if they do’*.⁵¹⁴ Therefore, it is meant to be a way of protecting individuals against damages incurred by public officers who abuse their public powers.⁵¹⁵ However, arbitrators and arbitants are individuals who are linked based

505. *Report on the Arbitration Bill* (n213) para. 132.

506. *Ibid.*, 133.

507. Robert Merkin & Louis Flannery, *Arbitration Act 1996* (5th edn, Informa Law from Routledge 2014) 100.

508. *Report on the Arbitration Bill* (n213) para. 134.

509. *Ibid.*, 134.

510. [1995] Ch 137.

511. *Ibid.*, 147.

512. Hebaishi (n8) 54.

513. [2003] 2 AC 1.

514. *Ibid.*, 143.

515. Jim Percival, ‘The Tort of Misfeasance in Public Office: Where Now after “Three Rivers”?’ (2001) 4(1) JLGL 5–6.

on a purely contractual basis, with no involvement to any public powers.⁵¹⁶ The burden of bad-faith proof shall be borne by disgruntled parties alleging such a bad-faith act or omission was committed by the arbitrator.⁵¹⁷ The allegation of bad faith is a difficult, complicated process which requires prima facie evidence justifying the claim.⁵¹⁸ Subject to Section 29, excluding bad-faith actions, arbitrators would enjoy absolute immunity from liability in tort and contract or other agreement of parties, terms of arbitrators appointment, or law governing the arbitrator relation to parties.⁵¹⁹ Immunity granted to arbitrators under Section 29 cannot be extended to cover liability arising from arbitrator resignation.⁵²⁰ Finally, the DAC committee highlighted a conclusion reached by its members that the court should be given power to remove or modify the immunity as it sees fit when it removes an arbitrator.⁵²¹ The adoption of such conclusion in the DAC report attempted to establish that arbitral immunity stems from the state and not by virtue of the parties agreement.⁵²² In sum, in light of the English Arbitration Act and the decisions rendered by the House of Lords, arbitrators are cloaked with immunity akin to that of judges.

[2] Arbitrators' Immunity under French Law

Pursuant to French law, the state is responsible for compensations arising from damages caused by the malfunction of the courts. Nevertheless, this responsibility is limited only to

516. Susan D Franck, 'The Role of International Arbitrators' (2006) 12 ILSA J Intl & Comp L 505, 509.

517. Merkin & Flannery (n507) 100.

518. *Melton Medes Ltd v. Securities and Investment Board* [1995] Ch 137, 147. Lightman J stated:

This hurdle in the way of a claimant is substantial, for the allegation of bad faith is, like that of fraud, one to be made only where there exists prima facie evidence justifying the allegation. If there is no reasonable evidence or grounds to support the allegation, a statement of claim making such an allegation will be struck out as an abuse of process.

519. VV Veeder, 'National Report for England (1997)' in Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International 1984, updated December 2015, Suppl No. 87) 34.

520. See English Arbitration Act 1996, Art. 29(3). See also Karyl Nairn & Maximilian Szymanski 'National Report for England and Wales (2019 through 2020)' in Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International 2020, updated April 2020, Suppl No. 110)45.

521. *Report on the Arbitration Bill* (n213) para. 136.

522. Yu Hong-Lin & Laurence Shore, 'Independence, Impartiality, and Immunity of Arbitrators – US and English Perspectives' (2003) 52(4) ICLQ 935, 956.

cases of gross negligence and denial of justice.⁵²³ Unlike common law countries, judges under French law are not cloaked with absolute immunity because their personal liability could be triggered in case of *prise à partie*.⁵²⁴ The concept of *prise à partie* includes the cases in which an arbitrator could be personally held liable. The cases include fraud, gross negligence (*faute lourde*), and denial of justice (*déni de justice*).⁵²⁵ Consequently, the situations in which a judge's immunity can be waived are very limited.⁵²⁶ Despite the fact that immunity extension to arbitrators is done on the basis of functional comparability between judges and arbitrators, French law has not adopted the same approach.⁵²⁷ Therefore, arbitrators are not subject to the same rules due to the private nature of arbitration as a judicial system.⁵²⁸ It is noted that, '*the arbitrator does not become a judge, even for a short time, but remains an ordinary citizen*', as a result of which '*an arbitrator can incur liability under a regime more straightforward than that applicable to a judge*'.⁵²⁹ Subject to French law, arbitrators are not conferred the status of a judge due to the fact that arbitrators do not render awards representing the French state or in the name of French people.⁵³⁰ This approach was confirmed by virtue of the French Arbitration Act, which does not address the issue of the arbitrator immunity.⁵³¹ However, French case law shows that arbitrators are cloaked with some sort of immunity. In *Elf Neftegaz v. M. B.*, the *Tribunal de Grande Instance de Paris* acknowledged that arbitrators are not provided general immunity except that judges and their decisions may be challenged only by means of recourses

523. See French Code of Judicial Organisation 2015 Art. L141-1 ('L'Etat est tenu de réparer le dommage causé par le fonctionnement défectueux du service de la justice. Sauf dispositions particulières, cette responsabilité n'est engagée que par une faute lourde ou par un déni de justice').

524. See *ibid.*, Art. L141-2 ('La responsabilité des juges, à raison de leur faute personnelle, est régie: -s'agissant des magistrats du corps judiciaire, par le statut de la magistrature; -s'agissant des autres juges, par des lois spéciales ou, à défaut, par la prise à partie').

525. See *ibid.*, Art. L141-3 ('Les juges peuvent être pris à partie dans les cas suivants: 1° S'il y a dol, fraude, concussion ou faute lourde, commis soit dans le cours de l'instruction, soit lors des jugements. 2° S'il y a déni de justice. Il y a déni de justice lorsque les juges refusent de répondre aux requêtes ou négligent de juger les affaires en état et en tour d'être jugées').

526. Matthew Rasmussen, 'Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France' (2002) 26(6) *Fordham Intl L J* 1824, 1860.

527. Franck (n6) 19.

528. Gaillard & Savage, *International Commercial Arbitration* (n1) 590.

529. Henri Motulsky, 'Ecrits' (1974) 2 *Etudes et Notes sur L'Arbitrage* 5, 15 (quoted in Gaillard & Savage, *International Commercial Arbitration* (n1) 590).

530. Jean L Delvolve, 'Immunity of Arbitrators under French Law' in Julian DM Lew (ed.), *The Immunity of Arbitrators*, (Lloyd's of London Press 1990) 33.

531. See French Code of Civil Procedure 2011(Decree 2011-48).

set by law, particularly if there is a major breach that leads to sanctions.⁵³² In performing their judicial function, arbitrators are shielded with immunity.⁵³³ The Paris Tribunal of First Instance held that, *'because of this judicial function, an arbitrator could not be sued as a substitute for an action against award'*.⁵³⁴ Accordingly, arbitrators' immunity is not to be waived for any misconduct done in the adjudication of the allegation or the substance of the arbitral award.⁵³⁵ Therefore, disgruntled parties seeking to sue an arbitrator for an error shall start by exhausting the permitted possible remedies, such as vacating the award prior to lodging a claim against the arbitrator.⁵³⁶ The result of vacating would be either by dismissal or allowance – the former would raise the question of the arbitrator potential liability, but the latter will block the question of arbitrator liability.⁵³⁷

[3] Arbitrators' Immunity under Dutch Law

Pursuant to Dutch law, the state reserves liability for damages resulting from unlawful decisions made by judges in the course of rendering their decisions.⁵³⁸ Some time ago, the

532. *Elf Neftegaz v. MB*, TGI Paris, 29 juin 2011 <https://maciuvsq.files.wordpress.com/2011/07/ordonnance_du_jme_du_29_juin_2011-1.pdf> accessed 17October 2019. The court held:

Il n'est, du reste, pas contesté que, si elles sont des intervenants majeurs de la sphère juridique mondiale, les personnes choisies en qualité d'arbitre ne bénéficient pas pour autant d'une immunité générale, en dehors de celle reconnue à tout juge relativement à sa décision qui ne peut être critiquée que par les voies de recours légalement prévues, notamment dans l'hypothèse où il est soutenu qu'elles auraient commis de graves manquements susceptibles d'entraîner une sanction civile.

533. Delvolve (n530) 35.

534. *See Floragne v. Brissart et Corgie*, TGI Reims, 27 September 1978, 482/77 (unpublished) (quoted in Rasmussen (n526) 1861–62).

535. *Bompard v. Consorts Carcassonne*, TGI Paris, 13 juin 1990 (1996) 3 RevArb 476 (*'Il n'entre donc pas, par principe, dans les attributions du Tribunal de grande instance, saisi d'une action en justice de droit commun, d'apprécier le bien ou le mal jugé de la décision des arbitres, dont la responsabilité civile ne peut être engagée, pour une telle critique'*). See also Philippe Fouchard, 'Le Statut de l'arbitre dans la Jurisprudence Française' (1996) 3 RevArb 325, 359.

536. Delvolve (n530) 33.

537. *Ibid.*

538. Rob Widdershoven, 'The Principle of Loyal Cooperation Law Making by the European Court of Justice and the Dutch Courts' in FAM Stroink (ed.), *Judicial Lawmaking and Administrative Law* (Intersentianv 2005) 23. See also Meijer & Paulsson (n141) 31.

Netherlands Supreme Court established the grounds of this principle; however, it provided an exception where state liability could apply along these lines:

‘Only if, in the preparation of a judicial decision, a negligence of fundamental principles of law have been neglected that a fair and impartial treatment of the case cannot be deemed to have taken place and if no means of recourse are or have been available against said decision, the State might be held liable in damage for damages resulting from the violation of right ensure by Art. 6 of the European Convention for the protection of human rights and fundamental freedoms.’⁵³⁹

Pursuant to Dutch law, the principle applied by the Supreme Courts in relation to the immunity of judges is similarly applied to arbitrators.⁵⁴⁰ The case law in the Netherlands offered two judgments, rendered by the Supreme Court, dealing with the immunity of arbitrators in (1916 and 1927).⁵⁴¹ In the first case, ruled in 1916, an arbitration clause was incorporated in a sales contract referring future disputes to an arbitral tribunal composed of five members. The dispute arose and the tribunal took over the dispute on 5 December 1912. Subsequently, the arbitral tribunal resigned on 21 January 1913 without resolving the dispute. As a result, an allegation was raised by the claimant on the premise of Article 628 of the Dutch Code of Civil Procedure.⁵⁴² The Dutch Supreme Court dismissed the case on the basis that the claimant still had a recovery because he could have proceeded with the appointment of replacement arbitrators or, if that was impossible, he could have opted to place the merits of the case in front of the court.⁵⁴³ In the second case, decided in 1927, the arbitrators were sued by the claimant, alleging that the arbitrators issued an award ‘although they knew better’; the claimant constituted the grounds of his allegation on the arbitrators’ obligations ‘which resulted from the acceptance of their mandate’. In course of the appeal the claimant settled the dispute against the respondent with the mutual release of all claims. The Court of Appeal

539. HR, 3 December 1971, ECLI:NL:HR:1971:AB6788, NJ 1972/137,408, cited in Albert Jan van den Berg, ‘Immunity of Arbitrators under Dutch Law’ in Julian DM Lew (ed.), *The Immunity of Arbitrators* (Lloyd’s of London Press 1990) 60.

540. Ynzonides, Leijten & van der Bend (n141) 268.

541. Vanden Berg, ‘Immunity of Arbitrators’ (n539) 60.

542. Dutch Former Civil Code of Procedure 1838, Art. 628 (‘An arbitrator who failed to carry out his mandate or did not do so in a timely manner could be liable in damages’).

543. HR, 29 December 1916, NJ 1917/118, cited in van den Berg, ‘Immunity of Arbitrators’ (n539) 59.

rejected the claim on the premise that the approval of settlement by the claimant turned the proof of the claimed damages to be unfeasible.⁵⁴⁴ The issue of the arbitrator immunity in Netherlands is merely extended on functional comparability basis to judges or to be granted through the court decision,⁵⁴⁵ yet, the new Dutch Arbitration Act, which was amended in 2015, did not contain any provisions dealing with arbitral immunity.⁵⁴⁶ However, the court decisions have continued to decide over the matter of immunity and the cases where an arbitrator may lose this immunity.⁵⁴⁷

[4] Arbitrator Immunity under Egyptian Law

The Egyptian legislator has regulated the/any action aiming to pursue judges' potential civil liability through 'indictment of judges' under the Egyptian Civil Procedural Act.⁵⁴⁸ The cause to pursue such actions is limited to a particular case, should a judge commit, in the course of his/her adjudicatory office, fraud, treachery, or gross professional error.⁵⁴⁹ It is noteworthy that suing a judge for one of the aforementioned actions does not take place through ordinary procedures of filing a claim before courts; it should be pursued through specific procedures designated particularly for pursuing this action under the Egyptian Civil Procedure Act.⁵⁵⁰ *A contrario*, arbitrators in their capacity as private adjudicators do not enjoy similar immunity to that granted to judges and are not subject to the same procedures since they are not counted as part of the state judiciary.⁵⁵¹ In this context, the Egyptian Arbitration Act No. 27 for the year 1994 contains no provisions regarding arbitrator immunity.⁵⁵² In a similar vein, Egyptian courts have not yet addressed the issue of arbitrator immunity to fill the gap of the arbitration act. This does preclude the need to acknowledge a certain limit of immunity to arbitrators, on the premise of the judicial function undertaken by the latter, in a manner that equally maintains the justice and transparency of the arbitral process.⁵⁵³ One could assume that the Egyptian legislator did not address the issue of immunity in order to leave the application, as regards the existence of immunity to arbitrators and its extent, to the court discretion on case-by-case basis.

544. HR, 28 January 1927, NJ 1927/662, cited in van den Berg, 'Immunity of Arbitrators' (n539) 59.

545. *See* HR, 4 December 2009, ECLI:NL:HR:2009:BJ7834, NJ 2011/31.

546. *See* Dutch Civil Procedure Code 2015.

547. *See* HR 30 September 2016, ECLI:NL:HR:2016:2215, JOR 2016/324.

548. *See* Articles (495–500) Egyptian Civil Procedural Act no. 13(1968).

549. *Ibid* Article 494.

550. *Ibid* Article 495.

551. Waly (n143) 367.

552. *See* Egyptian Arbitration Act (No. 27) 1994.

553. Waly (n 143)368.

Moreover, it could be argued that the lack of explicit reference to arbitrators' statutory immunity in the Egyptian Arbitration Act 1994 is a reflection of the existence of implied impunity to arbitrators based on functional comparability to judges.

[5] *Arbitrator Immunity under UAE Law*

The legal system of the UAE is, in principle, built upon the civil law system.⁵⁵⁴ The UAE has created a civil code influenced by the Egyptian Civil Code and the French Civil law.⁵⁵⁵ The UAE Arbitration Act 2018 does not contain any articles cloaking arbitrators with immunity or referring to a specific extent of immunity to be enjoyed by the arbitrators.⁵⁵⁶ Consequently, if there is no explicit agreement by the parties to provide immunity to the arbitrators against civil liability or agreement to run the arbitration under DIAC rules or any other arbitral institutions rules waiving the liability of the arbitrators, matters related to arbitrators' immunity will be decided by the courts of the seat.⁵⁵⁷ The existence of the aforementioned agreement by parties does not result in absolute immunity being given to arbitrators because the courts will still preserve their authority to decide the occurrence of a breach of duty by arbitrators that results in liability in exceptional situations.⁵⁵⁸

§3.02 Immunity Forms General Concepts

Immunity as a general concept is defined as '*a special exemption from all or some portion of the legal process and its judgment*'.⁵⁵⁹ Immunity is either absolute or qualified. Absolute immunity '*provides a person with complete protection from civil law suits and an individual with it can defeat a law suit at the onset*'.⁵⁶⁰ By contrast, qualified immunity '*provides*

554. Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (1st edn, John Wiley & Sons 2016) 6.

555. 'United Arab Emirates Investment and Business Guide: Volume 1 Strategic and Practical Information' (IBP Inc.Lulu.com 2016) 47.

556. See the UAE Arbitration Act (Federal Law No. 6) 2018. See also Sami Tannous; Samantha Lord Hill & Sarah-Jane Fick 'National Report for United Arab Emirates (2020)' in Jan Paulsson and Lise Bosman (ed.), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International 2020, updated July 2020 Suppl No.111) 56.

557. Lagarde (n145) 803.

558. See also Dubai Court of Cassation, Case No. 212/2014 Gordon Blanke, 'The Liability of Arbitrators in the UAE: Quod novi sub sole?' Kluwer Arbitration Blog <arbitrationblog.kluwerarbitration.com/2016/03/28/the-liability-of-arbitrators-in-the-uae-quod-novi-sub-sole/> accessed 17October 2019.

559. Richard K Burke, 'Privileges and Immunities in American Law' (1985–1986) 31 *SDL Rev* 1, 3.

560. Rudolph Alexander Jr, 'Social Workers and Immunity from Civil Lawsuits' (1995) 40(5) *Social Work* 648.

protection to an individual on the condition that the individual adheres to his or her duties and does not violate clearly established rights that reasonable people should know'.⁵⁶¹ The concept of absolute immunity has been upheld by the common law courts, particularly in medieval England.⁵⁶² Absolute immunity provides protection from lawsuits against common law tort acts, even if the tortious act is of unscrupulous, malicious, or bad faith nature.⁵⁶³ Similarly, qualified immunity is developed under common law, namely by the US Supreme Court.⁵⁶⁴ In this respect, governmental officials are shielded from liability for infringements on civil rights, except for violations to a "clearly established law."⁵⁶⁵ Thus, qualified immunity provides protection against common law tort acts with exception to corruption, maliciousness and bad faith.⁵⁶⁶ Absolute and qualified immunity is discussed below with regard to arbitrators. The approach of common law countries is to adopt absolute immunity as discussed in the sections below.

[A] Absolute Immunity of Arbitrators

Arbitrators' absolute immunity covers all the acts and omissions that an arbitrator might commit while and after he/she performs his/her judicial function. Essentially, the general rule is that arbitrators enjoy absolute immunity similar to judges as long as they are performing functions similar to them. The tendency of granting absolute immunity to arbitrators is not a general concept but an/the approach of common law countries.⁵⁶⁷ Common law systems adopt the doctrine of absolute immunity to arbitrators, construed on the basis that the said systems maintain the jurisdictional theory that proposes functional comparability between the arbitrators and judges' roles.⁵⁶⁸ Subject to this form of immunity, arbitrators' decisions are free

561. *Ibid.*

562. T Leigh Anenson, 'Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers' (2004) 31(4) *Pepp L Rev* 915, 918.

563. William L Bostleman, 'Aspen Exploration Corp. v Sheffield: "The Status of Official Immunity in Alaska"' (1990) 7 *Alaska L Rev* 187, 188.

564. Scott Michelman, *Civil Rights Enforcement* (Wolters Kluwer Law & Business, 2020) 262.

565. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 819 (1982).

566. *Ibid.*, 188.

567. Houtte & McAsey (n248) 140 (noting that immunity of arbitrators in United States is absolute and similarly in United Kingdom with the exception to bad faith).

568. Jenny Brown, 'Malik v Ruttenberg: "The Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion?"' (2009) 1 *J DispResol* 226, 229 (noting 'the jurisdictional theory stands for the proposition that the roles judges and arbitrators play are analogous. This theory has shaped attitudes toward arbitration in the United States and finds support in other jurisdictions that subscribe to absolute arbitral immunity').

from civil liability, even when failing to disclose conflicts of interest; thus, their actions cannot be challenged in contract or tort before courts or arbitral institutions.⁵⁶⁹ The scope of this immunity could be extended to cover gross negligence and bad faith actions.⁵⁷⁰ The US South Carolina Federal Court went beyond the limit in *Corbin v. Washington Fire & Marine Ins. Co.*, expanding absolute immunity to the whole arbitral process, including the arbitral proceedings.⁵⁷¹ The court justified:

*[i]f arbitration is to be safely utilized as an effective means of resolving controversy, the absolute immunity attaching to its proceedings must extend beyond the arbitrators themselves; it must extend to all “indispensable” proceedings ... To urge that the immunity should be limited to the arbitrators would be similar to arguing that judicial immunity should go no farther than the judge.*⁵⁷²

Furthermore, the US Supreme Court upheld in support of the absolute immunity doctrine that absolute immunity is required for those performing quasi-judicial actions because it preserves the independence necessary for decision makers to act ‘without harassment or intimidation’.⁵⁷³ The trend of arbitrators’ absolute immunity was embraced in the statutes of California⁵⁷⁴ and Florida,⁵⁷⁵ providing arbitrators absolute immunity against any act or omission. Similarly, in England and prior to the enactment of the 1996 English Arbitration Act, English case law conferred arbitrators with unlimited absolute immunity.⁵⁷⁶ After the enactment of the 1996 English Arbitration Act, it still appears that the absolute immunity

569. Ramon Mullerat, “‘The Liability of Arbitrators’: A Survey of Current Practice’ (2006) Intl Bar Assoc, Commission on Arb 1, 10–11. www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/arbitrators_impartiality_and_independence/mullerat_ilability_arbs.pdf accessed 17 October 2019.

570. Franck (n6) 13. *See also Hoosac Tunnel Dock and Elevator Co v. O’Brien*, 137 Mass 424, 426 (1884) (the court waived the liability of arbitrator who acted fraudulently and clothed him with liability similar to that of judges).

571. 278 F Supp 393, 398 (1968).

572. *Ibid.*

573. *Butz v. Economou*, 438 US 478, 512 (1978).

574. Cal CivProc Code §1297.119 (‘An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract’).

575. Fla Stat § 684.35 (1998) (‘Immunity for arbitrators. No person may sue in the courts of this state or assert a cause of action under the law of this state against any arbitrator when such suit or action arises from the performance of such arbitrator’s duties’).

576. *Sutcliffe v. Thackrah* [1974] AC 727. *See also Arenson v. Casson Beckman Rutley and Co* (1977) AC 405.

principle was followed, as the act provides absolute immunity for the arbitrators' acts and omissions. However, it excludes acts and omissions done in bad faith.⁵⁷⁷ As explained earlier, bad faith is a hurdle for the one trying to prove it. Consequently, holding the arbitrator liable pursuant to Section 29 is a real barrier considering the required means of proof; thus, there is a limitation of arbitrator immunity with respect to bad faith. The rationale behind this broad protection is founded on public policy reasons by maintaining arbitral independence, facilitating the recruitment of arbitrators, and guaranteeing the finality of the decision.⁵⁷⁸ However, there are two exceptions to absolute arbitral immunity. First, it does not prevent claims for declaratory, injunctive or other equitable relief against arbitrators.⁵⁷⁹ The reason is that the judicial immunity which is extended to arbitrators on a comparable basis is 'immunity from damages and not an immunity from declaratory or injunctive relief'.⁵⁸⁰ Arbitral immunity covers only the arbitral acts and acts fall within the arbitrator jurisdiction.⁵⁸¹ Consequently, claims against arbitrators for injunctive and equitable relief cannot be barred by arbitral immunity.⁵⁸² In *Kemner v. District Council of Painting and Allied Trades No. 36*,⁵⁸³ Kemner (a painting contractor) was a party to a collective bargaining agreement with a labour union. By virtue of this agreement, two arbitration committees were designated for the purpose of settling disputes arising under the agreement.⁵⁸⁴ The labour union invoked the arbitral proceeding, alleging that Kemner breached the agreement by failing to pay trust fund contributions.⁵⁸⁵ Kemner was present in the arbitration hearings before the arbitration committees, objecting to the committees' proceedings on the grounds that the labour union improperly included matters not covered by the agreement.⁵⁸⁶ The committees concluded that Kemner was liable for the unpaid trust funds.⁵⁸⁷ Kemner filed suit for the annulment of the

577. See English Arbitration Act 1996, s. 29.

578. Nolan & Abrams, 'Arbitral Immunity' (n368) 237.

579. Moberly (n369) 325. See also *Pullam v. Allen*, 466 US 522, 541–542 (1984) ('judicial immunity is not a bar to prospective injunctive relief against a judicial officer').

580. *Browning v. Vernon*, 874 F Supp 1112, 1124 (D Idaho 1994). See also *Schmidt v. Degen*, 376 F Supp 664, 670 (ED Pa 1974) ('As a general rule, the immunity doctrine will not preclude the granting of equitable relief against judicial or quasi-judicial officials').

581. Mattera (n378) 794.

582. See *Trans World Airlines Inc v. Sinicropi*, 1994 WL 132233 1, 2 (SDNY 14 April 1994) ('as a matter of law, arbitral or judicial immunity does not shield an individual from claims for equitable relief').

583. 768 F2d 1115 (9th Cir 1985).

584. *Ibid.*, 1117.

585. *Ibid.*

586. *Ibid.*

587. *Ibid.*, 1118.

committees' award on the grounds that the committees exceeded the scope of their authority.⁵⁸⁸ The labour union and committees were named as defendants, who moved to dismiss the complaint arguing *inter alia* that arbitrators were immune from suit; the district court granted the motion to dismiss without explanation or discussion.⁵⁸⁹ The Ninth Circuit reversed the judgment, holding that the district court erred to the extent that it had dismissed the case on the grounds that the committees were immune from suit.⁵⁹⁰ Kemner filed the suit merely for being granted relief from the committees' acts in excess of their jurisdiction and not for any damages incurred by the committees or individual. The court rejected the extension of immunity to equitable relief claims and held, '[s]ection 301 confers jurisdiction on the courts to determine such issues, and the policy concerns underlying the doctrines of judicial and arbitral immunity from damages actions do not obtain'.⁵⁹¹ The reason for not extending immunity to a declaratory or injunctive relief is that the relief does not lead to a threat of personal liability of the defendant.⁵⁹² The relief 'only affects an individual in the conduct of his or her official duties. Thus, an extension of the judicial immunity to the field of prospective relief would not serve the purpose for which the defence was created'.⁵⁹³ Therefore, the injunction was explained as:

*'not threaten[ing] a judge in the same way as an action for damages which the judge may have to pay out of personal funds. Injunctive relief, then, does not pose the same kind of risk to the judiciary as other forms of liability, and therefore, it is not necessary to use judicial immunity to interdict it.'*⁵⁹⁴

588. *Ibid.*

589. *Ibid.*, 1117.

590. *Ibid.*, 1120.

591. *Ibid.*, 1119–1120 (citation omitted).

592. *Church of Lukumi Babalu Aye Inc v. City of Hialeah*, 688 F Supp 1522, 1525 (SD Florida 1988) ('The immunity doctrines are premised on the concern that the threat of personal liability will thwart the officials' ability to carry out their duties with the decisiveness and good faith judgment required. The immunity doctrines, therefore, do not protect officials when they are not threatened with personal liability, such as when a complaint seeks injunctive relief.') (Footnotes omitted).

593. *Adams v. Supreme Court of Pennsylvania*, 502 F Supp 1282, 1286 (MD Pa 1980).

594. Jeffrey M Shaman, 'Judicial Immunity from Civil and Criminal Liability' (1990) 27 San Diego L Rev 1, 14.

It may be noted that all these cases related to post award requests for injunctive relief. Similarly, absolute immunity is not extended to the non-performing arbitrator,⁵⁹⁵ ‘one guilty of nonfeasance rather than misfeasance’.⁵⁹⁶ The non-performance of the arbitrators is their failure to render a timely award.⁵⁹⁷

[B] Qualified Immunity of Arbitrators

With respect to qualified immunity for arbitrators, civil law countries adopt this concept *per se* whereby, it cloaks arbitrators with limited liability.⁵⁹⁸ This is due to the criteria followed by civil law countries towards the arbitrator’s office; considering the latter, a party to an agreement whereby he/she is under an obligation to perform a specific duty in return for a certain remuneration.⁵⁹⁹ Qualified immunity is granted to arbitrators on limited grounds in connection with which arbitrators’ potential liability may raise for acts and omissions that could be avoided on a reasonable level in the course of the arbitral proceedings until the award is rendered.⁶⁰⁰ Qualified immunity shields arbitrators against any act or omission except those committed in bad faith, such as gross negligence and fraud.⁶⁰¹ Qualified immunity of arbitrators has received the support of some authors due to the balance it provides to allow private allegations against the traditional public policy that shields arbitrators from ‘vexatious litigants’.⁶⁰² Claims seeking to waive arbitrators’ immunity require proof that the arbitrator’s alleged wrongdoing was conducted with subjective/deliberate bad faith or malice.⁶⁰³ Accordingly, in order to gain summary judgment, ‘the plaintiff would have to present either evidence of subjective bad faith; or evidence of objective bad faith that is sufficient to support an inference of subjective bad faith’.⁶⁰⁴ Qualified immunity compared to absolute immunity is considered a kind of compromise where the arbitrators will continue being

595. *Mattera* (n378) 795. *Graphic Arts International Union Local 508 v. Standard Register Co*, 103 LRRM (BNA) 2212 (SD Ohio 1978).

596. Nolan & Abrams, ‘Arbitral Immunity’ (n368) 251.

597. *Baar v. Tigerman*, 140 Cal App 3d 979 (Cal Ct App 1983).

598. Pedro J. Martinez-Fraga, *The American Influence on International Commercial Arbitration: Doctrinal Developments and Discovery Methods* (Cambridge University Press, 2020) 43.

599. *Ibid.*, 41.

600. Mullerat (n569) 13–14.

601. Brown (n568) 231.

602. Emmanuela Truli, “‘Liability v Quasi-Judicial Immunity of the Arbitrator’: The Case Against Absolute Arbitral Immunity’ (2006) 17 *Am Rev Intl Arb* 383, 401. *See also* Rutledge (n411) 172.

603. Sponseller (n408) 444.

604. *Ibid.*

cloaked with immunity, and, at the same time, the injured parties are able to seek compensation as a possible remedy after exhausting all alternative remedies,⁶⁰⁵ due to the fact that said remedies, such as the annulment of the award or the arbitrators non-receipt of remuneration, would not be sufficient to compensate for the damages incurred by the arbitrator's misconduct.⁶⁰⁶ The consensual nature of arbitration, which is a distinctive key between it and court proceedings, supports the concept of qualified immunity.⁶⁰⁷ It is noteworthy that qualified immunity has been criticised for negating the exchange of performance under the arbitrators' contract, since it is not contractually realistic to provide arbitrators with unwarranted juridical elements. Whereby an exemption from penalty to the latter is provided by virtue of the contract, yielding their contractual relation with parties to be of an odd nature.⁶⁰⁸ The foregoing critique is based on the grounds that arbitrators function as service providers under the binding effect of the arbitrators' contract. To that end there is no room to consider the existence of immunity.⁶⁰⁹ Despite the above critique, several national arbitration acts – particularly those of civil law countries – recognise qualified immunity for arbitrators.⁶¹⁰ This is due to the fact that civil law countries adopt a wider approach in relation to the grounds of arbitrators' accountability that arises from their breach to their function to be bestowed upon general rules of contract law. Thus, liability of arbitrators may be triggered on grounds of simple negligence.⁶¹¹ In this respect, one could argue that it is not in the interest of the arbitral process to solely construe the arbitrator's role on the concept of contractual rubric and overlook/disregard the adjudicatory role performed by an arbitrator in the context thereto. This is due to the subverted idea that will/could be stimulated within the mind-set of the arbitration users to perceive arbitrators as commercial actors in the marketplace of services, thus stripping the judicial character that should be preserved for them, to ensure the integrity of the process and promote the credibility of the entire process.

§3.03 Civil Liability General Concepts

605. Franck (n6) 26.

606. Truli (n602) 403.

607. *Ibid.*

608. Alessi, 'Enforcing Arbitrator's Obligations' (n350) 782.

609. *Ibid*

610. *See also* Swiss Rules 2012, Art. 45(1). *See* Spanish Arbitration Act (Law No. 60) 2013, Art. 21(1). *See also* Italian Code of Civil Procedure 2006, Arts 813*ter* (2).

611. Agata Cevc, 'Civil Liability of Arbitrators' in Dunja Duić and others (eds), "EU and Comparative Law Issues and Challenges Series" ECLIC 3(2019) 413, 414.

It is paramount to address the general concepts of civil liability at large under this section in order to determine the grounds of its applicability on arbitrators whilst performing their functions. Civil liability in general is ‘a form of vulnerability because a judgment of liability means that a defendant is exposed in a way that he was not before’.⁶¹² Civil liability could be classified in two forms: contract and tort.⁶¹³ Contractual liability stems from the breach of a contractual obligation.⁶¹⁴ The breach of contract is defined as a ‘*breach committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, or performs defectively or incapacitates himself from performing*’.⁶¹⁵ In contrast, tort liability is defined as a ‘*civil “wrong” other than a breach of contract that causes injury, for which a victim can get a judicial remedy, usually in the form of damages*’.⁶¹⁶ Civil actions could be brought against the party incurring damages in contract or tort, and compensations are to be the remedies provided to the plaintiff.⁶¹⁷ In contractual breach, the injured party is to be compensated by providing the said party what he/she expected under the contract.⁶¹⁸ In contrast, the remedy in tort has a broader scope as ‘monetary damages for pain and suffering, economic damages[,] and punitive damages’ are awarded to the injured party.⁶¹⁹ In the first form, the liability is voluntarily imposed by contract, in the latter the liability is imposed involuntarily, by law.⁶²⁰ The liability for contractual breach is based on similar principles in both common and civil law systems. However, differences arise with regard to damages

612. Nathan B Oman, ‘A Theory of Civil Liability’ (2014) 21 *Geo Mason L Rev* 381, 395.

613. Andy Gibson & Douglas Fraser, *Business Law 2016* (9th edn, Pearson Australia 2016) 118.

614. Justo P Torres Jr, *Obligations and Contracts* (2003 edn, Rex Bookstore Inc 2003) 302.

615. Ewan Mckendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 322. *See also* HG Beale, WD Bishop & MP Furmston, *Contract: Cases and Materials* (5th edn, OUP 2008) 13 (‘Contractual liability is based on the defendant’s failure to perform an undertaking or promise’). *See also* The City Law School London, England (David Emmet ed.), *Remedies* (16th edn, OUP 2012) 12 (‘A claim for damages arises in circumstances where there has been a failure to perform without lawful excuse, one or more of the obligations (whether conditions, warranties or innominate or intermediate terms) contained in a contract’).

616. F Patrick Hubbard, ‘The Nature and Impact of the “Tort Reform” Movement’ (2006) 35 *Hofstra L Rev* 437, 439. *See also* Brenda Mothersole & Ann Ridley, *A-Level Law in Action* (2nd edn, Cengage Learning EMEA 1999) 277 (noting that ‘tortious liability arises from the breach of a duty primarily fixed by law; such duty is towards persons generally, and its breach is redressable by an action for unliquidated damages’).

617. Gibson & Fraser (n613) 118.

618. J Stanley Edwards, *Tort Law* (6th edn, Cengage Learning 2015) 7.

619. *Ibid.*

620. Richard Mann & Barry Roberts, *Essentials of Business Law and the Legal Environment* (12th edn, Cengage Learning 2015) 122.

between both systems.⁶²¹ These basic differences are represented by the requirement of fault for the recovery of damages in civil law, while fault as a requirement does not exist in common law.⁶²² Lodging a claim on the grounds of liability in contract under English law requires the existence of a valid contract with offer, consent, consideration, and intention to create legal relation.⁶²³ Thus, when a contract fulfils the aforementioned elements, liability to perform does exist. In *Hadley v. Baxendale*, the court held:

*‘Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.’*⁶²⁴

Contractual liability subject to English law is strict; as a result, a party who enters into a contract cannot be legally excused from performing the obligation set by the said contract.⁶²⁵ Thus, each party to a contract ‘assumes a legally recognised and enforceable obligation to perform it’.⁶²⁶ The reason is ‘that the purpose of a contract is performance’.⁶²⁷ Thus, a defence against this strict liability on the basis of denying the party’s fault in constituting the breach is

621. Pejovic (n11) 825.

622. *Ibid.*

623. Richard Schaffer, Filiberto Agusti & Lucien Dhooge, *International Business Law and Its Environment* (9th edn, Cengage Learning 2014) 93 (‘Under the common law, a valid contract is an agreement that contains all of the essential elements and meets all the requirements of a binding contract including: 1. It is an agreement between parties entered into by mutual assent and resulting from their words or from conduct that indicates their intention to be bound. 2. It must be supported by consideration (the bargained for exchange of a legal benefit or incurring of a legal detriment). 3. The parties must have legal capacity (they may not be minors, legally incompetent, or under the influence of drugs or alcohol). 4. The contract must not be for illegal purposes or contrary to the public policy’).

624. (1854) 9 Ex 341. *See also* *Alley v. Deschamps* (1806) 13 Vesey Junior 225, 228. Lord Erskine noted, ‘the party had a legal right to the performance of the contract’. *Ibid.*

625. *See* *Raineri v. Miles* [1981] AC 1050, 1086. Lord Edmund Davies stated, ‘It is axiomatic that, in relation to claims for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligation, and certainly no defence to plead that he had done his best’. *Ibid.*

626. *In Re T & N Ltd* [2006] 1 WLR 1728, 1743.

627. *George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd* [1983] QB 284, 304.

not acceptable.⁶²⁸ In contrast, tort liability requires, pursuant to English law, the breach of a duty of care.⁶²⁹ Duty of care was defined in *Donoghue v. Stevenson*.⁶³⁰ Lord Atkin pointed out that:

‘in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of “culpa,” is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, “Who is my neighbour?” receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.’⁶³¹

The breach of this duty should result in damages to be incurred on the claimant.⁶³² The said breach assumes the existence of a relationship between the party who owes the duty and the injured party at the time preceding the infliction of the damage.⁶³³ Damage is defined as ‘*an abstract concept of being worse off, physically or economically*’.⁶³⁴ The cause of action⁶³⁵ in

628. Pejovic (n11) 825.

629. See Cees Van Dam, *European Tort Law* (2nd edn, OUP Oxford 2013) 101 (quoting the classical definition of a tort by Winfield: ‘Tortious Liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages’).

630. [1932] AC 562.

631. *Ibid.*, 580.

632. Donal Nolan, ‘Damages in the English Law of Negligence’ (2013) 4(3) J European Tort L 259, 263.

633. Van Dam (n629) 103.

634. *Rothwell v. Chemical & Insulating Co Ltd* [2008] 1 AC 281, 289.

635. See Geoffrey Samuel, *Law of Obligations & Legal Remedies* (2nd edn, Routledge 2013) 22 (‘Cause of action has been defined as a factual situation giving rise to remedy’).

English tort law requires proof by the claimant on the balance of probability that the defendant's misconduct was a cause for the damage with respect to the alleged compensations.⁶³⁶ The claimant should demonstrate that *but for* the defendant's misconduct the damage would not have existed⁶³⁷ or that the defendant's misconduct *materially contributed* to the damage.⁶³⁸ Pursuant to English law, causes of action in tort may concur with a cause of action in contract.⁶³⁹ Causation under English tort law is based on factual cause as well as legal cause.⁶⁴⁰ However, civil law imposes a general obligation to act sensibly when the relation is not governed by contract.⁶⁴¹ It has to be borne in mind that tort liability under English law (other than death or personal injury) may be excluded by a contractual clause provided to satisfy the requirement of reasonableness.⁶⁴² In contrast to English law, contractual and tort liability under French law is a part of the law of obligations in the French Civil Code.⁶⁴³

636. *Sienkiewicz v. Greif (UK) Ltd* [2011] 2 AC 229, 242. Lord Phillips noted, 'It is a basic principle of the law of tort that the claimant will only have a cause of action if he can prove, on balance of probabilities, that the defendant's tortious conduct caused the damage in respect of which compensation is claimed'. *Ibid.*

637. *Ibid.*, 242.

638. *Wakelin (Pauper) v. The London and South Western Railway Co* (1886) 12 App Cas 41, 47. Lord Wastons noted, '[T]he plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury'. *Ibid.* See also Sandy Steel, 'Causation in English Tort Law: Still Wrong after All These Years' (2012) 31(2) UQLJ 243.

639. See *Jarvis v. Moy, Davies, Smith, Vandervell and Co* [1936] 1 KB 399, 405. Greer L J noted:

[W]here the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract.

Ibid.

640. Paul J Zwier, 'Cause in Fact in Tort Law A Philosophical and Historical Examination' (1982) 31(4) De Paul L Rev 769, 774.

641. William Tetley, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) 60 La L Rev 678, 713.

642. See Unfair Contract Terms Act 1977, s. 2(1, 2) ('1. A person cannot by reference to any contract term liability or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence. 2. In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness').

643. See French Civil Code, Arts 1147, 1382–86.

Contractual liability pursuant to French law is based on two different types of obligations: *obligation de moyens* and *obligation de résultat*.⁶⁴⁴ The first imposes a duty on the promisor to take the necessary care to achieve a promised result.⁶⁴⁵ *Obligation de moyens* is similar to the common law concept of the duty of best efforts.⁶⁴⁶ The obligee is required to provide all due care while performing the duty assigned by the contract.⁶⁴⁷ The duty of reasonable care is known in French as *diligence du bon père de famille*.⁶⁴⁸ Thus, the promisor has an obligation to perform with the conduct of a ‘good family man’ without guaranteeing a promised result.⁶⁴⁹ Subject to the *obligation de moyens*, the injured party claiming damages must prove the fault of the obligee.⁶⁵⁰ In contrast, in *obligation de résultat*, the promisor has an obligation to achieve a certain result.⁶⁵¹ The party claiming damages under the *obligation de résultat* need only prove that the defendant failed to perform his/her obligation under the contract.⁶⁵² The

644. Marcel Fontaine & Filip de Ly, *Drafting International Contracts* (BRILL2009) 219 (noting that the distinction is constantly used by lawyers in the French tradition). *See also* A Farnsworth, ‘On Trying to Keep One’s Promises: The Duty of Best Efforts in Contract Law’ (1984) 46 U Pitt L Rev 1, 3 (‘French law, for example, distinguishes two kinds of contractual obligations. Under one, the promisor’s obligation is to achieve a promised result. Under the other, the promisor’s obligation is merely to use appropriate means to achieve a promised result’).

645. Dario Alessi, ‘The Distinction Between *Obligations de Résultat* and *Obligations de Moyens* and the Enforceability of Promises’ (2005) 5 Euro Rev Priv L 657, 660.

646. Farnsworth (n644) 4 (‘Our common law counterpart of the French obligation as to appropriate means is, of course, the duty of best efforts’).

647. *See* French Civil Code, Art. 1137 (‘An obligation to watch over the preservation of a thing, whether the agreement has as its object the profit of one party, or it has as its object their common profit, compels the one who is responsible to give it all the care of a prudent administrator. That obligation is more or less extensive as regards certain contracts, whose effects, in this respect, are explained under the Titles which relate to them’).

648. Marcel Planiol & Georges Ripert, *Traité Pratique de Droit Civil Français* (2nd edn, Librairie générale de droit et de jurisprudence 1952) 503 (‘[U]n homme d’une diligence moyenne, que doit être jugée la conduite d’un débiteur quelconque. Cette référence au type abstrait, proposée par les jurisconsultes romains, a été conservée parce que la plupart des hommes sont capables d’y atteindre, et qu’en exigeant d’eux qu’ils s’y conforment on les incite à le faire’).

649. Fontaine & de Ly (n644) 219.

650. Alessi, ‘The Distinction’ (n645) 663.

651. *See* French Civil Code, Art. 1147 (‘A debtor shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non-performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part’). *See also* James Gordley, ‘Contract and Delict: Toward a Unified Law of Obligations’ (1996–1997) 1 Edinburgh L Rev 345, 354.

652. Pejovic (n11) 826.

fault of the defendant is not required to be proved by the claimant. Accordingly, the liability of the obligee is strict liability under the *obligation de résultat*.⁶⁵³

The defendant's obligation, as well as his/her liability for not fulfilling his/her obligation under the contract, would be released upon the existence of a force majeure.⁶⁵⁴ Force majeure is defined as '*a valid excuse for the non-performance of otherwise enforceable contractual obligations*'.⁶⁵⁵ On the other hand, tort liability under French law is based on fault. The French Civil Code in Article 1382 prescribed the general rule of tort: '*Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it*'.⁶⁵⁶ By virtue of Article 1382, it could be clearly realised that the elements that constitute tort liability are damage incurred on claimant, misconduct (fault) done by defendant, and, finally, a casual direct link must be established between the conduct of the defendant and the damage suffered by the claimant. Subsequently, Article 1383 provides: '*Everyone is liable for the damage he causes not only by his intentional act but also by his negligent conduct or by his imprudence*'.⁶⁵⁷ Therefore, it was illustrated that: '*The French judge is satisfied if he finds an objective failure to respect the rules of conduct that a normal person, in the circumstances in which the defendant found himself or herself at the time of causing the harm in question, would have observed*'.⁶⁵⁸ Nevertheless, it shall be borne in mind that liability would be strict when it flows from intentional misconduct. Unlike common law, there is no possibility for tort liability and contractual liability to occur simultaneously under French law.⁶⁵⁹ The *Cour de Cassation* held that Article 1382 of the Civil Code cannot be used as a remedy to a loss linked to a contractual relation.⁶⁶⁰ Tort liability under French law cannot be excluded by a contractual

653. Alessi, 'The Distinction' (n645) 663.

654. See French Civil Code, Art. 1148 ('There is no occasion for any damages where a debtor was prevented from transferring or from doing that to which he was bound, or did what was forbidden to him, by reason of force majeure or of a fortuitous event').

655. Alphonse M Squillante & Felice M Congalton, 'Force Majeure' (1975) 80 Com L J 4.

656. See French Civil Code, Art. 1382.

657. See *ibid.*, Art. 1383.

658. Genevieve Viney, 'Tort Liability' in George ABermann and others (eds), *Introduction to French Law* (Kluwer Law International 2008) 248.

659. John Cartwright, Stefan Vogenauer & Simon Whittaker, *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription ('the Avant-projet Catala')* (Bloomsbury Publishing 2009) 817.

660. Cass 2eme Civ, 9 juin 1993 (Bull Civ II, n° 204) 110 ('*Vu l'article 1382 du Code civil; Attendu que ce texte est inapplicable à la réparation d'un dommage se rattachant à l'exécution d'un engagement contractuel*'). See also Cass 1ere Civ, 6 janv 198 (BullCiv I, n° 17) ('*Les articles 1382 et suivants du Code civil ne peuvent pas être invoqués à l'appui d'une demande tendant à la réparation du préjudice résultant pour l'une des parties au contrat d'une faute commise par l'autre partie dans l'exécution d'une obligation contractuelle*').

term because it is deemed as a matter related to public order; thus, it is not possible to derogate it.⁶⁶¹ Similarly, Egyptian law adopted the same criteria in constituting tort liability on basis of fault. This was clearly set by virtue of Article 163 of the Egyptian Civil Code, which provides: *'Each fault which causes injury to another imposes an obligation to make reparation upon the person who committed'*.⁶⁶² Following the French tort law elements, Egyptian tort law requires the commitment of (a) fault, (b) damage suffered by another person, and (c) a causal link between the fault and damage.⁶⁶³ Tort liability under Egyptian law could be excluded by contractual clause, except in cases of fraud and gross negligence.⁶⁶⁴ The reference for contractual liability in Egyptian law is addressed by stressing that *'the contract makes the law of the parties. It can be revoked or altered only by mutual consent of the parties or for reasons provided for by law'*.⁶⁶⁵ Subject to the said contract damages incurred by one of the parties due to the other's non-performance or delay in performance, the party at fault shall be condemned to pay damages as a remedy unless it is a force majeure.⁶⁶⁶ The Egyptian Court of Cassation confirmed this approach by ruling that the non-performance or delay in performance by the debtor to his contractual obligation is an error constituting liability.⁶⁶⁷ Akin to the French law system, tort and contractual liability under Egyptian law are not in accord.⁶⁶⁸ The civil liability

661. Cass 2eme Civ, 17 fév1955 (Publié au bulletin, n° 55-02810) ('sont nulles les clauses d'exonération ou d'atténuation de responsabilité en matière délictuelle, les articles 1382 et 1383 du Code Civil étant d'ordre public et leur application ne pouvant être paralysée d'avance par une convention').

662. See Egyptian Civil Code, Art. 163.

663. Decision No. 6051 of 13 June 1993 of the Court of Cassation (Egypt) judicial year 62, <http://www.cc.gov.eg/Courts/Cassation_Court/All/Cassation_Court_All_Cases.aspx> accessed 17 October 2019.

664. See Egyptian Civil Code, Art. 217 ('The debtor may by agreement be discharged from all liability for his failure to perform the contractual obligation, with the exception of liability arising from his fraud or gross negligence').

665. See Egyptian Civil Code, Art. 147.

666. See *ibid.*, Art. 215 ('When specific performance by the debtor is impossible, he will be condemned to pay damages for non-performance of his obligation, unless he establishes that the impossibility of performance arose from a cause beyond his control. The same principle will apply if the debtor is late in the performance of his obligation').

667. Decision No. 0592 of 26 January 1989 of the Court of Cassation (Egypt) judicial year 55, <private.tashreaat.com/private/nakd_taan_rules.aspx?base_serial=2731&taan_serial=0592&taan_year=55&vindex=1&nakdtann=0&nakddate=&PageIndex=1> accessed 17 October 2019.

668. Decision No. 311 of 30 March 1967 of the Court of Cassation (Egypt) judicial year 32, <private.tashreaat.com/private/nakd_taan_rules.aspx?base_serial=49567&taan_serial=311&taan_year=32&vindex=1&nakdtann=0&nakddate=&PageIndex=1> accessed 17 October 2019.

in the context of Dutch law resembles French law, where its grounds are found within the law of obligations of the Dutch Civil Code, which regulates contractual and delictual liability.⁶⁶⁹ By virtue of Dutch law, contractual liability is based on the failure to fulfil an agreed obligation, where the consequence of this failure obliges the debtor to compensate the losses suffered by the creditor; however, said compensations for damage are not applicable if the failure is not caused by the debtor.⁶⁷⁰ As a result, the debtor bears the burden of proof when a contractual breach obligation is triggered by the creditor.⁶⁷¹ Therefore, pursuant to Dutch law, the failure to perform an obligation is a fundamental requirement for constituting liability in contract leading to the possible remedies to the creditor.⁶⁷² Apart from the failure attributable to the debtor, force majeure where the debtor's failure of fulfilment was out of his/her control does not result in his accountability towards the creditor.⁶⁷³ Late performance attributable to the obligor is also a cause for contractual liability.⁶⁷⁴ On the other hand, tort liability under Dutch law is constituted on the performance of a person to an unlawful act that causes damage to another person, where the wrongdoer is responsible in this case to repair said damage.⁶⁷⁵ This tortious act can take the form of an act or omission derogating a legal commitment set by law, or the performance of improper conduct that results in damage to others.⁶⁷⁶ By virtue of Dutch law, the wrongdoer is liable in tort provided that the tortious act

669. *See* Dutch Civil Code 1992, book 6.

670. *See* Dutch Civil Code, Art. 6:74(1) ('Every imperfection in the compliance with an obligation is a non-performance of the debtor and makes him liable for the damage which the creditor suffers as a result, unless the non-performance is not attributable to the debtor').

671. Madeleine Van Rossum, 'Concurrency of Contractual Liability and Tort Liability in a European Perspective' (1995) 4 *Euro Rev Priv L* 539, 556.

672. Martijn van Kogelenberg, 'Failure in Performance of an Obligation in Dutch Law: A Confusing Mix of National, Transnational and Linguistic Interpretation' (2016) 30(17) *BW-krantJaarboek* 90.

673. *See* *ibid.*, Art. 6:75 ('A non-performance cannot be attributed to the debtor if he is not to blame for it nor accountable for it by virtue of law, a juridical act or generally accepted principles (common opinion)').

674. *See* *ibid.*, Art. 6:85 ('Damage resulting from a delay in the performance of the obligation only has to be compensated by the debtor over the time that he is in default'). *See also* Arthur SeverijnHartkamp, 'Law of Obligations' in Jeroen MJ Chorus and others, *Introduction to Dutch Law* (Kluwer Law International 2006) 142.

675. *See* *ibid.*, Art. 6:162(1) ('A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof').

676. *Ibid.*, Art. 6:162(2) ('As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour').

emanates from his/her fault or a source he/she is deemed responsible for by the provisions of law.⁶⁷⁷ In a nutshell, it could be concluded that the presence of four elements – unlawfulness, fault, damage and causal link – are necessary to constitute tort liability in the Netherlands.⁶⁷⁸ The party that suffered damage by the fault of the wrongdoer is responsible for the proof of said damages.⁶⁷⁹ The grounds for tort liability have been established and asserted by the Dutch Supreme Court (HogeRaad) in *Lindenbaum v. Cohen*, where the Supreme Court held: ‘Unlawful act is to be understood an act or omission which violates another person’s right, or conflicts with the defendant’s statutory duty, or is contrary either to good morals or to the care which is due in society with regards to another person’s or property’.⁶⁸⁰ In the Netherlands, the concurrence of tort and contractual liability exists.⁶⁸¹ However, the Dutch legal doctrine is bifurcated regarding said concurrence, where most of the doctrine is of the belief that the rules of contractual breach set forth in Articles 6:74 et. seq. are regarded as a *lex specialis* rather than the general rule dealing with tort actions set forth in Articles 6:162 et. seq. This results, in principle, in the superiority of contractual provisions in case of contractual breach and excludes the general rules dealing with tort rules in accordance to the adage *lex specialis derogate lex generalis*.⁶⁸² In contrast, part of the Dutch doctrine promotes the belief that a possibility for concurrence between tort and contract may ensue in specific situations provided that the derogation of a duty that results in a tortious act shall arise independently of the breach of the contractual terms.⁶⁸³ In alignment with the Egyptian Civil Law, the UAE has provided grounds of contract and tort liability in the Civil Code No. 5 for 1985. By virtue of said law, a person shall be liable in contract upon his/her failure or the delay in fulfilling his/her obligation stemming from a contract.⁶⁸⁴ The Dubai Court of Cassation has elucidated the grounds of the contractual liability by stating:

677. *Ibid.*, Art. 6:162(3) (‘A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles’).

678. *See also* Hartkamp (n674) 146.

679. Van Rossum (n671) 556.

680. HR, 31 January 1919, ECLI:NL:HR:1919:AG1776, NJ 1919/161 cited in Elizabeth Van Schilfgaarde, ‘Negligence under the Netherlands Civil Code-an Economic Analysis’ (1991) 21(2) *Cal W Intl L J* 265, 273.

681. Matthias Haentjens & Edgar du Perron, ‘Liability for Damage Caused by Others under Dutch Law’ in JaapSpier and others (eds), *Unification of Tort Law: Liability for Damage Caused by Others* (Kluwer Law International 2003) 178.

682. Van Rossum (n671) 555.

683. *Ibid.*, 555.

684. *See* UAE Civil Code (No. 5) 1985, Art. 386: (‘When the specific performance by the debtor is impossible, he will be condemned to pay damages for non-performance of his

*‘There is contractual liability in the presence of three factors; a fault which occurs when one of the contracting parties does not carry out the obligations stipulated in the contract or if there is delay in performing the same; a proven damage; and the presence of causation between the fault and the damages.’*⁶⁸⁵

As a result, the party claiming damages under contract should establish the respondent’s breach to the contract and the damages incurred as a result of said breach.⁶⁸⁶ The absence of the breach, damage, and causation results in the absence of liability.⁶⁸⁷ Pursuant to the UAE Civil Code, the non-performance of a party to his/her obligations under a bilateral contract resulting from the force majeure does not lead to liability in contract.⁶⁸⁸ In contrast, liability in tort, according to the UAE Civil Code, requires the commitment of damage by its doer on a third party.⁶⁸⁹ The basis of said liability can arise from damage alone in the case of a direct act, or damage arising from trespass in the event of an indirect act.⁶⁹⁰ By virtue of Article 284 of the law, a causal link is required for tort liability to give rise.⁶⁹¹ This approach was construed by the Dubai Court of Cassation.⁶⁹² It should be noted that the UAE imposed the concept of

obligation, unless he establishes that the impossibility of performance arose from a cause beyond his control. The same principle applies, if the debtor is late in the performance of his obligation’).

685. Dubai Court of Cassation, Case No. 37/2004, 18/09/2004.

686. *Ibid.* (‘[T]he creditor shall be responsible to prove the debtor’s fault by the non-fulfilment of the obligations resulting from the contract and establishment of the incurred damage’).

687. *Ibid.* (‘When one of these elements elapses the liability elapses as well’).

688. *See* UAE Civil Code (No. 5) 1985, Art. 273(1) (‘In bilateral contracts, if a force majeure arises that makes the performance of the obligation impossible, the corresponding obligation shall, be extinguished and the contract ipso facto rescinded’). *See also* Dubai Court of Cassation, Case No. 37/2004, 18/09/2004 (‘The causal relation is supposed to exist as the debtor cannot deny his obligation unless he proves that the damage is due to a force majeure, a sudden act, a creditor’s fault or a third party’s act’).

689. *See ibid.*, Art. 282 (‘Any damage done to another obliges the actor to compensate it’).

690. *Ibid.*, Art. 283 (‘(1) If damage is direct, compensation is obligatory and unconditional’ (2) ‘If damage is indirect, it is stipulated that trespass or wilfulness must be present and that the act results in damage’).

691. *See ibid.*, Art. 284 (‘[I]f the harm is both direct and indirect, the rules relating to direct harm shall apply’).

692. The Dubai Court of Cassation held, in the Case No. 188/2009:

It is well settled in the precedents of this court that under articles 282 and 283 of the Civil Code, any act resulting in harm to another, whether done directly or indirectly, will render the doer thereof liable to make good. The harm may be direct, if there is a link between the harmful

non-concurrence of both contractual and tort liability affected in this regard by French and Egyptian law.⁶⁹³ The aforementioned views present the general concepts of civil liability in both civil and common law, with special focus on the basis of said liability – the cause of action within the different jurisdictions subject to this dissertation. The scope of application of the civil liability principles within each of the aforementioned systems pertaining to arbitrators is discussed below.

3. Civil Liability of Arbitrators

Arbitrators may be held liable and unable to benefit from immunity when they fail to fulfil the obligations that stems from their mandate. Due to the contractual nature of the arbitration, the

act and the occurrence of the harm, such as the link between the instrument of destruction and the property destroyed. The same applies to any act done by the wrongdoer without any other act intervening, from which the damage results. The damage will be by indirect causation if there intervenes between it and the doer thereof another act out of which the damage arises, or something that is a cause of the damage, but if the original act did not of itself cause the damage save indirectly. If damage occurs by direct causation then the doer must unconditionally make it good, whether the doer is acting wrongfully or not. If the act is by indirect causation, then it is a condition of the doer being liable for it that he should have been guilty of a wrongdoing, that is to say that he should not have had the right to do the act out of which the damage arose, or he did it deliberately or with the intention of causing damage as opposed to the intention of doing the act, and the act must have led causatively to the damage. If two acts combine to cause damage, one of them direct and the other indirect, then the basic rule is that compensation will be payable by the doer of the direct act. It is a matter of fact for the discretion of the trial court whether an act was the direct or indirect cause of the harm.

693. *See* Dubai Court of Cassation, Case No. 56/2004, 26/12/2004: It is established by the precedents of this court that the legislator has laid down different provisions for contractual and delictual liabilities in distinct provisions. By doing so the legislator is declaring its intention to have a separate scope for each one of the two liability grounds. Therefore, if there is a specific contractual relationship ... and the damage sustained by one of the contracting parties was as a result of the other party's breach of his contractual obligation, then what should be applied are the provisions of the contract. ... The rules pertaining to delictual may not be invoked as this amounts to a neglect of the contractual provisions relating to the breach of contract.

link between the arbitrator and the parties is by virtue of a contract that sets reciprocal rights and obligations among the arbitants and the arbitrators. The parties are expected to pay the arbitrators the fees they require; in turn, arbitrators owe them an obligation to complete their mandate until they render a final award. Therefore, when arbitrators breach their obligations or practice improper conduct, liability actions could be brought against them. In performing their functions, arbitrators might commit an act of misconduct or breach one of their contractual obligations set by the arbitrators' contract. Thus, liability is either based on contract or on tort. Arbitrators' liability would be contractual if the arbitrators declined to perform their contractual obligations.⁶⁹⁴ On the other hand, arbitrators' liability would be a tort subject to PL rules if the arbitrators failed to provide due care while performing their functions.⁶⁹⁵ Arbitrators' liability varies between contractual and tort depending on whether their relation is characterised in accordance with either the contractual approach or the status approach.⁶⁹⁶ Common law countries adopted the status theory and addressed the issue of arbitrators' liability on a tort basis that exists upon the violation of a duty to care.⁶⁹⁷ Civil law countries have adopted the contractual characterisation referring the arbitrators' liability to the contractual relationship between the arbitrator and the parties.⁶⁹⁸ In both systems, liability is the outcome of breach of duties, but requirements and remedies may differ according to the applicable law.⁶⁹⁹ The duties and obligations of arbitrators are either to be imposed by parties' agreement or by law in addition to ethical duties.⁷⁰⁰ These duties begin with the commencement of the arbitral process and continue until the award is rendered. The breach of arbitrator duties in any of these phases holds the arbitrators liable, whether the breach violated duties imposed by parties or by law. The arbitrator's duties could be generally described as settling the dispute between parties, rendering a valid award, being impartial and independent in performing their jurisdiction, keeping the confidentiality of the arbitral process, and fulfilling their duty within the time limit imposed by parties or the procedural law.⁷⁰¹ The applicable law on the arbitral process would deem the procedural duties of arbitrators as part

694. Moses (n83) 163–164.

695. Lew, Mistelis & Kroll, *Comparative International* (n3) 288.

696. Blackaby, Partasides & Redfern (n2) 321. See also Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015) 124.

697. Franck (n6) 2.

698. *Ibid.*

699. Maisner (n5) 150.

700. Fouchard (n92) 17. See also, for example, English Arbitration Act 1996, Art. 33(1a, b). See generally IBA Code of Ethics.

701. Maisner (n5) 155.

of the contractual duties set implicitly by the arbitration contract.⁷⁰² The contract addresses certain mandatory terms, such as the obligation to perform in good faith, and this duty exists even if it is not mentioned in the contract. It cannot be waived, so the failure to perform in good faith constitutes a breach of the contract.⁷⁰³ The breach of any of the aforementioned contract obligations or duties requires an action that protects the parties' rights and provides the sufficient remedies for the damages incurred by the breach. In turn, civil liability of arbitrators would be a reason for appealing the aggrieved party and raising the standards of due care and the quality of the arbitral services provided by arbitrators.⁷⁰⁴

[1] *Contractual Liability of Arbitrators*

Contractual liability arises from the consensual nature of arbitration. The contractual approach classifies liability on a contractual basis by considering arbitrators as service providers either appointed by the parties or on their behalf.⁷⁰⁵ Accordingly, a contractual relation binds both the parties and arbitrators and the basis for contractual liability may stem from the performance of the contract by the arbitrator.⁷⁰⁶ The arbitrators' contract terms and conditions find their source in either the arbitration agreement, the relevant rules of arbitration, or the appointment agreement.⁷⁰⁷ Thus, the acceptance of the arbitrator to proceed with his/her mandate switches the arbitrator to be party to an agreement with the arbitrants.⁷⁰⁸ Recognition of the agreement among the arbitrators and the arbitrants may give rise to liability in contract against arbitrators for any act or omission conducted while exercising their function.⁷⁰⁹ The breach of such agreement by either of the two parties constitutes an obligation to compensate damages incurred on the injured party.⁷¹⁰ In relation to the arbitral process, a breach by the arbitrator of his/her contractual obligations would harm the arbitrants' interest in attaining the desired

702. See English Arbitration Act, s. 33(1). See also Lew, Mistelis & Kroll, *Comparative International* (n3) 279.

703. Andrew T Guzman, 'Arbitrator Liability: Reconciling Arbitration and Mandatory Rules' (2000) 49 *Duke L J* 1279, 1316.

704. Lin Yu & Sauzier (n348) 56–57.

705. Houtte & McAsey (n248) 137. See also Blackaby, Partasides & Redfern (n2) 322.

706. Abd Al-Hamid Ahdab & Jalal El-Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 377–378.

707. Blackaby, Partasides & Redfern (n2) 322. See also Susan Blake, Julie Browne & Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press 2014) 434, 435.

708. See *K/S Norjarl A/S v. Hyundai Heavy Industries Co Ltd* [1992] QB 863, 884–85. See also Franck (n6) 2.

709. Emmanuel Gaillard, 'France' in Frank Bernd Weigand (ed.), *Practitioner's Handbook on International Commercial Arbitration* (2nd edn, OUP Oxford 2009) 465.

710. Pornbacher & Knief (n432) 221.

arbitral resolution services.⁷¹¹ Thus, the commitment of an error in the course of the arbitral proceedings would represent a contractual breach in which the arbitrator is contractually liable.⁷¹² The damages suffered could be described as the loss that the arbitrant would not have to bear if the arbitrator had performed his/her contractual obligations, and the economic gain that the arbitrant would have the benefit of if the arbitrator had fulfilled the obligations thereof.⁷¹³ Without the contractual liability as a consequence to be borne by the wrongdoer, contractual obligations would lose their force.⁷¹⁴

The extent of arbitrators' prospective liability is subject to the terms of the agreement with the parties and the mandatory provisions of national law.⁷¹⁵ The majority of legal systems constitute the ground of civil claims against arbitrators on a contractual basis.⁷¹⁶ Civil law systems analyse the issue of arbitrator liability based on the contractual nature between the arbitrator and the parties despite the quasi-judicial function that the arbitrator performs.⁷¹⁷ Based on this contractual link, it can be seen that the arbitrator provides professional services to the parties on the basis of the applicable rules of law; in return, they are paid the agreed-upon remuneration.⁷¹⁸ Nevertheless, the belief that arbitrators are service providers like any other profession was opposed by the ECJ in *Von Hoffmann v. Finanzamt Trier*.⁷¹⁹ Although the case concerned the question of liability of arbitrators for payment of value-added taxes on the basis of an European Union (EU) directive, the court held:

‘[T]he services of an arbitrator cannot correspond to those of a consultant, engineer, and consultancy bureau accountant. None of the services principally and habitually as a part of any those professions concerns the settling of dispute

711. Dario Alessi, ‘Enforcing Arbitrator’s Obligations: Rethinking International Commercial Arbitrators’ Liability’ (2014) 31(6) *J Intl Arb* 735, 779.

712. Gaillard, ‘France’ (n709) 465.

713. Alessi, ‘Enforcing Arbitrator’s Obligations’ (n350) 780.

714. Pornbacher & Knief (n432) 221.

715. Hausmaninger (n366) 19.

716. ElieKlieman, ‘The SNF v International Chamber of Commerce Case and the Obligation to Conduct Arbitration Proceedings with “Expected Dispatch”’ in Devin Bray and Heather L Bray, *International Arbitration and Public Policy* (Juris Publishing Inc 2014) 85.

717. Peter Ashford, *Handbook on International Commercial Arbitration* (2nd edn, Juris Publishing Inc 2014) 128.

718. Gaillard & Savage, *International Commercial Arbitration* (n1) 606.

719. Case C-145/96 ECJ 1997 (6th Cir) I-4870.

a dispute between two or more parties ... consequently the services cannot be regarded as similar to those of any of those profession.⁷²⁰

This contractual nature of the relation between arbitrators and arbitants is accepted under the French system, with no absolute immunity conferred to arbitrators.⁷²¹ Therefore, arbitrators are not akin to judges, even during the performance of their duties; they are subject to liability like an ordinary citizen if they cause damage to parties.⁷²² The New French Civil Procedure Code has no existing legal text addressing the liability of arbitrators.⁷²³ As a result, in addition to the commentators, French case law has enriched and participated in setting a frame for the liability. This was reflected in the *Cour de Cassation* decision, where it was held that:

‘as arbitrators assume no public office and can therefore not cause the state to incur liability under Article 505 of the Code of Civil Procedure ..., an action for damages in respect of the performance of their functions can only be brought under ordinary tort or contract law.’⁷²⁴

Subsequent decisions established the contractual basis of the arbitrator liability, the French *Cour d’appel* in *société Raoul Duval* held *‘that the contractual nature binding the arbitrator to the arbitants justifies the possible rise of the arbitrator liability under the ordinary rules of article 1142 of the civil code’*.⁷²⁵ The liability might occur, for instance, upon the withdrawal

720. *Ibid.*, I-4876-I-4878.

721. Yves Derains & Laurence Kiffer ‘National Report for France (1997)’ in Jan Paulsson and Lise Bosman (ed.), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International 1984, updated May 2013 Suppl No. 74) 40.

722. Gaillard & Savage, *International Commercial Arbitration* (n1) 589 (quoting Henri Motulsky ‘the arbitrator does not become a judge, even for a short time, but remains an ordinary citizen,’ as a result of which ‘an arbitrator can incur liability under a regime more straightforward than that applicable to a judge’).

723. See Decree No. 2011-48 of 13 January 2011 on the Reform of Arbitration.

724. *Veuve J. Houdet et Fils v. Chambre arbitrale de l’union syndicale de grains et farines de Bordeaux*, Cass 2e Civ, 29 janv 1960 (1960) RevArb 121, as cited in Gaillard & Savage, *International Commercial Arbitration* (n1) 589.

725. *V v. société Raoul Duval*, CA Paris (1Ch C), 12 October 1995 (1999) 2 RevArb 324 (‘*Le lien de nature contractuelle qui unit l’arbitre aux parties justifie que sa responsabilité soit appréciée dans les conditions de droit commun sur le fondement de l’article 1142 du Code civil*’). See also *Bompard v. Consorts C. et autres*, CA Paris (1Ch A), 22 mai 1991 (1996) 3 RevArb 475 (‘*Dans l’accomplissement de leur mission déduite de ce contrat d’investiture, les arbitres engagent leur responsabilité civile, dans les termes des art. 1142 et 1147 C. civ., en*

of the arbitrator prior to the completion of his/her mandate after being appointed by parties, performing his/her function below the standards of reasonable duty of care, or in case of denial of justice (*déni de justice*),⁷²⁶ or his/her failure to render the award in accordance to the time limit set by contract or law.⁷²⁷ However, there is no rule setting the level of severity of the arbitrator error, whether the arbitrators' obligations are either characterised as an *obligation de resultat*, which means that the arbitrators' obligations are subject to strict performance guaranteeing a specific result, or *obligation de moyen*, which imposes the duty of due diligence in the performance of the arbitral duties.⁷²⁸ Subject to the general principles of contractual liability, it is obvious that a debtor will be liable only for failing to fulfil his/her obligations, regardless of the reasons for such failure, unless it is force majeure.⁷²⁹ However, in relation to the arbitrators' obligations imposed by virtue of their appointment agreement, it could be realised that the arbitrators' obligations are either *obligation de resultat* (that is, rendering a timely award) or *obligation de moyen* (that is, duty to render a valid award).⁷³⁰ Nevertheless, the Cour de Cassation in *Société CNCACEC-Centre extérieur de coordination SAS et autre v. M. R. et autres* ruled that the arbitrators were only subject to an obligation of means (*de moyens*) and not of results, and, therefore, arbitrators were not liable for the procedural delays or for suspension of their work as that had been demanded by the parties.⁷³¹ French case law

cas d'inexécution ou de mauvaise exécution qui leur serait imputable à faute, soit à titre individuel soit à titre collectif dans le cas d'une décision collégiale).

726. Delvolve (n530) 34.

727. *L et B Juliet v. X et autres*, Cass 1ere Civ, 6 déc 2005 (2006) 1 RevArb 126 ('*En laissant expirer le délai d'arbitrage, sans demander sa prorogation au juge d'appui, à défaut d'accord des parties ou faute pour celles-ci de la solliciter, les arbitres, tenus à cet égard d'une obligation de résultat, ont commis une faute ayant entraîné l'annulation de la sentence, et ont engagé leur responsabilité. Viole l'article 1142 C. civ. l'arrêt qui, pour rejeter la demande en responsabilité, retient que l'action en responsabilité exercée contre les arbitres à raison de l'accomplissement de leur mission ne peut l'être que dans les conditions du droit commun, que cependant, en raison de la spécificité de la mission des arbitres, d'essence juridictionnelle, tout manquement contractuel n'engage pas nécessairement leur responsabilité et enfin qu'il en est ainsi, en l'absence d'une faute personnelle des arbitres telle qu'un défaut de diligence, du manquement à l'obligation de respecter le délai fixé par les parties, celles-ci ayant une part active au déroulement de l'instance*').

728. Delvolve (n530) 34.

729. See French Civil Code, Art. 1147.

730. Delvolve (n530) 35.

731. Cass 1ere Civ, 17 nov 2010, Arrêt n° 1089 FS-P+B+I, pourvoi n° N 09-12.352(2010) 4 Revarb 979 ('*Enfin, la suspension du délibéré ne pouvait être reprochée aux arbitres dont le dessaisissement était demandé, de sorte que l'action en responsabilité des arbitres, qui ne sont tenus que d'une obligation de moyens, ne pouvait être accueillie sur le fondement d'un manquement à leur obligation de rendre une sentence dans un délai raisonnable*').

has set a frame for the extent of the arbitrators' liability in cases of fraud, misrepresentation, or gross fault (*fautelourde*). In the *Bompard* case, the Tribunal de Grand Instance de Paris held that 'civil liability can only be incurred by the arbitrators where it is established that they have committed fraud, misrepresentation, or gross fault'.⁷³² *Déni de justice* occurs when the arbitrator refuses to render his/her award when the subject matter is ready for decision.⁷³³ On the other hand, *fautelourde* is defined, according to the *Cour de Cassation*, as 'the fault committed under the influence of so gross an error that a reasonably conscientious judge would not have committed it'.⁷³⁴ As a result, allegations against arbitrators cannot be based on a fault committed directly in the contents of the award, 'the grounding of the award' (*bien-fondé de la sentence*), or the juridical act of arbitrators.⁷³⁵ The limitation of the liability motion against the cases thereof was affirmed by the *Bompard* decision, where the Tribunal de Grande Paris held that '[a]rbitrators' liability does not exist if arbitrators' errors are committed in the adjudication of the claim or the contents of the award'.⁷³⁶ The rationale of this limitation is to provide judges with some sort of freedom while they are performing their adjudicative function. This was reflected by the *Cour de Cassation* in the *Reims* case, where the court held:

[A]ll of the claimant arguments essentially amount to the general criticism that the arbitrators reached the wrong decision. In this context, the arbitrators could

732. *Bompard v. Consorts C et autres*, TGI Paris (1Ch, 1s), 13 juin 1990 (1996) 3 RevArb 475 ('Il n'entre donc pas, par principe, dans les attributions du Tribunal de grande instance, aisi d'une action en justice de droit commun, d'apprécier le bien ou le mal jugé de la décision des arbitres, dont la responsabilité civile ne peut être engagée, pour une telle critique, que s'il est établi à leur encontre la preuve d'une fraude, d'un dol ou d'une faute lourde'). See also Cass 1ere Civ, 15 janvier 2014, n°11-17.196, Publié au bulletin <https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/2_15_2819_5.html>accessed 17 October 2019.

733. See French Code of Judicial Organisation, Art. L141-3(2) ('Il y a a déni de justice lorsque les juges refusent de répondre aux requêtes ou négligent de juger les affaires en état et en tour d'être jugées'). See also French Civil Code, Art. 4 ('A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice'). See also Delvolve (n530) 31.

734. Cass 1ère Civ, 13 October 1953, Bull.n° 224 ('celle qui a été commise sous l'influence d'une erreur tellement grossière qu'un magistrat normalement soucieux de ses devoirs n'y eut pas été entraîné').

735. Poudret & Besson (n295) 374.

736. *Bompard v. Consorts C. et autres*, TGI Paris (1Ch, 1s), 13 juin 1990 (1996) 3 RevArb 475–476 ('Cependant, une telle action en responsabilité ne peut pas être substituée aux voies de recours ouvertes contre la sentence ni conférer indirectement au juge étatique un pouvoir de révision de la décision arbitrale qui doit être rendue par les arbitres en toute conscience, indépendance et impartialité').

only incur liability in the event of gross fault, fraud or connivance with one of the parties. Otherwise the protection, independence, and authority of the arbitrators would be restricted to an extent that would be incompatible with the task of judging.⁷³⁷

Consequently, all possible remedies against the award (such as appeal or recourse) should be exhausted prior to the allowance of a liability claim against an arbitrator.⁷³⁸ If these remedies resulted in the annulment of the award, the admissibility of the liability claim would be inapplicable.⁷³⁹

Unlike civil law countries, the common law countries constitute the grounds of arbitrators' legal liability on the quasi-judicial function of arbitrators.⁷⁴⁰ There is no reported case law under English law in which an arbitrator has been held liable.⁷⁴¹ English law is opposed to the idea of a contractual relation between arbitrators and arbitants; instead, it formulates the relation based on functional comparability to the relation between judges and litigants. This was confirmed by the House of Lords in *Sutcliffe v. Thackrah*:⁷⁴² 'those employed to perform duties of judicial character are not liable to their employers for negligence'.⁷⁴³ Furthermore, in a more recent decision, *Jivraj v. Hashwani*, the Supreme Court held '[t]he arbitrator ... is in no sense in a position of subordination to the parties; rather the contrary. He is in effect a "quasi-judicial adjudicator"'.⁷⁴⁴ This does not preclude the fact that there are few court decisions recognising the contractual link between the parties and the arbitrator.⁷⁴⁵ The 1996 English Arbitration Act has addressed the liability of arbitrators' issue in Section 29(1), where the liability of arbitrators pursuant to this section could be triggered for any act or omission committed by the arbitrator provided that the act was done in bad faith.⁷⁴⁶ The Act has also asserted that arbitrators could be held liable when they resign without good cause and without

737. *Florange c. BrissartCorgié*, TGI Reims, 27 September 1978, n° 482/77. (unpublished) (cited in Gaillard & Savage, *International Commercial Arbitration* (n1) 590–591).

738. *Delvolve* (n530) 33.

739. *Ibid.*, 33.

740. *Houtte & McAsey* (n248).

741. *Veeder* (n519) 30.

742. *Sutcliffe v. Thackrah* [1974] AC 727.

743. *Ibid.*, 736.

744. [2011] ICR 1004, 1021.

745. *Compagnie Européenne de Céréales SA v. Tradex Export SA* [1986] 2 Lloyd's Rep 301, 306. See also *K/S Norjarl A/S v. Hyundai Heavy Industries Co Ltd* [1992] QB 863, 884–885.

746. See English Arbitration Act 1996, s. 29(1).

applying to the court to be granted a relief from bearing potential liability.⁷⁴⁷ Liability of arbitrators would also arise subject to Section 33, which is a mandatory provision imposing a duty to act fairly and impartially as between the parties, to apply suitable circumstances for each case, and to avoid necessary delay and expenses in the course of the arbitral process.⁷⁴⁸ Although the act is very conservative regarding arbitrator liability, the wording of Section 33 could incur broad liability on arbitrators when they breach the obligation imposed by virtue of the section. In effect, arbitrators can limit their liability under English law to the extent that it does not derogate the applicable law. Egypt, with its current Arbitration Act of 1994, does not contain any provisions with regard to arbitrator liability.⁷⁴⁹ The view of the relation between arbitrators and arbitants under Egyptian law is of a contractual nature.⁷⁵⁰ Therefore, arbitrators have a duty to act fairly and impartially while rendering a decision in the dispute, to perform their function with due care, to keep deliberations confidential, and to provide fair means of resolution and respect rights of defence, to render a timely award that coincides with the arbitral agreement, and to disclose, prior to the acceptance of their mandate, any circumstances that may give rise to doubts as to their independence or impartiality.⁷⁵¹ There is no Egyptian case law in which an arbitrator has been held liable.⁷⁵² The amended Dutch Civil Procedure Act of 2015 did not contain any provision pertaining to the issue of arbitrator's liability,⁷⁵³ despite the fact that former Dutch Arbitration Acts have contained references to that effect.⁷⁵⁴ In an attempt to reduce the magnitude of claims pertaining to potential liability against arbitrators, as a result of setting aside the arbitral award, the new Dutch Arbitration Act grants the right for the Court of Appeal, on its own motion, to suspend the setting aside proceedings

747. *Ibid.*, s. 25(3) ('An arbitrator who resigns his appointment may (upon notice to the parties) apply to the court (a) to grant him relief from any liability thereby incurred by him, and (b) to make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid. (4) If the court is satisfied that in all the circumstances it was reasonable for the arbitrator to resign, it may grant such relief as is mentioned in subsection (3)(a) on such terms as it thinks fit').

748. *See ibid.*, 33(1, 2).

749. *See* Egyptian Arbitration Act (No. 27) 1994.

750. Ahmed Abdel Karim Salama, *Commercial International and Domestic Arbitration* (1st edn, Dar El-Nahda El-Arabeya 2004) 721.

751. *Ibid.*

752. Karim Hafez 'National Report for Egypt (2013)' in Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International 1984, updated March 2013 Suppl No. 73) 16.

753. *See* Dutch Code of Civil Procedure 2015.

754. Gerard J Meijer & Albert Jan Van den Berg 'National Report for Netherlands (2020)' in Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International 2020, updated October 2020, Suppl No. 112) 37.

for a period of time to be determined by the Court of Appeal to put the arbitral tribunal in a position to reverse the ground for setting aside by reopening the arbitral proceedings or by taking other measures that the arbitral tribunal considers appropriate.⁷⁵⁵ In this context, the arbitral tribunal is rendered the opportunity to rectify errors that may result in setting aside the award, which can make room for the disgruntled party to seek liability claim against arbitrators. Accordingly, the opportunities to hold the arbitrators liable can be reduced. Nonetheless, some of the arbitrators' errors are not rectifiable, such as acting in a non-timely manner or breaching the duty of impartiality or independence. As a result, rectification in the foregoing examples is not possible and, therefore, does not result in preventing liability claims against arbitrators.

755. Dutch Civil Procedure Code 2015 Art.1065(a).

Dutch law originates the relationship among arbitrators and arbitants as a pure contractual relation, where said contract among the parties is deemed an agreement for rendering certain services.⁷⁵⁶ Therefore, the breach of the arbitrator of their contractual obligation as a service provider would result in the arbitrator liability to recover the damages incurred on the injured party. Albeit, in recognition of this contractual relation, which creates contractual liability, the Hoge Raad has applied on the arbitrators the same principle to be applied on the state court judges relating to their liability, which arises in exceptional situations.⁷⁵⁷ The UAE has followed Egypt in adopting the civil law system; as a result, contractual theory is the accepted method for linking the arbitants and arbitrators. This contractual link takes the form of clauses incorporated within the terms of reference, rules relevant to arbitration, and the submission agreement to arbitration.⁷⁵⁸ The UAE's current Arbitration Act 2018 does not prescribe any provisions related to the status of arbitrators or the scope of their liability.⁷⁵⁹ The lack of information, sources, and rules governing the liability aspect had an adversarial influence on the development of the arbitrator's liability under UAE law.⁷⁶⁰ As an appealing venue for regional and international arbitrations, Dubai has given its courts the opportunity to gather most of the liability cases, not only those brought against arbitrators, but also those brought against arbitral institutions. Dubai courts presided by the Dubai Court of Cassation have ruled on a number of claims invoking arbitrators' liability where the Court of Cassation has contributed to establishing the basis of said liability, either in contract or tort. *In Meydan Group L.L.C v. Alexis Mourre*, the claimant Group (Medyan) lodged a claim before the Dubai Court of First Instance against the respondent (Alexis Mourre) in his capacity as a sole arbitrator in a DIAC-based arbitration. The DIAC had extended the parties' agreed time schedule several times. Medyan alleged damages against Alexis Mourre on the premise of extinction of the

756. van den Berg, 'Immunity of Arbitrators' (n539) 60. *See also* Dutch Civil Code, Art. 7:400 ('(1)A service provision agreement is the agreement under which one of the parties ("the service provider") has engaged himself towards the other party ("the client") to perform work on another basis than an employment agreement, which work consists of something else than the making of a tangible construction, the safekeeping of property, the publication of a work or the transportation of persons or goods[.] (2)The provisions of Arts 7:401 up to and including 7:412 apply to each type of service provision agreement, unless something else results from law, the content or nature of the agreement, another juridical act or usage (common practice) and without prejudice to Article 7:413').

757. *See also* Ynzonides and Leijten and van der Bend (n141) 268. *See also* HR, 4 December 2009, ECLI:NL:HR:2009:BJ7834, NJ 2011/31.

758. Lagarde (n145) 792.

759. *See* UAE Arbitration Act (Federal Law No. 6) 2018.

760. Blanke (n558).

arbitration based on the nullity of the arbitrator's appointment, as well as the fact that the time limit during which he should have rendered the award had expired. Medyan requested that the respondent be ordered to pay an amount of AED 7,000,000 as compensation for moral and material damages, with interest of 12 percent.⁷⁶¹ The Court dismissed the action for being submitted prematurely. Moreover, the Court concluded, based on Article 24 of the DIAC Statute Rules,⁷⁶² that there was no intention for the arbitrator to cause damages to the applicant. The court held:

*'Regarding the breaches of contract on the basis that the alleged fault on the part of the arbitrator to issue a wrongful decision to proceed with the arbitration despite the latter being time-barred as well as the nullity of his appointment, no fault has been actually proven. Now presuming that there was indeed a fault in the issuance of a final award, such fault does not constitute a breach of contract that would trigger the arbitrator's liability whether on the basis of the contract of the plaintiff with the Centre that appointed him or its consent refer to him as arbitrator in accordance with the Centre's rules of which the plaintiff was aware as well as the law.'*⁷⁶³

The decision was challenged, and the Court of Appeal confirmed the first-instance decision.⁷⁶⁴ Consequently, the appeal decision was challenged before the Court of Cassation. The Dubai Court of Cassation affirmed the aforementioned decision based on Article 24 of the DIAC Statute Rules in alignment with Article 40 of the DIAC Rules, illustrating that:

'[on the basis of those provisions] the arbitrator is not responsible for any unintentional error ... based on authorities provided under the prevailing laws, according to which the power to judge is left to the arbitrator's discretion. This

761. Dubai Civil Court of First Instance, Case No. 292/2013.

762. See DIAC Statute Rules 2004, Art. 24 ('Neither the Centre nor any of its employees, members of the Board of Trustees or members of any dispute settlement panel shall be held liable for any unintentional error in their work related to the settlement of disputes by the Centre').

763. Dubai Civil Court of First Instance, Case No. 292/2013 Official Copy of Decision Provided by Dubai International Arbitration Centre.

764. Dubai Court of Appeal, Case No. 9/2014 Official Copy of Decision Provided by Dubai International Arbitration Centre.

*means that the arbitrator enjoys the protection of the law in the exercise of his duties unless the arbitrator commits a fundamental error. A fundamental error is defined as a failure to comply with unambiguous legal principles or ignore clear-cut facts while the judgement is left to the arbitrator's own consideration.*⁷⁶⁵

The liability action was triggered on the basis of an alleged contractual breach by the arbitrator, reflecting that the UAE legislation and case law recognises the existence of contractual liability of the arbitrators. As shown above, the Court of Cassation seized the opportunity, going beyond confirming the appeal decision, to explain the grounds that cause an arbitrator to be held accountable vis-à-vis arbitrants. Similarly, in case No. 254/2014, a claim was brought to the Dubai Court of First Instance by respondent-party in a DIAC based arbitration against the sole arbitrator, alleging that the arbitrator demonstrated impartiality and was therefore unsuitable.⁷⁶⁶ The claim arose out of a purchase agreement among a Real Estate Company (Claimant) and two individuals (Respondents). The subject of the agreement was the purchase of the two individuals' fora villa in Dubai from the real estate company for a total purchase price in millions of AED. The Real Estate Company was responsible for accomplishing the construction of said villa. Nonetheless, the final instalment payment of the purchase price provided in the agreement was not paid by the Respondents. Consequently, the agreement was terminated and the claimant de-registered the villa from the Respondents' names. Subsequently, the Claimant sought a declaration that the contract termination was lawful, through his right in the entitlement to retain 40 percent of the purchase price, and to be awarded compensation in return of damages and costs. The Respondents introduced a counterclaim. The DIAC Executive Committee appointed a sole arbitrator on behalf of the parties and transferred the file. Later, a challenge was brought by the Respondents in front of the DIAC Executive Committee against the sole arbitrator on grounds that he acted impartially between the parties and was not neutral in favour of the Claimant. In reacting to said challenge, the DIAC Executive Committee dismissed the Respondents' challenge against the sole arbitrator. As a result, the Respondents initiated legal proceedings against the Claimant and the sole arbitrator before the Dubai Court of First Instance.⁷⁶⁷ The Court of First Instance

765. Dubai Court of Cassation, Case No. 212/2014 Blank (n545).

766. See Dubai Court of First Instance, Case No. 254/2014 Lagarde (n146) 790.

767. *Ibid.* See also Lagarde (n146) 790.

dismissed the Respondents' claim, reasoning that the provisions of the DIAC Arbitration Rules shall apply, as agreed between the parties, in relation to the appointment and the revocation of the arbitrators. The First Instance Court decision was affirmed by the Dubai Court of Appeal⁷⁶⁸ and Court of Cassation.⁷⁶⁹ There are several cases in Dubai where civil liability was triggered against arbitrators on grounds of impartiality and independence.⁷⁷⁰ The aforementioned case law through the different jurisdictions shows that the civil-law-based legal systems do recognise and accept claims originating on breach of contract by arbitrators. However, the common-law-based legal systems are reluctant to accept claims against arbitrators stemming from contractual breach based on the conservative take on the contractual nature among arbitrators and arbitants. This nature of common law legal systems is confirmed by a recent judgement of the Dubai International Financial Center (DIFC) Court of First Instance. Therein, Meydan Group – a real estate developer in onshore Dubai – brought a claim in the offshore DIFC Court against the Dubai International Arbitration Centre (DIAC) based on the latter's alleged breach of an arbitration agreement concluded between Meydan and its contracting partner and of DIAC's own arbitration rules. The alleged breach related to DIAC's appointment of a tribunal chair in a DIAC arbitration. In the DIFC proceedings, DIAC did not challenge the jurisdiction of the DIFC court with respect to an onshore Dubai arbitration and the DIFC Court concluded that the arbitration agreement and the DIAC arbitration rules were to be construed strictly so that the appointment of a tribunal chair by DIAC that did not comply with these contractual requirements, as construed by the DIFC Court, was invalid. In circumstances where the parties' agreed-upon mechanism for appointing the chair as interpreted by the DIFC Court had become 'inoperable' and one of the parties had objected to departing from that mechanism, the appointment of a tribunal chair by DIAC was 'non-valid' as DIAC had no authority to do so and support had to be sought from the onshore Dubai courts to deal with this problem of inoperability. Nevertheless, the court refused to declare that DIAC was liable for breach of contract since the error was unintentional.⁷⁷¹ It is worth noting that all

768. Dubai Court of Appeal, Decision No. 177/2015 Lagarde (n146) 790.

769. Dubai Court of Cassation, Decision No. 341/2015 *ibid.*, 791.

770. *See*, for example, Dubai Court of Cassation, Decision No. 148/2014 *ibid.*, 790.

771. Tom Jones & Sebastian Perry, 'Dubai Centre Escapes Liability for Invalid Appointment' (2019) Global ArbitrationReview. <<https://globalarbitrationreview.com/article/1194690/dubai-centre-escapes-liability-for-%E2%80%9Cinvalid%E2%80%9D-appointment>> accessed 17 November 2019.

DIFC Courts are of an independent English language common law judiciary, based in Dubai, UAE.⁷⁷²

[2] *Tort Liability*

The predominant tort theory for PL is negligence.⁷⁷³ Principles of PL could be invoked against attorneys, physicians, surgeons, or any other expert who requires a certain standard of skills and qualifications while practicing their profession.⁷⁷⁴ With respect to PL allegations, the existence of an agreement between the professional and the client constitutes their relation in which a duty of care is imposed on the professional. Nevertheless, the tort liability of the defendant stems from the derogation of the duty imposed separately based on what the defendant has agreed to carry out with relation to the claimant's interests, and not from the breach of the said agreement.⁷⁷⁵ Arbitrators could be held liable on a tortious basis if they perform their function without due care.⁷⁷⁶ Therefore, arbitrators can avoid tort liability arising from violating their professional duties by performing competently.⁷⁷⁷ In practice, several legal actions have been lodged against arbitrators on grounds of negligence, bias, and failure to follow policies; however, these actions were impeded by the impenetrable doctrine of immunity.⁷⁷⁸ Pursuant to English law, tort liability could be invoked against members of a profession or skilled craft if they failed to undertake the level of skill and care normally carried out by members of their profession.⁷⁷⁹ There were no reported English cases regarding arbitrators' professional negligence.⁷⁸⁰ Under French law, arbitrators may be held liable under the general

772. Steven L Smith, 'Enforcement of International Arbitral Awards under the New York Convention' in Richard Chernick and others (eds), *The Practitioner's Handbook on International Arbitration and Mediation* (3rd edn Juris Publishing, 2012) 359.

773. Carl S Hawkins, 'Retaining Traditional Tort Liability in the Nonmedical Professions' (1981) *BYU L Rev* 33, 35.

774. *Citizens' Loan, Fund & Savings Assn v. Friedley*, 23 NE 1075, 1076 (1889), quoted in Martin T Fletcher, 'Standard of Care in Legal Malpractice' (1968) 43(3) *Ind L J* 772 ('[A]ttorneys are very properly held to the same rules of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians and surgeons and other persons who hold themselves out to the world as possessing skill and qualifications in their respective trades or professions').

775. Hawkins (n754) 36.

776. Moses (n83) 164.

777. Franck (n6) 4.

778. Maureen A Weston, 'Re-examining Arbitral Immunity in an Age of Mandatory and Professional Arbitration' (2003–2004) 88 *Minn L Rev* 449, 458–459.

779. *Ibid.*, 6.

780. Hebaishi (n8) 70.

principles of tort law.⁷⁸¹ Thus, if arbitrators caused damage to a party through fault or misconduct, their liability could be triggered in accordance with Article 1382 of the French Civil Code. The absence of a contractual link between the arbitrators and the injured party could also give rise to their tort liability. As a result, third parties can invoke tort liability under Article 1382 against arbitrators for damages incurred by their misconduct.⁷⁸² However, the existence of a contractual link among the arbitrators and the arbitrator does not exclude the possibility of pressing a claim on tort basis, even if damages caused by the latter have resulted from fault or misconduct.⁷⁸³ The tort liability allegations could be brought against arbitrators by arbitrators if the arbitral agreement is invalid. In *Société Annahold BV et D. Frydman v. société L'Oréal et B.*,⁷⁸⁴ the Annahold company (plaintiff) discovered that the sole arbitrator appointed by it and the other party was a financial consultant to the chairman of the other party. The plaintiff asked the arbitrator to resign from his mission and brought an action before the court for an interim ruling on its challenge. The following day, the arbitrator rendered the award. Therefore, the *Tribunal de Grande Instance de Paris* decided that there were no grounds for an interim ruling on the challenge, instructing the plaintiff to exercise the only possible remedies available against the arbitral award, if there were grounds for a cause of nullity.⁷⁸⁵ Subsequently, the award was set aside by the *Cour d'appel* on grounds of invalid consent to the arbitration agreement.⁷⁸⁶ Based on the *Cour d'appel* decision, Annahold filed several motions against the opponent and the arbitrator before the *Tribunal de Grande Instance de Paris*. The court held the arbitrator liable in tort in accordance with Article 1382 of the Civil Code.⁷⁸⁷ In this respect, the French *Cour de Cassation* affirmed in a subsequent and relatively

781. *Société Veuve JHoudet et Fils c. Chambre Arbitrale de L'union des Grains et Farines de Bordeaux*, Cass 1^{ère} Civ, 29 janv 1960 (1960) RevArb 121 (cited in Gaillard & Savage, *International Commercial Arbitration* (n1) 589).

782. Delvolve (n530) 34.

783. *Cass 2^{ème} Civ*, 9 juin 1993 (Bull Civ II, n° 204) 110.

784. *Société Annahold BV et D Frydman v. société L'Oréal et B*, TGI Paris, 2 juil 1990 (1996) 3 RevArb 483.

785. *Ibid.*, 483 ('*Si l'arbitre a rendu sa sentence et se trouve dessaisi de sa mission, il n'existe plus de difficulté de constitution du tribunal arbitral susceptible de justifier l'intervention du Président du Tribunal de grande instance de Paris statuant en la forme des référés sur une demande de récusation de l'arbitre. Il appartient au demandeur d'exercer les seuls recours ouverts contre la sentence arbitrale, s'il estime établie une cause de nullité*').

786. *Société Annahold BV et D Frydman v. L'Oréal et autres*, CA Paris (1 Ch, C) 9 avril 1992 (1996) 3 RevArb 483.

787. *Société Annahold BV et D Frydman v. société L'Oréal et B*, TGI Paris (1Ch, 1s) 9 déc 1992 (1996) 3 RevArb 483 ('*Ce dol justifie l'annulation de sa décision et la réparation, sur le fondement de l'article 1382 C. civ., du préjudice subi par la partie qui en a été victime. Celle-ci est donc fondée à obtenir à titre de réparation la restitution des sommes qu'elle a*

recent decision that an arbitrator can be held liable for the misuse of the arbitrator's power if his/her fault caused damage.⁷⁸⁸ Likewise, pursuant to Dutch law, damages emanating from an erroneous act committed by arbitrators in course of arbitration can expose them to tort actions. In *ASB Greenworld v. NAI and Arbitrators*,⁷⁸⁹ the claimant (Greenworld) asserted a liability claim against the arbitrators and the Netherlands Arbitration Institute (NAI) in an NAI-based arbitration for committing a tortious act under Dutch law. The liability claim arose from an arbitration motion commenced by SagroAannemingsmaatschappij Zeeland under the rules of the NAI against ASB Greenworld and against a German company. The arbitral proceedings commenced. Due to the absence of a valid arbitration agreement, Greenworld asserted there was a lack of jurisdiction of the arbitral tribunal. The arbitral tribunal dismissed the plea and awarded the claim as filed by Sagro. Afterward, Greenworld applied to the District Court to set aside the arbitral award for the non-existence of a valid arbitration agreement. The Court dismissed said application; however, the Court of Appeal set aside the arbitral award for absence of a valid arbitration agreement. The Netherlands Supreme Court confirmed the appeal court decision. Subsequently, Greenworld filed the tort liability claim against the arbitrators and NAI for committing an unlawful act (or tort) subject to Dutch law, which was dismissed in two instances. Greenworld appealed to the Netherlands Supreme Court, which issued a landmark decision on arbitrator liability in The Netherlands, stating:

'The mere fact that a decision is set aside does not make the decision wrong. Arbitrators render judicial or quasi-judicial functions that render them comparable to judges. Like judges, arbitrators should be at liberty to judge cases. When arbitral awards are set aside, this does not necessarily mean the decisions were wrong and decisions can only be held to be unlawful in exceptional cases. As a general rule formulated by the Netherlands Supreme Court, arbitrators can only incur personal liability in the event of intent, wilful misconduct or if arbitrators manifestly failed to exercise due care and skill.'

versées à titre d'honoraires pour expertise et arbitrage, avec intérêt légal à compter de la date du versement').

788. *M. S. v. Royal Anancy*, Court of Cassation, Civil, Civil Chamber 1, March 28, 2018, 15-16.909, Unpublished

<<https://www.legifrance.gouv.fr/juri/id/JURITEXT000036780098/>> accessed 13 January 2020.

789. HR4 December 2009, ECLI:NL:HR:2009:BJ7834, NJ 2011/31.

Subsequent to this judgment, on 30 September 2016, the HogeRaad, in (Qnow/Respondent), extended the scope of personal liability of arbitrators beyond the *Greenworld* decision to include damages resulting from the annulment of an award on the ground of procedural error.⁷⁹⁰ In this case, Qnow BV the (claimant) concluded an agreement with another party to transfer a package of shares. Accordingly, the shares have transferred. However, the other party afterward annulled the agreement without court involvement (extra judicially). The parties initiated arbitral proceedings and the tribunal rendered an award in favour of Qnow. However, the president of the tribunal (the respondent) neglected to have the award signed by the co-arbitrators. The other party challenged the award in front of the Amsterdam District Court and its request for annulment was granted. Qnow started proceedings against the president of the tribunal, alleging that the annulment of the award was caused by a professional error of the arbitrator and that the latter was therefore responsible for the damages suffered as a consequence. In assessing the error conducted by the chairman of the tribunal regarding his negligence to have the award signed by the participant arbitrators, the HogeRaad held:

‘a “substantial part of his [the president’s] task”; failure to complete this task correctly could therefore amount to gross negligence, especially considering its very serious consequences (annulment of the award). Furthermore, such negligence is “objectified” (ie, it should be assessed according to the circumstances of the case and independent from the arbitrator’s intentions or good faith).’⁷⁹¹

Based on the foregoing decisions and lack of reference(s) related to the issue of liability under the Dutch Arbitration Act, as mentioned earlier, it could be concluded that the Dutch Arbitration Act drafters preferred to set aside the determination/assessment of arbitrators’ liability, its source and extent to the courts’ decision. In this respect, courts could assess the existence of said liability on a case-by-case basis, taking into consideration the circumstances of the specific case. Despite the scarcity of court precedents in the Netherlands that address the issue of liability, courts have ruled that arbitrators could be held liable not only for acts of misconduct related to the substance of a case, but also to procedural errors.

One could argue that the amended Arbitration Act of 2015 has fashioned very efficient treatment towards the liability of arbitrators. The latter incorporated neither a statutory immunity nor a statutory liability that would provide an environment where arbitrators can act

790. HR 30 September 2016, ECLI:NL:HR:2016:2215, JOR 2016/324.

791. *Ibid.*

in a non-intimidating manner whilst looking over their shoulders (that is, being chased) by the aggrieved party. The Arbitration Act of 2015, however, maintained/prioritised arbitrators' due care while functioning – within their role – to avoid being held potentially liable based on the court assessment. However, the aforementioned argument could be refuted on the premise that absence of explicit statutory liability will lead to widening court discretion in granting existence to assessment of liability. The latter could, in turn, result in inconsistent judgements that address the same issue instead of constituting the grounds of their rulings based on solid rules/laws. Such tailor-made rules/laws that aim to address this said liability are both sensitive and debatable in nature. In this context, immunity and liability provisions should have been included within the Dutch Arbitration Act to remove any ambiguity pertaining to the acts that trigger the arbitrators' liability or unwarranted allegation as regards the existence/nonexistence of immunity, due to the absence of any reference in the act to that end.

Similarly, in accordance with UAE law, the tort liability of arbitrators may arise from their unlawful acts. In *Meydan Group LLC v. Doug Jones, Humphrey Lloyd QC, and Stephen Furst QC*,⁷⁹² the Claimant (Medyan Group LLC) raised a plea against a DIAC arbitral tribunal of three members in a DIAC based arbitration, seeking compensation in an amount of AED 60 million, with interest of 12 percent from the tribunal. This liability claim arose out of an arbitration clause incorporated in a contract concluded September 2007 with WCT Holding ('WCT') to build a racecourse. Later, in December 2008, Meydan Group ('Meydan') issued a notice cancelling the contract. As a result, WCT commenced arbitration proceedings in the DIAC against Meydan and claimed damage amounts for breach of contract and for the non-completed work. Following the Request for Arbitration, the arbitral tribunal was designated, consisting of Doug Jones, Humphrey Lloyd QC, and Stephen Furst QC. In April 2010, during the course of arbitration, the claimant and the respondent submitted a joint application seeking to stay the arbitration proceeding, desiring instead to employ confidential settlement negotiations. The application was approved by the tribunal, rendering an order staying the proceedings and asserting that the substance of the negotiations would not be revealed to the arbitral tribunal if the negotiations failed and the arbitration continued to proceed. However, following the stay and the settlement negotiations, the tribunal issued a further order granting itself jurisdiction to scrutinise the confidential negotiations in order to establish whether a settlement had been reached.

792. Dubai Court of First Instance, Case No. 496/2011. Decision Provided by Dubai International Arbitration Centre.

Meydan believed that the two orders contradicted each other and claimed that the tribunal had, by scrutinising the confidential settlement negotiations, breached its earlier order to keep the settlement negotiations confidential among the arbitrants only. Accordingly, Meydan raised a plea against the arbitral tribunal in front of the Dubai Court of First Instance alleging (i) failure to suspend the arbitral proceedings pending completion of a parallel arbitration process, (ii) failure to respect the terms of a confidentiality agreement concluded between the arbitrating parties, and (iii) failure to stay within its mandate. Accordingly, the grounds of said claim were pressed on tort basis due to failure of performance and breach of duty of care under the UAE law. In January 2015, Dubai's Court of First Instance dismissed Meydan's claim against the tribunal.⁷⁹³ In June 2015, the appeal court confirmed the lower court decision.⁷⁹⁴ Finally, the Dubai's Court of Cassation affirmed the two former decisions and dismissed Meydan's claim on the basis of its failure to submit sufficient evidence in support of its claims and to establish liability in tort on part of the tribunal. The Court of Cassation held: 'It is established that liability in tort requires proof of three elements, namely error, damage and a causal relationship between the two; failure to prove any one of these will mean that no liability has been established'.⁷⁹⁵ In a very recent decision, a new principle for the civil liability of arbitrators was set by the Dubai Court of Cassation in case 484/2017. The case concerned a party who had been awarded AED 42,705,955 (over USD 11.5 million) in a DIAC dispute in relation to a real estate transaction in Dubai. The facts of this case were as follows. The First Respondent had purchased 149 units in a tower in Dubai Marina. Post-completion, the First Respondent alleged that unit areas were not in conformity with the sale-and-purchase agreements and therefore filed a claim against the Petitioner before DIAC. The Second Respondent was appointed as the sole arbitrator by DIAC; however, after issuing a summary award concerning preliminary jurisdictional issues, he resigned. Following the resignation of the Second Respondent, the Third Respondent was appointed as the sole arbitrator. The Third Respondent rendered a final award that required the Petitioner to pay the First Respondent AED 46,522,337 plus interest and costs and a supplemental award to correct accounting calculation errors in the award. Later, a claim was pressed in front of the Dubai Court of First Instance alleging that, in their capacity as arbitrators, the Second and Third Respondents committed material errors, including changing the terms of the sale and purchase agreements, misrepresenting the data relating to the area of the units, disregarding relevant Land

793. *Ibid.*

794. Dubai Court of Appeal, Appeal No. 103/2015 Lagarde (n145) 784.

795. Dubai Court of Cassation, Case No. 284/2015 Blanke (n558).

Department documents, and lacking jurisdiction to hear the dispute. The claim was dismissed by the Dubai Court of First Instance and affirmed by the Court of Appeal; however, the Court of Cassation dismissed the Court of Appeal decision and held that for an arbitrator to be liable to a party in a civil matter there must be: (i) an act or omission by the arbitrator, (ii) harm incurred by a party, and (iii) causation between the act/omission and the harm caused. Critically, the Court of Cassation confirmed that there would need to be a '*serious mistake tainted by deceit, fraud, collusion with the opponent or refraining from arbitrating without acceptable justification*' in order to establish liability by an arbitrator. An ordinary mistake or negligence is not sufficient to hold the arbitrator liable unless it is a serious mistake or fraud.⁷⁹⁶

§3.04 Acts of Misconduct Holding the Arbitrator Liable

There are certain standards and duties that arbitrators must fulfill while exercising their role during the arbitral process. Failure of arbitrators to meet these standards or to fulfil their duties will give rise to damage claims against them. The prospective liability claims against arbitrators are discussed below.

[A] Claims for Delay by Arbitrators

In undertaking their functions, arbitrators have an obligation to fulfil their role in a timely manner and to act without undue delay.⁷⁹⁷ This obligation has been affirmed by national arbitral acts⁷⁹⁸ and institutional rules.⁷⁹⁹ Arbitrators performing contrary to the required

796. Julian Bailey, et al., 'Civil liability of Arbitrators in the UAE- an Update' <<https://www.whitecase.com/publications/alert/civil-liability-arbitrators-uae-update>> accessed 2 March 2018.

797. See UNCITRAL Rules 2010, Art. 17(1) ('The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute').

798. See, for example, English Arbitration Act, s. 33(1b). See also French Code of Civil Procedure (Decree 2011-48), Art. 1463 ('If an arbitration agreement does not specify a time limit, the duration of the arbitral tribunal's mandate shall be limited to six months as of the date on which the tribunal is seized of the dispute'). See also Egyptian Arbitration Act, Art. 45(1) ('The arbitral tribunal shall make the award terminating the dispute within the period agreed upon by the two parties. In the absence of such agreement, the award must be made within twelve months of the date of commencement of the arbitral proceedings. In all cases, the arbitral tribunal may decide to extend the period of time, provided that the period of extension shall not exceed six months, unless the two parties agree on a longer period').

799. See ICC Rules 2021, Art. 31(1) ('The time limit within which the arbitral tribunal must render its final award is six months. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court. The Court may fix a different time

manner cannot be cloaked with immunity due to the fact that such acts are not related to their adjudicative functions.⁸⁰⁰ However, controversies may arise regarding assessments of damages resulting from delays and non-speedy performance of arbitrators.⁸⁰¹ Case law has dealt with delay claims within both the civil and common law systems. In *Juliet*, the French *Cour de Cassation* held arbitrators liable based on their rendering the award out of time, although there was neither an agreement of extension by parties nor an extension granted by the court.⁸⁰² In a recent case, *Delubac*, the French *Cour d'appel* reversed a decision of the first instance court, ordering the arbitrators to pay back over a million euros in collective fees for issuing an award some three months past the ICC six-month deadline.⁸⁰³ In *Baar v. Tigerman*,⁸⁰⁴ the California Court of Appeal held liable the arbitrator who failed to make a timely decision and declined to extend the immunity of judges to the arbitrator.⁸⁰⁵ The court asserted that the failure of an arbitrator to render an award is not one of the arbitrator's quasi-judicial actions.⁸⁰⁶ Assuming that this claim had been filed under Dutch law, one could expect that, subject to the new Dutch Arbitration Act, the consequence would be a holding of the arbitrator liable should the latter: (i) not safeguard himself/herself against unreasonable delay or (ii) the tribunal exercises reluctance/omission to attend to the arbitrator's request or motion to that end.⁸⁰⁷ This is due to the new provisions introduced by the Act, which include a

limit based upon the procedural timetable established pursuant to Article 24'). *See also* LCIA Rules 2020, Art. 15(10) ('In any event, the Arbitral Tribunal shall seek to make its final award as soon as reasonably possible and shall endeavour to do so no later than three months following the last submission from the parties (whether made orally or in writing), in accordance with a timetable notified to the parties and the Registrar as soon as practicable (if necessary, as revised and re-notified from time to time)').

800. Lew, Mistelis & Kroll, *Comparative International* (n3) 295.

801. *Ibid.*

802. Cass 1ère Civ, 6 December 2005 (2006) 1 RevArb 126, note, Charles Jarroson ('[Q]u'en ayant rendu leur sentence après l'arrivée du terme, les arbitres ont contrevenu à leur obligation de respecter le délai fixé par les parties; que, toutefois, la durée du procès arbitral ne dépend pas que des arbitres et que les parties ont une part active au déroulement de l'instance; qu'il s'ensuit que la responsabilité des arbitres ne peut être engagée du seul fait du non-respect par eux du délai d'arbitrage; qu'il appartient aux demandeurs à l'action en responsabilité professionnelle de démontrer la faute personnelle qu'auraient commise les arbitres, telle que le défaut de diligence caractérisé dans la conduite de la procédure').

803. *SCS Banque Delubac & Cie c/ M A Bouanha et autres*, CA Paris (Pôle 1 – Ch 1), 31 Mars 2015 (2015) 2 RevArb 635, 636.

804. 140 Cal App 3d 980.

805. *Ibid.*, 982 ('We decline to grant quasi-judicial immunity to an arbitrator who breaches his contract to render a timely award').

806. *Ibid.*, 983 ('Arbitral immunity covers only the arbitrator's quasi-judicial actions, not failure to render an award').

807. Dutch Civil Procedure Code 2015 Art. 1036 (2).

statutory duty on arbitrators to protect against unreasonable delay of the proceedings and, if necessary, at the request of a party or of its own motion, take measures.⁸⁰⁸ The Egyptian and UAE Arbitration Acts do not explicitly contain provisions addressing the obligation of the tribunal to guard unreasonable delay. It is paramount to state that the Dutch Arbitration act has adopted the best practices in international arbitration law, pertinent to the efficiency of the arbitral tribunal and warranting the expeditious manner of the entire arbitral process.

[B] Claims for Failure to Disclose Conflicts of Interest

Arbitrators are required to disclose conflicts of interest as a result of being independent and impartial.⁸⁰⁹ Failure to disclose conflicts of interest leads to the vacatur of the award or the termination of the arbitration.⁸¹⁰ The transparency of the arbitral process requires the disclosure of any prospective and real conflicts that could affect the arbitrator's capability to perform impartially.⁸¹¹ The disclosure obligation of arbitrators arises at the time of their appointment and continues throughout the arbitral proceedings.⁸¹² The disclosure includes any relevant facts that would lead to a potential challenge against the arbitrator or the award when they become known.⁸¹³ The disclosure duty was asserted by most arbitration acts and rules.⁸¹⁴

808. Marieke Van Hooijdonk, M P L Schaink, 'Arbitration in the Netherlands – The 2015 Dutch Arbitration Act' (2016) 50 *Revista de Arbitragem e Mediação* 581,585.

809. *See* IBA Guidelines on Conflicts of Interest 3(a) ('If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment 7 or, if thereafter, as soon as he or she learns of them').

810. Hwang, Chung & Cheng (n7) 237.

811. Omar E García-Bolívar, 'Comparing Arbitrator Standards of Conduct in International Commercial Trade Investment Disputes' (2006) 60 *DispResol J* 76, 80.

812. *See* UNICITRAL Rules 2010 Art. 11 ('When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances').

813. Lew, Mistelis & Kroll, *Comparative International* (n3) 265.

814. *See* French Code of Civil Procedure 2011 (Decree 2011-48), Art. 1456 ('Before accepting a mandate, an arbitrator shall disclose any circumstance that may affect his or her independence or impartiality. He or she also shall disclose promptly any such circumstance that may arise after accepting the mandate ...'). *See also* Netherlands Arbitration Act 2015, Art. 1034(1) ('When a person is approached in connection with his possible appointment as an arbitrator presumes that he would be challenged, he shall disclose in writing to the person who has approached him of the existence of such possible grounds'). *See also* Sweden Arbitration Act, s. 9 ('A person who is asked to accept an appointment as arbitrator shall

French case law has participated in setting the grounds for the disclosure obligation. In *Nykcool AB v. société Dole France*, the French *Cour d'appel* held:

'[A]n arbitrator is under a duty to disclose all circumstances which may reasonably call into question his independence in the mind of the parties and should particularly inform the parties of any relationship which is not common knowledge and which could be reasonably expected to have an impact on his judgment in the parties' eyes'.⁸¹⁵

In *Société Annahold BV et D. Frydman v. société L'Oréal et B*, the court held the arbitrator personally liable by virtue of Article 1382 of the French Civil Code for his failure to disclose

immediately disclose all circumstances which, pursuant to section 7 or 8, might be considered to prevent him from serving as arbitrator. An arbitrator shall inform the parties and the other arbitrators of such circumstances as soon as all arbitrators have been appointed and thereafter in the course of the arbitral proceedings as soon as he has learned of any new circumstance'). See ICC Rules 2021, Art. 11(3) ('An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Art 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration'). See LCIA Rules 2020, Art. 5(5) ('Each arbitrator shall assume a continuing duty, until the arbitration is finally concluded, forthwith to disclose in writing any circumstances becoming known to that arbitrator after the date of his or her written declaration (under Article 5.4) which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence, to be delivered to the LCIA Court, any other members of the Arbitral Tribunal and all parties in the arbitration.'). See also Egyptian Arbitration Act 1994, Art. 16(3) ('The arbitrator's acceptance of his mission shall be in writing. When accepting, he must disclose any circumstances which are likely to cast doubts on his independence or impartiality'). See also CRCICA Rules 2011, Art. 11(1) ('When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances. Any doubts as to the duty to disclose a fact, circumstance or a relationship shall be interpreted in favour of disclosure').

815. CA Paris (Pôle 1 – Ch. 1), 10 mars 2011 (2011) 2 RevArb 568 (*'L'arbitre doit révéler toute circonstance de nature à affecter son jugement et à provoquer dans l'esprit des parties un doute raisonnable sur ses qualités d'impartialité et d'indépendance, qui sont l'essence même de la fonction arbitrale. Le lien de confiance devant être préservé continûment, les parties doivent être informées pendant toute la durée de l'instance arbitrale des relations qui pourraient avoir à leurs yeux une incidence sur le jugement de l'arbitre'*). See also *Consorts Allaire v. SAS SGS Holding France*, CA Paris (Pôle 1 – Ch 1), 09/16182, 9 September 2010 (2010) 4 Rev Arb 965. See also *Sociétés TAI, ESW et IEC v. sociétés SIAPE, Engrais de Gabès and others*. CA Paris (1 Chsuppl) 2 juin 1989 (1991) 1 RevArb 87.

his relation to the parties prior to appointment, which resulted in the vacatur of the award.⁸¹⁶ The arbitrator non-disclosure for any circumstances that may raise justifiable doubts regarding his independence may result in legal motions against the arbitrator for damages caused by his conduct.

In the recent case of *Halliburton v. Chubb Bermuda Insurance Ltd*, the UK Supreme Court, confirming that the English law of arbitration imposes a duty on arbitrators. This duty compels arbitrators to disclose matters that would or might lead to the conclusion that there is a real possibility that they are biased.⁸¹⁷ The Court held that ‘unless the parties to the arbitration agree otherwise, an arbitrator is subject to a legal duty of disclosure under English law, in relation to facts and circumstances which would or might give rise to justifiable doubts as to his or her impartiality’.⁸¹⁸ Non-disclosure of conflict of interest, under the Dutch law, could be a strong cause for pursuing a claim pertaining to an arbitrator’s liability. This is due to the obligation pursuant to the Dutch Act to disclose any reason(s) that can disqualify his or her appointment and subject him or her to challenge.⁸¹⁹ In a similar vein, both Egyptian⁸²⁰ and UAE⁸²¹ laws impose a duty of disclosure on arbitrators to any circumstances, which are likely to cast doubts on their independence or impartiality. The breach of such statutory duty can promote the chances of holding arbitrators liable, should they breach the duty thereof.

[C] Claims for Being Corrupt

816. TGI Paris (1Ch, 1s) 9 déc 1992 (1996) 3 Rev Arb 483. *See also V v. société Raoul Duval*, CA Paris (1Ch C), 12 October 1995 (1999) 2 Rev Arb 324, confirmed by Cass 1ère Civ, 16 déc 1997, 95-15.921, Inédit<www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007367685> accessed 17 October 2019.

817. [2020] UKSC 48.

818. *Ibid.*, 136.

819. Dutch Civil Procedure Code 2015 Art. 1034(1).

820. Egyptian Arbitration Act 1994 Art. 16(3).

821. UAE Arbitration Act 2018 Art.10(4)

Arbitrators must perform their functions honestly and impartially.⁸²² Arbitrators fulfill honesty when they totally believe that what they are doing is right.⁸²³ Dishonesty is ‘not necessarily for a financial motive, but still dishonesty always involves a grave charge’.⁸²⁴ Corruption is spread widely; thus, inevitably, some arbitrators might be corrupt. The existence of such probability that an arbitrator may be corrupt was reflected in the national arbitration acts of common law jurisdictions and the rules of the main arbitral institutions waiving immunity for fraud, dishonesty, or actual bias.⁸²⁵ By virtue of that waiver of immunity, actions for damages against arbitrators may result from committing one of the actions thereof. Similarly, the French court decisions have successively held arbitrators liable for fraud.⁸²⁶ If there are doubts about the bias of the arbitrator, the court has the power to remove the arbitrator. In *Sierra Fishing Company and Others v. Hasan Said Farran and Others*, the court removed the arbitrator for being biased and had no difficulty concluding that ‘the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased’.⁸²⁷ In other national laws, arbitrators may face extra sanctions from the court, requiring them to repay any fees or expenses already paid.⁸²⁸ Pursuant to US law, by contrast, immunity is extended to arbitrators for allegations of fraud, corruption and conspiracy, and in

822. See Lord Neuberger, ARBRIX Annual Conference, London, Address to Property Arbitrators, 12 November 2013<<https://www.supremecourt.uk/docs/speech-131112.pdf>> accessed 17 October 2019 (‘Whatever the reason for choosing arbitration, arbitrators perform a very important function. While, unlike judges, they are private appointees, they are like judges in that they have a duty to act judicially – and this very important duty is not merely owed to the parties to the arbitration, but it is also, I would suggest, owed to the public. When performing their function, arbitrators are participating in the rule of law: they are giving effect to the parties’ contract in accordance with substantive and procedural legal principles. If they perform, and appear to perform, that role honestly, impartially, expeditiously, and openly, confidence in the rule of law will be maintained’).

823. Frances Kellor, *American Arbitration: Its History, Functions and Achievements* (Beard Books 1999) 236.

824. *Cannock Chase District Council v. Kelly* [1978] 1 WLR 1, 6 (Megaw J). See also Carol Mulcahy, ‘Arbitrator Immunity under the New Arbitration Act’ (1996) 62(3) Arb 203.

825. Hwang, Chung & Cheng (n7) 240.

826. *Bompard v. Consorts C. et autres*, TGI Paris (1Ch, 1s) 13 juin 1990 (1996) 3 Rev Arb 475. See also Cass 1ère Civ, 15 janv 2014, n°11–17.196, Publié au bulletin <courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/2_15_28195.html> accessed 18 October 2019.

827. [2015] EWHC 140 (Comm).

828. See English Arbitration Act 1996, Art. 24(4) (‘Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid’).

these cases the award maybe vacated.⁸²⁹ This approach clearly reveals the US as a common law country with a tendency to grant arbitrators absolute immunity.

[D] Claims for Negligence

Upon the acceptance of their mandate, arbitrators impliedly agree to act with due care and diligence.⁸³⁰ Negligence is not considered wilful misconduct, but it is considered incompetence. However, arbitrators could be held liable for negligence if it reaches a gross extent.⁸³¹ The English case law limited the arbitrator liability only to fraud⁸³² and declined to hold arbitrators liable for negligence.⁸³³ However, legal systems adopting the contractual approach do not decline to allow claims for negligence against arbitrators,⁸³⁴ although the French courts limited the arbitrator liability to cases of gross negligence (*faute lourde*).⁸³⁵ Liability must be invoked against arbitrators in instances of both negligence and gross negligence. The rationale is that arbitrators often lack legal training and the resources to deduce the law efficiently.⁸³⁶ As a result, such liability will purify the arbitration industry of unqualified arbitrators who would be hesitant to put themselves at risk of liability claims. The Netherlands has similarly adopted the approach of the French system and limited liability claims against arbitrator to acts that form gross negligence on the arbitrator's part.⁸³⁷ Egypt recognises the concept of liability against judges upon gross professional error. Therefore, it could be foreseeable that courts may likewise apply it on arbitrators, due to the lack of any

829. See US Arbitration Act (1976), 9 USC § 10(a) (1,2) ('In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them').

830. Simon Greenberg, Christopher Kee & J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2010) 268. See also Thomas E Carbonneau, *Carbonneau on Arbitration: Collected Essays* (Juris Publishing Inc 2010) 288.

831. Matti Kurkela & Santtu Turunen, *Due Process in International Commercial Arbitration* (OUP 2010) 135.

832. *Arenson Appellant v. Casson Beckman Rutley & Co* [1977] AC 405, 430.

833. *Sutcliffe v. Thackrah* [1974] 727, 735.

834. Hwang, Chung & Cheng (n7) 242.

835. *Bompard v. Consorts C. et autres*, TGI Paris (1Ch, 1s) 13 juin 1990 (1996) 3 Rev Arb 475.

836. Paul J Krause, 'Disregarding Manifest Disregard: Watts Shifts Standard for Vacating Arbitrators' Decisions' (2005) 72 Def Counsel J 79.

837. HR4 December 2009, ECLI:NL:HR:2009:BJ7834, NJ 2011/31.

court precedents in this regard. The UAE Court of Cassation has ruled that arbitrators are held liable for fundamental errors.⁸³⁸

[E] Claims for the Breach of Collegiality

Collegiality ‘is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered’.⁸³⁹ By this definition, cooperation among the parties to an agreement is crucial for its success. Collegiality is based on reciprocal grounds of respect, understanding, and trust among the members of the collegial body depending on their ‘shared sense’, where they jointly cooperate together to achieve the ‘welfare and the mission’ of a specific community.⁸⁴⁰ As a result, members of the collegial body exclude their self-interest and look to merely achieve the interest of some greater group.⁸⁴¹ In applying collegiality to the judiciary, Judge Harry Edwards of the DC Circuit demonstrated that it is a manner in which ‘appellate judges overcome their individual predilections in decision-making’.⁸⁴² Judge Edwards argued that collegiality is fulfilled when ‘judges have a common interest, as members of the judiciary, in getting the law right, that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect’.⁸⁴³ Collegiality was similarly described by Judge Frank Coffin, who confirmed that judges undertake their role in a manner that pays mutual esteem to their fortes and opinions, seeking to render a distinguished court decision based on their mutual understanding and compromise.⁸⁴⁴ Due to the fact that arbitrators are performing a judicial function, they are bound by the principle of arbitral collegiality. The breach of such a duty is a significant trigger of liability. In a recent decision, the Spanish Supreme Court dismissed an appeal of two

838. Dubai Court of Cassation, Case No. 212/2014 Blank (n545).

839. Harry T Edwards, ‘The Effects of Collegiality on Judicial Decision Making’ (2003) 151(5) UPa L Rev 1639, 1645.

840. Villanova University Faculty Congress (2006) Definition of Collegial Governance<https://www1.villanova.edu/content/dam/villanova/faculty_congress/definition-of-collegial-governance.pdf> accessed 19 October 2020.

841. Frank B Cross & Emerson H Tiller, ‘Symposium: Positive Approaches to Constitutional Law and Theory Understand Collegiality on the Court’ (2007–2008) 10(2) J Const L 257.

842. Edwards (n839) 1639.

843. *Ibid.*, 1645.

844. Frank M Coffin, *On Appeal: Courts, Lawyering, and Judging* (1st edn, Norton 1994) 215 (‘The deliberately cultivated attitude among judges of equal status and sometimes widely differing views working in intimate, continuing, open, and noncompetitive relationship with each other, which manifests respect for the strengths of the others, restrains one’s pride of authorship, while respecting one’s own deepest convictions, values patience in understanding and compromise in nonessentials, and seeks as much excellence in the court’s decision as the combined talents, experience, insight, and energy of the judges permit’).

arbitrators, ordering them to return multinational Puma AG RDS ('Puma') all fees, plus interest and costs, received from Puma during an ad hoc arbitration, on grounds of violating the arbitral collegiality principle.⁸⁴⁵ The dispute that led to this Spanish court decision arose from an ad hoc arbitration that commenced on 6 August 2009 by Estudio 2000, S.A. ('Estudio 2000'), a former Spanish distributor of Puma, against multinational Puma. Accordingly, a tribunal was designated in which two arbitrators (defendants: Mr Temborry Redondo and Mr Ramallo García), appointed by the Spanish distributor and the chairman of the arbitral tribunal, respectively, rendered an award in the absence of Mr Santiago Gastón de Iriarte, the arbitrator appointed by Puma on 2 June 2010.⁸⁴⁶ The arbitral award was annulled by a final decision of the Provincial Court of Madrid, dated 10 June 2011, based on Puma's claim of breaching the principle of arbitral collegiality, because the third arbitrator, appointed by Puma to the arbitral tribunal, was excluded by the defendants when rendering the award.⁸⁴⁷ Consequently, Puma commenced civil liability actions against the two arbitrators based on a violation of Article 21 of the Spanish Arbitration Act, related to the responsibility of arbitrators and arbitration institutions.⁸⁴⁸ The allegation for civil liability against the arbitrators resulted in a judgment against each of them for EUR 750,000, plus interest – corresponding to the amount of the fees received by each of them as arbitrators due to the undue exclusion of the third arbitrator in the deliberation of the award.⁸⁴⁹ The Court of Appeal affirmed the decision of the first instance court, rejecting the conduct of the arbitrators having been engaged in determining and rendering the award without the participation, consent or knowledge of the third arbitrator appointed by Puma.⁸⁵⁰ Finally, the Spanish Supreme Court confirmed the Court of Appeal's

845. See B Cremades & Asociados (trans), 'Judgment of the Spanish Supreme Court 102/2017, February 15, 2017, Liability of Arbitrators: The "Puma" Decision', 1, 2 <www.cremades.com/pics/contenido/398872_1.pdf>accessed 18 October 2020.

846. *Ibid.*, 4.

847. *Ibid.* The court held:

On 2 June the two defendants, Mr. Ramallo and Mr. Temborry, met. As a result of this meeting, the award was notified to the parties. The president of the arbitral tribunal, Mr. Ramallo, sent a copy of the text to the third arbitrator, Mr. Gastón de Iriarte (who, as indicated, did not participate in the meeting in which the award was finalized, and to which he was not summoned, with the other members being aware that he was travelling outside Madrid), on the same day, 2 June, at 21:11, via email.

848. *Ibid.*, 5.

849. *Ibid.*

850. *Ibid.*, 8.

judgment, holding the arbitrators liable and ordering them to pay the costs. One could argue that if the same case had taken place under English law, this may have set grounds for ‘arbitrator’s deliberate misconduct’, represented in determining and rendering the award in the absence of a third member of the tribunal. Similarly, Dutch, Egyptian and UAE laws can construe such an act to be ‘grave misconduct’ amounting to gross negligence that sounds a necessity to uphold the arbitrators’ accountability.

It is paramount to note that there is an approach wherein liability claims against arbitrators can be pursued, only if the arbitral award that contains the errors committed by an arbitrator is set aside, since the arbitrators’ liability necessarily presupposes the successful setting aside of the arbitral award.⁸⁵¹ However, some of the above claims may result in the annulment of the award despite having damages incurred on the aggrieved party, such as liability claims resulted from delay. The latter example demonstrates liability on the arbitrators’ part in case they do not render the award in timely manner; however, this misconduct by the arbitrators’ does not result in the annulment of the award.

§3.05 Chapter Summary

Based on the presentation of immunity and liability of arbitrators in both the domestic and international jurisdictions, it appears that neither immunity nor liability has been addressed in national arbitration laws or institutional rules. Common law countries using English law still have a conservative approach regarding the liability of arbitrators, even after the 1996 English Arbitration Act. The 1996 Arbitration Act does not allow claims against arbitrators for errors committed unless they are committed in bad faith. It seems that English law, by allowing claims against arbitrators in instances of bad faith, has abandoned the absolute immunity approach. In theory, this approach by English law slightly differentiates arbitrators from judges. In practice, however, proving bad faith is not a simple process. According to the provisions of English law, arbitrators are covered by absolute immunity except in cases of bad faith, meaning that even gross negligence would be covered by immunity unless it is done in bad faith. This reveals that the English Arbitration Act does not provide fixed acts that may incur arbitrator liability. On the other hand, in civil law countries, arbitrators are considered service providers committed to their obligations set by agreement or contract. With respect to French law, claims against arbitrators could be based on contractual responsibility vis-à-vis the parties in instances of breach of duties imposed by contract. Egyptian law has no provision

851. *See*, for example, Austrian Supreme Court Decision, OGH, 22.03.2016, 5 Ob 30/16x.

regarding the issue of immunity or liability. A major argument against an unconditional arbitrator immunity is that because liability would entice arbitrators to increase their duty of care, immunity of arbitrators should be limited to prevent the potentially negative effects that blanket immunity could have on the arbitral process.⁸⁵² The debate about the issue of immunity and liability of arbitrators is crucial due to the absence of a uniform law. The existence of a uniform law would be a tool for defining arbitral immunity, its extent, arbitrator liability, and when it could be incurred. Through a uniform law, the approach of granting absolute immunity to arbitrators shall be replaced by qualified immunity. This will offer assistance to individual countries as national laws are still incapable of fully regulating arbitrator liability. Even with a uniform law, there are some outstanding questions about the possibility of insuring against prospective liability of arbitrators. For instance, what acts could be covered by the insurance? Could insurance be deemed a compulsory requirement for an arbitrator to be permitted to arbitrate?



CHAPTER 4 Immunity and Liability of Arbitral Institutions

Chapter 4 Immunity and Liability of Arbitral Institutions

Ahmed F. El Shourbagy

Chapter 3 addressed the immunity and liability of arbitrators in both the ad hoc and institutional reference under the laws subject to this dissertation. The chapter presented the extension of judicial immunity to arbitrators based on their functional comparability to judges. Chapter 3 also addressed the civil liability of arbitrators in contract and tort, as well as the potential claims that may arise from carrying out their mandate pursuant to the jurisdictions thereto. Chapter 4 further addresses the legal status of immunity and liability with reference to arbitral institutions rules, national laws, and case law under consideration. Due to the rapid increase of international business and investments, arbitration markets have demonstrated remarkable growth in international commercial disputes. This progress in the arbitration industry led to the development of specialised institutions providing qualified arbitration

852. Rubino-Sammartano (n44) 523.

services.⁸⁵³ These arbitral institutions have significantly impacted the development of the arbitral process by providing a special body of procedural rules, model clauses, and an influential role on legislations to recognise the enforcement of arbitral awards.⁸⁵⁴ The arbitral process as an alternative dispute resolution system has two forms: ad hoc and institutional.⁸⁵⁵ Since arbitration is founded on the principle of freedom of contract,⁸⁵⁶ the selection of either ad hoc or institutional arbitration is subject to the parties' autonomy while they are selecting arbitration as a method of dispute settlement.⁸⁵⁷ Ad hoc arbitration is not administered under supervision or a body of rules of a specific arbitral institution.⁸⁵⁸ Parties in ad hoc arbitration may designate their own procedural rules or may assign it to an established set of rules, such as the UNICITRAL rules.⁸⁵⁹ Thus, the arbitrator would be conducting the proceedings according to the agreement between parties. The parties in ad hoc arbitration practice complete control over the arbitral proceedings.⁸⁶⁰ This control allows the parties to design the proceedings to conform to their needs and circumstances, reflecting a basic advantage of ad hoc arbitration.⁸⁶¹ *The mandatory* provisions of the *law of the seat* (lex arbitri) are the provisions governing ad hoc arbitrations; thus, there is no reliance on an arbitral institution to administer the procedures.⁸⁶² Unlike ad hoc arbitration, institutional arbitration is a form of arbitration in which the arbitration is run and managed under the supervision of an arbitral

853. Rémy Gerbay, *The Functions of Arbitral Institutions* (Kluwer Law International 2016)35. See also William K Slate II, 'International Arbitration: Do Institutions Make a Difference' (1996) 31 Wake Forest L Rev 41, 43.

854. Henry P De Vries, 'International Arbitration: International Commercial Arbitration: A Contractual Substitute for National Courts' (1982–1983) 57 Tul L Rev 42, 44. See also Cavinder Bull, 'An Effective Platform for International Arbitration: Raising the Standards in Speed, Costs and Enforceability' in Peter Quayle & Xuan Gao (eds), *International Organizations and the Promotion of Effective Dispute Resolution* (Brill Nijhoff 2019)7.

855. Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) 55(4) Intl Org 919–921. See also Gerald Asken, 'Adhoc Versus Institutional Arbitration' (1991) 2(1) ICC Bull 8.

856. Thomas E Carbonneau, 'The Exercise of Contract Freedom in Making of Arbitration Agreements' (2003) 36 Vand J Transnatl L 1189, 1193.

857. Julian DM Lew, 'Determination of Arbitrators' Jurisdiction and the Public Policy Limitation on That Jurisdiction' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Springer Science and Business Media 2013) 74. See also Pryles (n28) 328.

858. Born (n25) 191.

859. Blackaby, Partasides & Redfern (n2) 42.

860. Lew, Mistelis & Kroll, *Comparative International Commercial Arbitration* (n3) 35.

861. Joanna Jemielniak, *Legal Interpretation in International Commercial Arbitration* (Ashgate Publishing Ltd 2014) 73–74.

862. Hofbauer, Burkar, Bander & Tari (n309) 2.

institution in accordance with its rules.⁸⁶³ The institution administers the proceedings in exchange of remuneration, even if it is non-profit organisation.⁸⁶⁴ The arbitrator under institutional arbitration conducts the arbitral process as set forth by the rules of the institution. It has been said that: ‘Institutional arbitral tribunals are “*prefabricated tribunals in the sense that the participants are restricted by the procedural rules of the institution administering the arbitration when appointing the arbitral tribunal or during the proceedings*”’.⁸⁶⁵ These rules are usually included by the parties through their arbitration agreement to govern the proceedings.⁸⁶⁶ In addition to imposing arbitral immunities, the institution rules always provide a right to and method for remuneration to be paid in exchange of arbitral services.⁸⁶⁷ The incorporation of said rules to the agreement is usually done in the form of a model clause suggested by the selected institution.⁸⁶⁸ When a dispute arises, these model or standard clauses assure the *prima facie* expediency of following the arbitral procedure.⁸⁶⁹ The role of arbitral

863. Namarta Shah & Niyati Gandhi, ‘Arbitration: One Size Does Not Fit All: Necessity of Developing Institutional Arbitration in Developing Countries’ (2011) 6(4) JICLT 232, 234.

864. Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015) 129.

865. Rolf A Schütze (ed.), *Institutional Arbitration: A Commentary* (Bloomsbury Publishing 2013) 2.

866. Blackaby, Partasides & Redfern (n2) 45.

867. Thomas J Stipanowich, ‘Arbitration and Choice: Taking Charge of the New Litigation (Symposium Keynote Presentation)’ (2008–2009) 7 DePaul Bus & Comm L J 383, 431. See also Born (n25) 2210.

868. See the ICC, ‘The Standard ICC Arbitration Clause: Drafting the Arbitration Agreement’ <www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/> accessed 18 October 2020 (‘All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules’). See also The London Court of International Arbitration, ‘Recommended Clause for Future Disputes referred to the LCIA’ <www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx> accessed 18 October 2020 (‘Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place, of arbitration shall be [City and/or Country]. The language to be used in the arbitral proceedings shall be []. The governing law of the contract shall be the substantive law of []’). See also Mohamed Ibrahim Mostafa Aboul-Enien, ‘Arbitration under the Auspices of the Cairo Regional Centre for Commercial Arbitration’ (1986) 4(2) Intl Tax & Bus Law 256, 257 (‘Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be decided by arbitration in accordance with the Rules for Arbitration of the Cairo Regional Arbitration Centre’).

869. Gordon Blanke, ‘Institutional Versus Ad Hoc Arbitration: A European Perspective’ (2008) 9(2) ERA Forum 275, 277.

institutions is basically administrative, providing specific services like selection, confirmation, removal and replacement of arbitrators, handling challenges to arbitrators, dealing with arbitrator's fees, and managing different logistical and related matters.⁸⁷⁰ The administrative function of the institution is also reflected in reviewing the draft award, which was deemed a quasi-judicial task.⁸⁷¹ The extent of the administrative function performed by the institution differs from one institution to another.⁸⁷² This extent can range from designation of the arbitral tribunal to full control over the arbitration from the commencement of the proceedings until the issuance of the award.⁸⁷³ The differences in the extent of functions depend on the rules of every institution and the law of the seat.⁸⁷⁴ The administrative function performed by the institution requires the institution to keep qualified staff and a flexible and efficient mechanism in its control over the conduct of the proceedings to provide the parties the same degree of trust as in a court of law.⁸⁷⁵ As a result, it could be concluded that 'the difference between an

870. Rubino-Sammartano (n44) 415. *See also Frosst Laboratories Inc, et al. v. Arbitration and Conciliation Center of the Bogotá Chamber of Commerce Constitutional Court*, 18 August 1999, in Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XXVI* (Kluwer Law International 2011) 265 ('Further, the procedural powers of the director of the arbitral institution in this phase clearly and undoubtedly show that the director has a public function, as they concern the notification, acceptance or refusal of the request for arbitration, the decision on recourses, carrying out a conciliation hearing, etc. Lastly, the activity of the director of the arbitral institution in the pre-arbitral stage culminates with the transmission of all these acts – request, acceptance, notification, claims, objections, conciliation – to the arbitrators. The legal and procedural importance of the pre-arbitral phase is undeniable: although it does not settle the dispute, it shows that a public function is being carried out according to a legal procedure which is binding both on the institution and on the parties. Although the dispute is not decided in this phase, due process and right of defence may be compromised if the legal principles governing this phase are violated. The existence of these fundamental rights does not depend on the definition of this phase as jurisdictional, or on any power granted to the director of the arbitral institution').

871. Houtte & McAsey (n248) 162.

872. Jan Paulsson, Nigel Rawding & Lucy Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts* (Kluwer Law International 2011) 60.

873. Greenberg, Kee Weeramantry (n830) 25. *See also* J Gillis Wetter, 'The Internationalization of International Arbitration: Looking Ahead to the Next Ten Years' (1995) 11(2) *Arb Intl* 117, 124 (noting that 'Arbitration institutions can perform many and varied functions in the international arbitral process, ranging from strict and extensive control over the progress, conduct, cost and financial administration of proceedings to more limited, even essentially ancillary services').

874. Ferdinando Emanuele & Milo Molfa, *Selected Issues in International Arbitration: The Italian Perspective* (Thomson Reuters 2014) 86.

875. Ottoarndt Glossner, 'Sociological Aspects of International Commercial Arbitration' (1982) 10 *Intl Bus Law* 311, 313 ('It is matter of definition what the arbitration institution means, ... In any case, much depends on the organisation of the arbitration institution. There must be enough qualified persons to handle the matters and to deal with the task of

ad hoc arbitration and an institutional arbitration is like the difference between a tailor made suit and one which is bought off the peg'.⁸⁷⁶ Parties opt for arbitral institutions over ad hoc arbitrations due to the advantages the former provides in institutional arbitrations. These advantages are reflected in the automatic inclusion of the institution rules to the arbitration agreement if the parties adopted its rules.⁸⁷⁷ The procedural rules set by the institutions are subject to regular review to keep pace with the development of the international arbitration and to make the necessary updates.⁸⁷⁸ These rules would minimise problems that may arise related to arbitral procedures during the lifetime of the arbitral process.⁸⁷⁹ By virtue of these pre-tailored rules, the parties can avoid tedious problems and have access to foreseeable solutions for different arbitral cases.⁸⁸⁰ Another advantage is that the issuance of an arbitral award by a reputed institution may be more entrusted internationally when it is sought to be enforced.⁸⁸¹ Moreover, the arbitral process would be administered by professional staff that would play a role in providing procedural assistance to the parties, arbitral tribunal, and counsel.⁸⁸² Arbitral institutions always provide arbitrators who possess special skills and experience in the subject matter of the arbitration.⁸⁸³ The parties could receive assistance from the arbitral institution in designating their tribunal,⁸⁸⁴ or the institution could appoint the arbitrator by default in case the parties failed to do so.⁸⁸⁵ As a result, the relation between the arbitral institution and the arbitrators is buffered by the arbitral institution to protect the partiality of

administering arbitration proceedings, in short there must be a well-equipped infrastructure, an experienced routine in the mechanics of handling the subjects and the individuals and of the legal appraisal of the cases ... it is essential that they provide a smooth handling machinery, that they stay away from undue influence, that if such influence is exercised there is room for challenge of such practice and that arbitration awards which are the consequence of improper handling can be set aside. If these guarantees are granted, an arbitration institution can be valued on the same level as a law court'.).

876. Asken (n855) 9.

877. Blackaby, Partasides & Redfern (n2) 45.

878. Christopher R Drahozal, 'Party Autonomy and Interim Measures in International Commercial Arbitration' in AJ van den Berg (ed.) *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series No. 11 (London 2002) (Kluwer Law International 2003) 181.

879. Born (n25) 191.

880. Joyce J George, 'The Advantages of Administered Arbitration When Going It Alone Just Won't Do' (2002) 57(3) *Disp Resol J* 66, 69.

881. Moses (n83) 10. *See also* Carbonneau (n856) 1207.

882. Onyema (n46) 28.

883. Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution?' (1986–1987) 25 *Colum J Transnatl L* 9, 15.

884. Gaillard & Savage, *International Commercial Arbitration* (n1) 484.

885. Lew, Mistelis & Kroll, *Comparative International* (n3) 239.

arbitrators and the integrity of the whole arbitral process.⁸⁸⁶ Furthermore, the review conducted by the arbitral institution for the tribunal award before sending it to the parties, which is intended to ensure that all matters related to the arbitration are covered by the arbitral tribunal, is deemed a basic advantage (scrutiny of the awards conducted particularly by the ICC).⁸⁸⁷ In contrast, there are some drawbacks present in institutional arbitration, including the administrative fees paid by parties to the arbitral institution and the delays that arise from the institutional procedures for fulfilling its internal administrative standards.⁸⁸⁸ These drawbacks make it enticing to choose ad hoc arbitration when considering the financial efficiency and timeliness of arbitral proceedings that such arbitration provides.⁸⁸⁹ However, those advantages of ad hoc arbitration could, under specific circumstances, be seen as draw backs.⁸⁹⁰ For instance, because ad hoc arbitration arises from the dependence of the whole process on the cooperation of arbitrants and counsels,⁸⁹¹ a timely conclusion to the proceeding is only available when the arbitrants' conduct is reliable and responsible such that delays can be avoided.⁸⁹² In contrast, the pre-established rules of the arbitral institutions provide effective remedies for most situations that may arise.⁸⁹³ Furthermore, the fully electronic proceedings adopted by institutions eliminate delays and minimise certain routine administrative problems.⁸⁹⁴ For example, the ICC, in its efforts to speed up the momentum of the proceedings,

886. Claude R Thomson & Annie KM Finn, 'Managing an International Arbitration: A Practical Perspective' (2005) 60(2) *Disp Resol J* 74, 77.

887. See Blackaby, Partasides & Redfern (n2) 45. See also ICC Rules 2017, Art. 34 ('Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form'). See also *Carte Blanche (Singapore) Pte Ltd v. Carte Blanch International Ltd*, 888 F2d 260 (2nd Cir 1989). The Court held, '[t]he ICC Court is the best judge of whether its procedural rules have been satisfied, and when it certified the award as final, it certified that the procedural rules had been complied with to its satisfaction'. *Ibid.*, 267.

888. Christian Bühring-Uhle, Lars Kirchhoff & Gabriele Scherer, *Arbitration and Mediation in International Business* (2nd edn, Kluwer Law International 2006) 36.

889. Jemielniak (n861) 74.

890. Thomas J Stipanowich, 'Rethinking American Arbitration' (1987–1988) 63(3) *Ind L J* 425, 432.

891. Blackaby, Partasides & Redfern (n2) 43.

892. Carita Wallgren-Lindholm, 'Adhoc Arbitration v Institutional Arbitration' in G Cordero-Moss (ed) *International Commercial Arbitration: Different Forms and Their Features* (Cambridge University Press 2013) 70.

893. Moses (n83) 10.

894. Nassib G Ziade, 'Reflections on the Role of Institutional Arbitration Between the Present and the Future' (2009) 25(3) *Arb Int* 427, 428.

launched a pilot project and generated a virtual filing method for the participants in ICC arbitration proceedings, allowing the parties to communicate and share information on a secured ICC case management website called Net case.⁸⁹⁵ The website facilitates communication among the arbitrants and the arbitral tribunal by providing instantaneous access to the information 24 hours a day.⁸⁹⁶ Although institutional arbitration is costly, some argue that the using ad hoc arbitration is not always a less expensive option compared to institutional arbitration. Gerald Asken illustrated that the costs saved by selecting ad hoc arbitration are:

*'those of administrating agency itself but not the usually far larger legal and arbitrators' fees. Moreover, since most international institutions are now facing substantial competition from other arbitral bodies, transnational businesses are enjoying the benefit of lower and more reasonable fees.'*⁸⁹⁷

The arbitral institutions also offer an oversight of the arbitrators' remuneration, making it less expensive compared to the ad hoc arbitration.⁸⁹⁸ The gradual emergence of arbitral institutions had a direct impact in recognising and promoting these institutions, even more so than national laws.⁸⁹⁹

[§4.01 Arbitral Institutions and Conventional Recognition](#)

The recognition of institutional arbitration on the international level arose out of four conventions: Hague Conventions for Pacific Settlement of International Disputes of 1899 and 1907,⁹⁰⁰ the New York Convention,⁹⁰¹ the European Convention⁹⁰² and the Washington Convention.⁹⁰³ In the Hague Convention, the parties agreed to use their best efforts to insure

895. Gabrielle Kaufmann-Kohler & Thomas Schultz, 'The Use of Information Technology in Arbitration' (2005) JusLetter 1, 42.

896. *Ibid.*

897. Asken (n855) 11.

898. Born (n25) 192.

899. Gaillard & Savage, *International Commercial Arbitration* (n1) 467.

900. Convention for the Pacific Settlement of International Disputes, The Hague, 29 July 1899, revised 1907, second Hague Peace Conference.

901. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

902. Convention on International Arbitration, Geneva, 21 April 1961.

903. Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington, 18 March 1965.

the pacific settlement of international differences.⁹⁰⁴ By virtue of this convention, the PCA was established with ‘*the object of facilitating an immediate recourse to arbitration for international differences, which ... has not been possible to settle by diplomacy*’.⁹⁰⁵ The PCA was the outcome of the first Hague Peace Conference, which was assembled at the urging of Tsar Nicholas II of Russia ‘*with the object of seeking the most effective means of ensuring to all peoples the benefits of a real and durable peace*’.⁹⁰⁶ The PCA played a crucial role in arbitrating a number of interstate disputes, and this role has subsequently extended to arbitrating disputes among a state and non-state party.⁹⁰⁷ The year 1935 was significant in PCA history because it was the first time it handled a case involving non-State parties.⁹⁰⁸ The PCA extended its services beyond the service of designating an appointing authority under the UNICITRAL rules to cover the administration of arbitrations in disputes involving private parties as well as states.⁹⁰⁹ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is tailor-made for ‘the enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought’.⁹¹⁰ The Convention helped improve the international arbitration system;⁹¹¹ in fact, it is considered a principle arbitration convention with global influence.⁹¹² It is worth mentioning that the origin of the trial for drafting a convention for the enforcement of

904. See The Hague Convention for the Pacific Settlement of International Dispute 1899, Art. 1.

905. *Ibid.*, Art. 20 ([T]he Signatory Powers undertake to organise a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention’).

906. Frederick W Holes, *The Peace Conference at The Hague: And Its Bearings on International Law and Policy* 1900 (Forgotten Books 2013) 8.

907. PJH Jonkman, ‘Permanent Court of Arbitration Work in 1995’ in AC Kiss and JG Lammers, *Hague Yearbook of International Law* 8 (1995) (Martinus Nijhoff Publishers 1996) 199.

908. See *Radio Corp of America v. the National Government of the Republic of China* [1935] 3 RIAA 1621 <<https://pcacases.com/web/sendAttach/713>> accessed 19 October 2020.

909. See Permanent Court of Arbitration Rules 2012, Art. 1(1) (‘Where a State, State-controlled entity, or intergovernmental organisation has agreed with one or more States, State-controlled entities, intergovernmental organisations, or private parties that disputes between them in respect of a defined legal relationship, whether contractual, treaty based, or otherwise, shall be referred to arbitration under the Permanent Court of Arbitration Rules 2012 (hereinafter the “Rules”), then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree’). See generally Permanent Court of Arbitration, ‘Our Services’ <<https://pca-cpa.org/wp-content/uploads/sites/6/2015/11/PCA-Arbitration-Rules-2012.pdf>> accessed 19 October 2020.

910. See New York Convention, Art. I(1).

911. Greenberg, Kee & Weeramantry (n830) 9.

912. De Vries (n854) 56.

international arbitral awards was taken by the ICC in 1953.⁹¹³ This trial took the form of a report and a preliminary draft convention to the governments through the United Nations (UN) with the recommendation that *'the adoption of such a convention would greatly increase the efficiency of international commercial arbitration, by insuring a rapid enforcement of arbitral awards rendered in accordance with the will of the parties'*.⁹¹⁴

The New York Convention recognised the major role that could be performed by arbitral institutions, reflecting the institutions' remarkable growth in Article I(2), which provides *'[t]he term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted'*.⁹¹⁵ As a result, the countries that ratified the New York convention recognise arbitral institutions in their national arbitration acts.

The European Convention was sponsored by the UN Economic Commission for Europe.⁹¹⁶ The purpose of the Convention was to facilitate and encourage east-west trade at a time when Europe was not yet united.⁹¹⁷ The Convention sought to achieve this goal by overcoming obstacles that existed with regard to the organisation of arbitral processes among the European countries.⁹¹⁸ Due to the political and economic differences among the West and East bloc, mutual confidence in the others' courts was minimal.⁹¹⁹ Those differences were a product of political and economic changes resulting from World War II, creating permanent commercial arbitration bodies in all Eastern Europe (CMEA Council for Mutual Economic Assistance member countries).⁹²⁰ The Eastern European arbitration system was internally isolated, keeping bureaucratic entities, called trade commissions, in charge of managing trade and

913. Lew, Mistelis & Kroll, *Comparative International* (n3) 21.

914. Allen Sultan, 'The United Nations Arbitration Convention and United States Policy' (1959) 53(4) *Am J Intl L* 807, 812.

915. New York Convention, Art. I(2).

916. *See* European Convention, Preamble.

917. Pieter Sanders, *Quo Vadis Arbitration?: Sixty Years of Arbitration Practice* (Kluwer Law International 1999) 72.

918. PI Benjamin, 'Notes – The European Convention on International Arbitration' (1961) 37 *Brit YB Intl L* 478.

919. Stefan Michael Kroll, 'Issues Specific to Arbitration in Europe: The European Convention on International Commercial Arbitration – The Tale of a Sleeping Beauty' in C Klausegger and others (eds), *Austrian Yearbook on International Arbitration 2013* (Manz'sche Verlags und Universitäts buchhandlung 2013) 4.

920. Heinz F Strohbach, 'Arbitration Between Foreign Trade Organisations of Socialist Countries and Parties from the Capitalist Economic Sphere' (1984) 4(3) *Pace L Rev* 607, 609.

offering a complaint basis for transactional disputes settlement.⁹²¹ These trade commissions created arbitration mechanisms for the dispute settlements, which not only insulated the bloc but also served the political demands of the rules governing the bloc and ignored the promotion of other free trade market factors.⁹²² This gave rise to a debate about the nature of these permanent arbitration bodies in Eastern Europe, specifically whether they were the same as institutional arbitration bodies in Western Europe or akin to state courts.⁹²³ Ergo, prior to the European Convention, the New York Convention included in Article I(2), upon the request of Eastern Europe countries, that the term ‘arbitral award’ includes awards made by permanent arbitral bodies to which the parties submitted their disputes.⁹²⁴ Similarly, the European Convention included in Article I(2.b) that the term arbitration ‘*shall mean not only settlement by arbitrators appointed for each case (ad hoc arbitration) but also by permanent arbitral institutions*’.⁹²⁵ The recognition of institutional arbitration was also stressed by the convention under Article IV(1): ‘*The parties to an arbitration agreement shall be free to submit their disputes (a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution.*’⁹²⁶ Therefore, the Convention did not ignore the arbitral institutions’ role as a main participant in the arbitration industry.

Finally, the Washington Convention was formulated by the executive directors of the International Bank for Reconstruction and Development (the World Bank). The broad purpose of the Convention was to promote and assist foreign investment and economic development by offering a neutral dispute settlement mechanism among the Member States and the foreign investors that are nationals of a Member State.⁹²⁷ The Convention was pivotal for the recognition of the role of the arbitral institution by adapting an institutional arbitration mechanism in the resolution of international investment disputes.⁹²⁸ This was reflected in the

921. Thomas E Carbonneau, *Law and Practice of Arbitration* (5th edn, Juris Publishing Inc 2014) 626.

922. *Ibid.*, 626.

923. Sanders (n917) 61.

924. *Ibid.*

925. *See* European Convention, Art. I(2b).

926. *Ibid.*, Art. IV(1a).

927. Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States, pt B, s. 3

<https://icsid.worldbank.org/en/Documents/resources/ICSID_Conv%20Reg%20Rules_EN_2003.pdf> accessed 18 October 2020 (‘While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States’).

928. *See ibid.* (‘The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of

establishment of a permanent arbitral institution for the resolution of investment disputes, known as the ICSID.⁹²⁹ The entire arbitral procedure is merely governed by virtue of the ICSID Convention.⁹³⁰ Arbitral awards rendered pursuant to the ICSID Convention ‘*shall be binding on the parties and shall not be subject to appeal or to any other remedy except those provided for in [the ICSID] Convention*’.⁹³¹

Thus, by virtue of the Hague conventions and Washington convention, two permanent arbitral institutions were established: the PCA and the ICSID. In that regard, it is important to note that there is a difference between arbitral institutions created by virtue of public international law instrument and others established by means of private law.⁹³²

§4.02 Private Major Arbitral Institutions

Many arbitral institutions have been created all over the world. Recently, several arbitral institutions were founded in different countries to serve the arbitral process.⁹³³ The well-known institutions are the ICC, the London Court of Arbitration, and the American Arbitration Association (AAA); the most popular commercial chambers are the Stockholm, the Swiss, and the Vienna Chambers of Commerce. Moreover, there are regional arbitral institutions like the CRCICA.⁹³⁴

[A] ICC (International Court of Arbitration)⁹³⁵

The ICC was established in 1919 by a group of businessmen, known as the merchants of peace, to support the interests of international trade and business life.⁹³⁶ This was followed by the establishment of the International Court of Arbitration (ICA) in 1923, which is located in Paris.

mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.’) *See also* Gaillard & Savage, *International Commercial Arbitration* (n1) 480.

929. *See* ICSID Convention, Art. 1 (1, 2) (‘There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre). (2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention’).

930. Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff Publishers 1995) 296.

931. *See* ICSID Convention, Art. 53(1).

932. Lew, Mistelis & Kroll, *Comparative International* (n3) 38.

933. *Ibid.*, 37–38.

934. Blackaby, Partasides & Redfern (n2) 44.

935. *See* <www.iccwbo.org/> accessed 19 October 2020.

936. Greenberg, Kee & Weeramantry (n830) 7.

The ICA administers international arbitrations in different countries and is considered the world's most popular arbitral institution.⁹³⁷ The ICC was instrumental in encouraging international laws for arbitration (such as the New York Convention).⁹³⁸ The ICA is autonomous from the ICC but does not have a separate legal personality.⁹³⁹ Nevertheless, the ICA 'is an independent arbitral body' from the International Commercial Chamber.⁹⁴⁰ The result of this independence is that no one other than those on the court, such as the president or the members of the secretariat, can interfere or affect the court while exercising its functions.⁹⁴¹ The ICA does not have a judicial character and its decisions cannot be compared to those rendered by a state court.⁹⁴² The court is designated by a president, vice presidents, member, alternate members, and a secretariat of an assistive function.⁹⁴³ The members of the court are autonomous from the ICC National Committees and Groups.⁹⁴⁴ The court's main function is to administer arbitral proceedings by arbitral tribunals in accordance with its rules and not to resolve by itself.⁹⁴⁵ The court's administrative role, in the broader sense, is to watch the whole arbitral process starting from the time the arbitration request is filled until the award is rendered by the arbitral tribunal.⁹⁴⁶ The ICC has its own body of rules; the ICC's first body of arbitration rules was the 1923 version, these rules have been revised from time to time, including in 1927, 1931, 1933, 1939, 1947, 1955, 1975, 1988 and 1998.⁹⁴⁷ Throughout the past decade, the ICC had two versions of former rules (2012 and 2017), followed by the latest

937. Gaillard & Savage, *International Commercial Arbitration* (n1) 174.

938. Sanders (n917) 68.

939. Christian Aschauer & Andreas Reiner, 'ICC Rules' in Schütze (n856) 32. *See also* ICC Rules 2021, Appendix I – Statutes of International Court of Arbitration, Art. 1(2) ('As an autonomous body, it carries out these functions in complete independence from the ICC and its organs').

940. *See* ICC Rules 2021, Art. 1(1).

941. Thomas H Webster & Michael Buhler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (Sweet and Maxwell 2014) 26.

942. Eric Schäfer, Herman Verbist & Christophe Imhoos, *ICC Arbitration in Practice* (Kluwer Law International 2005) 15. *See also* *SNF SAS v. Chambre de Commerce Internationale*, CA Paris (1re Ch C) 07/19492, 22 janv 2009 (2009) 1 Rev Arb 233–235 ('Considérant que la CCI, organisation non-gouvernementale reconnue par l'ONU, est responsable des actes d'administration de la Cour internationale d'arbitrage, la CCI étant la seule à disposer de la personnalité juridique').

943. *See* ICC Rules 2021, Appendix I – Statutes of International Court of Arbitration, Art. 2.

944. *Ibid.* Art. 1(3).

945. *See ibid.*, Art. 1(2).

946. Simon Greenberg & Anders Ryssdal, 'Rules of Arbitration of the International Chamber of Commerce' in Cordero-Moss (n892) 207.

947. *See* Yves Derains & Eric A Schwartz, *Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International 2005) 3.

version of the ICC rules came into effect on 1 January 2021.⁹⁴⁸ The aim of this regular revision of the ICC rules is to provide greater cost efficiency and better acceleration of the arbitral process.⁹⁴⁹ The 2012 version of the ICC rules intended to highlight the administrative role of the court and to prevent the allegation that the ICC has an obligation to ensure that the tribunals have applied the rules in the proper manner.⁹⁵⁰ The latest version of the ICC Rules for 2017 has confirmed the approach of the former one. Pursuant to these rules, the ICC supervises the arbitral procedures, provides a group of crucial services, including the scrutiny of draft arbitral awards,⁹⁵¹ and acts as an appointing authority.⁹⁵²

[B] London Court of International Arbitration⁹⁵³

Historically, the first initiative for establishing an arbitral institution was taken in the UK through the foundation of the LCIA in 1892.⁹⁵⁴ Its founding arose from a real need to provide London's international business community with an efficient body for the settlement of its disputes.⁹⁵⁵ The LCIA is the second leading arbitral institution in Europe that provides arbitration services.⁹⁵⁶ The LCIA was formed as an independent arbitral body jointly managed by the Corporation of London and the London Chamber of Commerce.⁹⁵⁷ Upon its foundation, it was noted that: 'This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peace-maker instead of a stirrer up of strife'.⁹⁵⁸

948. See the ICC Rules of Arbitration 2021 downloadable in different languages. ICC, 'Rules of Arbitration' <www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> accessed 19 January 2021.

949. Greenberg & Ryssdal (n892) 208.

950. Webster & Buhler (n941) 28.

951. See ICC Rules 2021, Art. 1(2) ('The Court is the only body authorised to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules. It draws up its own internal rules, which are set forth in Appendix II (the "Internal Rules")').

952. See ICC Rules 2018 as an appointing authority in UNCITRAL or other arbitration proceedings.

953. LCIA <www.lcia.org/> accessed 19 October 2020.

954. Richard J Graving, 'The International Commercial Arbitration Institutions: How Good A Job Are They Doing?' (1989) 4(2) AmU Intl L Rev 319, 343.

955. Remy Gerbay, 'The London Court of International Arbitration' in JDM Lew and others (eds), *Arbitration in England with Chapters on Scotland and Ireland* (Kluwer Law International 2013) 51.

956. Born (n25) 201,202.

957. Gershon Ellenbogen, 'English Arbitration Practice' (1952) 17(4) LCP 656, 669.

958. Edward Manson, 'The City of London Chamber' (1893) 9 LQ Rev 86.

The tribunal was renamed the ‘London Court of Arbitration’ in 1903 and in 1975 as the ‘institute of arbitrators’. It is now known as the Chartered Institute of Arbitrators, joined in the administration with the other two bodies Corporation of London and the London Chamber of Commerce.⁹⁵⁹ In 1981, its name changed to the LCIA to represent the international nature of its arbitral services.⁹⁶⁰ In 1986, the LCIA became independent from its two founding bodies, the City of London and the London Chamber of Commerce, and became a private non-profit company limited by guarantee.⁹⁶¹ The board of this company is concerned with the operation of the LCIA business and corporate governance issues and does not play any function in relation to the disputes settled by the court.⁹⁶² However, the court is ruled by the LCIA Constitution.⁹⁶³ Therefore, in performing its functions under this Constitution, the court, its officers, and members are independent of the Board.⁹⁶⁴ The main focus of the LCIA as a specialised arbitral institution is to provide full administration for the arbitral process.⁹⁶⁵ The LCIA Court provides the grounds for international dispute settlement, especially for arbitrants seeking common law procedures.⁹⁶⁶ The Rules of the LCIA have been revised several times over the years.⁹⁶⁷ A new version of the LCIA rules came into effect on 1 October 2020.⁹⁶⁸ The LCIA Court is the final authority for the proper application of the LCIA rules.⁹⁶⁹ Subject to its rules, the LCIA Court appoints arbitrators to a dispute,⁹⁷⁰ determines challenges by parties

959. Mitchell L Lathrop, ‘Widely Used Rules in International Arbitration’ in Dennis Campbell (ed.), *International Dispute Resolution* (Kluwer Law International 2010) 60.

960. Remy Gerbay, Lisa Richman & Maxi Scherer, *Arbitrating under the 2014 LCIA Rules: A User’s Guide* (Kluwer Law International 2015) 2.

961. *Ibid.*, 2–3.

962. Julian DM Lew, Loukas A Mistelis & Josephine CR Davies, ‘LCIA Rules’ in Weigand (n694) 1616.

963. *See* LCIA Arbitration Court Constitution

<www.lcia.org/Search/Default.aspx?q=constitution> accessed 20 October 2020.

964. *See ibid.*, Art. D(4).

965. Slate (n853) 49.

966. Born (n25) 202.

967. VV Veeder QC, ‘The Draft New 1998 LCIA Rules’ *Biennial IFCIA Conference: On the Institutional Response to Changing Needs of Users*, vol 759(WIPO 1998) 31 (‘Revisions to its arbitration rules were certainly made in the two following decades but the LCIA surviving archives contain only editions of the rules made in 1926, 1931 (albeit undated), 1935, 1964, 1970, 1976, 1978, 1981 and more extensively 1985 upon the UNCITRAL Arbitration rules ... And after extensive consultation the new 1998 rules’).

968. *See* LCIA Rules 2020 <www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx> accessed 19 October 2019.

969. The Organisation of the LCIA Court <www.lcia.org/LCIA/organisation.aspx> accessed 19 October 2020.

970. *See* LCIA Rules 2020, Art. 5.

against those appointments,⁹⁷¹ and fixes the arbitration costs.⁹⁷² The dispute resolution services provided by the LCIA also include its service to act as an appointing authority, either under its own rules or under the UNICITRAL arbitration rules.⁹⁷³

[C] Netherlands Arbitration Institution⁹⁷⁴

The Netherland Arbitration Institution (Stichting Nederlands Arbitrage Instituut; ‘NAI’) was founded in 1949.⁹⁷⁵ It operates on a non-profit basis and, as a non-governmental institution, performs its duties independently and impartially.⁹⁷⁶ The duty of the NAI is to encourage arbitration by providing trade and industry with a soundly regulated arbitral procedure.⁹⁷⁷ The NAI possesses a strong reputation for both national and international arbitration due to the skills of its listed arbitrators and the eminence of professionals supporting the NAI.⁹⁷⁸ The NAI Executive Board consists of people from the business community, the legal profession, and science community who have extensive experience in the fields of arbitration.⁹⁷⁹ The NAI also has an Advisory and Supervisory Board.⁹⁸⁰ The NAI is managed by a director who is titled administrator as provided in the NAI’s rules. The latest version of rules was released and came into effect in January 2015. The NAI provides full supervision to arbitral process under the NAI’s rules or acts as an appointing authority if parties did not opt for the applicability of said rules.⁹⁸¹

[D] Cairo Regional Centre for International Commercial Arbitration⁹⁸²

971. *Ibid.*, Art. 10.

972. *Ibid.*, Art. 28.

973. *See* LCIA Constitution, Art. D(1a) (‘The Court shall have power to do anything which it may consider appropriate for the proper performance of its functions and shall in particular: (a) act as appointing authority under the LCIA Rules, the UNCITRAL Rules and in any other case where an agreement provides for appointments by the LCIA ...’).

974. <www.nai-nl.org/en/> accessed 19 October 2020.

975. *See* NAI Rules 2015, Art. 1.1.

976. <www.nai-nl.org/en/info.asp?id=826&name=NAI/Objective> accessed 19 October 2020.

977. *See* NAI Rules 2015, Art. 1.2.

978. Bommel van der Bend, Rogier Schellars, ‘The Netherlands Arbitration Institute’ in Loukas A. Mistelis, Laurence Shore, *Arbitration National Institutions Rules* (Juris Publishing, Inc., 2010) NAI-1.

979. *See* NAI Rules 2015, Art. 1.2.

980. <www.nai-nl.org/en/structure.asp?id=827&name=NAI/Structure#Committee> accessed 19 October 2020.

981. *See* NAI Rules 2015, Art. 1.2.

982. <crica.org.eg/> 19 October 2020.

The Cairo Regional Centre for International Arbitration (CRCICA) was established in 1979 by virtue of an agreement between the Asian African Legal Consultative Organisation (AALCO)⁹⁸³ and the Egyptian government.⁹⁸⁴ The CRCICA possesses the character of an independent non-profit international organisation.⁹⁸⁵ The government of the Arab Republic of Egypt cooperated in CRCICA's foundation to provide an arbitration framework for disputes that might arise out of investments and commercial transactions taking place in the region.⁹⁸⁶ The main role to be achieved by the CRCICA is to contribute to and support the growth of economic development in Asian and African countries by providing qualified resolution services for investment and trade disputes.⁹⁸⁷ The CRCICA management structure is formed of a Board of Trustees comprising well-known experts from Africa, Asia, and elsewhere. The director of the Centre performs the tasks and activities assigned by virtue of its rules. The CRCICA Advisory Committee carries out the functions provided for in the By-laws of the Advisory Committee annexed to CRCIC Rules.⁹⁸⁸ The CRCICA has revised its Arbitration Rules in 1998, 2000, 2002, and 2007 to ensure that the rules maintain the capacity to fulfil the needs of their users and provide the best practice in the field of international institutional

983. This Organisation is headquartered in New Delhi, India and was established in 1956 as an outcome of the Bandung Conference, which took place in 1955 in Bandung, Indonesia. It was formerly known as the Asian–African Legal Consultative Committee ('AALCC') until June 2001, when it changed its name to the Asian-African Legal Consultative Organisation ('AALCO'). AALCO currently has 47 countries as its members, comprising almost all the major states from Asia and Africa, namely: Arab Republic of Egypt, Bahrain, Bangladesh, Brunei Darussalam, Botswana, Cameroon, Cyprus, Democratic People's Republic of Korea, Gambia, Ghana, India, Indonesia, Iraq, Islamic Republic of Iran, Japan, Jordan, Kenya, Kuwait, Lebanon, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Oman, Pakistan, Palestine, People's Republic of China, Qatar, Republic of Korea, Saudi Arabia, Sierra Leone, Senegal, Singapore, Somalia, South Africa, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates, and Republic of Yemen. For more information about AALCO, see <www.aalco.int/aboutus/> accessed 19 October 2020.

984. See Introduction to CRCICA Rules 2011. See also Preamble of the Agreement between the Government of the Arab Republic of Egypt and the Asian-African Legal Consultative Committee

<www.aalco.int/agreements/Agreement%20between%20AALCO%20and%20Government%20of%20Egypt.pdf> accessed 19 October 2020.

985. *Ibid.*

986. Aboul-Enien (n869) 257.

987. Preamble of the Agreement between the Government of the Arab Republic of Egypt and the Asian-African Legal Consultative Committee.

988. See CRCICA Rules 2011, Introduction. For the designation and functions of the Advisory Committee, see By-laws Advisory Committee of the Centre <cricica.org.eg/org_advisorycommittee.html> accessed 19 October 2020.

arbitration.⁹⁸⁹ The CRCICA's latest version of rules came into effect on 1 March 2011.⁹⁹⁰ Pursuant to these rules, the CRCICA performs several functions in the administration of domestic and international arbitration in accordance with its rules in addition to ad hoc arbitration.⁹⁹¹ Regionally, the CRCICA plays a crucial role as a pioneer institution by attracting disputants from most Arab countries.⁹⁹² Internationally, the CRCICA gained the trust of foreign investors in handling their disputes with the Egyptian government under the auspices of the Cairo Centre as an independent international organisation not subject to any governmental influence.⁹⁹³

[E] Dubai International Arbitration Centre⁹⁹⁴

The foundation of the DIAC took place in 1994 within the Dubai Chamber of Commerce and Industry.⁹⁹⁵ DIAC is a permanent, non-profit institution located in Dubai that has the identity of an independent corporation with regard to its financial and administrative affairs within the Dubai Chamber of Commerce.⁹⁹⁶ The Centre aims to serve as a legal and real environment for the arbitration industry in the Middle East for both regional and international business

989. See CRCICA Rules 2011, Introduction. See also M Abdel Raouf, 'New Rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA)' (2011)3(1) Intl J Arab Arb 7.

990. See CRCICA Rules 2011<crica.org.eg/rules/arbitration/2011/cr_arb_rules_en.pdf> accessed 18 October 2020.

991. See CRCICA Rules 2011, Introduction ('The scope of services offered by CRCICA encompasses the following: Administering domestic and international arbitrations as well as ADR techniques under its auspices; Provision of institutional arbitration services according to its Rules or any other rules agreed upon by the parties; Providing advice to the disputants; Promotion of arbitration and other ADR techniques in the Afro-Asian region through the organisation of international conferences and seminars as well as the publication of researches serving both the business and legal communities; Preparation of international arbitrators and legal scholars from the Afro-Asian region by organizing training programs and workshops in cooperation with other institutions and organisations; Coordination with and provision of assistance to other arbitral institutions particularly those existing within the region; Providing ad hoc arbitration with necessary technical and administrative assistance at the request of the parties; Providing advice and assistance for the enforcement and translation of arbitral awards; Conducting academic and practical researches and studies; and Establishing a comprehensive library specializing in Arbitration and ADR').

992. MAM Ismail, *Globalization and New International Public Works Agreements in Developing Countries: An Analytical Perspective* (Ashgate Publishing Ltd 2013)174.

993. *Ibid.*, 174.

994. <www.diac.ae/idias/> accessed 19 October 2020.

995. Abdul EL Hamid El Ahdab & Jalal EL Ahdab, 'Arbitration in the United Arab Emirates' in *Arbitration with Arab Countries* (Kluwer Law International 2011) 786.

996. Daniel Ruiz, 'Arbitration in Dubai' (2008) 2 Spain Arb Rev 115, 119.

communities.⁹⁹⁷ Statistical studies have shown that the DIAC is growing rapidly as a major arbitral institution not limited to the Middle East and North Africa region but also extending worldwide.⁹⁹⁸ The Centre carries out services related to the selection of arbitrators, collaboration with international arbitral institutions, determination of the seat of arbitration, and establishment of the remuneration of the arbitrators.⁹⁹⁹ The organisation structure of DIAC is divided into three parts: the Board of Trustees, Executive Committee, and Administrative Body.¹⁰⁰⁰ The Board of Trustees embraces a number of distinguished qualifications in the arbitration profession, including lawyers, academics, legal consultants, and other specialised members in the arbitration industry on the domestic and international level.¹⁰⁰¹ The Board is comprised of a chairman and not fewer than 20 members, who are responsible for establishing and maintaining the enforcement of the general policy of the Centre, proposing any amendments regarding its rules to the concerned authorities, and issuing the bylaws related to the administration of the Centre.¹⁰⁰² The Centre Executive Committee is a five-member committee that is designated by the Board of Trustees from among said Board.¹⁰⁰³ The functions of the Committee include submitting draft proposals to the Board of Trustees regarding the amendments of the Centre statute rules of arbitration and bylaws, and appointing tribunal members according to the rules of arbitration and bylaws.¹⁰⁰⁴ The Centre administrative body is comprised of a director and a subordinate administrative staff.¹⁰⁰⁵ The director's role comprises, inter alia, the running of the centre activities, executing the decisions of the Board of Trustees, attending their meetings, and assisting in said meetings.¹⁰⁰⁶ The role of administrative staff involves many duties; the majority of those duties are related to the administration of the arbitration process under the auspices of the DIAC.¹⁰⁰⁷ The DIAC established its first set of arbitration rules in 1994; these rules were later replaced by revised

997. Kratzsch, 'DIAC Rules' in Schütze (n856) 865.

998. MAM Ismail, *International Investment Arbitration: Lessons from Developments in the MENA Region* (Routledge 2016) 41.

999. Ruiz (n996) 119. *See also* DIAC Statute Rules (10) of 2004, amended by Decree No. 58 of 2009, Art. 3.

1000. DIAC Statute Rules (10) of 2004, amended by Decree No. 58 of 2009, Art. 5.

1001. *Ibid.*, Art. 6.

1002. *Ibid.*, Art. 9.

1003. *Ibid.*, Art. 12.

1004. *Ibid.*, Art. 13 for more Details about the Executive Committee Functions.

1005. *Ibid.*, Art. 16.

1006. *Ibid.*, Art. 17 for more Details about the Director of the Centre Functions.

1007. *Ibid.*, Art. 18.

version that came into effect on 7 May 2007.¹⁰⁰⁸ Pursuant to these rules, the DIAC performs several functions, including the administration of domestic and international arbitration in accordance with its rules, in addition to ad hoc arbitration. The expansion of institutional arbitration and the progressive establishment of various arbitral institutions led to the administration of the arbitral process under the auspices of an advanced procedural framework. The administration of the arbitral process by an institution might give rise to some errors or wrongdoings committed by the institution in the course of supervising the arbitral proceedings. These errors would bring to the surface a crucial matter to be investigated regarding the immunity of the arbitral institutions from liability vis-à-vis the parties. The liability of arbitral institutions calls into question the need for some immunity for arbitral institutions from being attacked by aggrieved parties. This leads most of the arbitral institutions to incorporate in their rules provisions for immunity against liability that may be asserted by disgruntled parties.

In light of this issue, it is important to determine whether or not institutions enjoy immunity against any act or omission committed while administering the arbitral process, and, if so, the extent of that immunity. The following sections of this chapter will discuss how immunity is granted to institutions pursuant to their rules and national arbitration acts.

[§4.03 Immunity and Arbitral Institutions](#)

Arbitral immunity is granted to arbitrators on the premise that they operate similar to judges.¹⁰⁰⁹ In institutional arbitration, arbitrators work under the auspices of an institution selected by the parties. The arbitral institution derives arbitral immunity directly from the arbitrator immunity, although the immunity that cloaks the arbitral institution is not separately granted to the institution.¹⁰¹⁰ As a result, arbitral institutions that conduct arbitrations in accordance with this rule have immunity due to performing a quasi-judicial role.¹⁰¹¹ The extension of arbitral immunity to these institutions would shield them from being harassed by disgruntled parties who have lost the arbitration or against whom some decisions have been taken. Suing arbitral institutions jointly with or separately from arbitrators would be an easy avenue for damaged parties if the arbitrator were held liable, did not have enough assets to pay

1008. DIAC Arbitration Rules 2007

www.diac.ae/idiias/rules/Arb.Rules%202007/Introductory%20Provisions/ accessed 19 October 2020.

1009. Yu & Shore (n522) 951.

1010. Wilhelm (n343) 326.

1011. Moses (n83) 164.

compensations, or was legally immune from civil liability.¹⁰¹² Claims against arbitral institutions would be based on damages sustained by parties due to breach of duties set forth by the contract linking the institution to the parties.¹⁰¹³ The common law system continues its tendency toward absolute arbitral immunity by extending said immunity to arbitral institutions. The common law system considers institutions sponsoring arbitration as quasi-judicial organisations. Thus, providing immunity to arbitral institutions under common law is based on protecting the adjudicative part of the arbitral process.¹⁰¹⁴ Arbitral institution immunity is detailed by common law jurisdictions through case law and arbitration act provisions. The common law case law sustaining arbitral immunity is found in the US where arbitral immunity has been extended to arbitral institutions in a 1982 Sixth Circuit Court of Appeal decision, *Corey v. New York Stock Exchange*.¹⁰¹⁵ In this case, the claimant (Corey) commenced arbitral proceedings against (Merrill Lynch), a brokerage firm, after his portfolio sustained significant losses.¹⁰¹⁶ The rules of the New York Stock Exchange (NYSE) governed the selection of the arbitral tribunal in addition to the procedural rules to be applied; an NYSE official was in charge of the preliminary arrangements for arbitrations and the appointment of the tribunal.¹⁰¹⁷ The claimant appeared without counsel, and the arbitral tribunal ultimately dismissed the claimant's allegation.¹⁰¹⁸ Shortly thereafter, the claimant lodged a suit against the brokerage company and the NYSE, alleging that they conspired to deprive him of a fair hearing.¹⁰¹⁹ The court dismissed the claimant's allegations and upheld the principle of arbitral immunity, declining to hold the institution liable.¹⁰²⁰ The court held:

'Extension of arbitral immunity to encompass boards which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is

1012. Hausmaninger (n366) 40.

1013. Lew, Mistelis & Kroll, *Comparative International* (n3) 85.

1014. Hwang, Chung & Cheng (n7) 353.

1015. 691 F2d 1205 (6th Cir 1982).

1016. *Ibid.*, 1207.

1017. *Ibid.*, 1208.

1018. *Ibid.*

1019. *Ibid.* (holding that the individual arbitrators were not named as defendants; 'Corey challenged the composition of the arbitration panel as violative of the NYSE rules and asserted procedural irregularities that prevented him from submitting evidence, caused hearings to be postponed over his objection and allowed the arbitrators to dominate the proceedings with the purpose of defeating his claims').

1020. *Ibid.*, 1211.

*illusory. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring association.*¹⁰²¹

The court extended immunity based on the relationship between the institution and the arbitrator in an effort to maintain public policy objectives underlying the arbitral immunity doctrine.¹⁰²² Similarly, the New York Civil Court endorsed the approach of the Sixth Circuit Court of Appeal by extending arbitral immunity to the AAA. In *Rubenstein v. Otterbourg*,¹⁰²³ a claim was brought by the plaintiff against the AAA to recover legal fees after he succeeded in vacating an award rendered by the AAA-appointed arbitrators.¹⁰²⁴ The plaintiff based his allegation on the premise that the AAA had refused to intervene in the arbitral process, despite its knowledge that the chairman of the arbitral tribunal had a conflict of interest.¹⁰²⁵ The court stated that arbitral institutions are organisations with quasi-judicial functions performing a role similar to the role performed by a judicial organisation.¹⁰²⁶ In *Austern v. Chicago Bd. Options Exchange Inc.*,¹⁰²⁷ the claimant had a trading partnership agreement with Fried (partner) in which they agreed to settle any potential disputes arising from it through arbitral proceedings under the auspices of the Chicago Board Options Exchange (CBOE).¹⁰²⁸ The rules of the CBOE governed the proceedings and required that: (1) at least one member of the five-person arbitration panel come from outside the securities industry, and (2) notice of the proceedings be given to all parties at least eight business days prior to the hearing date.¹⁰²⁹ The CBOE, in administering the arbitral proceedings initiated by Fried, failed to comply with both of these requirements; thus, all five arbitrators were from the securities industry, and because the Austerns did not receive notice, they did not attend the hearing.¹⁰³⁰ However, the tribunal

1021. *Ibid.*

1022. *Ibid.*, 1209 ('Our decision to extend immunity to arbitrators and the boards which sponsor arbitration finds support in the case law, the policies behind the doctrines of judicial and quasi-judicial immunity and policies unique to contractually agreed upon arbitration proceedings').

1023. 78 Misc2d 376 (1973).

1024. *Ibid.*

1025. *Ibid.*

1026. *Ibid.*, 377 ('In any event bodies such as the association are recognised by the law. They perform with respect to arbitrators functions similar to those performed by the Judicial Conference, the Administrative Boards and the Appellate Division with respect to Judges. They are in effect quasi-judicial organisations; and an expanding umbrella of immunity is being extended over them') (citation omitted).

1027. 898 F2d 882 (2nd Cir 1990).

1028. *Ibid.*, 884.

1029. *Ibid.*

1030. *Ibid.*

conducted an ex parte hearing and ruled in favour of Fried for USD\$158,000.¹⁰³¹ Shortly thereafter, the Austerns lodged a claim against the CBOE seeking recovery of damages as a result of the organisation's negligence in empanelling and scheduling the arbitration proceedings and failure to provide adequate notice.¹⁰³² Although the court acknowledged that the CBOE conducted defective notice and improper selection of the arbitral panel, it cloaked the arbitral institution with immunity based on the premises that the acts were 'sufficiently associated with the adjudicative phase of the arbitration to justify immunity'.¹⁰³³ The court also dismissed the Austerns' claim that the acts cannot be covered by arbitral immunity because they were administrative or ministerial in nature.¹⁰³⁴ The court confirmed the institutional immunity regardless of whether it performed administrative or deliberative functions because it is a part of the adjudicative process and deserves to be immune.¹⁰³⁵ The court's decision reflects an obvious approach to extend absolute immunity for arbitrators to arbitral institutions.¹⁰³⁶ It is important to mention that US courts held arbitral institutions liable in one case, *Baar v. Tigerman*.¹⁰³⁷ In this case, the court held the arbitrator liable for failure to render a timely award under the auspices of the AAA.¹⁰³⁸ The court also held the AAA liable on the grounds that organisations sponsoring arbitration would not be granted immunity unless the arbitrator is immune from liability.¹⁰³⁹ In addition, the court in *Baar* held that the acts of the AAA were not conducted in relation to the arbitral process; thus, arbitral immunity did not cover those acts.¹⁰⁴⁰ The *Baar* decision was the trigger that caused the AAA to incorporate in its rules a waiver of a liability.¹⁰⁴¹ The US courts essentially believe that the institutions play a role in administrating justice, and, thus, immunity of arbitrators needed to be extended.¹⁰⁴²

1031. *Ibid.*

1032. *Ibid.*

1033. *Ibid.*, 886.

1034. *Ibid.*, 885.

1035. *Ibid.*, 886 ('The CBOE, as the commercial sponsoring organisation, is therefore entitled to immunity for all functions that are integrally related to the arbitral process. Furthermore, semantically categorising the challenged acts as "ministerial" or administrative, as opposed to "discretionary," in large part misses the mark, since the scope of arbitral immunity is "defined by the *functions* it protects and serves") (citation omitted).

1036. Rasmussen (n526) 1845–46.

1037. *Baar v. Tigerman*, 140 Cal App 3d 979 (Cal Ct App 1983).

1038. *Ibid.*, 982.

1039. *Ibid.*, 986 ('Arbitral immunity does not protect the sponsoring organisation when the arbitrator is not immune from liability').

1040. *Ibid.*, 987 ('The AAA did not act in an arbitral capacity and therefore its actions standing alone do not merit immunity').

1041. Hausmaninger (n366) 42.

1042. *See ibid.*, 43.

Historically, English case law did not contain any reference to the idea that an arbitral institution would be clothed with immunity akin to arbitrators. Thus, it was possible for appointing authorities to be held liable based on the breach of their implied promise or misrepresentation in selecting the qualified skilful arbitrator.¹⁰⁴³ England followed a much stricter approach pursuant to the 1996 English Arbitration Act, by waiving the liability of arbitral institutions by a mandatory provision and limiting liability only to acts or omissions conducted in bad faith, pursuant to section 74(1):

*'An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.'*¹⁰⁴⁴

Moreover, under Section 74(2) of the Act, full immunity is granted to arbitral institutions against acts or omissions committed by arbitrators appointed or nominated by the institution. According to Section 74(2):

*'An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator.'*¹⁰⁴⁵

The act remains silent on liability of arbitral institutions for acts and omissions of arbitrators conducted in bad faith, revealing the scope of absolute immunity for the institution, even in bad faith cases. The DAC drafting the English Arbitration Act justified the immunity granted to arbitral institutions, stating:

'The reason for this proposal is that without such an immunity, there is in our view a real risk that attempts will be made to hold institutions or individuals responsible for the consequences of their exercise of the power they may be given to appoint or nominate arbitrators, or for what their appointed or nominated arbitrators then do or fail to do. This would provide a means of

1043. Veeder (n519) 33.

1044. See English Arbitration Act 1996, s. 74(1).

1045. *Ibid.*, s. 74(2).

*reopening matters that were referred to arbitration, something that might be encouraged if arbitrators were given immunity (as we have also proposed in Clause 29) but nothing was said about such institutions or individuals. There is an additional point of great importance. Many organisations that provide arbitration services, including Trade Associations as well as bodies whose sole function it is to provide arbitration services, do not in the nature of things have deep pockets. Indeed, much of the work is done by volunteers simply in order to promote and help this form of dispute resolution. Such organisations could find it difficult if not impossible to finance the cost of defending legal proceedings or even the cost of insurance against such cost. In our view the benefits which these organisations (and indeed individuals) have on arbitration generally fully justify giving them a measure of protection so that their good work can continue.*¹⁰⁴⁶

However, it could be argued that most arbitral institutions receive remuneration for the arbitration services they provide and their existence is sometimes based on it.¹⁰⁴⁷

French law does not contain any provisions addressing the immunity of arbitral institutions.¹⁰⁴⁸ Pursuant to French law, the role of arbitral institutions is to control and organise the arbitral proceedings.¹⁰⁴⁹ This control over the arbitral proceedings is conferred by virtue of a contractual relationship between parties and arbitral institutions.¹⁰⁵⁰ The contractual

1046. *Report on the Arbitration Bill* (n213) 300-01.

1047. Lalive (n442)173.

1048. See French Code of Civil Procedure 2011 (Decree 2011-48).

1049. *Raffineries de pétrole d'Homs et de Baniyas v. Chambre de Commerce Internationale*, TGI Paris, 28 mars 1984 (1985) Rev Arb 141, 145 (cited in Philippe Fouchard, '*Les institutions permanentes d'arbitrage devant le juge étatique (A propos d'une jurisprudence récente)*' (1987) 3 Rev Arb 225, 246) ('*Cette commune volonté des parties fondement nécessaire des pouvoirs de juger conférés aux arbitres peut valablement charger un tiers d'organiser et de maintenir la police de l'instance arbitrale et de prendre des initiatives qui s'imposent pour mener à terme, savoir le prononcé de la sentence. ...*'). See also *Société Drexel Burnham Lambert limited et autres v. société Philipp Brothers et autres*, TGI Paris (Ord référé), 28 October 1988 (1990) 2 Rev Arb 497 ('*Pour statuer sur des litiges relatifs à des opérations de vente de cacao de Côte-d'Ivoire, opposant les sociétés acheteuses à leur vendeur, la société Philipp Brothers, des procédures d'arbitrage ont été organisées par l'intermédiaire de l'Association française du commerce des cacaos (dite A.F.C.C.), conformément aux clauses compromissaires convenues ayant désigné la Chambre arbitrale de cette association comme centre pré-constitué d'arbitrage*'). See *République de Guinée v. MM. R... et O...*, TGI Paris, 23 juin 1988 (1988) 4 Rev Arb 657.

1050. Romain Dupeyre, '*Les arbitres et centres d'arbitrage face à leurs responsabilités: le droit français à son point d'équilibre*' (2014) 32(2) ASA Bull 265.

relation is concluded when parties incorporate the rules of a specific arbitral institution to govern the arbitration of a future dispute in their arbitral agreement.¹⁰⁵¹ Subject to said contractual relation, the institution has duties to fulfil that are set out by rules that the parties incorporate in their agreement.¹⁰⁵² The arbitral institutions under French law do not play any adjudicative function or act as arbitrators, but merely administer the arbitral process.¹⁰⁵³ French courts consider it superfluous to grant judicial status and immunity to arbitral institutions.¹⁰⁵⁴ The courts justified the non-extension of immunity to arbitral institutions on the basis of not performing adjudicatory functions and being considered not part of administering justice.¹⁰⁵⁵ The issue of arbitral institutions' immunity was addressed in *Société Cubic Defense System v. Chambre de Commerce Internationale*.¹⁰⁵⁶ The dispute that finally led to this French court decision had arisen between a US corporation (Cubic) and the Iranian Ministry of Defense in relation to a contract of sale and services providing for arbitration in Zurich under the laws of the state of Iran.¹⁰⁵⁷ An arbitration request was filed to the ICC by the Iranian Ministry of Defense against the Cubic Corporation because the arbitration clause did not contain any reference to the ICC.¹⁰⁵⁸ The arbitration request was forwarded by the secretariat of the ICA of the ICC to the respondent (Cubic) with a letter providing that if the respondent declined to file an answer, the arbitration could not commence due to the absence of any reference in the agreement for conducting the arbitration under the ICC. However, Cubic responded with a counter claim.¹⁰⁵⁹ Protracted arbitral proceedings lasted five years, during which the ICC extended the six-month period for rendering the final award several times.¹⁰⁶⁰ Moreover, in the course of proceedings, the arbitral tribunal rendered a procedural

1051. Ileana M Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law Arbitration 2011) 143. *See also* Gaillard & Savage, *International Commercial Arbitration* (n1) 602.

1052. Houtte & McAsey (n248) 164.

1053. *See* French Code of Civil Procedure 2011 (Decree 2011-48), Art. 1450 ('Only a natural person having full capacity to exercise his or her rights may act as an arbitrator. Where an arbitration agreement designates a legal person, such person shall only have the power to administer the arbitration').

1054. Rasmussen (n526) 1863.

1055. Hausmaninger (n366) 43.

1056. *See* TGI Paris, 21 mai 1997 (1997) 3 Rev Arb 417. Confirmed by the CA, 15 September 1998 (1999) 1 Rev Arb 103, and affirmed by the Cass Civ (1 Ch) 20 fév 2001 (2001) 3 Rev Arb 511.

1057. *See ibid.*

1058. *Ibid.*, 418.

1059. *Ibid.*

1060. *Ibid.*

decision concerning, inter alia, the application of the statute limitation period for certain claims.¹⁰⁶¹ Cubic responded to said decision by challenging and criticising the panel of arbitrators. However, the ICC rejected this challenge on the premise of being procedural.¹⁰⁶² Cubic initiated a legal motion before the Tribunal de Grande Instance de Paris against the ICC, requesting the annulment of the contract of arbitration with the ICC and invoking compensation in contract and in tort.¹⁰⁶³ The main claims raised by Cubic were on grounds that the ICC had declined to qualify an order of the arbitral panel as an award that would have been subject to its scrutiny and the failure of the ICC to control the length of the proceedings and being generally powerless and inactive in relation to errors conducted by the arbitral tribunal, which justify the reason for ending its mission.¹⁰⁶⁴ The *Tribunal de Grande Instance de Paris* dismissed the claims and held that the intervention of the arbitral institution for the settlement of a dispute has a contractual basis. By their agreement, the parties entrust the chosen arbitral institution with the tasks of organising and administering the proceedings in exchange for the parties' agreement to be bound by the arbitration rules. The institution commits to abide by the provisions of its rules and administer proceedings without interfering in the adjudicative role devolved to the arbitrators, and is potentially liable for the failure to execute its mandate.¹⁰⁶⁵ The decision of the *Tribunal de Grande Instance de Paris* was affirmed by the *Cour d'Appel*. The court held that the arbitral institution may be held liable if the contract with the parties is breached and doubts can be cast on the validity of the clauses

1061. *Ibid.*, 419.

1062. *Ibid.*

1063. *Ibid.*

1064. *Ibid.*, 420 ('*Par son comportement pré-contractuel, la CCI s'est imposée à Cubic commettant compétence dans l'organisation de l'arbitrage obligeait celle-ci; or, par la suite, elle n'a fait preuve de l'efficacité de l'autorité promises et n'a accompli aucun effort pour justifier l'adhésion et la confiance qu'elle qu'elle avait provoquées; sa carence absolue dans la surveillance de la durée de l'arbitrage, son impuissance et son inaction face aux fautes du Tribunal arbitral justifient qu'il soit mis fin à sa mission*').

1065. *Ibid.*, 417 ('*L'intervention d'un centre d'arbitrage pour le règlement d'un litige a un fondement contractuel, l'offre que présente le centre par l'adoption et la diffusion de son règlement étant acceptée lorsque, par leur convention, les parties consentent à confier à l'institution choisie le soin d'organiser et d'administrer l'arbitrage; en contrepartie de l'adhésion des parties au règlement de l'institution, celle-ci s'engage à se conformer aux dispositions de ce règlement et à accomplir, sans s'immiscer dans la fonction de juger dévolue aux arbitres, les actes de gestion de l'instance arbitrale qui y sont définies, la responsabilité de l'organisme étant engagée en cas de manquement dans l'exécution de son mandat*').

excluding liability, even in the event they are not applicable in the present case.¹⁰⁶⁶ The *Cour d'Appel* decision was affirmed by the *Cour de Cassation*, which confirmed the existence of a contract between Cubic and the ICC in addition to the fact that liability may ensue if the ICC breached the obligations set out in that contract.¹⁰⁶⁷ The main outcome of this decision was the denial of any judicial character or similarity in function between the arbitral institution and courts. The decision constituted the grounds of possible liability of the ICC on the breach of its mandate, implicitly denying the immunity of the institutions. The court also noted that, even with the presence of the liability disclaimer in the institution rules, there are justifiable doubts about the extent of its applicability. Following the *Cubic* case, the French *Cour d'Appel* addressed the issue of the arbitral institution immunity with the presence of the liability waiver. The waiver of liability takes the form of provisions added to the rules of most of arbitral institutions excluding by its virtue the liability of the institution and the arbitrators or both.¹⁰⁶⁸ In *SNF SAS v. Chambre de Commerce Internationale*,¹⁰⁶⁹ the *Cour d'Appel* de Paris developed a new approach toward immunity even in the presence of a liability disclaimer. This case arose against the ICC following an ICC arbitration proceeding where the dissatisfied arbitrator, SNF, commenced legal action against a Dutch company, Cytec Industries B.V., before the *Tribunal de Première Instance de Bruxelles*.¹⁰⁷⁰ In 1991, SNF and Cytec signed an agreement for the supply of acrylamide monomer (AMD), a chemical compound, which was followed by a second agreement in 1993 that provided, among other things, for SNF to procure, for a period of eight years, its additional AMD supplies exclusively from Cytec.¹⁰⁷¹ In January 2000, SNF terminated the contract on alleged derogation for the antitrust provisions contained in Articles 81 and 82 of the European Competition Treaty.¹⁰⁷² In May 2000, Cytec initiated arbitral proceedings against SNF on the premise of the contractual arbitration clause that provides that

1066. Cass, 15 September 1998 (1999) 1 Rev Arb 103, 111 ('*Considérant que toute partie à une convention, fut-elle une association chargée d'organiser un arbitrage, engage sa responsabilité dès lors qu'elle manque aux obligations contractées; qu'en l'espèce une clause de non-responsabilité n'est invoquée par la CCI, celle figurant dans son nouveau règlement, édicté postérieurement à la conclusion du contrat litigieux, à la supposer même efficiente, n'étant pas applicable au présent litige*').

1067. Cass Civ (1 Ch) 20 fév 2001 (2001) 3 Rev Arb 511.

1068. Hofbauer, Burkar, Bander & Tari (n309) 31.

1069. *SNF SAS v. Chambre de Commerce Internationale*, CA Paris (1re Ch C) 07/19492, 22 janv 2009 (2009) 1 Rev Arb 233.

1070. *Société SNF SAS v. Société Cytec Industrie*, TPI Bruxelles, 8 mars 2007 (2007) 4 Rev Arb 303.

1071. *Ibid.*, 304–305.

1072. *Ibid.*, 305.

the arbitration shall be governed by French law and has its seat in Brussels.¹⁰⁷³ The arbitral tribunal awards were bifurcated into a partial and a final award. In the first, the arbitral tribunal dealt with the determination of liability; however, in the latter, it dealt with the assessment of damages and interest.¹⁰⁷⁴ In the partial award, the tribunal held that Cytec did not violate Article 82 of the European Competition Treaty. However, it held that the parties had shared liability, as both SNF and Cytec should have known that their contract was null and void for being in breach of Article 81.¹⁰⁷⁵ Nevertheless, in the final award, the tribunal granted damages exclusively to Cytec.¹⁰⁷⁶ In March 2006, the *Cour d'Appel de Paris* affirmed the validity of the arbitral awards in the enforcement proceedings and dismissed the appeal filed by SNF against enforcement of said awards for violating international public policy.¹⁰⁷⁷ The court based the dismissal of the appeal on SNF's failing to prove any flagrant, effective, and concrete violation of international public policy. As a result, there was no reason to ignore the decision of the arbitral tribunal.¹⁰⁷⁸ The *Cour de Cassation* confirmed the *Cour d'Appel* decision and noted that merely a 'clear, effective, and concrete' breach of public policy could result in the cancellation of the award.¹⁰⁷⁹ Moreover, SNF struggled to have enforcement proceedings stayed, pending the issuance of a decision in several criminal actions, which SNF had brought against a number of directors of Cytec. However, it was also dismissed by the French courts.¹⁰⁸⁰ The court's dismissal of the stay was based on the grounds that said stay is only

1073. *Ibid.*

1074. *Ibid.*, 307.

1075. *Ibid.*, 308.

1076. *Ibid.*, 309.

1077. *See Société SNF SAS v. Société Cytec Industries BV*, CA Paris (1re Ch C) 23 mars 2006 (2007) 1 Rev Arb100.

1078. *Ibid.* ('*En l'absence de toute démonstration par l'appelante d'une violation flagrante, effective et concrète de l'ordre public international, il n'existe aucune raison de tenir pour insignifiante qui a été jugé par le tribunal arbitral aux termes d'une instruction, et y substituer la propre appréciation de la cour.*'). *See also* Bernard Hanotiau and Olivier Caprasse, 'Introductory Report' in Emmanuel Gaillard (ed.), *The Review of International Arbitral Awards* (Issue 6 of IAI series of International Arbitration, Juris Publishing Inc 2010) 67, 68.

1079. *See Société SNF v. Société Cytec Industries BV*, Cass Civ (1re Ch) 4 juin 2008 (2008) 2 Rev Arb 346, 347 ('*S'agissant de la violation de l'ordre public international, seule la reconnaissance ou l'exécution de la sentence est examinée par le juge de l'annulation au regard de la compatibilité de sa solution avec cet ordre public, dont le contrôle se limite au caractère flagrant, effectif et concret de la violation alléguée.*'). *See also* Ibrahim Fadlallah, case note, *Société SNF v. Société Cytec Industries BV*, 4 juin 2008 (2008) Rev Arb 473.

1080. *Ibid.*, 346. *See also* Fadlallah (n1051) ('*Unedemande de sursis à statuer sur le fondement de l'article 4 du Code de procédure pénale dans sa rédaction antérieure à la loi du 5 mars 2007 ne peut être accueillie que si les faits dénoncés comme constituant l'infraction ont une*

possible if the facts alleged to constitute the criminal offence have a direct impact on the cause of cancellation of the award and if the criminal decision is likely to influence the civil decision.¹⁰⁸¹ SNF also applied to set aside proceedings for the partial and the final award rendered by the arbitral tribunal before the Belgian courts.¹⁰⁸² On 8 March 2008, the Brussels' *Tribunal de Grande Instance* vacated the awards in contrast to the French courts and justified the annulment on the basis that any violation of international public policy must be sanctioned, regardless of the nature of the breach.¹⁰⁸³ On 22 June 2009, the Brussels' Court of Appeal reversed the Brussels *Tribunal de Grande Instance* and decided that the awards did not violate public policy.¹⁰⁸⁴ Subsequently, SNF initiated legal action against the ICC before the *Tribunal de Grande Instance de Paris*, alleging the breach of the ICC contractual obligations towards the parties in a number of respects, namely the duration and excessive cost of the arbitral proceedings and for failure to correctly review the draft final award due to alleged non-compliance with EU public policy.¹⁰⁸⁵ The *Tribunal de Grande Instance de Paris* dismissed the claim and ruled that the ICC was bound by the 1998 rules, those being in effect at the time the request for arbitration was made. The exclusion of liability by virtue of Article 34 of the 1998 rules is legal under French law in accordance with Article 1150 of the Civil Code, and is all the more valid as it applied to an international contract.¹⁰⁸⁶ The court dismissed all claims alleged to hold the ICC liable in either contract or tort breach.¹⁰⁸⁷ SNF appealed the decision, but the Paris *Cour d'Appel* affirmed the decision. The two decisions differed based on the reason for the dismissal.¹⁰⁸⁸ In contrast to the Paris *Tribunal de Grande Instance*, the *Cour*

incidence directe sur la cause d'annulation de la sentence et si la décision pénale à intervenir rest susceptible d'influer sur la décision civile').

1081. *Ibid.* See also van den Berg, *Yearbook Commercial Arbitration* (n870) 490.

1082. *Société SNF SAS v. Société Cytéc Industrie*, TPI Bruxelles, 8 mars 2007 (2007) 2 Rev Arb 303.

1083. *Ibid.*, 304.

1084. *Cytéc Industries BV v. SNF SAS*, CA bruxelles (17e Ch) 22 juin 2009 (2009) 3 Rev Arb 574.

1085. *Société SNF v. Chambre de Commerce Internationale*, TGI Paris (1re Ch) 10 October 2007 (2007) 4 Rev Arb 848.

1086. *Ibid.*, 849 ('*Sauf conventions contraires entre les parties, in existantes en l'occurrence, le règlement applicable est ce lui qui était en vigueur à la date du début de l'arbitrage, soit le Règlement de 1998 ... Unetelle clause – exonératoire de responsabilité – est licite en droit français par application de l'article 1150 du Code civil d'autantqu'elle est insérée dans un contrat international*').

1087. *Ibid.*, 850.

1088. *SNF SAS v. Chambre de Commerce Internationale*, CA Paris (1re Ch C) 22 janv 2009 (2010) 2 Rev Arb 314. See also Laurence Kiffer, 'Comments on the Paris Court of Appeal Decision in SNF v. International Chamber of Commerce' (2009) 26(4) J Intl Arb 579, 580.

d'Appel decided that the ICC offer had been accepted by SNF and Cytec in 1993 (when the contract between SNF and Cytec was concluded) when the parties agreed to appoint the ICC with the version of rules in effect at the time of said appointment (1988). Hence, they did not stipulate that the rules in effect at the date of the commencement of the arbitral proceedings (1998) should be the applicable rules. However, the court noted that, in this case, the parties voluntarily accepted at the commencement of the proceedings the application of a different version of rules other than the one primarily chosen, by accepting the application of the 1998 version of the rules, as shown by the terms of reference signed by the parties.¹⁰⁸⁹ Consequently, if said agreement to terms of reference has not been agreed to by parties, the application of the ICC 1988 rules would have been governing the arbitral process as being the rules in effect at the time the agreement was signed.¹⁰⁹⁰ With respect to the liability disclaimer waiving the ICC liability, the court held that Article 34 of the ICC 1998 rules would be of voidable impact on the basis that this liability clause authorises the ICC to avoid executing its essential obligations as a non-judicial service provider.¹⁰⁹¹ The *Cour d'Appel*, having decided that the liability disclaimer was void with respect to the relation between the ICC and SNF, went beyond that and defined the essential obligations of the ICC. The court held that *'in order to require payment from the parties for the performance of its obligation, the ICC must organise and administer arbitral proceedings, and for that purpose it must provide the parties with proper structure to allow for efficient arbitral proceedings conducted according to the expected speed, according to the agreed rules, and which would lead to an executable award'*.¹⁰⁹² With respect to SNF's allegations of ICC's breach of obligations regarding the scrutiny of the award, length of the proceedings, and administrative costs, the *Cour d'Appel* found that the ICC had adequately set the administrative costs, had attentively run the length of the arbitral proceedings, and had acted in accordance to its rules distinguishing between the organisational function and the judicial function which is left solely to the arbitral tribunal.¹⁰⁹³ The absolute

1089. *Ibid.*, 318.

1090. Klieman (n716) 55.

1091. *SNF SAS v. Chambre de Commerce Internationale*, CA Paris (1re Ch C) 22 janv 2009 (2010) 2 Rev Arb 314, 318-319 (*'Considérant que la clause élisive de responsabilité qui autorise la CCI à ne pas exécuter son obligation essentielle en tant que prestataire de services non juridictionnels doit être réputée non écrite dans les rapports entre la CCI et la société SNF dès lors que la clause contredit la portée du contrat d'arbitrage'*).

1092. *Ibid.*, 318 (*'Considérant que pour exécuter ses obligations moyennant rémunération, la CCI doit organiser et administrer l'arbitrage et à cette fin fournir une structure propre à permettre un arbitrage efficace c'est-à-dire intervenant avec la célérité escomptée, élaborée conformément aux règles choisies et susceptible de recevoir exécution'*).

1093. *Ibid.*, 319-320.

immunity clauses set forth in the arbitral institution in France would be of insignificant impact if the arbitral institution breached its obligations. As a result, the SNF decision, noting that the ICC liability disclaimer clause is of a voidable impact, was a threshold for the ICC to qualify Article 34 of the 1998 rules by recognising, in Article 40 of the ICC the latest version of 2012 rules, that such an exclusion of liability is limited to the extent such limitation of liability is prohibited by applicable law.¹⁰⁹⁴ This amendment meant shielding the new liability exclusion (Article 40) from being totally nullified by national courts.¹⁰⁹⁵ The Dutch Arbitration Act did not prescribe any provisions related to immunity of arbitral institutions.¹⁰⁹⁶ Also, the Egyptian Arbitration Act also does not contain any provisions clothing arbitral institutions with immunity against civil liability.¹⁰⁹⁷ There is no case law in which arbitral immunity is granted to arbitral institutions. The current UAE arbitration law makes no reference to immunity waiver or limitation of liability.¹⁰⁹⁸ Having said that, the Dutch, Egyptian, and UAE laws have no provisions providing arbitrators with immunity; thus, there is no possibility of justifying the extension of immunity from arbitrators to arbitral institutions as there is in the common law approach.

[A] Extent of Immunity of Arbitral Institutions Considered Herein

The extent of arbitral immunity given to the arbitral institutions varies in accordance with the jurisdictions with respect to common law and civil law. The extent of this immunity is affected by its origin. Court decisions in different jurisdictions also play a significant role, either in limiting or expanding the extent of the immunity clauses incorporated in the rules of arbitral institutions.

[1] Immunity under LCIA Arbitration Rules

The LCIA rules incorporate a liability disclaimer; subject to this disclaimer, the LCIA has full exclusion of liability, except to the extent of acts or omissions that do not amount to conscious and deliberate misconduct on the part of the body or any of the individuals concerned. By virtue of Article 31(1):

1094. Klieman (n716) 55.

1095. *Ibid.*

1096. *See* Dutch Code of Civil Procedure 2015.

1097. *See* Egyptian Arbitration Act (No. 27) 1994.

1098. *See* UAE Arbitration Act 2018.

‘None of the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice-Presidents, Honourary Vice-Presidents and members), the Registrar (including any deputy Registrar), any arbitrator, any Emergency Arbitrator 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.’¹⁰⁹⁹

The application of Article 31(1) shall be in accordance with the applicable law governing the contractual relation among the LCIA and relevant parties. This contractual relation will be governed by English law by virtue of Article 4(2) of the Rome Convention,¹¹⁰⁰ and thus governed by section 74¹¹⁰¹ of the English Arbitration Act.¹¹⁰² Moreover, the LCIA prevents the staff from being legally obliged to make any statement about any matter related to the arbitration once the possibility of corrections and appeal have lapsed. Subject to Article 31(2):

1099. *See* LCIA Rules 2020, Art. 31(1).

1100. *See* EC Convention on the Law Applicable to Contractual Obligations Rome I 2008, Art. 4 (‘(2) Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. (3) Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. (4) Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected’).

1101. *See* English Arbitration 1996, s. 74 (‘(1) An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith. (2) An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator. (3) The above provisions apply to an employee or agent of an arbitral or other institution or person as they apply to the institution or person himself’).

1102. Simon Nesbitt & Michael Darowsk, ‘LCIA Arbitration Rules’ in LA Mistelis (ed), *Concise International Arbitration* (2nd edn, Kluwer Law International 2015) 561.

*‘After the award has been made and all possibilities of any memorandum or additional award under Article 27 have lapsed or been exhausted, neither the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice-Presidents, Honourary Vice-Presidents and members), the Registrar (including any deputy Registrar), any arbitrator, any Emergency Arbitrator or any expert to the Arbitral Tribunal shall be under any legal obligation to make any statement to any person about any matter concerning the arbitration; nor shall any party seek to make any of these bodies or persons a witness in any legal or other proceedings arising out of the arbitration.’*¹¹⁰³

Unlike Article 31 of the LCIA rules (1998),¹¹⁰⁴ Article 31 of the 2014 version has extended immunity to cover the secretariat, the honorary vice-presidents, and, remarkably, ‘officers’ of the LCIA (though the term ‘officer’ does not match with any classifiable post in the LCIA organisational structure).¹¹⁰⁵ It appears that including the term ‘officer’ provided as broad immunity as possible in order to eliminate any potential liability claims.¹¹⁰⁶ Article 31 of the 2014 LCIA rules went beyond the extent of bad faith set out under Sections 29 and 74 of the English Arbitration Act, which limits liability except where the acts were of a conscious and deliberate manner. As a result, the party alleging liability is required to prove the consciousness and deliberate character of the act or omission.¹¹⁰⁷ It could be said that it is impossible to provide evidence of the existence of the character; therefore, Article 31 could reflect implied absolute immunity for the LCIA and any individual concerned. The immunity granted to the

1103. *See* LCIA Rules 2020, Art. 31(2).

1104. *See* LCIA Rules 1998, Art. 31(1, 2) (‘None of the LCIA, the LCIA Court (including its President, Vice Presidents and individual members), the Registrar, any deputy Registrar, any arbitrator and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration conducted by reference to these Rules, save 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. After the award has been made and the possibilities of correction and additional awards referred to in Art. 27 have lapsed or been exhausted, neither the LCIA, the LCIA Court (including its President, Vice Presidents and individual members), the Registrar, any deputy Registrar, any arbitrator or expert to the Arbitral Tribunal shall be under any legal obligation to make any statement to any person about any matter concerning the arbitration, nor shall any party seek to make any of these persons a witness in any legal or other proceedings arising out of the arbitration’).

1105. Maxi Scherer, Lisa M Richman & Remy Gerbay, *Arbitrating under the 2014 LCIA Rules: A User’s Guide* (Kluwer Law International 2015) 374–375.

1106. *Ibid.*, 375.

1107. *Ibid.*, 376.

LCIA reveals the reluctant approach of the common law jurisdictions in being conservative with relation to arbitral institution immunity, which is not only derived from the rules of the LCIA but also provided by virtue of Section 74 of the English Arbitration Act of 1996. As a result, the LCIA was granted twofold immunity: one by the institution rules and the other subject to the Act.

[2] Immunity Pursuant to the ICC Arbitration Rules

The ICC introduced the idea of a liability waiver in 1998 by including Article 34¹¹⁰⁸ in its provisions in order to cloak itself and the arbitrators who function under its aegis with immunity against liability claims, at a time when claims by disgruntled parties were increasing to an extent that intimidated the entire arbitral process.¹¹⁰⁹ The 1998 liability waiver gave the ICC full and absolute immunity against any act or omission without any limitation. The French courts did not recognise such a broad exclusion of liability and deemed it unenforceable because it could allow the ICC to avoid accomplishing its essential duties.¹¹¹⁰ The ICC, in its 2012 version of rules, amended the liability disclaimer,¹¹¹¹ and the same disclaimer has remained without change in its latest version of rules, which came to effect on 1 January 2021. Pursuant to Article 41, the new liability waiver is titled ‘limitation of liability’ instead of ‘exclusion of liability’ because the exclusion of the rule provides exemption of liability to any act or omission except to the extent that such exemption of liability is prohibited by the applicable law pursuant to Article 41:

‘The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the 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.’¹¹¹²

1108. See ICC Rules 1998, Art. 34 (‘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’).

1109. Derains & Schwartz (n947) 382.

1110. *SNF SAS v. Chambre de Commerce Internationale*, CA Paris (1re Ch C) 22 janv 2009 (2010) 2 Rev Arb 314.

1111. See ICC Rules 2012, Art. 40.

1112. See ICC Rules 2021, Art. 41.

The mandatory provisions of the applicable law among different jurisdictions could limit the effectiveness of Article 40 due to the fact that some applicable laws do not allow such exclusion, indicating why the title in the 2012 version abandoned the term ‘exclusion to limitation’.¹¹¹³ The limitation of liability covers any act or omission committed in the course of the arbitral process that stems from contractual or tortious action.¹¹¹⁴

[3] Immunity Pursuant to NAI Arbitration Rules

Pursuant to its rules, the NAI liability is excluded either in contract or tort against damages arising by cause of an act or omission. Article 61 of the NAI rules provides:

‘The NAI, its board members and personnel, the members of its Advisory & Supervisory Board, the members of the Committee, the arbitrator or arbitrators and any secretary that may have been appointed, the third person as referred to in Article 39 and any other persons involved in the case by any or all of them shall not be liable either by contract or otherwise for any damage caused by their own or any other person’s acts or omissions or caused by the use of any aids in or involving arbitration, all this unless and insofar as mandatory Dutch law precludes exoneration. The NAI, its board members and personnel shall not be liable for payment of any amount that is not covered by the deposit.’¹¹¹⁵

The effect of the article is not guaranteed under all legal systems because the mandatory provisions of the applicable law under each legal system will determine whether and to what extent the article will be in effect.¹¹¹⁶ Therefore, in most of the legal systems, the absolute contractual liability stipulated by Article 61 would be worthless in case of misconduct or gross negligence.¹¹¹⁷

[4] Immunity Pursuant to the CRCICA Arbitration Rules

1113. Stephen R Bond, Marily Paralika & Matthew Secomb, ‘ICC Rules of Arbitration 2012’ in LA Mistelis (ed), *Concise International Arbitration* (2nd edn, Kluwer Law International 2015) 446.

1114. *Ibid.*, 447.

1115. See NAI rules 2015, Art. 61.

1116. Bommel van der Bend, *A Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law* (Kluwer Law International 2009) 269.

1117. *Ibid.*

The CRCICA was established with the character of an international organisation, and it is accorded immunities in light of its international status.¹¹¹⁸ By virtue of the Headquarter's agreement, the CRCICA, its property, and assets have absolute immunity against any legal action. This immunity can be exclusively waived by the Asian African Legal Consultative Organization Committee in any specific case.¹¹¹⁹ The Director of the Centre is granted immunities akin to that of the diplomatic envoys.¹¹²⁰ CRCICA officers are granted absolute immunity for any acts performed in their official capacity.¹¹²¹ Similarly, the deputy directors, professional staff and counsels, nationals of Egypt, or those having permanent residence in the Egyptian region, are provided the same immunity.¹¹²² The immunities and privileges given to individuals subject to the Headquarter's agreement are justified on the basis of ensuring the efficiency of functions performed by the Centre.¹¹²³ The committee preserves the right only to itself to waive said immunity if it obstructs justice.¹¹²⁴ Pursuant to the CRCICA rules of 2011, the institution has provided full exclusion from liability except in the case of wilful misconduct. By virtue of Article 16:

*'Save for intentional wrongdoing, neither the arbitrators, the Centre, its employees, the members of both the Board of Trustees and the Advisory Committee nor any person appointed by the arbitral tribunal shall be liable to any person, based on any act or omission in connection with the arbitration.'*¹¹²⁵

1118. See Headquarter's Agreement of the Cairo Regional Centre for International Commercial Arbitration, Preamble <crcica.org/HeadquartersAgreementen.pdf> accessed 19 October 2020.

1119. See *ibid.*, Art. IV(A) <crcica.org/HeadquartersAgreementen.pdf> accessed 19 October 2020 ('The Centre, its property and assets in the territory of the Arab Republic of Egypt shall enjoy from every legal process. The committee may waive this immunity in any particular case. However, no waiver of immunity shall extend to any measure of execution').

1120. *Ibid.*, Art. VIII(2) ('The director will be accorded in respect of himself, his spouse and minor children, all privileges and immunities, exemptions and facilities accorded to diplomatic convoys, in accordance with international law').

1121. See *ibid.*, Art. VIII(3)(a) ('[O]fficers in International category and professional staff shall be immune from the legal process in respect of words spoken or written and, all act performed by them in their official capacity').

1122. See *ibid.*, Art. VIII(4).

1123. See *ibid.*, Art. IX.

1124. See *ibid.*, Art. X ('The Committee has the right and duty to waive immunity in any case where the immunity would impede the course of justice, and can be waived without prejudice to the purpose for which immunity is accorded').

1125. See CRCICA Rules 2011, Art. 16.

This exclusion of liability shall be read and interpreted in accordance with Article 217(2) of the Egyptian Civil Code, which prohibits exclusion of liability in the presence of fraudulent acts or gross negligence.¹¹²⁶ It can be clearly seen that the ICC also receives twofold immunity – by virtue of its foundation agreement and by virtue of its rules.

[5] Immunity Pursuant to DIAC Rules

Fully realising that the current UAE Arbitration Act is free of any provision granting immunity to arbitrators or arbitral institutions, the drafters of DIAC arbitration rules were keen to incorporate an explicit immunity provision that shields arbitrators and the Centre against any potential civil liability in both DIAC Statute Rules and Arbitration Rules. In the former, Article 24 states: *‘Neither the Centre nor any of its employees, members of the Board of Trustees, its Committees or members of any dispute settlement panel shall be held liable for any unintentional error in their work related to the settlement of disputes by the Centre’*.¹¹²⁷ However, the latter prescribes, in Article 40, *‘No member of the Tribunal or of the Executive Committee, nor the Centre and its employees, nor any expert to the Tribunal shall be liable to any person for any act or omission in connection with the arbitration’*.¹¹²⁸ The wording of both articles reveals an absolute immunity against any act or omission that may lead to practical and legal problems upon their application, reflecting a confirmed possibility for clashing with the mandatory rules of the applicable law. As a result, it could be a feasible for the Executive Committee to revisit said provision and propose an amendment similar to the one that appeared within the liability exclusion of the ICC in 2017, limiting this exclusion to the acts prohibited by the applicable law. A common feature of the rules of the five institutions is the exclusion of liability for all acts and omissions related to the arbitration, despite the adjudicatory or administrative nature of acts. The extent of exclusions of the clauses in the rules of four institutions is affected by the approach of the legal system towards the arbitral immunity concept, the extent to which the clauses are recognised by courts, and the legal character the institution possesses, which is determined by the legal basis of its foundation.

§4.04 Civil Liability of Arbitral Institutions

1126. See Egyptian Civil Code, Art. 217(2). See also Hafez (n752) 16.

1127. DIAC Statute Rules 2004, amended by Decree No. 58 of 2009.

1128. See DIAC Arbitration Rules 2007, Art. 40.

An arbitral institution being selected by arbitrants to conduct the arbitration under its aegis does perform a basic role in the arbitral process.¹¹²⁹ By virtue of the parties' agreement, the arbitral institution is empowered to administer the arbitral process in accordance with its rules. Consequently, the arbitral institution may be held liable for breaching the obligation to act in accordance with its rules or the breach of its duty to function with the due care and diligence provided with the institution rules.¹¹³⁰ The engagement of an arbitral institution in civil liability depends on the determinacy of the nature of the obligation which is alleged to have been breached.¹¹³¹ The extent of the arbitral institution's liability differs in liability in *eligendo* and liability *invigilando*, the first when liability is incurred by arbitral institutions acting pursuant to a party mandate and the latter when it fully administers the arbitral process.¹¹³² Consequently, an arbitral institution acting as an appointing authority is not closely involved in the arbitral reference, like an institution running the entire process under its own body of rules.¹¹³³ This reflects that the more the institution is involved in the arbitral process, the more likely it is that its liability may be incurred. Liability is always constituted on the grounds of either contract law or tort.¹¹³⁴ As a result, the liability claims against the arbitral institutions would be either contractual or tort-based, depending on the actor omission that leads to damage.

[A] Contractual Liability of Arbitral Institutions

The contractual liability of the institutional arbitration stems from the contract concluded between the arbitral institution or arbitration centre and the parties to the arbitration.¹¹³⁵ The rules of the arbitral institutions that establish their duties form a part of this contract binding the parties to the institutions.¹¹³⁶ In administering the arbitral process, the arbitral institution liability may ensue after deciding any issue with respect to a matter related to setting in motion

1129. Bernardo M Cremades, 'Should Arbitrators Be Immune from Liability' (1991) 10 Intl Fin L Rev 32, 34.

1130. Ugo Draetta & Riccardo Luzzatto, *The Chamber of Arbitration of Milan Rules: A Commentary* (Juris Publishing Inc 2012) 25.

1131. Dupeyre (n1050) 279.

1132. Cremades (n1129) 34.

1133. Onyema (n46) 72.

1134. Moses (n83) 163.

1135. Robine (n284) 323. Lalive (n442) 173 ('Noting in the context of the responsibility of arbitration institutions, a relationship generally considered as contractual. It seems logically to follow that the principles of contractual liability should normally apply'). See also Section 6, Chapter 2 for further discussion about the contractual relation between the parties and arbitral institutions.

1136. Hofbauer, Burkar, Bander & Tari (n309) 161.

the arbitration or any matter giving rise in its course.¹¹³⁷ These matters include the decision of the arbitral institution of being competent or not to organise the arbitral process administration through its prima facie assessment of the existence or absence of an arbitral agreement,¹¹³⁸ appointment¹¹³⁹ and replacement of the arbitrator or arbitral tribunal,¹¹⁴⁰ determining or extending the length of the arbitral proceedings,¹¹⁴¹ scrutinising and approving the draft of the award,¹¹⁴² and determining the administration and arbitrators fees.¹¹⁴³ The aforementioned cases may invoke contractual liability against the arbitral institutions if the action does not conform with the contract linking the institution to the parties.¹¹⁴⁴ This contractual relation creates an obligation on the institution to perform certain functions with regard to the arbitral

1137. Draetta & Luzzatto (n1130) 25.

1138. See *Société Japan Time v. SW Kienzle France et Chambre de Commerce Internationale* cited in Rubino-Sammartano (n44) 429. See also *Les institutions permanentes d'arbitrage devant le juge étatique (A propos d'une jurisprudence récente)*, 1987 (1987) 3 Rev Arb 225, 270. In this case, the ICC held that the arbitral agreement concluded by parties does not exist. Pursuant to the ICC rules, the parties had to submit the matter to a court of law. The parties proceeded with said submission and the *Cour d'appel* held that the arbitral agreement existed and clearly designated that arbitral institution.

1139. See *BKMI Industrienlagen GmbH & Siemens AG v. Dutco Construction*, Cass 1^{ère} Civ, Pourvoi n° 89-18708 89-18726, 7 janv 1992(1992) 3 Rev Arb 470. In this case the decision was against the ICC for having forcing two parties that had a conflict of interest to appoint the same arbitrator. The appointment of arbitrators is held to violate public policy (*ordre public*). The Court of Cassation overruled the decision of the Court of Appeal and referred it to the Appeal Court of Versailles, holding that the principle of equality of the parties in the appointment of arbitrators is a public policy matter and can be waived only after the dispute has arisen. See *Société Philipp Brothers v. société Icco et autres*, CA Paris (1Ch suppl) 6 avril 1990 (1990) 4 Rev Arb 880, 885. In this case, an action was brought by Philipp Brothers to vacate an arbitral award done under the aegis of the Arbitration Chamber of the French Association of Cocoa Commerce (AFCC) on the premise of alleged independence of the arbitral tribunal designation by the (AFCC). '[T]he court held the issue of independence of the arbitral institution which appoints the arbitrator is not to be distinguished from the independence required for the arbitrator which is an absolute requirement for all arbitral proceedings'. *Ibid.*

1140. *Raffineries de pétrole d'Homs et de Banias v. Chambre de Commerce Internationale*, TGI Paris, 28 mars 1984, quoted by CRIAG, 'International Arbitration and National Restraints in ICC Arbitration' (1985) Arb Intl, cited in Rubino-Sammartano (n44) 428. In this case, a Syrian company initiated legal proceedings against the ICC before the French courts, alleging nullity of the removal of a Syrian arbitrator for previous relationships of that arbitrator with that party.

1141. *Société Cubic Defense system v. Chambre de Commerce Internationale*, CA, 15 September 1998 (1999) 1 Rev Arb 103.

1142. *SNF SAS v. Chambre de Commerce Internationale*, CA Paris (1re Ch C) 22 janv 2009 (2010) 2 Rev Arb 314.

1143. *Ibid.*

1144. Draetta & Luzzatto (n1130) 25.

process.¹¹⁴⁵ On the other hand, parties to the arbitration must conform to the arbitral institution rules.¹¹⁴⁶ It could be observed that the contractual relation binding the arbitral institution to the parties is recognised by the legal systems studied in this dissertation. The 1996 English Arbitration Act has recognised the contractual relation binding parties to the arbitral institutions pursuant to Section 4(2): ‘The other provisions of this part (the “non-mandatory provisions”) allow the parties to make their own arrangements by agreement but provide rules that apply in the absence of such agreement’.¹¹⁴⁷ Similarly, section 4(3) stipulates: ‘The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided’.¹¹⁴⁸

The Act allowed the disputing parties to contract beyond its mandatory provisions and to agree upon holding their arbitration under the rules of an arbitral institution.¹¹⁴⁹ The February 1996 DAC report states that the relationship between the parties and the institution is contractual.¹¹⁵⁰ Moreover, the applicable arbitral institution rules are deemed part of that contract.¹¹⁵¹ Similarly, pursuant to French law, a contract is concluded between the parties and the arbitral institution in order to grant to the institution the capacity to administer the arbitral process or appoint the arbitrators.¹¹⁵² Accordingly, liability may be incurred based on said contract.¹¹⁵³ The French courts recognised the existence of a contract between the arbitral institution and the disputing parties explicitly confirming the existence of a contractual relation between the ICC and the disputing parties.¹¹⁵⁴ The Dutch Code has expressly recognised the

1145. Lew, Mistelis & Kroll, *Comparative International* (n3) 296.

1146. Robine (n248) 325.

1147. *See* English Arbitration Act 1996, s. 4(2).

1148. *Ibid.*, 4(3).

1149. Patrik Scholdstrom, *The Arbitrator’s Mandate: A Comparative Study of Relations in Commercial Arbitration under the Laws of England, Germany, Sweden and Switzerland* (Jure 1998) 78.

1150. *Report on the Arbitration Bill* (n213) para. 120(I) (‘As a matter of general contract law, arbitrators, experts, institutions and any other payees whatsoever are entitled to be paid what has been agreed with them by any of the parties. Therefore, for example, if a party appoints an arbitrator for an agreed fee, as a matter of general contract law (rather than anything in this Bill), that arbitrator is entitled to that fee’).

1151. *See* Michael Mustill, ‘Cedric Barclay Memorial Lecture’ (1992) *Arb* 159, 162 (‘The institution is appointed and acts by virtue of a contract with the parties and with the arbitrators’).

1152. Yves & Kiffer (n721) 41.

1153. *Ibid.*

1154. *SNF SAS v. Chambre de Commerce Internationale*, CA Paris (1re Ch C) 22 janv 2009 (2010) 2 *Rev Arb* 314, 318 (‘que les relations de la société SNF et de la CCI étant de nature contractuelle, les prestations fournies par la Cour internationale d’arbitrage située à Paris, relèvent de la loi française’). *See also* Melis (n265) 112. *See also* *Ceskolovenska Obchodni*

contractual relation amongst the parties and the arbitral institution by virtue of Article 1020, paragraph 5: ‘The term arbitration agreement includes an arbitration clause which is contained in articles of association or rules which bind the parties’.¹¹⁵⁵ Moreover, paragraph 6 of the same article prescribed: ‘Arbitration rules referred to in an arbitration agreement shall be deemed to form part of that agreement’.¹¹⁵⁶ Subsequently, the Egypt Arbitration Act 1994 followed the two aforementioned approaches in adopting the contractual link between the arbitral institution and the disputing parties’ pursuant to Article 4(1):

‘For the purpose of this Law, the term “arbitration” means voluntary arbitration agreed upon by the two parties to the dispute according to their own free will, whether or not the chosen body to which the arbitral mission is entrusted by agreement of the two parties is a permanent arbitral organisation or centre.’¹¹⁵⁷

In contrast, the same Act in Article 5 described the arbitral institution as a third party in relation to parties:

‘In the cases where this Law permits the two parties to the arbitration to select the procedures which must be followed in a given matter, this also includes their right to allow third parties to make such selection. In this respect, any arbitration organisation or centre in the Arab Republic of Egypt or abroad shall be deemed a third party.’¹¹⁵⁸

The Egyptian Act is not precise in classifying the relation between the parties and the institution. This is shown in the first Article, where the Act recognised that the arbitral institution is empowered to perform its function by virtue of an agreement; however, in the latter, the law deemed the institution a third party. The UAE law, being an old-fashioned arbitration act that is not based on the UNICITRAL Model Law, contains no provisions about

Banka AS (Cekobanka) v. Chambre de Commerce Internationale (CCI), TGI Paris (1Ch 1s) 8 October 1986 (1987) 3 Rev Arb 367. See also Gaillard & Savage, *International Commercial Arbitration* (n1) 602. See also *République de Guinée v. Chambre arbitrale de Paris et autres*, TGI Paris (1Ch 1s) interim injunctions 30 mai and 30 Oct 1986 and judgment 28 janv 1987 (1987) 3 Rev Arb 371.

1155. See Dutch Code of Civil Procedure, Art. 1020(5).

1156. *Ibid.*, Art. 1020(6).

1157. See Egyptian Arbitration Act (No. 27) 1994, Art. 4(1).

1158. *Ibid.*, Art. 5.

institutional arbitration and, thus, does not classify the nature of the relation subject to the UAE law. This does not preclude the fact that several claims have been raised against DIAC on grounds of contractual breach. In *Meydan LLC v. Dubai International Arbitration Centre*, the Dubai Court of Cassation dismissed a claim brought by Meydan, the losing party in a DIAC. In that case, the arbitration was conducted by a sole arbitrator and Meydan was contesting the validity of the Centre's and the sole arbitrator's decisions, and seeking an annulment of the award.¹¹⁵⁹ Similarly, the Dubai Court of Appeal rejected a claim lodged against the Dubai International Centre by one of the parties in an arbitration conducted under its rules, where said party alleged procedural irregularities concerning the constitution of the tribunal and management of the case.¹¹⁶⁰ The relation classified between the parties and the arbitral institutions in a contractual frame would be the grounds for triggering the liability of an arbitral institution on a contractual basis. The arbitral institution's failure to fulfil its contractual obligations with regard to the organisation and administration of the arbitral procedures would be a reason to hold the institution contractually liable.¹¹⁶¹

[B] Tort Liability of Arbitral Institutions

The keystone of tort liability claims is breach of legal duty by the arbitral institution, in which the arbitration institution is committed to pursue the parties' interests. Organisations sponsoring arbitration are supposed to be members of a profession, and are therefore presumed to practice their duties with reasonable care and due diligence. Failure to act with reasonable skill and care would lead to damages to parties that result in holding the institutional liable due to the breach of professional duties. The prevalence of the potential contractual liability within the relationship between the arbitral institutions and parties does not preclude the possible existence of tortious liability.¹¹⁶² The arbitral institution that incurs damage on arbitrants in a pre-contractual stage could give rise to liability in tort.¹¹⁶³ The arbitral institution may also be engaged in tort liability when it ceases to operate or practice its function '*c'est-à-dire de retirer*

1159. Dubai Court of Cassation, Decision No. 210/2014 Official Copy of Decision Provided by Dubai International Arbitration Centre.

1160. Dubai Court of Appeal, Case No. 96/2016 Official Copy of Decision provide by Dubai International Arbitration Centre.

1161. Gaillard & Savage, *International Commercial Arbitration* (n1) 603.

1162. Dupeyre (n1050) 283.

1163. Emmanuel Gaillard, 'Intervention aux Débats' in 'Les Institutions d'arbitrage en France', Travaux du Comité Français de l'arbitrage, Paris, 19 janv 1990 (1990) 2 Rev arb 473, 474.

son offre'.¹¹⁶⁴ Moreover, the liability of the arbitral institution would be tort-based when third parties (that are not part of the contract linking the parties to the institution) are injured by one of its acts. Actions against arbitral institutions based on tort would be within a very narrow range due to contractual coverage for most of the arbitral institution's duties. This is clear in the provisions of the applicable laws subject to study and case law, particularly in France.

§4.05 Chapter Summary

The analysis of Chapter 4 has shown that institutional arbitration has evolved, being now much more popular than ad hoc arbitration due to the advantages provided in relation to the arbitral process when it is held under the aegis of an arbitral institutions. This led the arbitral institutions to take into account the actions that would be taken against them through parties dissatisfied with the result of the arbitral process from claiming unjustifiable liability. The arbitral institutions subject to study have included provisions in their rules, reflecting a clear approach in adopting an absolute immunity disclaimer. However, common law systems, represented in English law, have granted immunity to arbitral institutions by means of statutory provisions in addition to that stipulated by the arbitral institutions rules, which provide dual immunity, one by applicable law and other by institutional rules. On the other hand, civil law systems set new grounds for the issue of arbitral institution immunity. French courts have recognised that the immunity disclaimer in the arbitral institutions rules is worthless and does not shield it from being held liable in case of breach of a contractual duty. Egyptian law does not deal with the issue of arbitral institution immunity, and no case law in Egypt thus far has ruled against arbitral institutions. Liability of arbitral institution originally emanates and finds its basis in contract law. The legal systems subject to this study confirmed the contractual link between parties and arbitral institutions, either by virtue of its provisions or by the approach adopted by its courts. The Egyptian Arbitration Act is shown to merely open the way for tort claim by considering the arbitral institution as a third party in relation to disputing parties. Tort liability may still exist, but with less prevalence than liability based on contract. The increasing rate of liability suits against institutions and the tendency of the courts to nullify liability waivers is a real alert for the institutions to search for a subsidiary shield against liability. This shield may be sought in the form of an insurance coverage for arbitral institutions to cover said risk if the elements of liability are proved by a disgruntled party. Nevertheless, this insurance

1164. Charles Jarrosson, 'Intervention aux Débats' in 'Les Institutions d'arbitrage en France', Travaux du Comité Français de l'arbitrage, Paris, 19 janv 1990 (1990) 2 Rev arb 473, 474.

remedy is still subject to different questions regarding the type of provided policy and the extent of insurance coverage the underwriter is able to grant against that type of risk.

CHAPTER 5 Professional Indemnity, Insurance and Arbitration

Chapter 5 Professional Indemnity, Insurance and Arbitration

Ahmed F. El Shourbagy

The widespread use of the arbitration mechanism in dispute settlement is directly associated with the growth of international investment.¹¹⁶⁵ Arbitration provides an advanced tool for dispute resolution compared to the ordinary court system.¹¹⁶⁶ In the words of Lew: ‘International arbitration before neutral arbitrators, in a third country, with non-national or international procedures being followed, has become the essential mechanism for the settlement of all kinds of international business disputes’.¹¹⁶⁷

This evolution in using arbitration as a preferred method of dispute resolution is directly correlated with the increasing demand for arbitration services.¹¹⁶⁸ The enormous demand for arbitration services has turned arbitration into a business, with the increase of more professional arbitration service providers either at the ad hoc or institutional level.¹¹⁶⁹ Arbitration services could be rendered by ad hoc arbitrators or through multinational arbitral organisations.¹¹⁷⁰ Such a significant increase in the number of arbitral institutions offers a great variety to arbitrants in selecting the adequate arbitral institution to run the arbitral process.¹¹⁷¹ Arbitrants can choose to agree upon a person to arbitrate their dispute or agree to hold the

1165. Mohamed Ibrahim Mostafa Aboul-Enien, ‘Arbitration of Foreign Investment Disputes: Responses to the New Challenges and Changing Circumstances’ in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond* (Kluwer Law International 2005) 181.

1166. Marshall E Lippman, ‘Arbitration as an Alternative to Judicial Settlement: Some Selected Perspectives’ (1972) 24 Me L Rev 215.

1167. Julian DM Lew QC, ‘Achieving the Dream: Autonomous Arbitration?’, in Julian DM Lew QC and Loukas A Mistelis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration, Sponsored by Freshfields Bruckhaus Deringer* (Kluwer Law International 2007) 463.

1168. Weston (n778) 460.

1169. Lalive (n442) 173. *See also* Weston (n778) 449.

1170. Stephen Hayford & Ralph Peeples, ‘Commercial Arbitration in Evolution: An Assessment and Call for Dialogue’ (1995) 10 Ohio St JDisp Resol 343.

1171. Filip De Ly, ‘The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning’ (1991) 12 Nw J Intl L & Bus 48, 49–50.

whole arbitral process under the auspices of one of the institutions sponsoring arbitration.¹¹⁷² In performing their function, arbitrators are private actors who practise a role and are entitled to remuneration in return of rendering professional services.¹¹⁷³ Their mandate imposes a contractual obligation for the arbitrator to perform with due care.¹¹⁷⁴ The entire legal system and all national arbitration acts recognise that arbitrators are bound to arbitants on a contractual basis.¹¹⁷⁵ Consequently, arbitrators' civil liability could arise from breach of their contractual obligation. Moreover, liability of arbitrators may be triggered on grounds of tort due to the failure in performing their professional duty adequately.¹¹⁷⁶ Unlike the practice of arbitrators, arbitral institutions do not operate as arbitrators, they only regulate the arbitral proceedings.¹¹⁷⁷ Arbitral institutions that administer arbitration pursuant to their rules are linked through a contract to arbitants in which their rights and duties are set,¹¹⁷⁸ although the breach of the arbitral institution's obligation towards the parties would give rise to their contractual liability. Nevertheless, the extent of that liability varies according to the extent of the institution involvement in the arbitral process.¹¹⁷⁹ It is noteworthy that an arbitral institution that offers additional services, such as scrutiny of arbitral awards, would have its potential liability increased. Arbitrators are professionals with skills to resolve disputes.¹¹⁸⁰ Arbitrator's standards of professional responsibility are grounded in the principle of judicial

1172. Stephen J Choi, 'The Problem with Arbitration Agreements' (2003) 36 Vand J Trans Nat'l L 1233, 1234.

1173. Franck (n6)1.

1174. See English Arbitration Act 1996, s. 33(1) ('[T]he tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined').

1175. Fouchard (n92) 14. See also *K/S Norjahl A/S v. Hyundai Heavy Industries Ltd* [1991] 1 Lloyd's Rep. 524 ('[B]y accepting his appointment the arbitrator undertakes contractually to act with due diligence in consideration of remuneration'). See also Paris, 4 mai 1988, République de Guinée (1988) Rev arb 657, note, P Fouchard ('*La Cour d'appel de Paris, dans son second arrêt (celui du 4 mai 1988, qui statue au principal), va plus loin que le Tribunal de grande instance dans la qualification du rapport contractuel existant entre le Centre d'arbitrage et les parties. Elle y voit, plus nettement que le Tribunal ne l'avait déclaré, un véritable mandat. Et elle estime que ce mandat est "d'intérêt commun". Elle en déduit que le juge ne pouvait "imposer aux parties", hors leur volonté expresse "commune"*').

1176. Franck (n6) 19.

1177. Gaillard & Savage, *International Commercial Arbitration* (n1) 603.

1178. Born (n25) 2127.

1179. Cremades (n1129) 34.

1180. Lew, 'Introduction' (n350) 3.

ethics and the principle of professional ethics.¹¹⁸¹ Akin to all professional services providers, arbitrators render services that should meet a certain minimum standard of professionalism, care, and specialist knowledge.¹¹⁸² Court decisions in civil law countries have demonstrated the possibility of holding arbitrators liable if the arbitrators have manifestly failed to exercise due care and skill. A recent judgment of the French Court of Cassation has based the civil liability of arbitrators on grounds of personal fault equivalent to a guilty mind, constitutive of a fraud, gross negligence, and denial of justice.¹¹⁸³ The court held:

‘Que la responsabilité de l’arbitre, qui est uni aux parties par un lien de nature contractuelle et qui n’est investi d’aucune fonction publique, doit s’apprécier dans les conditions du droit commun, si bien qu’en jugeant que l’arbitre n’était responsable que de sa faute personnelle qui, pour engager sa responsabilité, doit être équipollente au dol, constitutive d’une fraude, d’une faute lourde ou d’un déni de justice.’

When errors occur, the arbitrator might be held professionally liable for any damages that might incur financial losses followed by legal actions. Furthermore, arbitral institutions struggling to attract more parties have increased the services they provide, and may gradually increase their exposure to potential liability.¹¹⁸⁴ As a result, in order to cope with their potential Professional Indemnity Insurance (PI), arbitrators and arbitral institutions have recourse to professional indemnity insurance to mitigate the effects of such actions.¹¹⁸⁵ Professional indemnity insurance is designed to shield a professional against risks linked to practicing the profession, taking into account damages arising from civil and disciplinary liability.¹¹⁸⁶ Specific insurance coverage for arbitrators’ PL has not been in existence for long, unless it was covered by insurance for being members of another profession.¹¹⁸⁷ Insurance coverage for

1181. Abram H Stockman, ‘Now Who Shall Arbitrate’ (1967) 19 Stan L Rev 671, 715.

1182. Born (n25)2136.

1183. Cass 1ère Civ, 15 janv 2014, 11-17.196, Publié au bulletin <cour decassation.fr/jurisprudence_2/premiere_chambre_civile_568/2_15_28195.html> accessed 19 October 2020.

1184. Houtte & McAsey (n248)25.

1185. *Ibid.*, 34.

1186. Jan-Mikael Bexhed & C Marian, ‘Insurance for International Arbitrators: Immunity from Liability, Existent Coverage, Exclusions and Control of Risk’ (2011) 8(2) Am J Int’ L 1.

1187. Veeder (n519) 31. *See also* Delvolve (n530) 37. The Bar of Paris has stated: when he is entrusted with a mission as arbitrator a member in the bar is subject in his performance thereof to the general duties of his profession account being taken of the particular

arbitrators and arbitral institutions would impede the multiple claims of their potential liability.¹¹⁸⁸ Arbitration jurisdictions have shown different approaches towards the principle of arbitrator's professional indemnity insurance. The House of Lords revealed a debate amongst the Lords while discussing the English Arbitration Act with regard to the issue of insuring arbitrators. Lord Donaldson held the belief that insurance is an obstacle facing arbitration: 'as a very occasional arbitrator, if I had to start taking out insurance, for my part I would cease to arbitrate at all'.¹¹⁸⁹ However, Lord Hacking replied:

*'The noble and learned Lord, Lord Donaldson, whom we do not wish to discourage from presiding over arbitrations, is worried about insurance. All I have to say to the noble and learned Lord and to other noble Lords is that all the rest of us who are in the market place offering professional services must have insurance, and I do not see any reason why arbitrators should not contemplate that as well.'*¹¹⁹⁰

Although the House of Lords discussion is valuable, the English Arbitration Act has no provisions for insurance either for arbitrators or arbitral institutions.¹¹⁹¹ French law also contains no provisions for arbitrators' or arbitral institutions' liability insurance.¹¹⁹² Similarly, the Dutch,¹¹⁹³ Egyptian,¹¹⁹⁴ and UAE¹¹⁹⁵ arbitration acts do not incorporate any insurance provisions that arbitrators should obtain prior to carrying out their activities. Few arbitration

rules which govern such mission including but not limited to the principles of independence and impartiality of an arbitrator vis a vis all the parties in the dispute, strict respect of time limits for the arbitral procedure and secrecy of deliberations.

1188. Robine (n248) 323.

1189. Committee on the Arbitration Bill, Grand Committee, UK Parliament <<https://api.parliament.uk/historic-hansard/grand-committee-report/1996/feb/index.html>> accessed 20 October 2020.

1190. *Ibid.*, §6GC.

1191. *See* English Arbitration Act 1996.

1192. *See* French Code of Civil Procedure 2011 (Decree 2011-48).

1193. *See* Dutch Arbitration Act 2015.

1194. *See* Egyptian Arbitration Act 1994.

1195. *See* UAE Arbitration Act 2018.

acts, particularly the Spanish¹¹⁹⁶ and Norwegian¹¹⁹⁷ Acts, incorporated an obligation on arbitrators and arbitral institutions to undertake liability insurance. Recently, a tangible development has been recognised in relation to arbitral institutions acquiring some sort of liability insurance, including leading arbitral institutions such as LCIA and ICC.¹¹⁹⁸ Moreover, some institutions clearly provide a professional indemnity insurance scheme for their members such as CI Arb.¹¹⁹⁹ The Netherlands Arbitration Institute follows the same approach in offering arbitrators appointed under its Rules professional indemnity insurance.¹²⁰⁰ However, insurance mechanisms and policies, like available coverage for arbitrators and arbitral institutions and the extent of this coverage from a geographical standpoint, as well as limits and exclusion of such policies, may justify research from different perspectives, as addressed in the sections below.

§5.01 Defining Professional Indemnity Insurance (General Concepts)

Insurance is generally defined as a contractual right of recovery on the occurrence of an uncertain event that is adverse to the assured in return for payment of a premium.¹²⁰¹ In the context of insuring arbitrators and arbitral institutions against their potential civil liability whilst providing professional/ arbitral services, the type of insurance that is designated to cover risks pertaining to malpractice is professional indemnity insurance. *‘Professional indemnity insurance is an insurance which indemnifies the insured professional against pecuniary loss arising out of the professional’s negligent act, error[,] or omission which causes loss to be suffered by his or her client or a third party’.*¹²⁰² *‘The acts covered under the insurance policy*

1196. See Spanish Arbitration Act (Law No. 60) 2013, Art. 21.1 (‘Arbitrators or arbitral institutions on their behalf will be bound to take liability insurance or equivalent security for the amount established in the rules’). See also Juan Ignacio Fernández Aguado, ‘Arbitration in Spain’ (2012) 1 CMS Guide to Arb 830 (‘[N]evertheless, a kind of contradiction could be realized in the act in requiring insurance against potential liability and limiting the liability of arbitrators and arbitral institutions as well to intentional, recklessness or willful misconduct only’).

1197. Rutledge (n411) 173.

1198. Houtte & McAsey (n248) 135.

1199. Chartered Institute of Arbitrators, ‘Professional Indemnity Insurance Scheme’ <<https://www.ciarb.org/membership/member-benefits/>> accessed 19 October 2019.

1200. Hwang, Chung & Cheng (n7) 245.

1201. Rob Merkin & Jenny Steele, *Insurance and the Law of Obligations* (OUP 2013) 42.

1202. ND Hooker & LM Pryor, ‘Professional Indemnity Insurance’ (1990) 32 J Staple Inn Actuarial Soc 37, 38.

are determined through the wording of the policy insuring clause.’¹²⁰³ The insured professional should pay a specific premium for the insurance policy. The premium is always decided based on several factors, such as the type of profession, the number of insured to be covered, and the territorial scope of the profession and its activities.¹²⁰⁴ Moreover, deductibles have a strong collateral impact on premium rates – the higher the deductible, the lower the premium rate.¹²⁰⁵ The deductible mechanism limits the insurer’s coverage of loss and eliminates the insurers’ expenses by reducing the cost of claim settlement related to small claims through the policy holder sharing responsibility in loss payments.¹²⁰⁶ Professional indemnity insurance policies presume the occurrence of a loss. Accordingly, professional indemnity insurance seeks to provide compensation to parties injured by a professional due to his/her failure to perform a task with due diligence for which he/she was employed. The basic distinction between PL policy and the commercial general liability policy is the insured’s act or failure to act rather than the damages incurred by the insured.¹²⁰⁷ According to Thornton, there are two main benefits granted to the policy holder pursuant to a professional indemnity insurance policy:

*‘First, this insurance provides a specific amount of money (the insurance policy “limits”) from which to pay a settlement or adverse judgment in a professional liability claim. This benefit is referred to as “indemnity”, or the “duty to indemnify”. Second, this insurance pays for legal representation in the context of a health care liability claim. This is referred to as the “duty to defend”. The duties to indemnify and defend are universal in professional liability policies.’*¹²⁰⁸

1203. Stephen Netherway, ‘Professional Indemnity Insurance – Scope of Cover and Claims Management: An Insured’s Guide’ (1998) 6(11) Intl ILR 356.

1204. Eugene Jericho & Edward Coultas, ‘Are Lawyers an Insurable Risk?’ (1977) 63 ABA J 832, 834.

1205. Nancy Dunnan, ‘Saving on Liability Insurance’ (1988) 74(2) ABA J 96.

1206. Michael R Powers & Larry Y Tzeng, ‘Risk Transformations, Deductibles, and Policy Limits’ (2001) 68(3) JR & I 466.

1207. Gregory Drutchas & Adam Kutinsky, ‘An Overview on Professional Indemnity Insurance’ (2011) 4(4) J Ins & Indemnity L 6.

1208. Russell G Thornton, ‘Not-So-Obvious Considerations from Professional Liability’ (2005) 18(4) Proc (Bayl Univ Med Cent) 408.

There is a blend of professional insurance policies with a diversity of names, such as errors and omissions (E&O) and PL, with minor or no practical difference between them.¹²⁰⁹ These names vary across different jurisdictions and insurance companies; however, E&O policies comprise all subsidiary forms of coverage.¹²¹⁰ Errors and omissions policies are tailored particularly to indemnify individuals or entities rendering professional services against liability arising from errors, omissions, and negligence related to the special profession in which they practice.¹²¹¹ The policy covers the wrongful acts committed by the insured party including errors and omissions, but excluding intentional acts.¹²¹² A typical E&O insurance policy might state something along these lines:

*'To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages resulting from any claims first made against the Insured and reported to the Insurer during the policy period ... for any Wrongful Act of the Insured or any other person for whose actions the Insured is legally responsible, but only if such Wrongful Act ... occurs solely in the rendering or failure to render Professional Services.'*¹²¹³

E&O policies provide two basic variations of coverage: occurrence-made policy and claims-made policy or (discovery).¹²¹⁴ Occurrence-made policies provide coverage for the errors committed by the policy holder within the policy period, irrespective of the time at which the claim arises.¹²¹⁵ An occurrence-made policy provides prospective coverage for claims filed

1209. Hooker & Pryor (n1202) 38.

1210. Bexhed & Marian (n1186) 7.

1211. *Snug Harbor Ltd v. Zurich Ins*, 968 F2d 538, 543 (5th Cir 1992). See also Peter J Kalis, Thomas M Reiter & James R Segerdahl, *Policyholder's Guide to the Law of Insurance Coverage* (Aspen Publishers Online 1997) § 12.01 (Supp1999).

1212. John P Sahl, R Micheal Cassidy, Benjamin P Cooper & Margaret C Tarkington, *Professional Responsibility in Focus* (Wolters Kluwer Law and Business 2017) 91.

1213. Adam P Doherty et al., 'A Tale of Two Towers: When Professional Liability and D&O Coverage Are Both Implicated' (ABA, Litigation Section, Insurance Coverage Litigation Committee CLE Seminar, March 2012) 3

<www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_inscle_materials/12_1_towers.authcheckdam.pdf> accessed 20 October 2020.

1214. David A Baugh & Ellen L Flannigan, 'Protecting the Professional: Brush Up on E&O Insurance' (1999–2000) 9 Bus L Today 15. See also *Merrill & Seeley Inc v. Admiral Ins Co*, 225 Cal App 3d 624, 628 (1990) ('By way of background, we note that the two common types of insurance policies offered in the professional liability field are the "claims made" (or discovery) policy and the "occurrence" policy').

1215. Gerald Kroll, 'The Claims Made Dilemma in Professional Liability Insurance' (1974–1975) 22 UCLA L Rev 925. See also *Samuel N. Zarpas Inc v. Morrow* 215 F Supp 887, 888

after the termination of the policy period provided that these incidents should arise during the policy term.¹²¹⁶ In contrast, claims-made policies provide coverage to the policy holder for actual claims triggered against him/her within the term of the policy.¹²¹⁷ A claims-made policy provides retroactive coverage for the acts that precede the commencement of the policy period, provided that the claim is done within the actual term of the policy.¹²¹⁸ A retroactive date is usually included in the claims-made policy in order to determine how far back the claims shall be covered.¹²¹⁹ The insured party under the claims-made policy is usually provided a discovery period that allows him/her to report to the insurer claims within a specific period of time (typically 90 days) after the expiration date of the policy without losing coverage.¹²²⁰ According to Kroll:

(DNJ 1963) ('In an occurrence policy the coverage is effective if the negligent or omitted act occurred during the period of the policy, whatever the date of discovery').

1216. Barry R Ostrager & Thomas R Newman, *Handbook on Insurance Coverage Disputes* (16th edn, Aspen Publishers Online 2013) 693 ('Under this type of policy, it is irrelevant whether the resulting claim is brought against the insured during or after the policy period, as long as the injury-causing event happens during the policy period'). See also *Brander v. Nabors* 443 FSupp 764, 767 (NDMiss1978) ('[T]he "occurrence" policy would provide unlimited prospective coverage and no retroactive coverage at all').

1217. John H Mathias Jr, John D Shugrue & Thomas A Marrinson, *Insurance Coverage Disputes* (Law Journal Press, 2014) §1.03(2). See also *Samuel N. Zarpas Inc v Morrow* 215 F Supp at 888. 'In a discovery policy the coverage is effective if the negligent or omitted act is discovered and brought to the attention of the insurance company during the period of the policy, no matter when the act occurred'. See also *Thoracic Cardiovascular Assocs, Ltd v. St Paul Fire & Marine Ins Co*, 181 Ariz. 449, 453(1994). The 'claims made' policy differs from an 'occurrence' policy in several important aspects. Because it triggers coverage, transmittal of the notice of the claim to the insurer is the most important aspect of the claims-made policy. A claims-made policy extends coverage if 'the negligent or omitted act is discovered and brought to the attention of the insurer within the policy term'. *ibid.* (quoting 7A John Alan Appleman, *Insurance Law and Practice* § 4504.01, at 312 (Berdal ed. 1979)). 'The timing of the making of the claim in such policies stands in equal importance with the error or omission as the insured event' [citation omitted].

1218. Susan Saab Fortnei, 'Legal Malpractice Insurance: Surviving the Perfect Storm' (2004) 28 J Leg Profession 41, 43. See also *Brander v. Nabors* 443 FSupp. 764, 767 (NDMiss 1978) ('Basically, the "claims made" policy would provide unlimited retroactive coverage and no prospective coverage at all'). This judgment was affirmed by the Court of Appeal in 579 F2d 888 (5th Cir 1978).

1219. Merkin & Steele (n1201) 70.

1220. Mathias Jr, Shugrue & Marrinson (n1189) §1.03(2). *Thoracic Cardiovascular Assocs Ltd v. St Paul Fire & Marine Ins Co*, 181 Ariz 449, 453(1994) ('Notice to the insurer of a claim made against the insured is generally required to be given during the policy period or within a specified amount of time after the policy period').

*“The major distinction between the “occurrence” policy and the “claims made” policy constitutes the difference between the peril insured. In the “occurrence” policy, the peril insured is the “occurrence” itself. Once the “occurrence” takes place, coverage attaches even though the claim may not be made for some time thereafter. While in the “claims made” policy, it is the making of the claim which is the event and peril being insured and, subject to policy language, regardless of when the occurrence took place.”*¹²²¹

Liability insurance policies were based on occurrence-made policies in the past; however, the insurance market has switched to claims-made policies due to their efficiency, particularly in specific fields such as PL insurance.¹²²² Occurrence-made policies were unmanageable for insurers as they continued to expose them to liability due to the possibility for a claim to be asserted after the end of the policy period; therefore, they are referred to as ‘long-tail liability’.¹²²³ This ‘tail’ is the time that lapses between the date of the error (within the policy period) and the time when a claim is made against the insured.¹²²⁴ Insurers suffered losses through occurrence-made policies, even raising the premiums failed to compensate for the expenses.¹²²⁵ Claims-made policies allowed the underwriters to set premiums with great certainty about the future loss and changes in the professional malpractice environment due to the non-open-end ‘tail’.¹²²⁶ Consequently, this was the factor that caused the insurance market to replace the occurrence policies with the claims-made policies.¹²²⁷ Professional indemnity insurance policies aim to identify the insured party where he/she is legally accountable to pay compensation to clients or third parties.¹²²⁸ Liability of a professional is triggered when negligence occurs and damages are incurred that are attributable to an individual or institution. Professional negligence is defined as a ‘negligence claim against a professional for harm-

1221. Sol Kroll, ‘The Professional Liability Policy “Claims Made”’ (1977–1978) 13 Forum 842, 843.

1222. Carolyn M Frame, ‘“Claims-Made” Liability Insurance: Closing the Gaps with Retroactive Coverage’ (1987) 60 Temp L Q 165.

1223. James F Hogg, ‘The Tale of a Tail’ (1998) 24 Wm Mitchell L Rev 515, 519.

1224. *Gulf Ins Co v. Dolan, Fertic and Curtis*, 433 So2d 512, 515 (1983).

1225. Jericho & Coultas (n1176) 835.

1226. *Ibid.*

1227. Hogg (n1195) 519.

1228. Peter Cane, ‘Liability Rules and the Cost of Professional Indemnity Insurance’ (October 1989) 14(53) Geneva Papers Risk & Ins 347.

causing wrongs committed through professional services'.¹²²⁹ Thus, professional negligence is most likely to occur when damages are incurred by professionals due to contractual breach¹²³⁰ or breach of duty which gives rise to tort liability. In *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*, Lord Morris stated that:

*'If someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.'*¹²³¹

The link between the professional and the client usually arises through a contract where a professional renders services in return for remuneration. The consequence of that contract is an implied condition by the professional to perform with reasonable care and skill. Nevertheless, the implied term shall not be the only contractual term where PL is triggered. In *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp*,¹²³² Oliver J stated that:

1229. Nelson Miller, *The Practice of Tort Law* (3rd edn, Vandepias Publishing 2012) 313. See also E DeVilliers Hugo, 'The Actions of Wrongful Life, Wrongful Birth, Wrongful Conception a Comparative Study from a South African Perspective' (Doctor Legum Thesis, University of Pretoria 1999) 133. Professional liability can be defined as 'as individual's accountability before a court of law which may take the form either of a civil judgment for delictual [or contractual] damages to compensate for harm wrongfully caused, or of a civil judgment compelling him to refrain from continuing with an unlawful course of action, or of a criminal conviction for an offence which was found to have been committed.' *ibid*.

1230. In *Brown v. Boorman* (1844) 11 Cl & Fin 1, the House of Lords stated 'wherever there is a contract, and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract.'

1231. *Hedley Byrne & Co Ltd v. Heller & Partners Ltd House of Lords* [1964] AC 465. See also David F Partlett, 'Roaming in the Gloaming: The Liability of Professionals' (1992)

14 Syd L R 261, 262.

1232. (1978) 3 All ER 571.

*‘The classical formulation of the claim in this sort of case as damages for negligence and breach of professional duty tends to be a mesmeric phrase. It concentrates attention on the implied obligation to devote to the client’s business that reasonable care and skill to be expected from a normally competent and careful practitioner as if that obligation were not only a compendious, but also an exhaustive, definition of all the duties assumed under the contract created by the retainer and its acceptance. But, of course, it is not. A contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care and skill is but one.’*¹²³³

On the contrary, the standard tort of negligence requires owing a duty of care. This duty must be breached and damages should have been incurred as a result of the breach of that duty.¹²³⁴ Thus, professionals owe a duty of care in addition to their contractual obligations. Lord Macmillan in *Donoghue v. Stevenson*¹²³⁵ stated:

*‘There is the equally well-established doctrine that negligence apart from contract gives a right of action to the party injured by that negligence – and here I use the term negligence of course in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action founded on negligence as between the same parties independently of the contract though arising out of the relationship in fact brought about by the contract.’*¹²³⁶

Professional services shall be provided based on knowledge and skill.¹²³⁷ Professionals are expected to render their services to the same standard of reasonable care, skill, and education to which other members of the same profession are to be held.¹²³⁸ The evaluation of a

1233. *Midland Bank Trust Co Ltd. v. Hett, Stubbs & Kemp* (1978) 3 All ER 571.

1234. David G Owen, ‘The Five Elements of Negligence’ (2007) 35 Hofstra L Rev 1673. See also Benjamin C Zipursky, ‘Legal Malpractice and the Structure of Negligence Law’ (1998) 67 Fordham L Rev 650.

1235. [1932] AC 562.

1236. *Donoghue v. Stevenson* [1932] AC 562, 610.

1237. William J Curran, ‘Professional Negligence – Some General Comments’ (1959) 12 Vand L Rev 538.

1238. Comment, ‘Professional Negligence’ (1973) 121 UPa L Rev 627, 638.

professional conduct is made in reference to the reasonable professional, not the reasonable man on the street.¹²³⁹ In *Lanphier v. Philpos*,¹²⁴⁰ Tindal stated that:

*‘Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill.’*¹²⁴¹

The breach of a duty of reasonable care under French law is a *faute* (fault), automatically giving rise to liability notwithstanding the defendant’s capacity to have acted otherwise.¹²⁴² The fault (*faute*) principle was elucidated and summarised by Domat, who illustrated:

*‘All losses and damage which may occur by the act of any person, whether by imprudence, carelessness, ignorance of what should have been known, or other similar faults, slight as they may be, must be repaired by him whose imprudence or other fault has caused them. For it is a tort that he has done, even though he had no intention to harm. Thus, anyone who imprudently plays ball in a place where there could be danger for the passer-by and in fact injures someone is liable for the harm he causes.’*¹²⁴³

1239. *Ibid.*, 634. See also *Blyth v. Birmingham Waterworks Co* (1856) 11 Exch 781. The most popular definition for the reasonable man was made by Lord Alderson:

negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. ... A reasonable man would act with reference to the average circumstances of the temperature in ordinary years.

1240. (1838) 173 ER 581.

1241. *Lanphier v. Philpos* (1838) 173 ER 581.

1242. Franz Werro & Erdem Buyuksagis in Mauro Bussani and Anthony J Sebok (eds), *Comparative Tort Law: Global Perspectives* (Edward Elgar Publishing 2015) 205–206.

1243. Jean Domat, *Les Lois Civiles Dans Leur Ordre Naturel* tit 8, n° 4 (1689), quoted in Andre Tunc, ‘A Codified Law of Tort-The French Experience’ (1978-1979) 39 *La L Rev* 1051, 1055.

The error usually takes place where the defendant performs in breach of a statutory duty or the rules of conduct that emanates from the general principle of *neminem laedere*.¹²⁴⁴ The principle of *neminem laedere* (which means ‘injure no one’) originates in Article 1382 of the Code Napoleon, which constitutes the ground of tort liability.¹²⁴⁵ The court’s assessment in case of said breach is based on whether the defendant acted with the degree of care expected from the reasonable man in the particular circumstances.¹²⁴⁶ Negligence actions against a member of a profession require proof by the injured party that the defendant has performed in a manner substandard to the defendant’s own profession, with no fault from the claimant’s side.¹²⁴⁷ Following the principles of professional negligence, arbitrators shall be liable for their negligent conduct that caused damages for arbitrants. There are different approaches to the recognition of the arbitrators’ professional negligence in civil and common law systems, particularly in the countries subject of the present dissertation. France has adopted the approach of possible legal action against arbitrators for damages incurred due to their negligence.¹²⁴⁸ In Egypt, by virtue of Article 163 of the Egyptian Civil Code, the legal actions against arbitrators are allowed for any error, omission, and negligence committed either by simple negligence or gross negligence with no specification.¹²⁴⁹ The Netherlands¹²⁵⁰ and UAE¹²⁵¹ have also recognised that serious errors and gross negligence may be grounds for legal action against arbitrators. However, England is reluctant to apply liability for an arbitrator’s professional negligence. For instance, the English Arbitration Act requires bad faith of arbitrators in their acts or omissions in order to hold them liable.¹²⁵² English case law has exempted arbitrators from liability arising from negligence, extending to them immunity

1244. Michel Cannarsa, ‘Compensation for Personal Injury in France’ (2002) 8(15) *Cardozo E-Bull* 1, 4 <<http://www.jus.unitn.it/cardozo/review/2002/cannarsa.pdf>> accessed 19 October 2019.

1245. Vernon Valentine Palmer and Mauro Bussani, ‘Between Contract and Tort: Pure Economic Loss in Europe’ in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005) 205.

1246. Cannarsa (n1214) 4.

1247. Hawkins (n754) 34.

1248. Cass 1^{ère} Civ, 15 janv 2014, 11-17.196, Publié au Bulletin <courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/2_15_28195.html> accessed 19 October 2019. *See also* Delvolve (n530) 34.

1249. *See* Egyptian Civil Code (Law No. 131) 1948, Art. 163 (‘A person committing any fault or error, causing harm to another, is obliged to compensate for the damages suffered’).

1250. *See also* HR, 4 December 2009, ECLI:NL:HR:2009:BJ7834, NJ 2011/31.

1251. Dubai Court of Cassation, Case No. 212/2014 Blanke (n550).

1252. *See* English Arbitration Act 1996, s. 29(1).

granted to judges. In the leading case, *Sutcliffe v. Thackrah*,¹²⁵³ Lord Reid said *'those employed to perform duties of a judicial character are not liable to their employers for negligence. This rule has been applied to arbitrators for a very long time. It is firmly established and could not now be questioned by your Lordships'*.¹²⁵⁴ Later, in *Arenson v. Arenson*,¹²⁵⁵ the House of Lords refused to extend immunity against negligence to the valuer on the basis that he was not regarded as an arbitrator performing a quasi-judicial function. Lord Kilbrandon wondered why arbitrators are immune from legal actions as a matter of public policy. He stated, *'it is conceded that an arbitrator is immune from suit, aside from fraud, but why?'* He continued to state his belief that *'an arbitrator at common law or under the Acts is indeed a person selected by the parties for his expertise, whether technical or intellectual that he pledges skill in the exercise thereof and that if he is negligent in that exercise he will be liable in damages'*.¹²⁵⁶ Notwithstanding some reservations, arbitrators are, under English law, immune from legal actions. However, there was some doubt about this traditional immunity by the House of Lords. Accordingly, it was argued that a sort of link could take place between the cost of professional indemnity insurance and legal rules governing liability alleged against the professional.¹²⁵⁷ This could be imagined in the world of arbitrators due to the existence of complete or partial immunity from legal liability to the parties with respect to their professional activity. This could demonstrate a collateral relation between the premium rates decided by the insurance companies and the liability regime applicable to arbitrators. An insurance policy is an agreement that includes terms, conditions, rights, and obligations. The policy wording and limitations vary according to each company; thus, to guarantee adequate coverage, the insured should review each policy provision.¹²⁵⁸

§5.02 Principles of Professional Indemnity Insurance

The PL insurance agreement is a contract that is subject to the ordinary legal rules governing contracts, establishing rights and duties for both the insurer and the insured party.¹²⁵⁹ There are common basic principles that exist in all insurance contracts, such as utmost good faith

1253. [1974] AC 727.

1254. *Ibid.*

1255. [1977] AC 405.

1256. *Ibid.*

1257. Cane (n1198) 347.

1258. Baugh & Flannigan (n1186) 15.

1259. Dennis J Horan & Marianne E Guerrini, 'Accountants Professional Liability: Insurance Issues, The Forum' (2012) 15(3) ABA Sec Ins Negl & Comp L 518.

(*uberrimae fidei*), indemnity, and insurable interest.¹²⁶⁰ The duty of good faith is achieved when the insured party discloses to the underwriter all material facts related to the risk that need to be covered.¹²⁶¹ Indemnity represents the compensation and the recovery measured in money that is provided to the insured party to retrieve the same position that he/she occupied prior to the occurrence of the risk.¹²⁶² Finally, the insurable interest of the insurer is a main factor in the legal recognition of the insurance contract.¹²⁶³ This is due to the fact that the insured is not seeking a gain but avoiding a potential future loss, and this differentiates insurance contracts from wagering contracts.¹²⁶⁴ The insurance contract's contents and extent of coverage are created through contractual terms and conditions. These contractual terms and conditions are the source agreement product, which is controlled by legal rules.¹²⁶⁵ The rules that are tailored to govern the professional indemnity insurance in principle, and accordingly apply to the policies taken out by arbitral institutions and arbitrators pursuant to the laws that are the subject of the present dissertation, will be discussed below.

[A] Professional Indemnity and Insurance under English Law

The English insurance industry is the third largest in the world, and London is considered the world's universal capital of insurance.¹²⁶⁶ English general contract law applies to the insurance contract.¹²⁶⁷ Professional indemnity insurance policies aim to provide coverage for the liability

1260. Jan M Smits, *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar Publishing 2012) 415.

1261. Whither John Lowry, 'The Duty of Good Faith in UK Insurance Contracts' (2009) 16 *Conn Ins L J* 97, 98.

1262. William H Hope, 'Whither Indemnity' (1962) *Ins L J* 632, 634.

1263. Emeric Fisher, 'The Rule of Insurable Interest and the Principle of Indemnity: Are They Measures of Damages in Property Insurance?' (1981) 54 *Wm & Mary L Sch.* 445.

1264. *Ibid.*, 446.

1265. See Felix Wieser, *Principles of European Insurance Contract Law: A Model Optional Instrument* (Sellier European Law Publishers 2011). See also Mandeep Lakhan and Helmut Heiss, 'An Optional Instrument for European Insurance Contract Law' (2010) 26(71) *Utrecht J Intl & European L* 1, 52.

1266. Huw Evans, 'Identifying the Challenges of a Changing World: The Trends Facing Insurers Towards the 2020s Association of British Insurers 2013'

<<https://www.abi.org.uk/globalassets/sitecore/files/documents/publications/public/jointthedebate/identifying-the-challenges/identifying-the-challenges-of-a-changing-world-full-document.pdf>> accessed 19 October 2019.

1267. Kyriaki Noussia, 'Definition: Different Common Law and Civil Law Approaches to the Definition of Insurance' in Julian Burling and Kevin Lazarus, *Research Handbook on International Insurance Law and Regulation* (Edward Elgar Publishing 2012) 37.

arising from the insured negligent acts conducted by him/herself or his/her employees.¹²⁶⁸ Nevertheless, the professional indemnity policy might afford coverage to non-negligent acts where they exist.¹²⁶⁹ The professional indemnity coverage is not applicable for loss due to negligence if the negligent act does not result in liability.¹²⁷⁰ Professional indemnity insurance policies pursuant to English law do not provide coverage for loss caused by the insured fraudulent conduct as this would violate public policy.¹²⁷¹ The coverage provided for professional indemnity insurance risks in the UK is always done on a claims-made basis.¹²⁷² Underwriters in the UK compute professional indemnity premiums as a percentage of the fee income of the professional or firm of professionals, which varies according to the type of the profession, geographical scope, and policy limits or deductibles.¹²⁷³ Professional indemnity policies' standard conditions are almost the same as all liability insurances. However, liability insurance policies under English law may include a Queen's Counsel clause, which purports to preserve the professionals' reputation. By virtue of that clause, a Queen's Counsel's advice is required to contest legal proceedings against the insured.¹²⁷⁴ The validity of insurance contracts under English law requires the existence of an insurable interest, which means that the insured party shall have a real interest in the subject matter in order to cover it with insurance.¹²⁷⁵ The absence of the said interest voids the insurance contract to be void.¹²⁷⁶ The principle of insurable interest is historically derived from the Marine Insurance Act of

1268. John Birds, *Insurance Law in the United Kingdom* (Kluwer Law International 2010) 154.

1269. *See Lumbermens Mutual Casualty Co v. Bovis Lend Lease Ltd* [2004] EWHC 2197 (Comm).

1270. *See Walton v. National Employers Mutual General Ins Assoc Ltd* [1973] 2 NSWLR73.

1271. *Haseldine v. Hosken* [1933] 1 KB 822 ('The court held any contract by policy or otherwise to indemnify the person making them against acts which are of a criminal character and make him liable to indictment are necessarily and entirely void as being contrary to public policy. In this country, whatever may be the case in other countries, no person is allowed to insure himself against the commission of a crime. A person may insure himself against errors of law, but not against the commission of a crime').

1272. Hooker & Pryor (n1202) 45.

1273. *Ibid.*, 44.

1274. *See West Wake Price & Co v. Ching* [1957] 1 WLR 45 ('If the assured emerged successfully from this ordeal and showed that his negligence, if proved, would be the true cause of the loss, the matter would then be remitted to Queen's Counsel to decide whether the issue of negligence ought to be fought at all. If he decided that it ought to be fought, and if the assured was unable to find reasonable grounds for withholding his consent, the trial between the claimant and the assured would then take place').

1275. Merkin & Steele (n1201) 51.

1276. James Farrier, 'Torts – Duty of Insurer to Investigate Insurable Interest' (1959) 19(2) *La L Rev* 555, 556

1906,¹²⁷⁷ Article 5 of which provides the requirement of insurable interest for the legality of the insurance contract as well as defining its meaning.¹²⁷⁸ The reason behind the insurable interest requirement is to impede the policy from being a gambling contract.¹²⁷⁹ The legal definition of insurable interest provided by the Act in Article 5(2) is derived from the classic decision of the House of Lords in *Lucena v. Craufurd*,¹²⁸⁰ in which Lord Eldon stated ‘... *insurable interest is a right in the property or a right derivable out of some contract about the property which in either case may be lost upon some contingency affecting the possession or enjoyment of the party*’.¹²⁸¹ Following the enactment of the Marine Insurance Act 1906, the House of Lords in *Macaura v. Northern Assurance Co Ltd*¹²⁸² (a non-marine case) required, for the legality of the insurance contract, first, a relation in fact to the subject matter insured giving rise to an economic interest, and, second, ‘legal or equitable relation to’ the subject matter insured.¹²⁸³ Given the aforementioned definitions by the Marine Insurance Act and the House of Lords, in *Feasey v. Sun Life Assurance Co of Canada*,¹²⁸⁴ Waller CJ noted ‘*it is difficult to define insurable interest in words which will apply in all situations*’. Further, the principle of indemnity is an essential feature of the insurance contract under English law, in which the compensations paid by the insurer to the assured shall be limited only to his/her

1277. Adrian Hamilton QC, ‘Commentary II on “Rethinking Insurable Interest”’ in Sarah Worthington (ed.) *Commercial Law and Commercial Practice* (Hart Publishing 2003) 369.

1278. See Marine Insurance Act 1906, Art. 5 (‘Insurable interest defined. (1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure. (2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof’).

1279. See *ibid.*, Art. 4 (1,2) (‘Avoidance of wagering or gaming contracts. (1) Every contract of marine insurance by way of gaming or wagering is void. (2) A contract of marine insurance is deemed to be a gaming or wagering contract—(a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or (b) Where the policy is made “interest or no interest” or “without further proof of interest than the policy itself,” or “without benefit of salvage to the insurer,” or subject to any other like term: Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer’). See also *Moran, Galloway & Co v. Uzielli* [1905] 2 KB 555, 563. Walton J stated, ‘Unless the assured is exposed to a risk of real loss by the perils insured against, the contract is not a contract of indemnity, but is a mere wagering contract, and cannot be enforced’. *Ibid.*

1280. (1806) 2 Bos & PNR 269.

1281. *Ibid.*, 321.

1282. [1925] AC 619.

1283. *Ibid.*, 630.

1284. [2004] 1 CLC 237.

actual loss without allowing him/her to become enriched.¹²⁸⁵ In *Castellain v. Preston*,¹²⁸⁶ Brett CJ stated that:

‘the contract of insurance ... is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.’

Insurance contracts pursuant to English law are contracts of utmost good faith founded upon the doctrine of *uberrimae fidei*. The utmost good faith duty was confirmed in *Carter v. Boehm*¹²⁸⁷ by Lord Mansfield, who demonstrated the principle of good faith. He held that ‘insurance is a contract upon speculation ... good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary’.¹²⁸⁸ Following Lord Mansfield’s principle, the duty of utmost good faith was adopted by the Marine Insurance Act 1906.¹²⁸⁹ The provisions of the 1906 Act impose a mutual duty on both parties to not misrepresent facts, as well as the duty to fully disclose all material facts.¹²⁹⁰ The non-disclosure of material facts by the insured party would enable the insurer to avoid the contract *ab initio*, even without a fraudulent act.¹²⁹¹ The House of Lords has confirmed that the duties imposed within Sections 17–20 of the Marine Insurance Act are extended to be applied to non-marine insurance contracts.¹²⁹² As a result, arbitrators or arbitral institutions seeking insurance owe a duty of disclosure and truthful representation

1285. Robert Merkin, *Insurance Law: An Introduction* (CRC Press 2014) 3.

1286. (1883) 11 QBD 380.

1287. (1766) 3 Burr 1905.

1288. *See Carter v. Boehm* (1766) 3 Burr 1905.

1289. *See* Marine Insurance Act 1906, s. 17 (‘A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party’).

1290. *See ibid.*, ss. 18–20.

1291. Lowry 1231 (n98).

1292. *See Pan Atlantic Ins Co v. Pine Top Ins Co Ltd* [1994] 3 WLR 677 (‘The insured who incurred the damages on the third party repaired the loss occurred accordingly the party has no room for negligence claim’).

towards the underwriter, so the latter will be aware of any circumstance that might affect his/her decision regarding the risk he/she is willing to cover.¹²⁹³ The UK has made professional indemnity insurance compulsory for some professions.¹²⁹⁴ Many professional institutions in the UK, such as the Institute of Chartered Accountants¹²⁹⁵ and the Royal Institute of British Architects,¹²⁹⁶ have set obligatory professional indemnity insurance for their members. Moreover, compulsory insurance also exists in the field of legal services. For instance, the Solicitor's Regulation Authority (SRA), which is the regulatory body of the Law Society of England and Wales, has required an indemnity insurance scheme for solicitors by virtue of the Solicitors Indemnity Insurance Rules 2012 in case of civil liability.¹²⁹⁷ While indemnity

1293. See *Joel v. Law Union and Crown Insurance Co.* (1908) 2 KB 884, 885. According to Fletcher Moulton LJ:

The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, depends on the knowledge you possess ... your opinion of the materiality of that knowledge is of no moment ... Insurers are thus in a highly favourable position that they are entitled not only to bona fides, of his answers to various questions put to him by them or on their behalf shall be a condition of the validity of the policy. This might be reasonable in some matters, such as the age and parentage of the applicant, or information as to his family history which he knows as facts, or it might be justifiable to stipulate that these conditions should obtain for a reasonable time – say during two years – during which period the company might verify the accuracy of the statements which by hypothesis have been made bona fide by the applicant. But insurance companies have pushed the practice far beyond these limits, and have made the correctness of statements of matters wholly beyond his knowledge, and which can at best be only statements of opinion or belief, conditions of the validity of the policy ... the policies issued by many companies are framed so as to be invalid unless this and many other like questions are correctly, not merely truthfully answered, though the insurers are well aware that it is impossible for anyone to arrive at anything more certain than an opinion about them. I wish I could adequately warn the public against such practices on the part of insurance offices. I am satisfied that few of those who insure have any idea how completely they leave themselves in the hands of the insurers should the latter wish to dispute the policy when it falls in.

1294. See Christopher J Whelan & Doreen McBarnet, 'The Crisis in Professional Liability Insurance' (1989) 14(53) *Geneva Papers Risk & Ins* 302.

1295. See The Institute of Chartered Accountants in England and Wales, 'Professional Indemnity Insurance Regulations and Guidance' (2014) ('Professional indemnity insurance is compulsory for all members of ICAEW who have a practising certificate and are engaged in public practice, regardless of the amount of practice income').

1296. See RIBA Code of Professional Conduct, Guidance Note 5, Art. 5.1, 5.2.

1297. See Solicitors Indemnity Insurance Rules 2012, Art. 1.1(a,b) ('The insurance must indemnify each insured against civil liability to the extent that it arises from private legal practice in connection with the insured firm's practice, provided that a claim in respect of such liability: (a) is first made against an insured during the period of insurance; or (b) is made against an insured during or after the period of insurance and arising from circumstances first notified to the insurer during the period of insurance').

insurance is required for solicitors as legal service providers operating under the auspices of the Ministry of Justice and HM (Her Majesty's) Courts, arbitrators and arbitral institutions pursuant to the English Arbitration Act are not required to obtain professional indemnity insurance against civil liability.¹²⁹⁸ Additionally, the LCIA has not incorporated in its rules a requirement for professional indemnity scheme for arbitrators operating under its auspices.¹²⁹⁹ The interpretation for the absence of a professional indemnity insurance scheme for arbitrators and arbitral institutions is the reluctant approach of the English Arbitration Act towards the issue of arbitrators and arbitral institution liability being limited only to bad faith. Following that approach, it could be concluded that the English Arbitration Act does not recognise errors and omissions as reason for triggering the arbitrators' or the arbitral institutions' liability unless it is conducted intentionally.

[B] Professional Indemnity Insurance under French Law

There is no legal definition of an insurance contract in the French Insurance Code. However, the *French Cour de Cassation* has ruled that an insurance contract has three main features: a future uncertain risk, premium, and the imbursement of a sum of money or task performance when the risk occurs.¹³⁰⁰ French insurance contracts shall meet the general principles of insurable interest, indemnity, and good faith. By virtue of Article 121-6, the grounds of insurable interest are set by allowing any person interested in the protection of a property to be covered by insurance and any direct or indirect interest in the avoidance of a risk may be a subject of insurance.¹³⁰¹ The indemnity principle (*le principe de indemnitaire*) is confirmed by the Code under Article 121-1, which provides that the compensations paid by the insurer to the assured party shall not exceed the amount of the value of the property covered by insurance

1298. See English Arbitration Act 1996.

1299. See LCIA Rules <www.lcia.org/> accessed 20 February 2021.

1300. Cass1ère Civ, 31 janv 1956 (*'comme des contrats d'assurance, alors, d'une part, que les éléments constitutifs d'un tel contrat ne sont pas réunis en l'espèce la Cour a relevé, en la cause, l'existence d'un risque, constitué par le paiement des frais d'avocat et d'avoué, événement futur et incertain et indépendant de la volonté des parties risque que ne supprime pas la clause d'arbitrage, et dont la réalité n'est d'ailleurs pas entièrement méconnue par le pourvoi; qu'elle a reconnu également l'existence du paiement d'une "somme fixe et forfaitaire qui présente bien le caractère d'une prime" et d'une prestation d'assurance'*).

1301. See Code des Assurance Act 2003 (No. 706), Art L.121 (*'Toute personne ayant intérêt à la conservation d'une chose peut la faire assurer. Tout intérêt direct ou indirect à la non-réalisation d'un risque peut faire l'objet d'une assurance'*).

at the time of loss.¹³⁰² Finally, the principle of good faith, *bonne foi*, is a basic requirement for the validity of any contract under French law. By virtue of Article 1134, '[a]greements lawfully entered into take the place of the law for those who have made them. They may be revoked only by mutual consent, or for causes authorised by law. They must be performed in good faith'.¹³⁰³ Consequently, the insurance contract shall meet this requirement for its validity. Liability insurance rules pursuant to French insurance law require the insurer to pay compensation to injured third parties provided that the insured party is held liable for damages incurred by the third party.¹³⁰⁴ Under French law, insurance does not cover intentional and fraudulent acts; thus, the insurer is not liable for damages and losses resulting from fraudulent or intentional acts committed by the insured party.¹³⁰⁵ The *Cour de Cassation* affirmed that coverage is excluded by the insurer in case the insured party willfully and knowingly intended to harm the interests of the other party and not only to cause risk.¹³⁰⁶ For insurance contracts to be valid, French law requires an obligation on the insured party to disclose facts to the insurer with due honesty, avoiding wilful false statements or fraudulent misrepresentations; otherwise the contract shall be declared null and void.¹³⁰⁷ Accordingly, the insurance

1302. *Ibid.*, Art. L.121-1 ('*L'assurance relative aux biens est un contrat d'indemnité; l'indemnité due par l'assureur à l'assuré ne peut pas dépasser le montant de la valeur de la chose assurée au moment du sinistre*').

1303. *See* Code Civil, Art. 1134. *See also* Rapport du groupe de travail de la *Cour de Cassation* sur l'avant-projet de réforme du droit des obligations et de la prescription, 15 Juin 2007 ('*La bonne foi largement entendue (loyauté, solidarité, proportionnalité et souci de l'équilibre contractuel) s'imposant dans toutes les phases de la vie du contrat: négociation, information, conclusion, exécution, interprétation, modification, renégociation, inexécution, rupture et ses conséquences*').

<www.courdecassation.fr/institution_1/autres_publications_discours_2039/discours_2202/travail_cour_10699.html> accessed 19 October 2019.

1304. *See* Code des Assurance Act 2003 (No. 706), Art. L124-1 ('*Dans les assurances de responsabilité, l'assureur n'est tenu que si, à la suite du fait dommageable prévu au contrat, une réclamation amiable ou judiciaire est faite à l'assuré par le tiers lésé*').

1305. *See ibid.*, Art. L.113-1 ('*Les pertes et les dommages occasionnés par des cas fortuits ou causés par la faute de l'assuré sont à la charge de l'assureur, sauf exclusion formelle et limitée contenue dans la police. Toutefois, l'assureur ne répond pas des pertes et dommages provenant d'une faute intentionnelle ou dolosive de l'assuré*').

1306. Cass 1^{ère} Civ, 10 avr 1996, n° 93-14.571, RGDA 1996, p. 716 (note J Kullmann) ('*au sens de ce texte, la faute intentionnelle qui exclut la garantie de l'assureur est celle qui suppose la volonté de causer le dommage et pas seulement d'en créer le risqué*'). *See also* Civ 2nd, 24 mai 2006, n° 03-21024 ('*The court has constituted the bases of wilful misconduct on "de façon délibérée", "en connaissance de cause", les "intérêts" de son contractant*').

1307. *See* Code des Assurance Act 2003 (No. 706), Art. L.113-8 ('*Indépendamment des causes ordinaires de nullité, et sous réserve des dispositions de l'article L.132-26, le contrat d'assurance est nul en cas de réticence ou de fausse déclaration intentionnelle de la part de l'assuré, quand cette réticence ou cette fausse déclaration change l'objet du risque ou*

contract's nullification will not occur unless bad faith of the insured party is recognised.¹³⁰⁸ The *Cour de Cassation* affirmed that bad faith shall be proved and the insured's intention in misleading the insurer as to the nature of the risk shall be clear in case the insurer needs to nullify the insurance contract.¹³⁰⁹ It is clear that French insurance law has adopted a more flexible approach than English law in not nullifying insurance contracts by reason of innocent non-disclosure. Professional insurance policies in France were only written on an occurrence basis. Claims-made policies were strictly prohibited by the *Cour de Cassation* as they did not provide adequate protection to the insured and injured third parties.¹³¹⁰ The Court's justification was that provisions restricting the compensation of loss to claims made might deprive the insured from benefits afforded by the coverage. Claims-made policies would allow the insurer to receive the premium but would not provide sufficient coverage, which the Court considered illegitimate and contrary to public order.¹³¹¹ However, the debate between the *Cour de Cassation* and the insurers was put to an end by the legal reform enacted by the French legislature in 2003, which introduced claims-made policies.¹³¹² Article L.124-5 of the Insurance Code stipulates that parties have the choice to select the type of coverage triggered either when the event occurs or when the claim arises. The French legislature has formulated and limited claims-made policies only for PL – it is not available for policies covering an

endiminue l'opinion pour l'assureur, alors même que le risque omis ou dénaturé par l'assuré a été sans influence sur le sinistre').

1308. See Code des Assurance Act 2003 (No. 706), Art. L.113-9 ('*L'omission ou la déclaration inexacte de la part de l'assuré dont la mauvaise foi n'est pas établie n'entraîne pas la nullité de l'assurance ...*').

1309. See Cass 2eCiv, 17 déc 2009, No. 09-12878 ('*Qu'en statuant ainsi, sans avoir constaté que la fausse déclaration avait été faite de mauvaise foi dans l'intention de tromper l'assureur sur la nature du risque*').

1310. See Civ. 1ère, 19 déc 1990, Bull. n°303 ('*le versement des primes pour la période qui se situe entre la prise d'effet du contrat d'assurance et son expiration a pour contrepartie nécessaire la garantie des dommages qui trouvent leur origine dans un fait qui s'est produit pendant cette période et que la stipulation de la police selon laquelle le dommage n'est garanti que si la réclamation de la victime, en tout état de cause nécessaire à la mise en oeuvre de l'assurance de responsabilité, a été formulée au cours de la période de validité du contrat, aboutit à priver l'assuré du bénéfice de l'assurance en raison d'un fait qui ne lui est pas imputable et à créer un avantage illicite comme dépourvu de cause au profit du seul assureur qui aurait alors perçu des primes sans contrepartie*').

1311. Francesco Seatzu, *Insurance in Private International Law: A European Perspective* (Hart Publishing 2003) 149.

1312. See Code des Assurance Act 2003 (No. 706), Art. L.124-5 ('*La garantie est, selon le choix des parties, déclenchée soit par le fait dommageable, soit par la réclamation*').

individual's liability.¹³¹³ The French legislature, when adopting claims-made policies, has accompanied such policies by two protective mechanisms. The first one, '*reprise du passé inconnu*', entails the right of the insured to be covered for a damage that occurred prior to entry into force of the insurance policy if the event was unknown to the insured at the time of signing the insurance policy. The second one, '*garantie subséquente*', entitles an injured party to make a claim no less than five years after the coverage period has terminated; thus, covering part of the long-tail risk.¹³¹⁴ French law shows a reluctant approach towards claims-made policies. Applying that to the arbitration industry, it might attract arbitrators and arbitral institutions to shop around in the French insurance market in particular, as it offers the longest period of coverage against risks in claims-made policies provided such policies are offered at competitive premiums. French insurance law also incorporated, in its Insurance Code, the concept of '*action directe*' in which an injured person can sue directly the insurer of the person or entity that incurred damages on him/her, particularly in liability insurance.¹³¹⁵

[C] Professional Indemnity and Insurance Under Egyptian Law

Under Egyptian law, the insurance contract is governed by Articles 747–773 of the Egyptian Civil Code (Law No. 131 of 1948). These provisions introduced the general principles of an insurance contract, with a special focus on life insurance and fire insurance and no reference to liability insurance. The insurance contract pursuant to Egyptian law is a contract whereby the insurer undertakes, in consideration of a premium or any other pecuniary payment to pay to the assured or the beneficiary for whose benefit the insurance is contracted, a sum of money or annuity or any other pecuniary payment upon the occurrence of the event of the risk specified in the contract.¹³¹⁶ The validity of the insurance contract, pursuant to Egyptian law,

1313. *See ibid.* ('*Toutefois, lorsqu'elle couvre la responsabilité des personnes physiques en dehors de leur activité professionnelle, la garantie est déclenchée par le fait dommageable*').

1314. *See ibid.* ('*La garantie déclenchée par la réclamation couvre l'assuré contre les conséquences pécuniaires des sinistres, dès lors que le fait dommageable est antérieur à la date de résiliation ou d'expiration de la garantie, et que la première réclamation est adressée à l'assuré ou à son assureur entre la prise d'effet initiale de la garantie et l'expiration d'un délai subséquent à sa date de résiliation ou d'expiration mentionné par le contrat, quelle que soit la date des autres éléments constitutifs des sinistres*').

1316. *See* Egyptian Civil Code (Law No. 131) 1948, Art. 747. *See also* Decision No. 362, 24 March 2004, Court of Cassation (Egypt), judicial year 64 <<http://www.cc.gov.eg/>> accessed 19 October 2019.

requires the existence of insurable interest, indemnity, and good faith. The principle of insurable interest is confirmed by virtue of Article 749, which provides, ‘*Any lawful economic interest which a person may have in the non-occurrence of a specified risk may be subject of insurance*’.¹³¹⁷ The indemnity principle is confirmed by Article 751, where the insurer shall only be bound to indemnify the assured for the actual loss arising as a result of the occurrence of the risk insured against, to the extent of the amount insured.¹³¹⁸ Insurance contracts pursuant to Egyptian law are contracts of utmost good faith; thus, misrepresentation and non-disclosure of all necessary information by the insured to allow the insurer to assess the insurable risk will lead to the nullification of the insurance contract.¹³¹⁹ The loss occurred due to fraudulent or intentional acts committed by the insured party will be excluded from the insurance coverage.¹³²⁰ Insurance coverage under Egyptian law is provided on an occurrence basis, with no reference to claims-made policies.¹³²¹ Thus, the insurance policies provided by the Egyptian Law are only policies that provide for long-tail coverage through the occurrence-made policy due to the absence of an alternative to a claims-made policy. The absence of liability insurance provisions that recognise claims-made policies in the Egyptian Civil Code may have been a significant reason why the Egyptian legislature overlooked the requirement for arbitrators and arbitral institutions to adopt compulsory insurance in order to be able to practice.¹³²²

[D] Professional Indemnity and Insurance under Dutch Law

The Dutch Insurance Law is part of the Civil Code contained in Book 7 and covers all areas of insurance. The insurance contract is a bilateral contract that is defined as follows:

1317. *Ibid.*, Art. 749.

1318. *Ibid.*, Art. 751. *See also* Decision No. 884, 8 February 2000, Court of Cassation (Egypt), judicial year 68

<private.tashreaat.com/private/nakd_search_byfehres2.aspx?vindex=1&clevel=3&l1=39&l2=8&l3=5&l4=0&l5=0&l6=0> accessed 19 October 2019.

1319. Decision No. 5878, 12 April 2006, Court of Cassation (Egypt), judicial year 75 <www.cc.gov.eg/Courts/Cassation> accessed 19 October 2019.

1320. *See* Egyptian Civil Code (Law No. 131) 1948, Art. 768. *See also* Decision No. 4766, 1 Feb 1993, Court of Cassation (Egypt), judicial year 61 <www.cc.gov.eg/Courts/Cassation> accessed 19 October 2019.

1321. *See ibid.*, Art. 751 (‘The insurer shall only be bound to indemnify the assured for actual loss arising as a result of the occurrence of the risk insured against, to the extent of the amount insured’). *See also* Decision No. 3625, 24 March 2004, Court of Cassation (Egypt), judicial year 64 <<http://www.cc.gov.eg>> accessed 19 October 2019.

1322. *See* Egypt Arbitration Act 1994.

‘An insurance agreement is an agreement under which one of the parties (“the insurer”) engages himself towards the opposite party (“the policyholder”) to pay one or more insurance benefits in exchange for an insurance premium, while neither party, at the moment they entered into this agreement, knows for certain if, when and to what amount any insurance benefits will have to be paid, nor how long the agreed payment of insurance premiums will last. An insurance agreement is either an indemnity insurance or a sums insurance (non-indemnity insurance).’¹³²³

Similar to most jurisdictions, Dutch law has incorporated the basic elements for the validity of an insurance contract. Pursuant to the Dutch Civil Code, the principle of good faith is not incorporated in the form of insurance statutory provisions; however, it has a significant influence on the allocation of the Dutch insurance law.¹³²⁴ This principle of good faith is prescribed by Article 3:11 of the Dutch Civil Code and requires that both parties shall perform reciprocally in good faith.¹³²⁵ Through the indemnity principle, constituted by virtue of Article 7:960, the beneficiary will not be rendered compensations for claims that would be obviously advantageous to what he/she would have been without insurance.¹³²⁶ Insurable interest has been preserved subject to Dutch law in indemnity insurance by compensating the loss or damage the assured party may suffer.¹³²⁷ The coverage provided by an insurance policy is only for the assured party interests; however, the said interest could be accredited to a third party.¹³²⁸ Misrepresentation and non-disclosure are reasons for waiving the liability of the insurer under Dutch law, as the assured party has a pre-contractual obligation to disclose all circumstances

1323. *See* Dutch Civil Code, book 7, Art. 925(1).

1324. *See*, generally, Dutch Civil Code, book 7.

1325. *Ibid.*, book 3, Art. 11 (‘A person has not acted in “good faith” as a condition for a certain legal effect if he knew or in the circumstances reasonably ought to have known the facts or rights from which his good faith depends. The impossibility to conduct an inquiry does not prevent that a person, who had good reason to doubt, is regarded as someone who ought to have known the relevant facts or rights’).

1326. *Ibid.*, book 7, Art. 960 (‘The insured person will receive no compensation under the insurance agreement if he would attain a clearly more advantageous position as a result of that agreement. The previous sentence does not apply when the value of an object has been assessed in advance by an expert assigned for this purpose or by parties themselves in conformity with an advisory report of an expert’). *See also* Jan Bernd Huizink, ‘Commercial Law’ in Chorus and others (n659) 209.

1327. Dutch Civil Code, book 7, Art. 944 (‘An indemnity insurance agreement is an insurance agreement intending to provide a compensation for material loss which the insured person may suffer’).

1328. *Ibid.*, Art. 7:946(1).

and facts he/she is aware of or ought to be aware of that may affect the decision of the insurer following to its disclosure.¹³²⁹ The derogation of said obligation grants the insurer the right to terminate the policy.¹³³⁰ Similar to the French system, the Dutch law adopted the direct action by a third party against the insurer in personal injury claims.¹³³¹ It is worth mentioning that professional indemnity insurance in the Netherlands is not statutorily required by law, yet there are certain professional bodies that require their members to buy insurance policies for being eligible to practice their profession.¹³³² Dutch lawyers are obliged by the Dutch Bar Association to take out insurance as a prerequisite for practicing as a lawyer in the Netherlands.¹³³³

[E] Professional Indemnity and Insurance under UAE Law

The insurance contract is governed by the UAE Civil Code, which has designated general provisions related to contracts and also incorporated rules that apply to insurance contracts. The general provisions thereof will apply to insurance contracts to the extent they do not oppose specific provisions under the insurance section of the Civil Code.¹³³⁴ The insurance contract is defined under said law as follows:

‘Insurance is a contract whereby both the insured and the insurer cooperate together to face the risks or accidents insured against and, whereby in consideration of a specified amount or periodical premiums, the insurer undertakes, upon occurrence of the event or the risk specified in the contract, to pay to the insured or the beneficiary a sum of money, an annuity or any other pecuniary right.’¹³³⁵

The wording of the article clearly reveals the existence of the indemnity principle as a requirement for the validity of the insurance contract, as by virtue of this article, the insurer has a mandate to provide coverage of a pecuniary nature to the insured party or beneficiary upon the occurrence of the risk or the event. The principle of good faith is a general obligation

1329. *Ibid.*, Art. 7:928(1).

1330. *Ibid.*, Art. 7:929(2).

1331. *Ibid.*, Art. 7:954(2).

1332. Houthoff Buruma, ‘National Report: Mandatory Insurance in the Netherlands’ (2010) AIDA World Congress <www.aida.org.uk/docs/Netherland.DOC> accessed 20 October 2020.

1333. Nederlandse Orde van Advocaten (Dutch Bar Assoc) <www.advocatenorde.nl/english> accessed 20 October 2019.

1334. *See* UAE Civil Code, Arts 125–148.

1335. *See ibid.*, Art. 1026(1).

imposed by the UAE Civil Code to perform any contract that is subject to UAE law in good faith.¹³³⁶ The obligation is also extended expressly to be imposed on the insurer to undertake its business on absolute good faith premises.¹³³⁷ In relation to the insurable interest concept, there is no provision dealing with the matter within the UAE Civil Code.¹³³⁸ However, the UAE Maritime Code includes a provision that prevents the any person from benefitting from a policy of insurance unless they have a ‘lawful interest’ in the peril not occurring.¹³³⁹ Although the UAE Civil Code did not address the insurable interest, taking out an insurance policy without an insurable interest would be similar to wagering, which is banned pursuant to the fundamental principles of Islamic Shariah.¹³⁴⁰ The misrepresentation, bad faith, or failure to disclose matters by the assured person would result in the insurer’s right to be entitled to retain the premium, in addition to requiring that the policy be cancelled.¹³⁴¹ Similar to the Egyptian insurance system, insurance policies in the UAE are made on an occurrence-made basis.¹³⁴² The absence of the claims-made policy would continue to make insurance in Dubai appealing for providing a long period of coverage. In relation to tort liability insurance, the insurer obligation gives rise only when a claim is brought by the injured party against the

1336. *See ibid.*, Art. 246(1) (‘The contract shall be implemented, according to the provisions contained therein and in a manner consistent with the requirements of good faith’).

1337. Insurance Authority’s Board Resolution (No. 3) 2010, Art. 3(2). The Insurer shall comply with the following:

Practice the business thereof in accordance with the principle of utmost good faith as one of the basic principles upon which the insurance business is based, and adopt the principle of disclosure and transparency when dealing in the insurance market, with Clients and relevant official bodies, particularly in all documents, instruments, commercials, advertisements, statements and researches issued by it.

1338. *See* UAE Civil Code (Federal Law No. 5) 1985.

1339. The UAE Maritime Law (Federal Law No. 26) 1981, Art. 368.

1340. *See* UAE Civil Code (Federal Law No. 5) 1985, Art. 1026(2) (‘The law regulates the insurance organisation, namely as concerns their legal forms, method of formation, means of performing their activities and supervision thereon, in order to achieve the cooperation aims of insurance without prejudice to the mandatory provisions and fundamental principles of Islamic Sharia’).

1341. *Ibid.*, Art. 1033 (‘If the insured, in bad faith, conceals a matter or makes a false statement in such a manner as to lessen the importance of the risk insured against, or leads to a change in its object, or if he fraudulently breaches his promise to fulfil an obligation, the insurer is entitled to demand rescission of the contract and be paid all premiums due prior to such demand’). *See also* Dubai Court of Cassation, Case No. 4/1995.

1342. *Ibid.*, Art. 1034 (‘The insurer is bound to pay the insured amount or the sum due to the insured or the beneficiary, as agreed, upon occurrence of the risk or maturity of the period fixed in the contract’).

assured party after the occurrence of damage.¹³⁴³ This implies that direct action is prohibited under the UAE Law and the injured party shall pursue the claim against the assured party directly (arbitrator or arbitral institution).

§5.03 Acts That Cannot Be Covered by Insurance

The main acts that are excluded from coverage in all the applicable laws discussed in this dissertation are intentional and fraudulent acts. The most common reason for the applicable laws to exclude intentional and fraudulent acts from coverage is that such coverage would be in violation of public policy. Such public policy includes an exclusion of coverage for fraud and intentional wrongdoing, even if the insurance policy does not include a term of exclusion.¹³⁴⁴ The party seeking insurance coverage against potential loss cannot benefit from that coverage if he/she wilfully and deliberately caused that loss.¹³⁴⁵ The principle is that insurance contracts are concluded to cover losses of an unknown event; thus a main element in the definition of insurance contract is the uncertainty that would be infringed by intentional misconduct.¹³⁴⁶ In *Prudential Insurance v. Inland Revenue Commissioners*,¹³⁴⁷ Channel J held:

*I think is the first requirement in a contract of insurance. It must be a contract whereby for some consideration, usually but not necessarily for periodical payments called premiums, you secure to yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event. Then the next thing that is necessary is that the event should be one which involves some amount of uncertainty. There must be either uncertainty whether the event will ever happen or not, or if the event is one which must happen at some time there must be uncertainty as to the time at which it will happen.*¹³⁴⁸

1343. *Ibid.*, Art. 1035 (‘Insurance covering tort liability shall have no effect unless the victim files a claim against the beneficiary after the occurrence of the event from which resulted such liability’).

1344. See *Regus (UK) Limited v. Epcot Solutions Limited* [2008] EWCA Civ 361.

1345. James A Fischer, ‘The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification’ (1990) 30 Santa Clara L Rev 95US source .

1346. See HG Beale, *Chitty on Contracts* (30th edn, Sweet and Maxwell 2008) 1299–1300 (‘A contract of insurance is one whereby one party (the insurer) undertakes for a consideration to pay money or provide a corresponding benefit to or for the benefit of the other party (the assured) upon the happening of an event which is uncertain, either as to whether it has or will occur at all, or as to the time of its occurrence ...’).

1347. [1904] 2 KB 658.

1348. *Prudential Ins v. Inland Revenue Commissioners* [1904] 2 KB 658.

Consequently, the exclusion of intentional acts from insurance coverage would help in eliminating the deliberate tortious errors of the professionals, knowing that no coverage is provided.

[A] Acts Not Covered by English Law

English law has excluded from coverage under the insurance policy the losses brought by the intentional wrongdoing of the assured party.¹³⁴⁹ English case law has repeatedly confirmed the principle that wilful acts cannot be recovered under the insurance policy if the assured's deliberate act brought the event that he/she is insured against. In *Beresford v. Royal Insurance Co.*,¹³⁵⁰ Lord Atkin summarised that:

*'On ordinary principles of insurance law an assured cannot by his own deliberate act cause the event upon which the insurance money is payable. The insurers have not agreed to pay on that happening. The fire assured cannot recover if he intentionally burns down his house, nor the marine assured if he scuttles his ship, nor the life assured if he deliberately ends his own life. This is not the result of public policy, but of the correct construction of the contract.'*¹³⁵¹

The losses caused by the assured negligent act would not fall under the intentional wrongdoing acts unless he/she performed in extreme recklessness that may be considered intentional. In *Patrick v. Royal London Mutual Insurance Society*:¹³⁵²

'But for an act to be wilful I do not think it is necessary to go as far as this. It will be enough to show that the insured was reckless as to the consequences of his act. Recklessness has been variously defined but if someone does something knowing that it is risky or not caring whether it is risky or not he is acting recklessly. Put more precisely for present purposes if the insured is aware that what he is about to do risks damage of the kind which gives rise to the claim or does not care whether there is such a risk or not, he will act recklessly if he goes ahead and does it. I think such conduct was intended

1349. See Marine Insurance Act 1906, s. 55(2)(a ('The insurer is not liable for any loss attributable to the wilful misconduct of the assured ...').

1350. *Beresford v. Royal Ins Co* [1938] AC 586. See also *Britton v. Royal Ins Co* (1866) 4 F & F 905, *Porter v. Zurich Ins Co.* [2009] EWHC 376 (QB).

1351. *Ibid.*

1352. *Patrick v. Royal London Mutual Insurance Society* [2006] EWCA Civ 421.

*to be included in the exclusion and I would equate a reckless act with a wilful act for this purpose. This approach focuses upon the state of the insured's mind when he does the act rather than its intended consequences. Defined in this way the exclusion does not require the insured to intend to cause damage of the kind in question.*¹³⁵³

Recovery and indemnity are not possible under the insurance policy for the assured due to his wilful criminal acts.¹³⁵⁴ Moreover, insurance policies indemnifying an assured against his or her intentional civil wrong conduct would be voidable. In *Burrows v. Rhodes*,¹³⁵⁵ Kennedy J held:

*'I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him there from. An express promise of indemnity to him for the commission of such an act is void.'*¹³⁵⁶

[B] Acts Not Covered by French Law

French law showed compatibility with common law jurisdictions in excluding the coverage for intentional and fraudulent acts, either through provisions of the insurance act or case law. Pursuant to the French Code des Assurance, the insurer is not responsible for covering losses and damages caused by the insured's deliberate tortious conduct.¹³⁵⁷ The *Cour de Cassation* has ruled consistently and continuously that the insured intentional wrongdoing excludes the insurer's liability for covering the insured losses.¹³⁵⁸ The exclusion of insurer liability for the losses requires the intent of the insured to cause damage as it occurred.¹³⁵⁹ Consequently, the

1353. *Ibid.*

1354. *Amicable Assurance v. Bolland* (1830) 4 BliNS 194. The court rejected the recovery of insured successors. Respondents under the policy stated: 'If insurance against death, as a felon or traitor, had been inserted in the policy, it would have been clearly illegal as contrary to public policy ...'. *Ibid.*

1355. *Burrows v. Rhodes* [1899] 1 QB 816.

1356. *Ibid.*, 829.

1357. *See* Code des Assurance Act 2003 (No. 706), Art. L.113-1.

1358. Cass 1ère Civ, 10 avr 1996, n° 93-14.571, RGDA 1996, 716 (note J Kullmann). *See also* Civ 2ème, 24 mai 2006, n° 03-21024; Civ 2ème, 22 September 2005, n° 04-17232.

1359. Cass 2ème Civ, 28 fév 2013, n°11-28247 ('pour exclure la garantie de l'assureur, la faute intentionnelle ou dolosive de l'assuré implique la volonté de causer le dommage tel qu'il est survenu').

deliberate misconduct removes the uncertainty of the event under the insurance contract.¹³⁶⁰ Fraudulent errors (*'faute dolosive'*) are acts that shall be committed by the sole will of the insured causing the removal of uncertainty of the insurance contract and is the only cause for the loss.¹³⁶¹ Moreover, the wilful misconduct would also exist if the insured's conduct was of an unacceptable degree of negligence, to the extent of making the loss certain.¹³⁶²

[C] Acts Not Covered by Egyptian Law

Akin to French insurance law, the Egypt Civil Code has excluded the coverage of the insured's wilful and intentional acts by virtue of Article 768, which stipulates:

*'An insurer is liable for damage resulting from the unintentional fault of the insured and also for any damage resulting from a fortuitous event or force majeure. An insurer is not however responsible for losses and damages caused deliberately or fraudulently by the insured, notwithstanding any agreement to the contrary.'*¹³⁶³

The Egyptian Court of Cassation has affirmed that losses caused by intentional misconduct of the insured party exclude the liability of the insurer to cover such losses due to its violation to public policy.¹³⁶⁴ It is noteworthy that, by virtue of Article 217.2 of the Egyptian Civil Code, a debtor could be discharged from liability of his/her failure to perform his/her contractual duties with exception to his/her liability arising from fraud or gross negligence.¹³⁶⁵ Consequently, gross negligence pursuant to Egyptian law would be excluded from the coverage akin to intentional acts committed by the insured.

1360. Cass 3ème Civ, 7 October 2008, n° 07-17969 (*'Les manquements délibérés de l'assuré ayant rendu les dommages inéluctables constituent une faute dolosive qui a pour effet de retirer aux contrats d'assurance leur caractère aléatoire'*).

1361. Cass 2ème Civ, 28 fév 2013, n° 12-12813 (*'que l'assuré n'avait pas eu la volonté de créer les dommages tels qu'ils étaient survenus, d'autre part, que ses actes et comportement n'avaient pas fait disparaître tout aléa du seul fait de la volonté de l'assuré'*).

1362. Cass 2ème Civ, 20 mars 2008, n° 07-10499 (*'comment soutenir qu'un entrepreneur commette une négligence "inacceptable", c'est-à-dire une faute volontaire dans le but de causer un dommage à son client ? Qu'il soit incompetent peut-être mais il n'agit certainement pas dans l'intention de nuire!'*).

1363. See Egyptian Civil Code (Law No. 131) 1948.

1364. Decision No. 4766, 1 February 1993, Court of Cassation (Egypt), judicial year 61 <www.cc.gov.eg> accessed 20 October 2019.

1365. See Egyptian Civil Code (Law No. 131) 1948, Art. 217.2.

[D] Acts Not Covered by Dutch Law

The Dutch law has expressly stipulated that intentional misconduct and recklessness of the insured party are reasons that enable the insurer to waive his/her liability to pay any compensation under the policy.¹³⁶⁶ Concerns could be regarded to the broad and ambiguous meaning of the word ‘recklessness’, which could open up room for disputes among the policy holder and the insurer to determine whether the act is an outcome of recklessness or not. It could have been better for the law to provide some examples of acts that could be labeled as a result of performing in a reckless manner. This is to render clear and fixed determination for such acts to avoid/delimit the foregoing concerns.

[E] Acts Not Covered by UAE Law

Pursuant to the UAE law, the insurer is only liable for damages stemming from the unwilful conduct of the insured party or the beneficiary.¹³⁶⁷ The wilful conduct and fraudulent acts committed by either the insured party or the beneficiary would exclude the liability of the insurer to provide cover for said acts under the policy, even with the presence of a contractual agreement contrary to the exclusion.¹³⁶⁸ Moreover, the insurer can exclude his/her liability to provide coverage for the assured person if the act committed resulted in a misdemeanour or a felony.¹³⁶⁹

§5.04 Scope of Available Insurance Coverage in the Insurance Market for Arbitral Institutions and Arbitrators’ PL (Interviews)

The aim of this section was to analyse the data collected regarding arbitral malpractice insurance from both arbitral institutions, the insured party and the insurance companies that offer arbitral malpractice policies (insurer). This would allow for a thorough analysis and obtain further knowledge about whether said schemes are taken out by arbitral institutions to cover their prospective liability; in addition to liability of arbitrators working under their auspices or whether they rely only on the judicial immunity doctrine and liability waiver

1366. *See* Dutch Civil Code, book 7, Art. 952 (‘The insurer shall not pay a compensation for damage to an insured person who has caused the damage himself on purpose or by reckless behaviour’).

1367. UAE Civil Code, Art. 1038.

1368. *Ibid.*, 1039 (‘Notwithstanding any agreement to the contrary, an insurer is not liable for damages caused deliberately or fraudulently by the insured or the beneficiary’).

1369. *Ibid.*, Art. 1028(a) (‘The following conditions in a policy of insurance are void: The condition providing for the forfeiture of the right to insurance on account of a breach of the laws, unless such breach constitutes a deliberate felony or misdemeanour’).

incorporated in their rules. The data also focused on whether and to what extent the insurance companies are familiar of this specific risk profile. Furthermore, the collected data focused on the availability of tailor-made policies covering malpractice for individual arbitrators and arbitral institutions, the types of policies they offer, the acts covered by the available schemes, limitations in relation to acts and geographical coverage, the ways of determining premiums, information that should be disclosed by the insured (either by the arbitral institution or by the arbitrator), and the impact of arbitral immunity on deciding the premiums by the insurer and elements – in general – that the insurance companies take into account in deciding the premium. A structured personal interview comprising 31 detailed questions was designated to be conducted with arbitral institutions and the insurance companies to present relevant and representative data. The set of interviews was planned to collect the data thereof from five arbitral institutions. Four of the five contacted institutions gave consent to conduct the interview, the exception was the LCIA. The latter justified its declination due to confidentiality reasons. In turn, the interviews were conducted with the directors of the ICC, NAI, CRCICA and DIAC. Interviews were also conducted with claims' officers of two of the insurance companies that offer policies covering arbitral malpractice: Aon (brokers) and Markel international (underwriters). The questionnaire list is enclosed in Appendix I of this dissertation.¹³⁷⁰ This section presents and discusses the data collected from the four aforementioned arbitral institutions, followed by presenting the data collected from the insurance companies. Accordingly, a comparative overview is provided between both (arbitral institutions and insurance companies) in relation to similarities and differences.

[A] Arbitral Institutions Data

The number of arbitral cases conducted and administrated under the auspices of arbitral institutions is significantly higher than that under ad hoc arbitration. It is important to investigate the existence of insurance cover within arbitral institutions that are considered as major market players. This large number of cases handled by each institution requires a specific organisational structure for adequate handling. This organisational structure of arbitral institutions consists of a managing board and a secretariat that assists in carrying out the administrative aspects of the disputes referred to arbitration under the auspices of the institution. In addition, arbitrators are appointed under the institution's rules, who render the award. In providing their services, arbitral institutions exercise important administrative

1370. See Appendix I (Interview Questions Providing Empirical Basis for Research Study).

functions to carry out their case load. This administrative function includes the case administration by the institution, the appointment of arbitrators, the management of the finances of a case and scrutiny of the award by institutions that provide this service. The personal misconduct by the board, the secretariat and arbitrators or the institution's failure, in any of its administrative roles, would give rise to liability. Although individual arbitrators in ad hoc arbitration are also exposed to the potential risk of being held liable, the facts reflect that there are more situations and incidents where institutions are faced with liability claims. The anticipation of such claims prompts institutions to shield themselves and their staff through seeking insurance coverage against their potential liability. This is exacerbated by the growth of the number of claims being recorded against arbitrators (and arbitral institutions); the approach of some courts to assert that the contractual immunity incorporated in the institutions' rules does not shield them upon breach of any of their obligations.¹³⁷¹ The policies and their scope of coverage, for each institution, are discussed in the following sections.

[1] ICC Interview¹³⁷²

The ICC is one of the principal institutions in the arbitration industry and a significant participant in the arbitration market with a bigger caseload and more arbitrators' appointments compared to other institutions.

[i] Liability, Insurance Coverage and Policy Nature

First and foremost, the -president of the ICC International Court of Arbitration initialised his response to the interview by asserting the institution's awareness, in the broader sense, of the possible potential liability of either arbitral institutions or arbitrators, which may arise from the arbitral services they provide. The reason for such awareness does not stem only from the ICC's general assessment of prospects for potential liability, but also from the actual claims brought by parties against the ICC in various jurisdictions. A number of state court decisions have dealt with this issue in relation to ICC proceedings; for example, the *SNF v. Cytec* litigation in Paris¹³⁷³ and, most recently, the *Landmark Ventures v. Cohen* case in the Southern District of New York.¹³⁷⁴ In the latter case, the court imposed sanctions for frivolous claims

1371. *SNF SAS v. Chambre de Commerce Internationale*, CA Paris (1re Ch C), 22 January 2009 (2010) 2 Rev Arb 318–319.

1372. Interview with John Beechey, Former President of the ICC International Court of Arbitration (Paris, 7 January 2015).

1373. *SNF SAS v. Chambre de Commerce Internationale*, CA Paris (1re Ch C), 22 January 2009 (2010) 2 Rev Arb 318–319.

1374. 13 Civ 9044 (JGK) 2014.

upon the claimant, which are regarded by the ICC as a positive step towards eliminating such types of claims. The ICC noted that although there is a real demand for insurance to back up institutions against liability claims, few arbitral institutions are actually and properly insured for their international activities, particularly some leading institutions at a local level. The reason that comprehensive cover is not carried out by every arbitral institution is due to the associated high expense. It could be envisaged that only principal institutions take out insurance coverage; nevertheless, there are certainly arbitral institutions that provide little or no coverage for arbitrators acting under their auspices. The interview also focused on the extent of the demand for insurance and whether it is more demanding at the level of the institution or of the arbitrators. The ICC answer clearly indicates that both the arbitral institutions and the arbitrators are highly concerned with adequate insurance. On one hand, insurance coverage for arbitrators is more delicate, since it is perceived as very personal (individually customised). There is an inherent challenge for arbitrators in performing their duties, as well as significant risk of personal liability for arbitrators who are not insured (or who do not have adequate insurance for their activity); this is particularly true for arbitration work involving the US and Canada. On the other hand, the matter of insurance for arbitral institutions is an issue of corporate governance and managing the institution affairs in a proper way. Because the ICC's liability may be triggered and it has already been exposed to actual claims, it has taken out insurance coverage. The interview laid out detailed questions regarding the nature of the insurance policy; the answers given state that the scheme basically covers ICC as an institution, arbitrators on ICC tribunals, members of the ICC court, and members of the ICC secretariat. The nature of this insurance policy could be defined as an ICC general insurance policy covering ICC activities in general, in which the ICC Court and its arbitration related activities are granted the lion's share. The policy includes insurance coverage for the arbitration services provided by the ICC International Court of Arbitration and is not a separate arbitration-related policy. Therefore, there is no clear classification for the type of this insurance policy, whether it comes in the form of a claims-made basis or an occurrence-made basis. The description that could be given to this policy is that it is a non-tailor-made arbitration activity policy; however, it is a general one for the ICC at large, including the ICC Court and the arbitral services provided by it. Insurance for arbitrators starts once the arbitral tribunal accepts its mandate and, thus, covers the moment the arbitrators begin to act as ICC arbitrators until the moment the award is rendered. Similarly, the ICC Court's coverage starts when the ICC accepts and registers the case. Once acceptance and registration are granted, the ICC starts its administrative role and, consequently, insurance coverage would start at such time and run

throughout the case and be terminated once the award is rendered (or, in other words, ‘until the award is out the door’); thus, insurance exists for the ICC throughout this entire period. The interview raised the question of whether the nature of the ICC policy is considered as a subsidiary policy for the arbitrator contingent on an arbitrator’s personal cover or a major policy. The answer given denied the subsidiary nature of the policy; however, based on discussions with the arbitrator concerning how a claim is to be handled, the ICC’s cover may be triggered and it would expect that the cover would be used and so it has to be discussed and determined on a case-by-case basis. For example, in the *Landmark v. Cohen* case,¹³⁷⁵ the ICC did not hesitate to use the cover to provide coverage for the arbitrator. A further hypothetical example given was an ICC case with three London barristers, who were serving as ICC arbitrators, all were covered by the Bar Mutual Policy. Upon problem occurrence, the arbitrator’s choice to use the ICC cover rather than the Bar Mutual Policy would be a matter of discussion. Therefore, the ICC does not rely on the fact, or assumes, that arbitrators who serve on ICC tribunals necessarily will have personal cover. If arbitrators have personal cover and want to invoke it, the basis of the cover and its scope will become an internal matter, to be sorted out between the insured and underwriters on the basis of full disclosure.

[ii] Insurance Rate, Premiums and Deductibles

The criterion applied in setting the insurance coverage rate is based on the maximum rate acceptable by the insurer according to the extent of coverage required by the institution. Both the value of the dispute and the value of the award exert no influence on the claimed rate of coverage. However, the insurance rate is affected by the nationality of the arbitrators and parties since there are specific limitations for arbitrators, arbitrations and lawsuits in the US and in Canada. Thus, any connection with the US and/or Canada would lead to difficulty in obtaining cover, which would in turn affect the assigned rate. Similarly, the rate of the premium is set according to criteria applied by the insurer. Such criteria are based on the same method of assessment applied to a law firm, namely based on its track record, number of claims, value of claims and the way it is managed. The premium might be set also by taking an actuary review from the market. In respect of an arbitral institution, any assessment shall be based on the number of cases per year, experience and track record of the institution. Moreover, other elements are part of the assessment, such as arbitral immunity, transparency of the institution and its internal statute and rules of administration. These assessment criteria by the insurer could be considered as a health check on the institution, as a whole, to ensure

1375. 13 Civ 9044 (JGK) 2014.

that its performance is effectively running its operation in a competent and sensible way. This does not preclude the fact that it is possible for the premium to change upon the change of the insurer, within the same country, due to market aspects. This may result in yielding different premium values for the same risk. Therefore, shopping around is advisable and may be a way to obtain different premiums from different companies. The probability of the change in premiums increases upon the change of the insurer among different countries. This change in premium is due to the difficulty facing the arbitral institution in getting cover in countries such as the US, in the context of an operation in the US. This difficulty exists particularly when an arbitral institution is in an emerging state; as a new company or new separate entity with no track record operating in a new market that has never operated before. As a result, upon the institution's commencement of activities, somewhere it will take a while to get cover. The interview also inquired about the matter of setting the deductibles by the insurer. The answer clearly indicates that it is done on the basis of full information given by the institution; as long as it has the information, it becomes a matter of negotiation between the institution and the underwriter.

[iii] Information Disclosure, Acts Covered Limitations and Other Related Matters

The interview set an inquiry to the institution regarding the information it should disclose to the insurer. The information should present a full description of the types of cases handled by the institution, regular updates on lawsuits and the status of each case (in which the institution is already involved), and the circumstances of every case. It should include, akin to the form of disclosure made by a law firm in terms of what claims it is aware of, what claims it thinks might be coming and what claims are already running. The interview inquired about the extent of coverage for risks under the policy, the limitations as to acts and geographical coverage. The response indicates that it is significant coverage, which includes negligence. The situation regarding gross negligence depends on the particular wording of the particular policy, but also may vary according to what the arbitrator can get, as well as what the institution can obtain. Moreover, gross negligence is easy to claim yet hard to prove for any institution, seeking to do what is correct, through its users and arbitrators, ensuring that it yields acceptable cover to encourage a prudent arbitrator to exert his/her utmost best. The cover does not include civil actions resulting from crimes (corruption, forgery) committed by either the institution or the arbitrator. The extent of limitations regarding the acts includes deliberate dishonesty, fraud, and deliberate misconduct. The interview raised a question regarding the possibility of insuring against the abovementioned limitations, such as in case of fraud or willful misconduct with no

intent to defraud the insurer. The answer given that the matter of insurance against the said limitations has been researched and it is possible to get coverage for the latter case. Nonetheless, the answer was not supported by any clarification as to how coverage would be granted, it being against applicable law. Regarding the geographic limitations concerning coverage: these limitations are raised in case of coverage required in the US and Canada. The interview inquired upon about any notification period imposed by the policy for reporting the risk upon its occurrence to the insurer. The answer given confirmed that the policy does not include any provision that such risk should be reported within a specific time. The interview also addressed the issue of reinsuring the risk of the institution; the response confirmed that there does not seem to be reinsurance for the insured risks.

[2] NAI Data¹³⁷⁶

The NAI, as the largest general arbitration institute in the Netherlands, administers an important number of arbitral cases and appoints a number of arbitrators who work under its auspices.

[i] Liability, Insurance Coverage and Policy Nature

Akin to the ICC, the managing director of the NAI confirmed her familiarity with liability arising from providing arbitral services. The answers to the interview stressed that the necessity and urgency of insurance became of the same concern both for the arbitral institutions and for the arbitrators. It could be estimated that most arbitral institutions have liability insurance cover, except for small institutions that typically do not consider it. Therefore, the NAI takes out an insurance policy against its potential liability arising from performing its arbitral functions. The policy covers the NAI, its board members, arbitrators, secretariat and the director. The policy is a general annual agreement that is customised (tailor-made) for the institution on a claims-made basis. Furthermore, there is a surplus (accident policy) for an equal amount of money to that of the main policy. The policy is taken out by the institution in the beginning of every year before starting the cases subject to arbitration. The NAI insurance policy is of a subsidiary nature, in a manner where arbitrators who possess their own insurance – as lawyers or board members of a law firm – must first rely on their policy before the policy of the NAI is triggered. However, this does not preclude the fact that there is no obligation for arbitrators acting under the NAI auspices to have a personal policy. For

1376. Interview with Fredy von Hombracht-Brinkman, former managing director of the Netherlands Arbitration Institute (Rotterdam, 18 August 2014).

arbitrators who do not have personal policies, the NAI would purchase a policy for them; judges, for example, can practice as arbitrators in Netherlands. Thus, they cannot be insured as professionals; as a result, the NAI purchases a professional indemnity policy (PII) for them when they are appointed as NAI arbitrators.

[ii] Insurance Rate, Premium and Deductibles

The insurance rate is based on the maximum rate accepted by the insurer. The insurer settlement for a said rate is not affected by the value of the dispute or the value of the award. The nationality of parties, nationality of arbitrator or arbitral institution plays no role in deciding the coverage rate. Furthermore, the rate does not change according to the domain of business or industry in which the NAI provides arbitral services. The question about how the premium is set by the insurer confirmed that it is done on a flat rate basis based on the caseload and the number of arbitrators' appointments. The NAI has an obligation to report, annually to the insurer, the caseload and the number of appointments for arbitrators and pay a certain amount of money for each case and for each appointment. Regarding the matter of arbitral immunity – on deciding upon the premium and the possibility of getting different premiums for the same risk through changing the insurer in the same country or among different countries – the NAI expressed a lack of information. Similarly, the NAI lacked information about the method in which the policy sets deductibles.

[iii] Information Disclosure, Acts Covered Limitations and Other Related Matters

The information that the NAI needs to disclose to the insurer while taking out its policy is the nature of the business, as well as the number of cases the institution handles. The NAI should also disclose the extent of appointment of foreign arbitrators and normal risks in terms of what claims the NAI is aware of, what are the estimates for prospect claims and claims that are already running. The acts covered under the policy are those that occur due to misconduct (negligence or gross negligence) either by the arbitrator or the arbitral institution. The policy does not state these acts due to the insignificant likelihood of them taking place. This could be justified on the premise that the NAI has had only two liability cases brought against it over the past 20 years. The most recent of the two cases is *ASB Greenworld v. NAI*.¹³⁷⁷ The said coverage does not include civil claims resulting from crimes (corruption, forgery) committed by either the NAI or any of arbitrators performing under its auspices. The answer to the question addressing the limitation acts and geographic coverage shows that neither the NAI

1377. HR 4 December 2009, <ECLI:NL:HR:2009:BJ7834> accessed 20 October 2020.

nor its arbitrators could benefit from the coverage, in case of intentional/deliberate and fraudulent acts. However, it shall be borne in mind that there is great difficulty in differentiating between what is intentional and what is not. The answer also denied the fact that it is possible to insure against the said limitations, even without the intent to defraud the insurer. Regarding the geographic coverage limitations, the answer given indicates that neither the NAI nor its arbitrators would receive any payment by insurance cover in case the claim is brought in front of the courts of the United States or Canada.

[3] CRCICA¹³⁷⁸

CRCICA is the principal arbitral institution in Egypt. Its arbitral activities extend to embrace a large number of arbitrations in Egypt and the Middle East. The director of CRCICA agreed with the aforementioned institutions about being familiar with the prospect of liability emanating from administering arbitrations under its auspices.

Although CRCICA has sound belief about said liability, it does not obtain any insurance coverage. The director explained that the reason why CRCICA does not have an insurance cover on the premise is due to its non-exposure to any liability suits over the past 35 years, except for one single case, No. 594 for 2011 (Cairo South Court, Fifth Circuit). In this case, the plaintiff – not an arbitrant but an arbitrator – brought a claim against CRCICA asking to be paid the whole amount of his remuneration due to what he claimed to be an unfair removal by the centre. The court dropped the case due to the plaintiff's negligence wherein he would not attend court sessions in due time.

[4] DIAC¹³⁷⁹

DIAC is an important arbitration centre in the Middle East, located in one of the most targeted cities for business. DIAC is currently competing on a massive scale with major arbitral, regional and international arbitral institutions, beholding an important number of cases. The former chairman of its Executive Committee affirmed the existence of several civil liability claims taken against the Centre per se while the arbitrators are in the course of providing their regular arbitral services. The centre currently has no insurance cover and does not provide any liability insurance; thus, it remains at the discretion of arbitrators whether to obtain insurance

1378. Interview with Dr Mohamed Abdel Raouf, director of the Cairo Regional Centre for International Commercial Arbitration (Cairo, 23 December 2014).

1379. Interview with Professor Dr Tarek Foad Riad, chairman of the Executive Committee of the Dubai International Arbitration Centre (Cairo, 20 June 2017).

or not. However, pursuant to the Centre's current policy, in case of the proceedings initiated against arbitrators appointed under the DIAC Arbitration Rules the centre takes care of the legal representation of the arbitrator as well as the associated payment.

[i] Insurers Data

After presenting the data collected through the interviews, among the arbitral institutions, this section presents the data collected among the underwriters themselves or through brokers providing much more detail regarding the subject matter. The interview targeted companies that underwrite insurance for professional liability. These companies have provided a full view on the subject-matter based on their profile history in insuring arbitrators and arbitral institutions.

[5] Aon Data¹³⁸⁰

Aon risk solutions is a worldwide leading insurance broker that specialises in providing insurance policies for PL as well as directors' and officers' liability policies.

[i] Liability, Insurance Coverage and Policy Nature

The broking director –started answering the interview questions by confirming Aon's awareness of potential liability that may be triggered against the arbitrators and the arbitral institutions. Aon believes that liability insurance for both arbitrators and arbitral institutions was of real concern, due to its awareness that there are certain risks arising from the services they provide. Thus, it assumes that all institutions insure, although there is no compulsory insurance required for arbitral institutions. However, it is advisable to insure for their potential liability risk. The extent of their concern differs according to the type of dispute the arbitrator or the arbitral institution is resolving. For example, construction disputes differ significantly from simple disputes between individuals. The reason is that the size of the first dispute will probably lead to a greater liability compared to the latter. Aon provides insurance coverage for both arbitrators and arbitral institutions against PL. Policies are of two types. One type, which covers the arbitrator, is a personal policy provided to cover an arbitrator solely; the other policy is designed to cover institutions providing arbitration services. The institution policy covers arbitrators who are accepted to join the institution, as well as everyone who assists in delivering arbitral services. On the other hand, the board of the arbitral institution could be covered by two policies: one covering PL arising from errors and omissions committed in their arbitral

1380. Interview with Paul Bootsma, broking director, Aon Risk Solutions Specialty Professional Services (Rotterdam, 3 October 2014).

capacity and the other covering decisions related to errors arising from managing the institution (employer's error), under directors and officers' liability insurance. The nature of the policy provided by Aon, either to arbitrators or arbitral institutions, is a general annual agreement. This policy is made prior to the commencement of the arbitral functions regarding the cases they have to resolve. Neither the arbitrator nor the arbitral institution needs to exclude any case from coverage, both the safe ones and the hazardous ones. However, the insured party may ask the insurer for a specific limit for a particularly sizeable case, in addition to the general agreement. For said risks Aon only provides claim-made policies; no occurrence-made policies could be provided, even upon the request of the insured party. The policy is tailor-made; based on the general wording of the PL policies of legal malpractice, particularly for lawyers and notaries. However, if the arbitrator is a lawyer, he or she is most likely to be covered for the arbitral services that he/she provides, under the lawyer's insurance policy required for practicing the profession.

[ii] Insurance Rate, Premiums and Deductibles

The interview addressed pecuniary aspects of the policy regarding the method by which the underwriter sets the insurance rate, premiums and deductibles for arbitral institutions and arbitrators. Regarding the insurance rate, the answer confirmed that while all rates are possible, the rate is likely to be a minimum rate that is adjustable depending on the size and the scope of the assured. Consequently, the insurance rate covering an arbitral institution, with an important caseload operating at an international level, differs from the small size institution operating at the local level. Similarly, the rate of coverage set for an international arbitrator beholding an abundance of cases is different from that of a colleague who is dealing with a modest number of domestic arbitral cases. Another factor that influences the insurance rate is the type of disputes in which the arbitrator (or the arbitral institution) is involved, also a function of difference in size and scope. An example of such is the significant difference in rate of coverage decided for a construction dispute versus that of telecommunications. In some cases, the insurance rate would be based on the amount of the award or dispute. This is based on the arbitral institution (or the arbitrator liability claims' history), professional history and the limit in which either of them asks the insurer to purchase. Finally, the rate may change according to the business, industry and nationality of parties who may be holding the nationalities of particular countries (which raises the specific question of geographical coverage; for example, the US). However, the rate does not change according to the nationality of arbitrators or arbitral institutions; since they should always pertain to (be nationals of) the

country where the underwriter operates. The response obtained regarding the method of setting the premium explains that the underwriter takes major elements into account while deciding the premium. One major element, professionalism, demonstrates the competence and specialty of an arbitrator or arbitral institution regarding his/its function and, in turn, delivered performance. The track record is also to be considered in setting the premium; thus, the performance history shown on their (arbitrator and/or arbitral institution) profile affects the premium. Furthermore, the claims' history with respect to liability claims pressed against the institution or the arbitrator imposes a significant impact on the premium. Finally, there is a clear correlation between the premium rate and the arbitral immunity of the arbitral institution (or the arbitrator); thus, if immunity is low, the premium is anticipated to be high, and vice versa. As a result, the premium of a policy tailored for lawyers is higher than that made for arbitrators due to the lawyer's lack of immunity. There are also factors that may provide a variability of premium rates, such as changing the underwriters within the same country, especially during the active renewal of the policy. The party seeking insurance may also check with different companies for a better premium. Therefore, it is always advisable to shop around to obtain a better premium. Premiums might also differ because of a change in the underwriter, among different countries, only if the insurer accepts to cover that kind of risk from different countries. However, the latter is difficult to apply due to practical constraints in terms of being able to estimate circumstances affecting the insured party in other countries. Furthermore, since there is a correlation between the premium and the deductibles, the interviewer inquired about the method of deductibles settlement upon which the insurer's decision is based. The answer given asserts that the deductibles are tailor-made; based on the claims history of the arbitral institution or the arbitrator and sometimes upon the request of the insured party.

[iii] Information Disclosure, Acts Covered Limitations and Other Related Matters

The information to be disclosed by both the arbitrators and arbitral institutions is the type of business in which they arbitrate. Thus, an example of what would be determined is whether or not the disputes would be subject to arbitration arising from construction, maritime or telecommunications disputes. Additionally, arbitrators must disclose any existing criminal records. Moreover, the claims history shall be honestly disclosed, regarding liability claims brought against them prior to policy purchase. The insurers must also disclose any and all relevant information that would influence the acceptance of the insurer while writing the policy. The fulfilment of the disclosure obligation validates the policy, in order to cover the acts in which it is tailored to cover. These acts are PL for both arbitrators and arbitral

institution; including the defence cost and sometimes the general liability for the arbitral institution in its capacity as employer. However, the policy does not determine the specific risks to be covered. The description of the risks is broad in wording and no particular acts are mentioned under the policy. If such risk description is detailed and elaborated upon, worries may arise to the underwriter and thus render him/her conservative while drafting the policy. The acts that are not covered under the policy – deeming these acts as limitations – are considered bad faith and fraudulent act(s). Such limitations cannot be covered under the policy, even upon the request of the assured without the intent to defraud the insurer. Moreover, the policy does not cover civil actions resulting from crimes committed by the arbitrator; even if it is possible, the broker and the underwriter will avoid covering said acts for the sake of their reputation. The policy limitations regarding the geographical coverage exclude the US and Canada. Therefore, no coverage is available by means of this policy to either arbitrators or arbitral institution in said countries. This does not preclude the fact that questions would be raised regarding the geographical coverage to any of the Anglo-Saxon countries such as UK and Australia. The interview also inquired about whether the institution policy is of a subsidiary nature; the answer given was that it depends on the wording of the policy. The institution would agree with the arbitrator to place its policy as a secondary one after his/her personal policy. If nothing in the policy wording or provisions settles this issues, then the policy will cover and come first. The interview also questioned the notification period included in the policy for the arbitral institution or the arbitrator. The answer provided that the claims' notification shall be delivered in a timely manner (within approximately three months) if they are aware of the liability claim, yet still depends on the wording. Upon the renewal of the policy, the insurer always inquires whether there are any claims to be reported. Finally, the interview inquired about the possibility of reinsuring the risks of arbitrators and arbitral institutions. The response was that there is no reinsurance, since reinsurance is only bought by insurance companies; the law does not allow the companies to reinsure for an insured. However, secondary coverage may be provided to either arbitrators or arbitral institutions.

[6] *Markel International Netherlands Data*¹³⁸¹

Unlike Aon Brokerage Company, Markel International Netherlands is a branch of the global Markel International group. It is an insurance company that specialises in the field of

1381. Interview with Valerie van Voorthuysen, senior underwriter, Liability Netherlands (Rotterdam, 15 September 2014).

professional indemnity. The information obtained through the interview was drawn directly from the company's underwriter.

[i] Liability, Insurance Coverage and Policy Nature

The senior underwriter representing Markel initiated responses to the interview questionnaire by stating that the company specialises in providing professional indemnity insurance policies. Accordingly, the PL of either arbitrators or arbitral institutions is a well-known risk profile to the company; it already comprises policies that cover arbitrators and arbitral institutions. The reason beyond including arbitrators and arbitral institutions as part of the risk covered by the company is that the liability aspect has become of real concern as one is aware of the professional risk potentially arising from arbitration. In respect of arbitral institutions, there is no fixed information, whether all buy insurance policies or only the leading ones. It is worth mentioning that the company has provided insurance policies for specialised arbitral institutions that focus on special types of disputes, such as architecture. This yields a clear indication that various institutions buy insurance, not just the leading ones. The company provides PL insurance policies solely for arbitrators in the form of a personal policy. Arbitral institutions have also provided policies covering its arbitrators, board and all personnel assisting in providing arbitral services. The policy is customised and designed mainly for arbitrators and arbitral institutions. The policy is provided on a claims-made basis wherein there is no possibility to provide a policy based on an occurrence-made basis, even upon the request of the assured party. The policy comes in the form of a general agreement for one year with optional annual renewal. Therefore, it is considered a general annual agreement that should be purchased prior to the advent of the case, since insurance applies only to cases that have not yet been initiated. As regards reinsurance against potential risks of arbitrators and arbitral institutions, such reinsurance is not available within the insurance market.

[ii] Insurance Rate, Premiums and Deductibles

The insurance rate is minimum adjustable in accordance with size. Thus, the insurance rate is decided for the arbitrators based on their caseload. Nonetheless, for an arbitral institution, the number of each arbitrator's appointment is taken into consideration within the caseload. This insurance rate is influenced by several factors, such as the value of the dispute; that is, the rate for disputes in the order of thousands of Euros, for instance, is certainly different from those in the order of millions. The rate could also be affected by the type of industry; arbitrating for maritime disputes differs significantly from architecture and construction disputes. In contrast, the nationality of the parties, arbitrators and/or arbitral institutions has no influence on said

rate, since they are always nationals of the country in which the underwriter operates. Therefore, no insurance for foreigners is made available. Additionally, the amount of the award does not affect the said rate, because the company, in its capacity as underwriter, cannot predict the amount of the award in advance. Akin to the insurance coverage rate, several factors are taken into consideration while deciding the premium rate. In deciding the premium for either the arbitral institution or the arbitrator, the company scrutinises the subject matter or type of disputes it aims to handle. Thus, arbitrators or arbitral institutions specialised in construction or maritime disputes differ from those specialised in general or mere individual disputes. Immunity is another factor taken into consideration while deciding the premium for both, but not to a great extent. There are also some aspects that affect setting the premium in respect only to arbitral institutions. While deciding upon the premium to the arbitral institution, the company considers the means by which the arbitrators are chosen; for example, a legal advisor or former lawyer will be one of the tribunal members. If the institution is specialised in a particular field, such as construction disputes, the tribunal shall be designated from specialised personnel in construction, along with a legal advisor. Therefore, the premium of an arbitral institution that does not follow the said method in designating the arbitral tribunals would significantly influence the premium rate. The company also considers whether or not there is an internal appeal system available in the institution, since this would give a chance to recover the mistake. Thus, it becomes a lower risk for the underwriter when there is a possibility for appeal. The company also takes the expertise of the board of the arbitral institution into consideration when deciding on the premium. This presents a member who is an expert in the type of disputes handled by the institution. This consideration is instrumental for the arbitrator who would be arbitrating disputes related to his/her expertise, and this could be easily figured out from his profile. The change in premium could take place through changing the insurer in the same country. The reason is that premiums of tailor-made policies have different rates among different companies. Accordingly, the broker must check for all possible insurers. However, there is no fixed information about whether the rate changes through changing insurers among various countries. Deductibles are tailor-made based on the size (in relation to the caseload), the claims made, history and the request made (either by the arbitral institution or the arbitrator).

[iii] Information Disclosure, Acts Covered Limitations and Other Related Matters

The information required to be disclosed – generally by both arbitrators and arbitral institutions – should be presented in proposal form, including clear information regarding the comprised

claims. Such claims should include present and contingent claims, criminal records and/or claims history. However, there remains some information that the arbitral institutions are required to disclose, such as their location, the number of arbitrators appointed, and the main/major businesses they carry out, before the arbitral institution submits its rules. The acts covered under the policy are mistakes that harm a third party. However, acts such as deliberate misconduct and fraud, which are excluded by the applicable law, are not covered under the policy. These excluded acts cannot be covered by the policy, even upon the request of the assured and without the intent to defraud the company. The policy does not cover civil actions arising from crimes. The exclusions or limitations regarding the geographical coverage exclude coverage for the US, unless the assured party asked for it. Nevertheless, unlike most underwriters around the world, coverage is provided to Canada without a special request from the assured party. The matter of whether an institution policy is of a subsidiary nature to the arbitrator's personal policy depends on the rules of the arbitral institutions or the agreement between the arbitrator and the institution. In the case of absence of said rules or agreement, if the two policies are made by the same underwriter, the party who brought up the claim would have its policy come first. If the underwriters are different, a contact between them shall take place to decide upon the party that caused the error and in turn brought up the claim; thus, its policy comes first. The interview presented a question regarding the notification period for reporting a claim to the insurer; the given answer explains that it should be as soon as the insured party is aware about the claim.

[B] Comparative Analysis for the Data Collected from Institutions

The data collected show that the interviewed arbitral institutions are fully aware of their potential liability. Only two of the four interviewed institutions are covered by an insurance policy (the ICC and the NAI, and not CRCICA or DIAC).

The interviewed institutions showed the same awareness and concern regarding the necessity of taking out an insurance coverage. The ICC and the NAI have almost the same coverage; by means of the insurance policy for its board, secretariat, and arbitrators. The policies of the two institutions correspond in terms of being general annual agreements concluded prior to the commencement of the cases. However, the two institutions differ in terms of the policy type and nature. The ICC policy is a general non-tailor-made policy. It includes provisions that cover its arbitral services and the policy is of a non-subsiary nature, for arbitrators acting under its auspices. In contrast, the policy of the NAI is a tailor-made PL policy designed particularly on a claims-made basis for arbitral institutions with a subsidiary

nature for the NAI arbitrators. The two institutions showed compatibility regarding the method of getting the amount of insurance rate coverage. This is based on the maximum acceptable by the insurer, without being based on either the amount of the dispute or the award. Moreover, the two institutions agreed upon the concept that neither the type of business nor type of industry affects the rate of coverage. However, the institutions showed different approaches regarding nationality and its impact on the said rate of coverage. According to the ICC, the rate may be affected by nationality, since there are specific limitations regarding arbitrations and arbitrations conducted in the US and Canada. In contrast, the NAI declined any impact for the nationality on the insurance rate. The institutions contradict in respect of the way in which the premium rate is decided by the insurer. The ICC stated that it is clearly based on experience, track record and claims history, but the NAI stated that it is a flat rate based on the caseload and number of appointments to arbitrators done by the institution. The ICC added that the premium rate is affected by elements such as arbitral immunity and changing the insurer in the same country or among different countries. However, the NAI lacked information dealing with the impact of the said elements on the premium. Unlike the NAI, which lacked references regarding the deductibles' way of settlement, the ICC stated that the criteria are based on information disclosed and discussions between the institution and arbitrator. The two institutions also deviated regarding the nature of information that should be disclosed to the insurer. An exception to that is the information regarding the type of cases they administrate, where they both agreed on its disclosure. The information said to be disclosed by the ICC to the insurer focused on types of cases handled by the institution, updates on actual claims which the institution is already involved, and the circumstances of each case. In contrast, the information said to be disclosed by the NAI is the number of cases, the extent of appointment of foreign arbitrators, and normal risks. The two institutions match in terms of the extent of coverage for acts of misconduct including negligence. Regarding the coverage of gross negligence, the NAI explicitly stated that gross negligence is covered under the policy, taking into consideration that the wording of its policy does not specify the acts covered. However, ICC depends on the policy and what the institution can get from the insurer. This implicitly reflects a possibility for gross negligence coverage under the policy. The institutions also exhibited similarity regarding the limitation of acts that are excluded under the policy, namely fraudulent and deliberate misconduct. ICC advised that it is possible to get insurance against fraudulent and bad faith acts. However, NAI denied this possibility. Moreover, the two institutions agree in terms of the impossibility of obtaining insurance for civil claims arising from crimes. Similarly, the two institutions are akin in the geographical limitations that they

have under the policy, excluding coverage in the US and Canada. In respect of the notification period during which the institution must report the claim, ICC denied the existence of a provision under the policy for the said period. NAI lacked information or reference regarding this period. Finally, the two institutions denied that there is reinsurance coverage for their potential liability.

[C] Comparative Analysis for the Data Collected from Insurers

The collected data aimed to gain a two-dimension insurance perspective. Thus, it coupled both the brokerage and underwriter companies' perspectives to achieve a deeper insight into the subject matter. The two interviewed companies showed how both institutions are fully aware of the arbitrators and arbitral institutions liability. They also stated that the part of the risk profile they work on is providing PL policies for arbitrators and arbitral institutions. They also confirmed that they already have insured arbitrators and arbitral institutions under their policies. On the side of arbitral institutions, both companies agree that they are concerned with insurance, due to their awareness of the particular risks arising from performing arbitral services. However, the two companies deviated regarding the extent of the arbitral institutions' concern and desire regarding insurance. Aon brokerage stated that the concern of arbitral institutions varies in accordance with the type of the disputes arbitrated under its auspices. In contrast, Markel International (underwriter) stated that the extent is the same due to their awareness of prospects' risk. The two companies match in the coverage they provide to the institution, which includes the board, arbitrators and secretariat. Aon added that the board of the institution may also be covered by directors and officers' policy to address liability arising from errors in managing the institution. The two companies exhibited compatibility regarding the policy form, which is a general annual agreement that starts before the advent of cases. Similarly, they match in the nature of policy they provide, which is a tailor-made PL policy designed especially for arbitral institutions and its wording is on a claims-made basis. The two companies showed dissimilar approaches in the criteria deeming the arbitral institution of subsidiary nature to the arbitrators acting under its auspices. The brokerage demonstrated that the subsidiary nature depends on the wording of the policy. In case of absence of a reference in the policy wording, the court shall decide the extent and enforcement of the subsidiary nature in a manner that brings primarily the policy of the party that brought the claim first. In contrast, the underwriter demonstrated that the subsidiary nature of the policy is based on the rules of the institution or the agreement between the arbitrators and the institution. The non-existence of such an agreement will result in superseding the activation of the policy of the party that

brings the claim whether the two policies are provided by the same insurer or by two different insurers. The two companies agreed that the coverage rate provided is a minimum rate adjustable, according to the size of the case load and appointments. The two companies acknowledge that the rate of coverage may change according to the business and industry in which the arbitral institution provides its service in relation thereto. Similarly, they both denied any kind of change for the said rate based on nationality of the arbitral institution, arbitrators and parties, provided that they should be nationals of the country in which the underwriter is located. Therefore, it could be concluded that the insurance coverage rate could be changed based on arbitral institution, arbitrators and parties' nationality, if their nationality differs from the nationality of the insurer providing the coverage. Moreover, they agreed that the rate of coverage would change according to the value of the dispute. In relation to the value of the award and the possibility to be used in deciding the coverage rate, the underwriter completely denied this possibility. However, the brokerage stated that it sometimes exists based on the claims' history, professional history and the limit in which the institution requests to purchase. The two companies agreed on the general elements upon which the premium is based, which are the professionalism, track record and claims history of the institution. Nevertheless, the underwriter extended additional elements that affect the premium rate, such as the types of disputes, the requirement of a specialised member in every tribunal according to the type of the dispute, specialisation of the board member of the institution according to the disputes it administrates, and the possibility of internal appeal within the institution. The two companies agreed that it could be possible for the premium to vary for the same risk in case of changing the underwriter in the same country or among different countries. Likewise, they agreed that arbitral immunity is taken into consideration while setting the premium. Nonetheless, whilst the brokerage stated that arbitral immunity has a significant impact on the premium, the underwriter felt that this does not have a significant influence. Both companies agreed that deductibles are customised based on the claims history and the request of the party. However, the underwriter added that the size of business carried out by the institution also decides the premium. Regarding the information that the institution needs to disclose, the two companies showed compatibility regarding claims history and the type of business they carry out. The two companies were similar in terms of relation to the acts covered under the policy, which is very broad and not defined by the policy. The brokerage confirmed that the policy does not define the acts covered. Likewise, the underwriter asserted that the acts covered by the policy are not defined yet include any damages incurred by third parties. Fraudulent acts and bad faith are said to be excluded from the acts covered by both companies and there is no

possibility of insuring against them, even upon the request of the arbitral institution. The companies deviated regarding the limitations regarding the geographical coverage because the brokerage confirmed that the US and Canada are excluded; in contrast, the underwriter includes Canada and excludes the US. The two companies are similar regarding the notification period within which the institution is required to report the claim, which should be swift and timely. The brokerage added that this should normally be finalised within three months of the institution becoming aware of the claim. However, this still depends on the wording of the policy. Finally, the two companies jointly denied the possibility for reinsurance by the policies they provide. On the side of the arbitrator, the companies apply the same criteria in respect to the institution, with a minor difference being that the policy of the arbitrator comes in a form of personal policy that solely covers arbitral activities. The two companies noted that it could be seen as an incentive for arbitrators and arbitral institutions to act prudently and precisely, knowing that a civil liability claim against them may yield a significant increase in the premium by the insurer upon the annual renewal of the policy.

[§5.05 Chapter Summary](#)

This chapter commenced by addressing professional liability (PL) and insurance. It focused on PI policies, claims-made and occurrence-made policies in each jurisdiction subject to study within this dissertation. The aforementioned effort addresses the acts covered, as well as limitations under the applicable law of each country, again subject to study within this dissertation. Subsequently, an empirical view was elaborately reflected regarding insurance coverage, available in the market, for arbitral institutions and/or arbitrators. This empirical overview is conducted through interviews conducted amongst the two polarities of the insurance process: the insured (arbitral institutions and/or arbitrators) and the insurer (underwriters and/or brokers). Thus, this chapter yields a scrutinised and integrated overview on the subject matter. To a great extent, the data collected demonstrated the existing similarities and differences, either amongst the insurance companies or the arbitral institutions. Through data analysis and associated discussion, a framework was drawn for the coverage available in the insurance market (for both arbitral institutions and arbitrators). Nonetheless, this brought attention to several practical constraints and a number of outstanding inquiries. These inquiries and constraints, which are evident in practice, mainly deal with acts, limitations, rate of coverage and notification periods.

CHAPTER 6 Summary, Conclusion and Recommendations

Chapter 6 Summary, Conclusion and Recommendations

Ahmed F. El Shourbagy

Arbitrators are fundamentally the base of the arbitral process. The outcome of their function is the arbitral award. Arbitrators are seen as something of a double-edged sword; if they perform their function appropriately and fulfil their contractual obligations, the entire arbitral process is a success and maintains the rights of arbitrants. However, if arbitrators perform in a substandard manner or breach their contractual obligations, this could lead to loss of the arbitrants' rights and other dire consequences. Consequently, arbitrants may seek to prosecute the arbitrators to obtain damages that are caused by their arbitral malpractice. It is often said that 'Arbitration is only as good as the arbitrator (*Tant vaut l'arbitre, tant vaut l'arbitrage*)'.¹³⁸²

The result of the malpractice by an arbitrator may give rise to a new dispute between the dissatisfied arbitrant and the arbitrator, the panel of arbitrators and/or the arbitral institution. The dissatisfied arbitrant (claimant) in said new dispute seeks to invoke the arbitrators liability. To counteract, the arbitrator (defendant) may base his/her defence on the premise of arbitral immunity, given the nature of the judicial function performed by the arbitrator. However, arbitral immunity is not guaranteed to shield the arbitrator from the outcome of a liability claim since there is still potential for the arbitrator to be held liable. Upon proof of the arbitrator's liability, the injured party may face a hurdle in recovering the damages inflicted by the arbitrator; the former may be entitled to and capable of gaining consequent financial compensation. Hence, professional indemnity insurance against arbitrators and arbitral institutions liability is considered to be a step forward in providing an effective and efficient remedy for arbitrators, arbitral institutions, as well as for the injured arbitrants (claimants).

This dissertation is concerned with the immunity and liability of arbitrators and arbitral institutions, as well as insurance against this liability under common and civil law jurisdictions. This study has explored the main controversies and complexities, in relation to immunity and liability of arbitrators and arbitral institutions, with different approaches in different jurisdictions. It has also examined the tendency of said jurisdictions in respect of insuring the

1382. Stephen R Bond, 'The International Arbitrator: From the Perspective of the ICC International Court of Arbitration' (1991–1992) 12 Nw J Intl L & Bus 1.

professional malpractice of arbitrators and institutions. This examination considered the coverage and limitations provided by virtue of the insurance laws of every legal system studied and comparing them to coverage available in the insurance market.

In an attempt to obtain answers for key questions about the possibility of insurance against arbitrators and arbitral institutions, this dissertation has addressed the nature of the relation amongst the two main parties (the arbitrators and the arbitral institutions). This has clearly demonstrated the existence of a contractual link. By virtue of this contractual link, arbitrators are empowered to practice their arbitral functions and arbitral institutions are granted the authority to administer the arbitral process. This is in order to reach a resolution for any dispute amongst the arbitants. The recognition of this contractual link is the source of the arbitrators' and arbitral institutions' mandate, from which their obligations emanate. Consequently, the breach of either the arbitrator or arbitral institutions' obligations may give rise to their civil liability on the premise of said contractual breach.

The issue of arbitrators' immunity is addressed in this dissertation through introducing its origin. This origin stems from the judicial immunity, as well as the grounds of its extension; based on function comparability between judges and arbitrators and also the extent of arbitral immunity. Arbitral immunity is extended to arbitrators as a direct result of the arbitral functions performed by the arbitrators in the course of the arbitral proceedings until the award is rendered. In both common and civil law jurisdictions studied herein, arbitral immunity is granted to arbitrators in order to protect them from being harassed by disgruntled arbitants, thus preserving their integrity and independence, which would consecutively protect the entire arbitral process. The extension of arbitral immunity to arbitral institutions is justified on the premise that said institutions derive their immunity from the arbitrators' immunity. Therefore, the immunity of arbitral institution is linked to the arbitrators' immunity. The waiver of the former is based on the waiver of the latter. Nevertheless, the extent of arbitral immunity varies with respect to common and civil law jurisdictions; it is absolute in the former since it is extended on basis of the quasi-judicial function performed by the arbitrator. As stated earlier by one of the US judges:

'Arbitrators may act with impunity

For theirs is a favored community

Though losers may whine

And even malign

*Judges will guard your immunity.*¹³⁸³

This absolute immunity approach is reflected through common law arbitration acts¹³⁸⁴ that give, at most, absolute immunity to arbitrators and arbitral institutions. Common law court decisions also decline to waive either the arbitrator or the arbitral institution immunity.¹³⁸⁵ However, said immunity is qualified in the latter due to its adoption of the contractual approach in empowering the arbitrators or arbitral institutions to perform their function. This qualified immunity is affirmed by court decisions that have highlighted that the arbitrator is not cloaked with immunity in case of guilty mind, gross negligence and fraud.¹³⁸⁶ In the presence of such arbitral immunity and the recognition of this immunity by different legal systems, this dissertation is concerned with discussing the prospects of arbitrators' civil liability in the presence of the said immunity.

In discussing the potential liability of arbitrators, it is clear that although arbitral immunity is granted to arbitrators, they can be held liable on contractual and tort grounds. The tendency of arbitrators' potential liability, pursuant to common law, is subject to strict limitations. Such limitations demonstrate a conservative approach that declines to hold arbitrators liable, except in very narrow situations limited to fraud and bad faith. In contrast, civil law systems recognise the potential liability of arbitrators on much broader grounds, abandoning the strict approach of common law jurisdictions in holding arbitrators liable. Likewise, the extent of liability of an arbitral institution that is subject to both common and civil law jurisdictions exhibits a significant difference; arbitral institutions could be held liable under common law systems, only upon proving the liability of the arbitrator. Thus, the institution's liability is connected to the liability of the arbitrator. In contrast, arbitral institutions' liability under civil law systems is not linked to that of the arbitrators. However, the institution could be held liable upon breach of any of its obligation vis-à-vis the arbitants.

Regarding the answer to the research question rendered through semi-structured interviews, arbitrators and arbitral institutions are keen to take out an insurance policy against possible arbitral malpractice. The empirical research also affirms that insurance underwriters and brokers provide tailor-made policies for covering risk profiles. However, the terms of the

1383. Lew, 'Introduction' (n350) 85.

1384. English Arbitration Act 1996, s. 29(1).

1385. 13 Civ 9044 (JGK) 2014.

1386. Cass 1^{ère} Civ, 15 Jan. 2014, n° 11-17.196, Publié au bulletin

<courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/2_15_28195.html>
accessed 19 October 2019.

policies may differ slightly among different underwriters and brokers. It may be concluded that PL insurance for arbitral malpractice is important for both arbitral institutions and arbitrators who operate in an ad hoc reference or under the auspices of an institution. Herein, there is an implied recognition that immunity is not only sufficient to shield them against potential liability, but it might also be suspended due to an act of misconduct. Although arbitral institutions incorporate immunity provisions in their rules – for the institution and/or the arbitrators working under its auspices or the extension of judicial immunity to arbitrators – their move towards insurance is a belief that they need subsidiary defences. This is because their liability and the alleged arbitral immunity is not sufficient for protection, as it might be overturned by a court decision. This may also raise justifiable doubts regarding the judicial nature of the arbitral process and its function vis-à-vis litigation. As a result, it became evident in case law, in both common law and civil law systems, that courts are reluctant to waive the liability of their judges, since this is considered a public-policy-related matter. Moreover, under French law, for example, the state is obliged to compensate litigants who suffer damages due to the actions of judges, which is not the same in the case of damages suffered by arbitrants in arbitration. Additionally, the protection of the judicial character of arbitral services would be denied for arbitrators if they cannot shield themselves by taking out insurance policies, since no legal system exists in which judges take out insurance policies to shield themselves against potential liability in case of lack of immunity and there is no state liability for arbitral malpractice. The denial of said judicial character to arbitrators could extend to denial of the same judicial character for the arbitral institution. This is the case under common law systems, in which arbitral institutions' immunity emanates from the arbitrators' immunity. The immunity extent varying from common law systems to civil law systems – being absolute in the former and qualified in the latter – could be a reason to entice arbitrants to opt for seat of arbitration in civil law countries rather than common law countries. This may be justified based on the fact that the selection of the seat of arbitration in a common law country purports to cloaking of arbitrators and arbitral institution(s) with absolute immunity against their potential misconduct. This research establishes the existence of an inversely proportional correlation between the arbitral immunity and the premium decided by the insurer; the greater the extent of immunity, the smaller the premium. Ultimately, immunity is absolute in common law systems; it seldom makes it possible to hold arbitrators liable and even serves as an impediment thereto. On the other hand, in some common law systems, namely the US and Canada, the tendency of most insurers is to decline coverage. Insurers that accept to offer possible coverage for arbitral malpractice in Anglo-Saxon systems always do so for high premiums, disregarding

said correlation between the immunity and the premium. Furthermore, the information collected has demonstrated that most of the policies do not state the type of acts that the policy covers. This would give rise to problems when risks occur between the insured party (arbitrator or arbitral institutions) and the insurer. Herein, the insurer may utilise the broad wording in waiving its liability to cover a specific act of misconduct, since it is not stated explicitly by the policy. Similarly, the same problem of denying the insurer's liability based on the broad wording of the policy may apply between the injured party and the insurer. This case is most likely to happen in jurisdictions that apply the concept of '*action directe*', such as in France, where the injured party can directly sue the insurer of an individual or entity that caused damages to them. The broad wording of an arbitral malpractice policy may lead to more complications and problems in practice. Drafting the insurance policy against arbitral malpractice in common law systems raises a question regarding the strict nature of contractual liability. Unlike civil law systems, common law systems do not recognise the differentiation between *obligation de moyens* and *obligation de résultat*. Under Anglo-American contract law, which adopts the strict liability concept, a party that enters into a contract cannot be legally excused from fulfilling the obligation set by virtue of said contract. Under common law's contractual strict liability, the breach of one or more of the obligations of the arbitrator or arbitral institution (promisor) towards the arbitrant(s) (promisee) would give rise to their liability. In this case, if the arbitrator or the arbitral institution is covered by an arbitral malpractice insurance policy, and the insurer becomes committed to proceed with the payment to remove the damages suffered by the injured party, the insurer may argue about its liability to cover the risk on the grounds of deliberate misconduct by either the arbitrator or arbitral institution. The reason is that the insured party was aware of the strict liability while committing the breach. The denial of the insurer's liability to cover the damages incurred by the insured party may be acceptable, provided that the contract linking the arbitrator or the arbitral institutions is free of any waiver of liability. However, said waiver shall not deny the applicable law of the state. Similarly, the issue of whether or not gross negligence is covered under the policy would also raise the problem of deliberate misconduct. It is obvious that if negligence amounts to gross negligence, this would clearly indicate that the act has been committed with extreme recklessness to an extent that could be considered intentional. The reason is that the wrongdoer could have expected the damages to be incurred by the injured party from said reckless acts. Additionally, and as alluded to in Chapter 3, commentators have deemed immunity necessary for the independence and integrity of arbitrators and arbitral institutions. However, their concern is that it might serve as a reason for both to perform in an

unacceptable manner. It could be concluded that this concern would grow to form a real problem within arbitral malpractice insurance; considering arbitrators and arbitral institutions would then trust that even if liability is accepted in a court decision, they are still cloaked by insurance. Consequently, this may cause the downgrade of their standards in relation to the services provided and may also lead to an adverse impact on the quality of the awards rendered. The possibility of arbitral misconduct would increase accordingly. Moreover, it could be deduced that the arbitral institutions' policies covering arbitrators operating under its auspices are preferred to be, by default, of a subsidiary nature and not primary as applied by the NAI. This default subsidiary nature would make an arbitrator aware that, should he or she err, his or her personal policy would promptly come first to cover him or her. Thus, the arbitrator herein is not fully dependent on the institution, but also bears the consequence of the risk resulting from his or her error. Accordingly, upon the renewal of the arbitrator's policy, the insurer would be aware of the arbitrator's mistakes. The insurer would, in turn, increase the premium for the new policy or decline to provide coverage –altogether if misconduct would potentially lead to important damages resulting in huge compensations to be paid by the insurer. It would be comforting for arbitrators' and arbitral institutions to know that they are insured, given frequent attacks by dissatisfied arbitants. The arbitants may deem the liability claim against arbitrators as a subsidiary avenue to attack the award, in particular, if there is appropriate coverage. This could lead to the prompt payment of compensations, as opposed to the case of no coverage, where the injured party would need to go after the personal assets of the arbitrator or the arbitral institutions to invoke his or her rights. Based on one of the interviews that raised the question of the 'possibility of insuring against fraud and deliberate misconduct of arbitrators and arbitral institution', a further conclusion could be reached. It could be toxic to spoil the entire arbitral process if arbitrators and arbitral institutions are able to obtain coverage for such misconduct. The reason is that said coverage for deliberate and fraudulent acts would turn arbitration into a fertile environment for corruption and could ultimately lead to loss of legitimacy. As a result, arbitants may abandon arbitration out of their fear of having fraud committed deliberately and thoughtlessly by arbitrators (in bad faith), given that they are covered by insurance and thus promoting unfair arbitral awards. Arbitral malpractice insurance is fundamentally meant to serve as a remedy for arbitrators, when they are held liable; however, it could regretfully serve as a method of shifting the dispute from its original zone – between the insured party (the reckless/remiss arbitrator or arbitral institution) and the injured party – to the insurer and the injured party specially under the laws containing the action direct method. It is noteworthy that one source of the latter problem is the broad wording of the

insurance policy regarding the acts covered under it, which would give room for the insurers to do their best to deny coverage vis-à-vis the injured parties. In this respect, the injured party can retrieve back to pursue a claim against the arbitrator to recover his/her damages and, in turn, the arbitrator sues the insurer to prove that the act that the arbitrator was held liable for is covered under the insurance policy. Accordingly, insurance could be used as a futile attempt from both arbitrators and insurers to escape recovery of damages incurred on the injured party.

Although immunity and liability of arbitrators and arbitral institutions has been controversial for a long time, and the liability and immunity thereto differ from jurisdiction to jurisdiction as well as from court decision to court decision, the related debate has not yet ended. The nature of arbitrators' status is not yet clearly decided by arbitration statutes. Moreover, the existence of professional indemnity insurance (PII) coverage for arbitrator and arbitral institution malpractice does not settle the debate either. It is not enough to offer either a practical solution to eliminate the liability claims before the state courts (against arbitrators and arbitral institutions) or equitable protection to arbitants compared to arbitrators, who are cloaked with a double protection emanating from the arbitral immunity and the insurance policy. There are advantages of arbitration in comparison to litigation. However, in litigation, litigants still have better opportunities to recover compensation from judicial misconduct by appealing the decision to higher courts. In contrast, appealing an arbitration decision is limited to nullification, which does not include in its conditions the right to press actions due to arbitrator or arbitral institutional error or misconduct.¹³⁸⁷

Future research should take into consideration different aspects that may yield better results in dealing with the arbitrator and arbitral institutional liability. These recommendations are as follows:

- Legal systems around the world should start accepting and recognising the concept of state liability upon proof of the arbitrator misconduct, which is akin to state judges' liability. The reason for this is that parties are empowered to arbitrate by virtue of the arbitration acts enacted by the state(s). Furthermore, the outcome of the arbitral process is an award that is deemed of a judicial nature and could be recognised and enforced by the state, should it conform to the New York Convention rules. Thus, the state admits the judicial nature of the arbitral process in its entirety and, consequently, it will be neither logical nor legal should the state deny/exclude its liability for the misconduct of the person (arbitrator) who renders the award, whether or not the latter is chosen by the

1387. *See* New York Convention.

state. The concept of state liability for arbitrators' misconduct would yield more credibility to the arbitral process. Furthermore, it instills trust, for the arbitants, that their damages could be recovered from the state, upon the occurrence of their misconduct. It could be argued that this is not realistic as states do not have control over the selection of arbitrators and/or over the conduct of the proceedings. Nonetheless, this argument could be refuted on the premise that although states have control over the selection of court judges and the proceedings, which would purportedly guarantee more integrity, judges are still potentially subject to liability. It is also possible for the state courts to appoint the arbitrator(s) should the arbitants fail to agree upon appoint a particular arbitrator. Hence, the state is yet to play an instrumental role in the selection by virtue of law. The state control over selection or proceedings does not prevent the occurrence of cases of misconduct. However, it could be argued that recognising state liability for arbitrators may encourage states to introduce an appeal mechanism against arbitral awards. This argument may also be refuted on the basis that states adopted arbitration, as an alternative means of settlement for disputes, to encourage foreign trade and investments. This is/was achieved through allowing the submission of their potential disputes, away from the bureaucracy of national courts; in most cases, the conventional said-appeal system available within countries is a repelling factor to foreign trade. Moreover, the adoption of an appeal system would ruin the purpose of arbitration in maintaining less burden over the state courts, in particular. Thus, the said adoption will retrieve the same load back onto courts. The motion of the state, to present an appeal system, would require a collateral motion for the amendment of most of the national arbitration acts and of the UNICITRAL Model Law. For the latter, the said national acts are drafted based on the Model law. It is noteworthy that Model Law recognises the challenge of an arbitral award only through the nullity action.

- A motion to amend the New York Convention, from the states that have signed and ratified the convention, has now reached a total of 161 states.¹³⁸⁸ The core of this amendment lies in an article that gives the right to refuse the enforcement of the arbitral award upon proof of misconduct or wrongdoing by the arbitrator, arbitral tribunal, or arbitral institution. This amendment for declining enforcement due to the arbitrator's

1388. *See* UN Commission on International Trade Law, 'Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1958) <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 > accessed 20 October 2020.

error would be deemed instrumental in eliminating the arbitrators' and arbitral institutions' liability lawsuits. This would also help end the approach of disgruntled arbitants to consider the liability legal action against either arbitrators or arbitral institution as a subsidiary avenue to attack the award in case they failed to achieve the refusal of its enforcement. It may be perceived as unrealistic to consider amending the New York Convention rules; nonetheless, keeping pace with the developments occurring in the arbitration industry requires a real motion towards said amendment. This should be applied instead of limiting the refusal of enforcement in case of 'the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'.¹³⁸⁹ This could give rise to queries about the discrepancy of the convention approach in giving the right to the state to refuse the enforcement. This applies in case the composition of the arbitral authority is against the arbitral agreement or the law of the country where the arbitration took place. At the same time, the Convention overlooked to state a reason for rejecting enforcement upon the proof of the arbitrator's liability emanating from his/her misconduct.

- A motion towards arbitrating disputes arising from liability of arbitrators and arbitral institutions is extremely important. This could be achieved by amending the existing rules of the arbitral institutions through adding a binding arbitration clause to the arbitral institutions' rules. This will significantly help settle any disputes arising from the arbitral functions that are performed by either arbitrators or arbitral institutions, apart from state court adjudication to be resolved only through arbitration. This idea may give rise to constraints in relation to neutrality and confidentiality issues because the arbitral institution, which will run the arbitration of said disputes under its auspices, could be a potential competitor to the other (arbitrant) institution. However, the issue of neutrality could be solved through a motion from the side of arbitration institutions. Incorporation of a separate arbitration scheme will make it possible to run and administer the arbitrations of said disputes that may arise against the arbitral institution or one of the arbitrators that function for the institution. Consequently, arbitrating the arbitrators and arbitral institutions' liability dispute would protect the arbitral process as a whole, as well as its confidentiality. It would also preserve the integrity and reputation of

1389. *See* New York Convention, Art. V5 1(d).

arbitrators and enhance the trust of potential arbitants who anticipate further disputes that may arise from arbitrators or arbitral institutions misconduct, providing solution/remedy, without state courts' intervention; wherein the latter (state courts) may jeopardise the confidentiality of the subject matter of the arbitrators.

- In order to minimise arbitral misconduct and malpractice, arbitral institutions shall designate an internal disciplinary system for arbitrators who are held accountable for performing erroneously or in malice. This would provide arbitants, subject to its rules, with more confidence and trust by penalising the wrongdoing arbitrator and simultaneously encouraging the arbitrators' community to pay heed to disciplinary consequences.
- In recognising how prevalent arbitration is, as a method of dispute settlement that could be deemed a competitor to state courts, individuals performing arbitral functions shall be selected based on specific criteria. This can be achieved through the founding of an international bar for arbitrators, to set admission requirements for arbitrators. Consequently, arbitrators who do not pass this bar or do not follow its required criteria may be banned from arbitration practice or being designated as a member in any arbitral tribunal. The aim of the proposed bar is to ensure the quality of the arbitrators running the arbitral process, and professional indemnity insurance (PII) shall be compulsory for arbitrators in order to be admitted to the proposed bar.
- An amendment for the UNICITRAL Model Law rules shall be invoked to set a frame for the arbitrators' immunity and exceptions. The aim of this amendment is to overcome the differences among various jurisdictions, allowing the arbitants who are willing to sue arbitrators not to suffer when determining the extent of arbitrators' immunity or liability, wherever the seat of arbitration is located, whether in a civil or a common law country. The amendment shall provide a frame for the liability of arbitrators and cases of triggering said liability. While the Model Law has adopted within its articles the immunities granted to arbitrators,¹³⁹⁰ it ignored the fact that arbitrators' misconduct may potentially give rise to civil liability.
- Arbitral malpractice insurance policies should consider the inclusion of an arbitration clause to address any future dispute that may arise between the insurer and the insured parties (arbitrators and arbitral institutions). This is in order to eliminate the courts' intervention into the process between the arbitrators (and/or arbitral institution) and the

1390. *See* UNICITRAL Model Law, Art. 16.

insurer, on one hand, and the injured party and the insurer, on the other, regarding the debate regarding the broad wording of acts, covered under the insurance policy.

- National arbitration acts that are silent and do not contain any provisions regarding immunity and liability of arbitrators¹³⁹¹ may consider initiating an amendment to the current acts. This could be achieved through adding some provisions that regulate the immunity of arbitrators and arbitral institutions as well as their extent. Additionally, it is recommended to set a regulatory frame for professional conduct and error prevention that may lead to the loss of the arbitral immunity by either the arbitrator or the arbitral institution.
- Arbitral acts – such as the English Arbitration Act and associated court decisions – that yield limited liability of arbitrator(s) to bad faith are supposed to add to their acts an interpretation of bad faith acts for clarification purposes, not leaving them undefined or subject to mis-interpretation. This is to avoid confusion whilst being investigated by a state court.
- Immunity of arbitrators or arbitral institutions, namely those in countries adopting the absolute approach, exhibit contradiction to the Universal Declaration of Human Rights¹³⁹² and the European Convention on Human Rights¹³⁹³, both preserving the right of each individual in a fair trial by an independent and impartial tribunal. In light of said conventions, absolute immunity of the arbitrator or the arbitral tribunal – upon its performance in a conduct that prevented the parties from being granted a fair trial or serve as the source of an impartial or independent manner – represents an explicit breach to the fundamental rights of fair trial that is preserved by the aforementioned conventions.



1391. *See*, for example, Egyptian Arbitration Act (No. 27) 1994. *See also* French Code of Civil Procedure 2011 (Decree 2011-48).

1392. *See* Universal Declaration of Human Rights, Art. 10 ('Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him').

1393. *See* European Convention on Human Rights, Art. 6(1) ('In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law').

Bibliography

Books

- Abd Al-Hamid Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International, 2011).
- Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, U.S., and West German Law* (Schulthess, 1989).
- Agata Cevc, *Civil Liability of Arbitrators*, in Dunja Duić and others (eds), "EU and Comparative Law Issues and Challenges Series, ECLIC 3(2019).
- Ahmed Abdel Karim Salama, *Arbitration in Domestic and International Financial Transactions* (Dar El Nahda El Arabia, 2006).
- Albert Jan Van Den Berg, *Yearbook of Commercial Arbitration Vol. XXXIII*, Vol. 33 (Kluwer Law International, 2009).
- Albert Rogers and Karin C.J. Frikkee (eds), *Liability of Lawyers and Indemnity Insurance* (Kluwer Law International, 1995).
- Alexander Belohlávek, *Arbitration Law of Czech Republic: Practice and Procedure* (Juris Publishing, 2013).
- Andy Gibson and Douglas Fraser, *Business Law 2016* (8th ed., Pearson Australia, 2016).
- Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff Publishers, 1995).
- Barbara Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (Springer, 2016).
- Barry R. Ostrager and Thomas R. Newman, *Handbook on Insurance Coverage Disputes* (16th ed., Aspen Publishers Online, 2013).
- Bommel van der Bend, *A Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law* (Kluwer Law International, 2009).
- Brenda Mothersole and Ann Ridley, *A-Level Law in Action* (2nd ed., Cengage Learning EMEA, 1999).
- Bruno Nascimbene and Elisabetta Bergamini, *The Legal Profession in the European Union* (Kluwer Law International, 2009).

- Carita Wallgren-Lindholm, *Ad Hoc Arbitration vs. Institutional Arbitration*, in *International Commercial Arbitration: Different Forms and Their Features*, Giuditta Cordero-Moss (ed.) (Cambridge University Press, 2013).
- Cees van Dam, *European Tort Law* (2nd ed., Oxford University Press, 2013).
- Christian Bühring-Uhle, Lars Kirchhoff and Gabriele Scherer, *Arbitration and Mediation in International Business* (2nd ed., Kluwer Law International, 2006).
- David D. Caron and Lee M. Caplan (eds), *The UNCITRAL Arbitration Rules: A Commentary* (1st ed., Oxford University Press, 2013).
- DeVilliers Hugo, *The Actions for Wrongful Life, Wrongful Birth, and Wrongful Conception: A Comparative Study from a South African Perspective* (Doctor Legum Thesis, University of Pretoria, 1999).
- Elliott C. Kulakowski Lynne U. Chronister, *Research Administration and Management* (Jones & Bartlett Publishers 2008).
- Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge, 2010).
- Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999).
- Eric Schäfer, Herman Verbist and Christophe Imhoos, *ICC Arbitration in Practice* (Kluwer Law International, 2005).
- Ewan McKendrick, *Contract Law* (10th ed., Palgrave Macmillan, 2013).
- Fathy Waly, *Arbitration in National and International Commercial Disputes: Theory and Practice* (1st edn, *Monsha'at Al Maaref*, Alexandria 2014)
- Felix Wieser, *The Perspective of the Insurance Industry*, in *Principles of European Insurance Contract Law: A Model Optional Instrument*, Helmut Heiss (ed.) (Sellier European Law Publishers, 2011).
- Ferdinando Emanuele and Milo Molfa, *Selected Issues in International Arbitration: The Italian Perspective* (Thomson Reuters, 2014).
- Frances Kellor, *Arbitration in Action: A Code for Civil, Commercial and Industrial Arbitrations* (Harper and Brothers Publishers, 1941).

- Frances Kellor, *American Arbitration: Its History, Functions and Achievements* (Beard Books, 1999).
- Francesco Seatzu, *Insurance in Private International Law: A European Perspective* (Hart Publishing, 2003).
- Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* (1st ed., Norton, 1994), as cited in Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International*.
- Franz T. Schwarz and Christian W. Konrad, *The Arbitrators in The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International, 2009).
- Franz T. Schwarz and Christian W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International, 2009).
- Frederick W. Holes, *The Peace Conference at the Hague: And Its Bearings on International Law and Policy 1900* (Reprint. Forgotten Books, 2013).
- Gary Born, *International Commercial Arbitration* (241, 2nd ed., Kluwer Law International, 2014).
- Genevieve Viney, *Tort Liability*, in Introduction to French Law, George A. Bermann and others (eds) (Kluwer Law International, 2008).
- Geoffrey Samuel, *Law of Obligations & Legal Remedies* (2nd ed., Routledge, 2013).
- Giuditta Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability* (Cambridge University Press, 2014).
- Hugh G. Beale, *Chitty on Contracts* (30th ed., Sweet and Maxwell, 2008).
- Hugh G. Beale, William D. Bishop and M. P. Furmston, *Contract: Cases and Materials* (5th ed., Oxford University Press, 2008).
- Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law Arbitration, 2011).
- Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press, 2015).
- Jean Foelix, *Trait du Droit International Privé* (2nd ed., Joubert, 1847).
- J. Stanley Edwards, *Tort Law* (6th ed., Cengage Learning, 2015).

- Jacqueline Rubellin-Devichi, *L'arbitrage: Nature Juridique: Droit Interne et Droit International Privé* (Librairie Generale de Droit et de Jurisprudence, 1965).
- James M. Gaitis, Carl F. Ingwolson Jr. and Vivien B. Shelanski, *College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (3rd ed., Juris Publishing, 2014).
- Jan Paulsson, Nigel Rawding and Lucy Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts* (Kluwer Law International, 2011).
- Jan Smits, *Elgar Encyclopedia of Comparative Law* (2nd ed., Edward Elgar Publishing, 2012).
- Jean Paulin Niboyet, *Traité de droit international privé français*, Vol. 6 (Recueil Sirey, 1950) 136, quoted in Lew, *Applicable Law*.
- Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet and Maxwell, 2007).
- Joanna Jemielniak, *Legal Interpretation in International Commercial Arbitration* (Ashgate Publishing Ltd., 2014).
- John Birds, *Insurance Law in the United Kingdom* (Kluwer Law International, 2010).
- John H. Mathias Jr., John D. Shugrue and Thomas A. Marrinson, *Insurance Coverage Disputes* (Law Journal Press, 2014).
- John Cartwright, Stefan Vogenauer and Simon Whittaker, *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription ('the Avant-projet Catala')* (Bloomsbury Publishing, 2009).
- John P. Sahl, R. Micheal Cassidy, Benjamin P. Cooper and Margaret C. Tarkington, *Professional Responsibility in Focus* (Wolters Kluwer Law and Business 2017).
- Julian Burling and Kevin Lazarus, *Research Handbook on International Insurance Law and Regulation* (Edward Elgar Publishing, 2012).
- Julian D.M. Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications Inc., 1978).
- Julian D.M. Lew, Loukas A. Mistelis and Stefan Michael Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003).

- Justo P. Torres Jr., *Obligations and Contracts* (2003 ed., Rex Bookstore Inc., 2003).
- Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Kluwer Law International, 2012).
- Klaus Peter Berger, *International Economic Arbitration* (Kluwer Law and Taxation Publishers, 1993).
- Malcolm A. Clarke, *The Law of Liability Insurance* (15, Informa Law from Routledge, 2014).
- Marcel Fontaine and Filip De Ly, *Drafting International Contracts* (BRILL, 2009).
- Marcel Planiol and Georges Ripert, *Traité Pratique de Droit Civil Français* (2nd ed., Librairie générale de droit et de jurisprudence, 1952).
- Margaret L. Moses, *The Principle and Practice of International Commercial Arbitration* (2nd ed., Cambridge University Press, 2017).
- Matti Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (Oxford University Press, 2010).
- Mauro Bussani and Anthony J. Sebok (eds), *Comparative Tort Law: Global Perspectives* (Edward Elgar Publishing, 2015).
- Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (3rd ed., Juris Publishing Inc., 2014).
- Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (1st ed., John Wiley & Sons, 2016).
- Michael J. Moser, *Business Disputes in China* (3rd ed., Juris Publishing Inc., 2011).
- Michael J. Mustill and Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed., Butterworth and Co Publishers Ltd., 1989).
- Mitchell L. Lathrop, *Widely Used Rules in International Arbitration*, in *International Dispute Resolution*, Dennis Campbell (ed.) (Kluwer Law International, 2010).
- Mohamed A.M. Ismail, *Globalization and New International Public Works Agreements in Developing Countries: An Analytical Perspective* (Ashgate Publishing Ltd., 2013).
- Mohamed A. M. Ismail, *International Investment Arbitration: Lessons from Developments in the MENA Region* (Routledge, 2016).

- Nelson Miller, Paul T. Sorensen and Karen L. Chadwick, *The Practice of Tort Law* (3rd ed., Vandephas Publishing, 2012).
- Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press, 2015).
- Patrik Schöldström, *The Arbitrator's Mandate: A Comparative Study of Relationships in Commercial Arbitration under the Laws of England, Germany, Sweden and Switzerland* (Stockholm University, 1998).
- Pedro J. Martinez-Fraga, *The American Influence on International Commercial Arbitration: Doctrinal Developments and Discovery Methods* (Cambridge University Press, 2020).
- Peter Ashford, *Handbook on International Commercial Arbitration* (2nd ed., Juris Publishing Inc., 2014).
- Peter J. Kalis, Thomas M. Reiter and James R. Segerdahl, *Policyholder's Guide to the Law of Insurance Coverage* (Aspen Publishers Online, 1997).
- Phillipe Bartsch and Dorothee Schramm, *Arbitration Law of Switzerland: Practice and Procedure* (JurisNet, LLC, 2014).
- Pieter Sanders, *Trends in the Field of International Commercial Arbitration*, in *Recueil des Cours* (Vol. II AW Sijthoff, Leyden, 1975).
- Pieter Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (Kluwer Law International, 1999).
- Remy Gerbay, Lisa Richman and Maxi Scherer, *Arbitrating under the 2014 LCIA Rules: A User's Guide* (Kluwer Law International, 2015).
- Richard Mann and Barry Roberts, *Essentials of Business Law and the Legal Environment* (122, 12th ed., Cengage Learning, 2015).
- Richard Schaffer, Filiberto Agusti and Beverley Earle, *International Business Law and Its Environment* (9th ed., Cengage Learning, 2014).
- Robert Merkin, *Insurance Law: An Introduction* (CRC Press, 2014).
- Robert Merkin and Jenny Steele, *Insurance and the Law of Obligations* (Oxford University Press, 2013).

Robert Merkin and Louis Flannery, *Arbitration Act 1996* (Informa Law from Routledge, 2014).

Rolf A. Schütze (ed.), *Institutional Arbitration: A Commentary* (Bloomsbury Publishing, 2013).

Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2010).

Susan Blake, Julie Browne & Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press 2014).

Thomas E. Carbonneau, *Carbonneau on Arbitration: Collected Essays* (Juris Publishing Inc., 2010).

Thomas E. Carbonneau, *Law and Practice of Arbitration* (5th ed., Juris Publishing Inc., 2014).

Thomas H. Webster and Michael Buehler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (Sweet and Maxwell, 2014).

Ugo Draetta and Riccardo Luzzatto, *The Chamber of Arbitration of Milan Rules: A Commentary* (Juris Publishing Inc., 2012).

V.V. Veeder QC, London Court of International Arbitration, *The Draft New 1998 LCIA Rules*, Biennial IFCAI Conference: On the Institutional Response to Changing Needs of Users Volume 759 (31, WIPO, 1998).

Yves Derains and Eric A. Schwartz, *Guide to the ICC Rules of Arbitration* (2nd ed., Kluwer Law International, 2005).

Articles in Books

Adrian Hamilton, QC, *Commentary II on 'Rethinking Insurable Interest,'* in *Commercial Law and Commercial Practice*, Sarah Worthington (ed.) (Hart Publishing, 2003).

Alvin B. Rubin, *Arbitrators' Immunity from Damage Claims*, in *Arbitration Proceedings of the 39th Annual Meeting*, National Academy of Arbitrators (1986).

Anders Reldén and Ola Nilsson, *The Arbitration Agreement in U Franke*, in *International Arbitration in Sweden: A Practitioner's Guide*, A. Magnusson and others (eds) (Kluwer Law International, 2013).

- Bernard Hantiau and Olivier Caprasse, *Introductory Report*, in *The Review of International Arbitral Awards*, Emmanuel Gaillard (ed.) (Issue 6 of IAI series of International Arbitration, Juris Publishing Inc., 2010).
- Carita Wallgren-Lindholm, *Ad Hoc Arbitration vs. Institutional Arbitration*, in *International Commercial Arbitration: Different Forms and Their Features*, Giuditta Cordero-Moss (ed.) (Cambridge University Press, 2013).
- Christopher R. Drahozal, *Party Autonomy and Interim Measures in International Commercial Arbitration*, in *International Commercial Arbitration: Important Contemporary Questions*, Albert Jan Van Den Berg (ed.), ICCA Congress Series No. 11 (London, 2002) (Kluwer Law International, 2003).
- Crenguta Leaua, *The Applicability of Party Autonomy in the Appointment of Arbitrators*, in *Czech and Central European Yearbook of Arbitration Party Autonomy Versus Autonomy of Arbitrators*, Alexander J. Bělohávek and others (eds) (JurisNet, LLC, 2012).
- David D. Caron and Lee M. Caplan (eds), *The UNCITRAL Arbitration Rules: A Commentary* (1st ed., Oxford University Press, 2013).
- Dennis R. Nolan and Roger I. Abrams, *The Arbitrators Immunity from Suit and Subpoena*, in *Arbitration Proceedings of the 40th Annual Meeting*, National Academy of Arbitrators 149, 153 (1987).
- Elie Klieman, *SNF v. International Chamber of Commerce Case and the Obligation to Conduct Arbitration Proceedings with 'Expected Dispatch,'* in *International Arbitration and Public Policy*, Devin Bray and Heather L. Bray (Juris Publishing Inc., 2014).
- Emmanuel Gaillard, *France*, in *Practitioner's Handbook on International Commercial Arbitration*, Frank Bernd Weigand (ed.) (465, 2nd ed., Oxford University Press, 2009).
- Franz Werro and Erdem Buyuksagis, *The Bounds Between Negligence and Strict Liability*, in *Comparative Tort Law: Global Perspectives*, Mauro Bussani and Anthony J. Sebok (eds) (Edward Elgar Publishing, 2015).
- Gerard J. Meijer and Marike Paulsson, *National Report for the Netherlands*, in *International Handbook on Commercial Arbitration*, Jan Paulsson (ed.) (1984, updated 2012).
- Gerard J Meijer and Albert Jan Van den Berg, 'National Report for Netherlands (2020)' ICCA *International Handbook on Commercial Arbitration*, Jan Paulsson and Lise Bosman (eds Suppl No. 112 (Kluwer Law International, 2020, updated October 2020).

- Hans van Houtte and Bridie McAsey, *The Liability of Arbitrators and Arbitral Institutions*, in *Arbitral Institutions Under Scrutiny*, Philipp Habegger and others (eds) (2012) 40 ASA Special Series.
- Jean L. Delvolve, *Immunity of Arbitrators under French Law* in *The Immunity of Arbitrators*, Julian D.M. Lew (ed.) (Lloyd's of London Press, 1990).
- Julian D.M. Lew QC, *Achieving the Dream: Autonomous Arbitration?* in *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration*, Sponsored by Freshfields Bruckhaus Deringer, Julian D.M. Lew and Loukas A. Mistelis (eds) (Kluwer Law International, 2007).
- Julian D.M. Lew, *Determination of Arbitrators' Jurisdiction and the Public Policy Limitation on That Jurisdiction*, in *Contemporary Problems in International Arbitration*, Julian D.M. Lew (ed.) (Springer Science and Business Media, 2013).
- Karim Hafez, *National Report for Egypt (2013)*, in *ICCA International Handbook on Commercial Arbitration*, Jan Paulsson and Lise Bosman (eds), Suppl No. 73 (Kluwer Law International, 1984, updated March 2013).
- Karyl Nairn and Maximilian Szymanski, *National Report for England and Wales (2019 through 2020)*, in *ICCA International Handbook on Commercial Arbitration*, Jan Paulsson and Lise Bosman (eds), Suppl No. 110 (Kluwer Law International, 2020, updated April 2020).
- Karl Pornbacher and Inken Knief, *Liability of Arbitrators' Judicial Immunity Versus Contractual Liability*, in *Czech and Central European Yearbook of Arbitration Party Autonomy Versus Autonomy of Arbitrators*, Alexander J. Bělohávek and others (eds) (JurisNet, LLC, 2012).
- Kyriaki Noussia, *Definition: Different Common Law and Civil Law Approaches to the Definition of Insurance*, in *Research Handbook on International Insurance Law and Regulation*, Julian Burling and Kevin Lazarus (eds) (Edward Elgar Publishing, 2012).
- M. I. M. Aboul-Enien, *Arbitration of Foreign Investment Disputes: Responses to the New Challenges and Changing Circumstances*, in *New Horizons in International Commercial Arbitration and Beyond*, Albert Jan Van Den Berg (ed.) (Kluwer Law International, 2005).

- Martin Maisner, *Liability and Independence of the Arbitrator*, in Czech and Central European Yearbook of Arbitration Party Autonomy Versus Autonomy of Arbitrators, Alexander J. Bělohávek and others (eds) (JurisNet, LLC, 2012).
- Matthias Haentjens and Edgar du Perron, *Liability for Damage Caused by Others under Dutch Law*, in Unification of Tort Law: Liability for Damage Caused by Others, Jaap Spier and others (eds) (Kluwer Law International, 2003).
- Michel Hwang, Katie Chung and Fong L. Cheng, *Claims Against Arbitrators for Breach of Ethical Duties*, in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers, Arthur W. Rovine (ed.) (Martinus Nijhoff Publishers, 2007).
- Mitchell L. Lathrop, *Widely Used Rules in International Arbitration*, in International Dispute Resolution, Dennis Campbell (ed.) (Kluwer Law International, 2010).
- Paula Hodges and Joanne Greenaway, *Duties of Arbitrators*, in Arbitration in England: With Chapters on Scotland and Ireland, Julian D.M. Lew and others (eds) (Kluwer Law International, 2013).
- Remy Gerbay, *The London Court of International Arbitration*, in Arbitration in England with Chapters on Scotland and Ireland, Julian D.M. Lew and others (eds) (Kluwer Law International, 2013).
- Richard M. Mosk and Tom Ginsburg, *Becoming an International Arbitrator: Qualification, Disclosures, Conduct and Removal*, in Practitioner's Handbook on International Arbitration and Mediation, Daniel M. Kolkey and others (eds) (3rd ed., JurisNet, LLC, 2012).
- Rob Widdershoven, *The Principle of Loyal Cooperation Law Making by the European Court of Justice and the Dutch Courts*, in Judicial Lawmaking and Administrative Law, F.A.M. Stroink (ed.) (Intersentia nv, 2005).
- Sami Tannous, Samantha Lord Hill and Amr Omran, *National Report for the United Arab Emirates*, in International Handbook on Commercial Arbitration, J Paulsson (ed.) (2016).
- Sami Tannous; Samantha Lord Hill & Sarah-Jane Fick National Report for United Arab Emirates (2020)' in ICCA International Handbook on Commercial Arbitration, Jan Paulsson and Lise Bosman (eds.), Suppl No.111 (Kluwer Law International, 2020, updated July 2020).

Simon Nesbitt and Michael Darowski, *LCIA Arbitration Rules*, in *Concise International Arbitration*, L.A. Mistelis (ed.) (2nd ed., Kluwer Law International, 2015).

Simone Hofbauer, et al., *Survey on Scrutiny of Arbitral Institutions*, in *Arbitral Institutions Under Scrutiny* (2012) 40 ASA Special Series.

Stefan Michael Kroll, *Issues Specific to Arbitration in Europe: The European Convention on International Commercial Arbitration – The Tale of a Sleeping Beauty*, in *Austrian Yearbook on International Arbitration 2013*, C. Klausegger and others (eds) (Manz'sche Verlags und Universitäts buchhandlung, 2013).

Stephen R. Bond, Marily Paralika and Matthew Secomb, *ICC Rules of Arbitration 2012*, in *Concise International Arbitration*, L.A. Mistelis (ed.) (2nd ed., Kluwer Law International, 2015).

V.V. Veeder, *National Report for England (1997)*, in *ICCA International Handbook on Commercial Arbitration*, Jan Paulsson and Lise Bosman (eds), Suppl No. 87 (Kluwer Law International, 1984, updated December 2015).

Vernon Valentine Palmer and Mauro Bussani, *Between Contract and Tort: Pure Economic Loss in Europe*, in *Comparative Remedies for Breach of Contract*, Nili Cohen and Ewan McKendrick (eds) (Hart Publishing, 2005).

Yves Derains and Laurence Kiffer, *National Report for France (1997)*, in *ICCA International Handbook on Commercial Arbitration*, Jan Paulsson and Lise Bosman (eds) Suppl No. 74 (Kluwer Law International, 1984, updated May 2013).

Articles

Abram H. Stockman, 'Now Who Shall Arbitrate' (1967) 19 Stan L Rev .

Abimbola A. Olowofoyeku, 'Immunity of Quasi-Judicial Officers' (1990) J Prof Negligence.

Alan Uzelac, 'Succession of Arbitral Institutions' (1996) 3 Croatian Arb YB.

Alphonse M. Squillante and Felice M. Congalton, 'Force Majeure' (1975) 80 Com L J 4.

Allen Sultan, 'The United Nations Arbitration Convention and United States Policy' (1959) 53(4) Am J Intl L.

Andrew T. Guzman, 'Arbitrator Liability: Reconciling Arbitration and Mandatory Rules' (2000) 49 Duke L J 12.

Asif Salahuddin, 'Should Arbitrators be Immune from Liability?' (2017) 33(4) Arb Intl.

- Benjamin C. Zipursky, 'Legal Malpractice and the Structure of Negligence Law' (1998) 67 Fordham L Rev.
- Bernardo M. Cremades, 'Should Arbitrators be Immune from Liability?' (1991) 10 Intl Fin L Rev 32, 34.
- Carl S. Hawkins, 'Retaining Traditional Tort Liability in the Nonmedical Professions' (1981) BYU L Rev.
- Carol Mulcahy, 'Arbitrator Immunity under the New Arbitration Act' (1996) 62(3) Arb 203.
- Carolyn M. Frame, "'Claims-Made" Liability Insurance: Closing the Gaps with Retroactive Coverage' (1987) 60 Temp L Q.
- Caslav Pejovic, 'Civil Law and Common Law: "Two Different Paths Leading to the Same Goal"' (2001) 32 Vict U Well L Rev.
- Charles Jarrosson, 'Intervention aux Débats' in 'Les Institutions d'arbitrage en France', Travaux du Comité Français de l'arbitrage, Paris, 19 January 1990 (1990) 2 Rev Arb.
- Christian Hausmaninger, 'Civil Liability of Arbitrators-Comparative Analysis and Proposals for Reform' (1990) 7(40) J Intl Arb.
- Christopher J. Whelan and Doreen McBarnet, 'The Crisis in Professional Liability Insurance' (1989) 14(53) Geneva Papers Risk & Ins.
- Claude R. Thomson and Annie K. M. Finn, 'Managing an International Arbitration: A Practical Perspective' (2005) 60(2) Disp Resol J.
- D. McLaren, 'Party-Appointed v List-Appointed Arbitrators: A Comparison' (2003) 20(3) J Intl Arb.
- Daniel Ruiz, 'Arbitration in Dubai' (2008) 2 Spain Arb Rev.
- Dario Alessi, 'The Distinction Between *Obligations de Résultat* and *Obligations de Moyens* and the Enforceability of Promises' (2005) 5 Euro Rev Priv L.
- Dario Alessi, 'Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability' (2014) 31(6) J Intl Arb.
- David A. Baugh and Ellen L. Flannigan, 'Protecting the Professional: Brush Up on E&O Insurance' (1999–2000) 9 Bus L Today.
- David Branson, 'Ethics of International Arbitrator' (1987) 3(1) Arb Intl.

David F. Partlett, 'Roaming in the Gloaming: The Liability of Professionals' (1992) 14 Syd LR.

David G. Owen, 'The Five Elements of Negligence' (2007) 35 Hofstra L Rev 1673.

Dennis J. Horan and Marianne E. Guerrini, 'Accountants Professional Liability: Insurance Issues, The Forum' (2012) 15(3) ABA Sec Ins Negl & Comp L518.

Dennis R. Nolan and Roger I. Abrams, 'Arbitral Immunity' (1989) 11 Indus Rel L J 228, 229.

Donald Nolan, 'Damages in the English Law of Negligence' (2013) 4(3) J European Tort L.

Edward Manson, 'The City of London Chamber' (1893) 9 L Q Rev.

Elizabeth Wilhelm, 'How Far is Too Far: "Reexamining the Continuing Extension of Arbitral Immunity to Arbitral Organisations"' (2006) 1 Disp Resol J.

Emeric Fisher, 'The Rule of Insurable Interest and the Principle of Indemnity: Are They Measures of Damages in Property Insurance?' (1981) 54 William & Mary Law School.

Emmanuel Gaillard, 'Intervention aux Débats' in 'Les Institutions d'arbitrage en France', Travaux du Comité Français de l'arbitrage, Paris, 19 January 1990 (1990) 2 Rev arb 473, 474.

Emmanuela Truli, "'Liability v Quasi-Judicial Immunity of the Arbitrator": The Case Against Absolute Arbitral Immunity' (2006) 17 Am Rev Intl Arb.

Eric Robine, 'The Liability of Arbitrators and Arbitral Institutions in International Arbitrations under French Law' (1989) 5(4) Arb Intl.

Eugene Jericho and Edward Coultas, 'Are Lawyers an Insurable Risk?' (1977) 63 ABA J 832, 834.

F. Patrick Hubbard, 'The Nature and Impact of the "Tort Reform" Movement' (2006) 35 Hofstra L Rev.

Filip De Ly, 'The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning' (1991) 12 Nw J Intl L & Bus.

Frank B. Cross and Emerson H. Tiller, 'Symposium: Positive Approaches to Constitutional Law and Theory Understand Collegiality on the Court' (2007–2008) 10(2) J Const L.

Frederick Alexander Mann, 'The UNCITRAL Model Law "Lex Facit Arbitrium"' (1986) 2(3) Arb Intl.

- G. Ellenbogen, 'English Arbitration Practice' (1952) 17(4) LCP.
- Gabrielle Kaufmann-Kohler and Thomas Schultz, 'The Use of Information Technology in Arbitration' (2005) Jus Letter.
- Gerald Asken, 'Ad Hoc Versus Institutional Arbitration' (1991) 2(1) ICC Bull 8.
- Gerald Kroll, 'The Claims Made Dilemma in Professional Liability Insurance' (1974–1975) 22 UCLA L Rev, §1.03.
- Gordon Blanke, 'Institutional Versus Ad Hoc Arbitration: A European Perspective' (2008) 9(2) ERA Forum.
- Gregory Drutchas and Adam Kutinsky, 'An Overview on Professional Indemnity Insurance' (2011) 4(4) J Ins & Indemnity L.
- Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution?' (1986–1987) 25 Colum J Transnatl L.
- Harry T. Edwards, 'The Effects of Collegiality on Judicial Decision Making' (2003) 151(5) U Pa L Rev 1639, 1645.
- Hazem Hebaishi, 'Should Arbitrator Immunity be Preserved under English Law?' (2014) 45 North East Law Review.
- Heinz F. Strohbach, 'Arbitration Between Foreign Trade Organisations of Socialist Countries and Parties from the Capitalist Economic Sphere' (1984) 4(3) Pace L Rev.
- Henry P. De Vries, 'International Arbitration: International Commercial Arbitration: A Contractual Substitute for National Courts' (1982–1983) 57 Tul L Rev.
- Hong Lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) Contemp Asia Arb J.
- Hong Lin Yu and Eric Sauzier, 'From Arbitrator's Immunity to the Fifth Theory of International Commercial Arbitration' (2000) Intl ALR.
- J. Domat, *Les Lois Civiles Dans Leur Ordre Naturel* tit 8, n° 4 (1689), quoted in Andre Tunc, 'A Codified Law of Tort-The French Experience' (1978–1979) 39 La L Rev.
- J. Gillis Wetter, 'The Internationalization of International Arbitration: Looking Ahead to the Next Ten Years' (1995) 11(2) Arb Intl.

- Jan-Mikael. Bexhed and C. Marian, ‘Insurance for International Arbitrators: Immunity from Liability, Existent Coverage, Exclusions and Control of Risk’ (2011) 8(2) *Am J Int’ L* 1.
- James Farrier, ‘Torts – Duty of Insurer to Investigate Insurable Interest’ (1959) 19(2) *La L Rev*.
- James A. Fischer, ‘The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification’ (1990) 30 *Santa Clara L Rev*.
- James F. Hogg, ‘The Tale of a Tail’ (1998) 24 *Wm Mitchell L Rev* 515, 519.
- Jenny Brown, ‘Malik v Ruttenberg: “The Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion?”’ (2009) 1 *J Disp Resol*.
- Jim Percival, ‘The Tort of Misfeasance in Public Office: Where Now after “Three Rivers”?’ (2001) 4(1) *Journal of Local Governmental Law*. 5–6.
- John Yukio Gotanda, ‘Setting Arbitrators’ Fees: An International Survey’ (2000) 33 *V and J Transnatl L*.
- John Dyson, ‘The Proper Limits of Arbitrators’ Immunity. The Master’s Lecture, The Worshipful Company of Arbitrators, 13 March 2018’ (2018) 84(3) *The International Journal of Arbitration, Mediation and Dispute Management*.
- Joseph Dainow, ‘The Civil Law and the Common Law: Some Points of Comparison’ (1966–1967) 15(3) *Am J Comp L*.
- Joyce J. George, ‘The Advantages of Administered Arbitration When Going it Alone Just Won’t do’ (2002) 57(3) *Disp Resol J*.
- Juan Ignacio Fernández Aguado, ‘Arbitration in Spain’ (2012) 1 *CMS Guide to Arb* 830.
- Kazutake Okuma, ‘Arbitration and Party Autonomy’ (2005) 38(1) *Seinan L Rev*.
- Klaus Lionnet, ‘The Arbitrator’s Contract’ (1999) 15 (2) *Arb Intl*.
- M.I.M. Aboul–Enien, ‘Arbitration under the Auspices of the Cairo Regional Centre for Commercial Arbitration’ (1986) 4(2) *Intl Tax & Bus Law*.
- Madeleine Van Rossum, ‘Concurrency of Contractual Liability and Tort Liability in a European Perspective’ (1995) 4 *Euro Rev Priv L* 539, 556.

- Mandeep Lakhan and Helmut Heiss, 'An Optional Instrument for European Insurance Contract Law' (2010) 26(71) *Utrecht J Intl & European L*.
- Mark A. Sponseller, 'Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators' (1992–1993) 44 *Hastings L J*.
- Marshall E. Lippman, 'Arbitration as an Alternative to Judicial Settlement: Some Selected Perspectives' (1972) 24 *Me L Rev*.
- Martijn van Kogelenberg, 'Failure in Performance of an Obligation in Dutch Law: A Confusing Mix of National, Transnational, and Linguistic Interpretation' (2016) 30(17) *BW-krant Jaarboek* 90.
- Martin Domke, 'The Arbitrator's Immunity from Liability: A Comparative Survey' (1971) 3U *Toledo L Rev*.
- Martin T. Fletcher, 'Standard of Care in Legal Malpractice' (1968) 43(3) *Ind L J* 772.
- Matthew Rasmussen, 'Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France' (2002) 26(6) *Fordham Intl L J*.
- Maureen A. Weston, 'Re-Examining Arbitral Immunity in an Age of Mandatory and Professional Arbitration' (2003–2004) 88 *Minn L Rev*.
- Mercedes Torres Lagarde, 'Liability of Arbitrators in Dubai: Still a Safe Seat of Arbitration' (2015) 33(4) *ASA Bull*.
- Michael D. Moberly, 'Immunizing Arbitrators from Claims for Equitable Relief' (2005) 5(2) *Pepp Disp Resol L J* 325.
- Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' (2007) 24(3) *J Intl Arb*.
- Michael R. King, 'Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability' (1978) 20 *Ariz L Rev* 549, 553.
- Michael Mustill, 'Cedric Barclay Memorial Lecture' (1992) *Arb*.
- Michael R. Powers and Larry Y. Tzeng, 'Risk Transformations, Deductibles, and Policy Limits' (2001) 68(3) *JR & I*.
- Murray L. Smith, 'Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment' (1992) 8(1) *Arb Int*.

- N. D. Hooker and L. M. Pryor, 'Professional Indemnity Insurance' (1990) 32 J Staple Inn Actuarial Soc 37, 38.
- Nancy Dunnan, 'Saving on Liability Insurance' (1988) 74(2) ABA J 96.
- Nassib G. Ziade, 'Reflections on the Role of Institutional Arbitration Between the Present and the Future' (2009) 25(3) Arb Int.
- Nathan B. Oman, 'A Theory of Civil Liability' (2014) 21 Geo Mason L Rev.
- Omar E. García-Bolívar, 'Comparing Arbitrator Standards of Conduct in International Commercial Trade Investment Disputes' (2006) 60 Disp Resol J.
- Orkun Akseli, 'Appointment of Arbitrators as Specified in the Agreement to Arbitrate' (2003) 20(3) J Intl Arb.
- Ottoarndt Glossner, 'Sociological Aspects of International Commercial Arbitration' (1982) 10 Intl Bus Law.
- P. I. Benjamin, 'Notes – The European Convention on International Arbitration' (1961) 37 Brit YB Intl L.
- Paul J. Krause, 'Disregarding Manifest Disregard: Watts Shifts Standard for Vacating Arbitrators' Decisions' (2005) 72 Def Counsel J 79.
- Paul J. Zwier, 'Cause in Fact in Tort Law A Philosophical and Historical Examination' (1982) 31(4) DePaul L Rev.
- Peter Cane, 'Liability Rules and the Cost of Professional Indemnity Insurance' (October 1989) 14(53) Geneva Papers Risk & Ins.
- Peter B. Rutledge, 'Toward a Contractual Approach for Arbitral Immunity' (2004–2005) 39 Ga L Rev.
- Pierre Lalive, 'Irresponsibility in International Commercial Arbitration' (1999) 7 Asia Pac L Rev.
- Richard J. Mattera, 'Has the Expansion of Arbitral Immunity Reached its Limits after *United States v City of Hayward*?' (1996–1997) 12 Ohio St J Disp Resol 779, 781.
- Richard J. Graving, 'The International Commercial Arbitration Institutions: How Good A Job Are They Doing?' (1989) 4(2) AmU Intl L Rev.

- Richard K. Burke, 'Privileges and Immunities in American Law' (1985–1986) 31 *SDL Rev* 1, 3.
- Rudolph Alexander Jr., 'Social Workers and Immunity from Civil Lawsuits' (1995) 40(5) *Social Work*.
- Russell G. Thornton, 'Not-So-Obvious Considerations from Professional Liability' (2005) 18(4) *Proc (Bayl Univ Med Cent)*.
- Sundra Rajoo, 'Institutional and Ad hoc Arbitrations: Advantages and Disadvantages' (2010) *The Law Review*.
- Sandy Steel, 'Causation in English Tort Law: Still Wrong after All These Years' (2012) 31(2) *U Queensland L J*.
- Sol Kroll, 'The Professional Liability Policy "Claims Made"' (1977–1978) 13 *Forum* 842, 843.
- Stephen Hayford and Ralph Peeples, 'Commercial Arbitration in Evolution: An Assessment and Call for Dialogue' (1995) 10 *Ohio St J Disp Resol* 343.
- Stephen J. Choi, 'The Problem with Arbitration Agreements' (2003) 36 *V and J Trans Nat'l L* 1233, 1234.
- Steven L. Smith, 'Enforcement of International Arbitral Awards under the New York Convention' in Richard Chernick and others (eds), *The Practitioner's Handbook on International Arbitration and Mediation* (3rd edn Juris Publishing, 2012).
- Stephen Netherway, 'Professional Indemnity Insurance – Scope of Cover and Claims Management: An Insured's Guide' (1998) 6(11) *Intl ILR* 356.
- Stephen R. Bond, 'The International Arbitrator: From the Perspective of the ICC International Court of Arbitration' (1991–1992) 12 *Nw J Intl L & Bus*.
- Susan D. Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' (2000) 20 *NY Sch J Intl & Comp L*.
- Susan D. Franck, 'The Role of International Arbitrators' (2006) 12 *ILSA J Intl & Comp L*.
- Susan Saab Fortnei, 'Legal Malpractice Insurance: Surviving the Perfect Storm' (2004) 28 *J Leg Profession*.
- T. Leigh Anension, 'Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers' (2004) 31(4) *Pepp L Rev*.

- Thomas E. Carbonneau, 'Arbitral Justice: The Demise of Due Process in American Law' (1995–1996) 70 Tul L Rev.
- Thomas E. Carbonneau, 'The Exercise of Contract Freedom in Making of Arbitration Agreements' (2003) 36 Vand J Transnatl L.
- Thomas J. Stipanowich, 'Arbitration and Choice: Taking Charge of the New Litigation (Symposium Keynote Presentation)' (2008–2009) 7 DePaul Bus & Comm L J.
- Thomas J. Stipanowich, 'Rethinking American Arbitration' (1987–1988) 63(3) Ind L J.
- Tom Jones and Sebastian Perry, 'Dubai centre escapes liability for “invalid” appointment' (2019) Global Arbitration Review.
- Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) 55(4) Intl Org.
- Werner Melis, 'Function and Responsibility of Arbitral Institution' (1991) 13 Comp L YB Intl Bus.
- Whither John Lowry, 'The Duty of Good Faith in UK Insurance Contracts' (2009) 16 Conn Ins L J 97, 98.
- William L. Bostleman, 'Aspen Exploration Corp. v Sheffield: “The Status of Official Immunity in Alaska”' (1990) 7 Alaska L Rev.
- William K. Slate II, 'International Arbitration: Do Institutions Make a Difference' (1996) 31 Wake Forest L Rev.
- William Tetley, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) 60 La L Rev.
- William H. Hope, 'Whither Indemnity' (1962) Ins L J.
- Yat-Sen Li, 'Arbitral Immunity: A Profession Comes of Age' (1998) 64(1) Arb.
- Yu Hong-Lin and Laurence Shore, 'Independence, Impartiality, and Immunity of Arbitrators – US and English Perspectives' (2003) 52(4) ICLQ.
- Yassin Ahmad Alqudah and Abdullah Ahmed Alkhseilat, 'The Extent of the Arbitrator's Immunity from Civil Liability Compared to the Judge's Immunity (Comparative Study)' (2020) 11 J Advanced Res L & Econ.

Online Articles

Adam P. Doherty, et al., ‘A Tale of Two Towers: When Professional Liability and D&O Coverage Are Both Implicated’ (ABA, Litigation Section, Insurance Coverage Litigation Committee CLE Seminar, March 2012).

B. Cremades and Asociados (trans), ‘Judgment of the Spanish Supreme Court 102/2017, February 15, 2017, Liability of Arbitrators: The “Puma” Decision’.

Dubai Court of Cassation, Case No. 212/2014 Gordon Blanke, ‘The Liability of Arbitrators in the UAE: Quod novi sub sole?’ Kluwer Arbitration Blog.

Houthoff Buruma, ‘National Report: Mandatory Insurance in the Netherlands’ (2010) AIDA World Congress.

Huw Evans, ‘Identifying the Challenges of a Changing World: The Trends Facing Insurers Towards the 2020s Association of British Insurers 2013’.

Michel Cannarsa, ‘Compensation for Personal Injury in France’ (2002) 8(15) Cardozo E-Bull 1.

Ramon Mullertat, “‘The Liability of Arbitrators’: A Survey of Current Practice’ (2006) Intl Bar Assoc, Commission on Arb.

Villanova University Faculty Congress (2006) Definition of Collegial Governance.

Official Report of the Committee on Arbitration Bill 1996, Grand Committee, UK Parliament.

Report of the Executive Directors on the ICSID Convention, International Centre for Settlement of International Disputes, World Bank Group.

Report on the Arbitrator’s Liability: Ad hoc Committee, Les Club des Juristes.

Appendix I

Interview Questions Providing Empirical Basis for Research Study

1. Are you familiar with liability arising from arbitration?
2. Do you insure against the professional liability of arbitrators and arbitral institutions? If yes, who is covered under the insurance policy?

3. Who is more concerned with insurance – arbitrators or arbitral institutions?
4. Does the extent of this concern change from arbitrators to arbitral institutions?
5. Do most of the arbitral institutions insure, or only the leading institutions?
6. How does the insurance take place (general agreement or case-by-case)?
7. What kind of policies provided to cover the risk (claims-made policy or occurrence-made policy)?
8. What if coverage is granted on claims made basis and the insured (arbitrator, arbitral institution) asked for occurrence-made policy – would the insurer accept?
9. Does the insurer provide you a tailor-made policy designed for arbitrators, arbitral institutions and their risk profile or is it based on professional liability policies for other professions? If so, for which professions?
10. If the arbitrator has a personal policy and, at the same time, is covered by a policy under a specific arbitral institution, which policy comes first?
11. How is the rate of insurance decided (maximum, minimum or flat rate)?
12. Does it change according to the business, nationality of parties, industry and nationality of arbitrator, arbitral institution?
13. Does the amount of dispute influence the rate of insurance?
14. Is it the amount of the award or the dispute?
15. How are deductibles set by the insurance company while insuring against professional liability of arbitrators and arbitral institutions?
16. When does insurance take place – at the beginning of the case or after the case?
17. What does the insurance broker/underwriter need from the insured party (arbitrator, arbitral institution) to disclose and when?
18. What is the extent of coverage for risks?
19. What is the extent of limitations?
20. If there are limitations under the applicable law, would the broker still insure against those limitations, such as in case of fraud or wilful misconduct, and not with the intent to defraud the insurance company?

21. Does insurance cover civil actions resulting from crimes (corruption, forgery) committed by the insured party (arbitrator, arbitral institutions)?
22. Could changing the insurance company change the premium within the same country?
23. Could changing the insurance company change the premium among different countries?
24. Are there any specific countries raising specific questions as to geographical standpoint, like the USA?
25. Is it advisable to shop around and is shopping useful?
26. Is it possible to get different premium from different companies for the same risk covered?
27. Is the issue of arbitrator immunity taken into consideration while deciding the premium?
28. Is the issue of the arbitral institution immunity taken into consideration while deciding the premium?
29. Does the policy include any provision like time limit or notification period for reporting the risk if it occurred?
30. Do you reinsure against liability of arbitrators and arbitral institutions?
31. What are the general elements, not covered above, that the insurance company takes into account in deciding the premium?