

Kluwer Arbitration Blog

The Paris Court of Appeal Rules that the Brussels I Recast Regulation is Inapplicable to Liability Claims against Arbitrators

Claudia Cavicchioli (Linklaters LLP) and Guillaume Croisant (Linklaters) · Monday, July 26th, 2021

In a [judgment](#) dated 22 June 2021, the Paris Court of Appeal ruled that liability claims against arbitrators fall within the “arbitration exception” of Article 1(2)(d) of the [Brussels I recast regulation](#), leading to the application of French private international law rules to determine the competent courts. The Paris Court of Appeal further considered that French courts have jurisdiction to hear the claim on the basis that the seat of the arbitration, located in France, constituted the place where the arbitrators’ services were performed (the applicable jurisdiction criteria under French private international law rules). This post discusses the jurisdictional question raised before the Paris Court of Appeal, as regards liability claims against arbitrators.

Factual Background and First Instance Decision

A Qatari and an Emirati company, both active in the automotive industry, started ICC arbitration proceedings pertaining to the non-renewal of contractual arrangements. The seat of the arbitral tribunal was formally in Paris, but the three arbitrators were domiciled in Germany and the hearing and the deliberation took place in Germany. The award, rendered in favour of the Emirati company, was challenged by the Qatari company before the French courts on the basis that one of the arbitrators omitted to mention the links between his law firm and the group of the Emirati company. The Paris Court of Appeal annulled the award by a [judgment dated 27 March 2018](#) because of the arbitrator’s breach of his disclosure obligations. Said judgment was [confirmed by the French Supreme Court](#).

The Qatari company then claimed damages against this arbitrator before the French Court of First Instance (*Tribunal judiciaire*), which held – on 31 March 2021 – that the Brussels I recast regulation was applicable to the claim but that French courts did not have international jurisdiction on the basis of Article 7(1) of the Brussels I recast regulation. Pursuant to this provision, the courts competent to hear claims pertaining to an agreement for the provision of services are the courts of the Member State where, under the contract, the services were provided or should have been provided. In the opinion of the *Tribunal judiciaire*, the fact that the award was deemed to be rendered in Paris (as stated by the applicable terms of reference and Article 32(3) of the 2021 ICC Rules), the seat of the proceedings, would be “*fictitious*” and insufficient to consider that the parties’ intention would have been for the services to be performed in France. The *Tribunal*

judiciaire ruled that the arbitrator’s activities were primarily performed in Germany, which was the country of domicile of the arbitrator and where the hearing and the arbitral tribunal’s deliberation were held.

The Qatari company appealed this decision before the Paris Court of Appeal on 26 April 2021.

Is the Brussels I Recast Regulation Applicable to Liability Claims against Arbitrators?

According to Article 1(2)(d) of the [Brussels I recast regulation](#), the regulation is not applicable to “arbitration”. In view of the debates of the scope of this so-called “arbitration exception” under the Brussels Convention and the Brussels I regulation, the predecessor to the Brussels I recast regulation, a new recital 12 was added to the latter, which provides that:

“[...] this Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award”.

As underlined by the Paris Court of Appeal, the list of excluded proceedings encompassed in the arbitration exception is thus not exhaustive.

Referring to the CJEU’s *Marc Rich* case ([Case C-190/89](#) of 25 July 1991), where the CJEU held that Member States “*intended to exclude arbitration in its entirety, including proceedings brought before national courts*” (para. 18), the Paris Court of Appeal considered that:

“An action to hold an arbitrator liable after the annulment of an arbitral award based on the arbitrator’s failure to disclose is closely linked to the constitution of the arbitral tribunal and to the conduct of the arbitration, since it aims at assessing whether the arbitrator has carried out, in accordance with their obligations under his arbitration contract, his mission, which is part of the implementation of the arbitration.

This action is thus an arbitration matter, even if it is governed by general tort law” (paras. 26-27; free translation).

It could be argued that, following *West Tankers* ([Case C-185/07](#) of 10 February 2009), where the CJEU ruled that anti-suit injunctions based on the existence of an arbitration agreement fell within the scope of the Brussels I recast regulation, the case law of the CJEU has evolved towards a more restrictive approach of the arbitration exception than its approach in *Marc Rich*. However, according to many commentators (see, for instance, [this contribution](#)), the decision may have been explained by the specificity of the case and the willingness of the CJEU to preclude anti-suit injunctions among EU courts. What the position of the CJEU would have been with respect to liability claims against arbitrators, if the Paris Court of Appeal had referred the question to the

CJEU, is thus uncertain.

If the solution reached by the Paris Court of Appeal were to be upheld, it would mean that the recognition and enforcement of judgments over the liability of arbitrators would not benefit from the regime provided for by the Brussels I recast regulation (which provides for limited grounds for refusal of enforcement and recognition, and abolishes the necessity to go through exequatur proceedings in the Member State where enforcement is sought).

Where do Arbitrators Provide their Services?

Having concluded that the Brussels I recast regulation was inapplicable, the Paris Court of Appeal had to apply French domestic private international law. In accordance with [Article 46 of the French Code of Civil Procedure](#), the defendant may, in addition to the courts of the domicile of the defendant, seize the courts of the country where the contractual services were performed.

The Court ruled that such place was determined by the seat of the arbitration, on the basis of the below reasoning:

“In international arbitration, unless otherwise agreed by the parties, the State court of the place where the service was provided for the purpose of ruling on an action for liability brought against the arbitrator in the performance of the arbitration contract is the court in whose jurisdiction the seat of the arbitration is located.

Indeed, the arbitrator’s contract is part of the mixed nature of arbitration, contractual by its source and jurisdictional by its purpose, and derives from the arbitration agreement to which it is closely linked.

Thus, an arbitrator’s service consists in the performance of his or her mission to settle the dispute submitted to him or her by the parties and includes the rendering of an award at the seat of the arbitration chosen by the parties or in agreement with them.

There is therefore a need, in view of the particular nature of the arbitrator’s contract, closely linked to the arbitration agreement, to consider that the place of performance of the arbitrator’s services is at the seat, even though the arbitration proceedings and the arbitrators’ deliberation may, by agreement between the parties, have taken place at other places.” (paras. 30-33, free translation)

As the seat of the arbitration was Paris (France), the Paris Court of Appeal held that French courts had international jurisdiction over the claim and quashed the *Tribunal judiciaire*’s decision.

Favouring the seat of the arbitration as the applicable criterion in order to localise the performance of the arbitrator’s services, rather than a number of factual circumstances (as held by the *Tribunal judiciaire*), has the benefit of enhancing legal certainty. While it was clear in this case that all of these factual circumstances pointed to Germany (as the three arbitrators were domiciled in Germany and all the procedural steps took place in Germany in practice), this may be less clear in

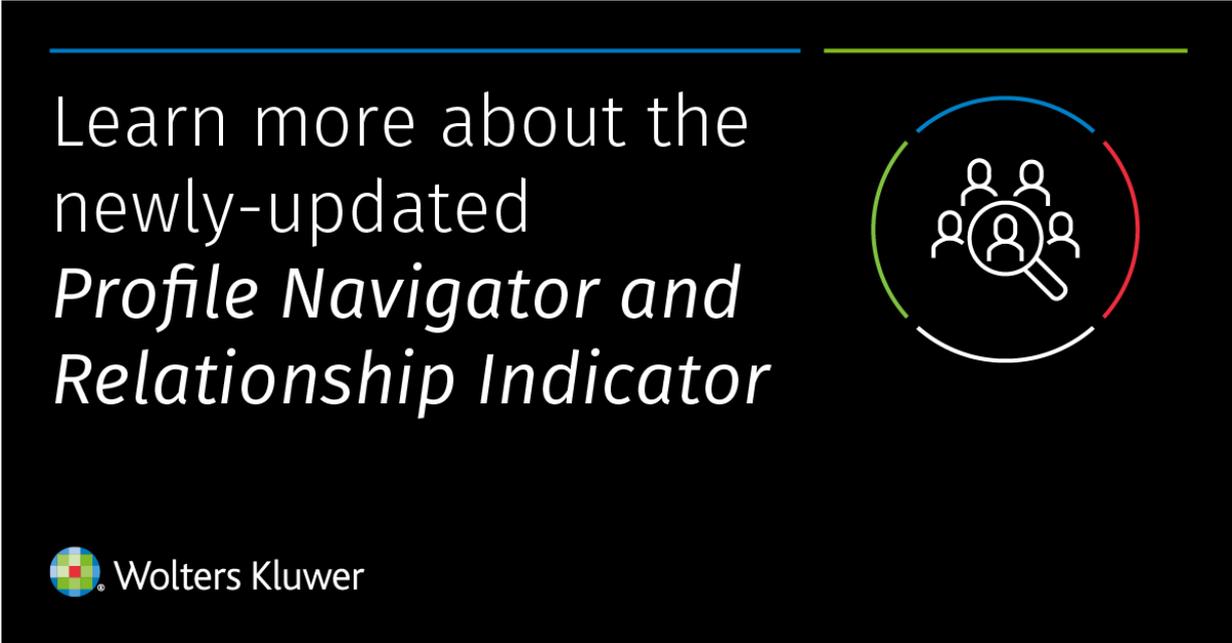
many international arbitrations where the factual circumstances do not point to a single state. Focusing on the seat, rather than these factual criteria, also appears to be more in line with the parties' intent in a case, such as the one at hand, where the terms of reference provide that (i) the arbitral tribunal may hold the hearing wherever it deems appropriate without impacting the seat of the arbitration and (ii) awards are deemed to be rendered at the seat.

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