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The Law Applicable to Arbitrators' Civil Liability from a European Point of View

Tadas Varapnickas (TGS Baltic) · Monday, March 25th, 2019 · Young ICCA

Without any doubt, international commercial arbitration found its place in the system of international dispute settlement. Many natural and legal persons choose to solve their disputes via the means of arbitration and in most of the cases arbitration is international in many aspects: Parties are from different countries, arbitrators are of different nationalities, sitting in a neutral arbitral seat. Consequently, many laws may influence arbitration proceedings. One of the issues in respect of applicable law is what law should govern arbitrators' civil liability. The issue of arbitrators' civil liability is in itself a taboo in international commercial arbitration, and also as such is the question of applicable law. This blog post, based on the author's PhD thesis,[1)] intends to provide some guidelines regarding this issue.

To begin with, it is the parties to the dispute who are interested the most in the arbitrators' civil liability primarily because they are subject to the arbitrator's decision, and because the arbitrators provide *paid* service to them. Arbitrators' misconduct can appear in many aspects. An example of misconduct could be a failure to remain impartial throughout the proceedings, or a failure to render an enforceable award. Failures may lead to the delay of the proceedings or even to the annulment or non-recognition of the award. Consequently, unsatisfied parties may see arbitrators as the ones to be blamed for the damages incurred. Although often parties fail to prove all the conditions of arbitrators liability because the standard of liability is very high and sometimes even equal to the immunity of a state judge, there are examples when arbitrators were found liable for their own misconduct, for example, in the famous Puma case in Spain. The fact that there is no unanimous approach to arbitrator's liability makes this issue even more important and worth analyzing.

Before determining the law applicable to arbitrators' civil liability, one needs to examine the relationship between the parties and the arbitrators. Neither the New York Convention nor the UNCITRAL Model Law help in this examination as both acts are silent on arbitrators' status. Although the convention and the laws are silent, the arbitration doctrine provides quite a clear answer to this question. According to Born, "*the better view is that arbitrators' status, rights and obligations are the result of a contract which operates within, and incorporates, a specialized legal regime – that regime being the international and national law framework governing the international arbitral process.*"[2)] Most of the authors also believe that this contract between the parties and the arbitrators should be qualified as a *sui generis* contract.[3)] Given the arbitrators and the parties' contractual relationship, the law governing the arbitrator's contract would also govern the issue of arbitrators' liability. Therefore, in order to determine what law will apply to the civil

liability of arbitrators, it is necessary to determine the law applicable to the arbitrator's contract.

The general rule of private international law is simple: Parties are free to choose the law applicable to their contractual relationship.This rule is provided, for example, in Article 3(1) of the Rome I Regulation applicable within the European Union, Article 116(1) of the Swiss Federal Code on Private International Law, but also in other jurisdictions. However, the problem is that in most of the cases parties to the arbitrator's contract do not agree on the applicable law, leaving this issue to be determined by the rules of private international law. On the other hand, private international law usually does not provide an answer to what law to apply to the arbitrator's contract, and neither do the rules say what law governs *sui generis* contracts as they may differ in many aspects. Therefore, it is necessary to determine what types of contracts have the closest link to arbitrator's contract. Again, the doctrine provides several stances.

Some authors[4)] and courts[5)] consider a contract of agency to be the closest to an arbitrator's contract since the arbitrators act as representatives of the parties. In the author's opinion, this approach to the arbitrator's contract should not be applicable. If it was claimed that arbitrators are parties' representatives, then it would be impossible to explain why arbitrators have an obligation to be impartial and neutral. This approach is also inconsistent as it fails to explain why arbitrators cannot reveal to the parties what they discussed when adopting the award since normally parties' representatives have an obligation to provide reports on the actions undertaken for the principal. Therefore, the contract of agency should not be regarded as having the closest connection with the arbitrator's contract.

As the agency approach is not widely accepted, the consideration that the arbitrators are service providers is more readily accepted.[6)] Still, although the approach that arbitrators are service providers is tempting, the arbitrator's contract cannot be purely qualified as the contract for the provision of services since it would lose its judicial aspect which is inseparable from arbitrator's functions. The supporters of this approach refuse to agree that arbitrators act as *quasi*-judges; in their opinion, this judicial function should not play any role when determining what type of legal relationship develops between the parties and the arbitrators. Having said that, it does not mean that rules for the provision of services cannot be applied *mutatis mutandis* to the arbitrator's contract. Through such a *sui generis* approach, it is not denied that arbitrators provide services to the parties, though it is also emphasized that the nature of these services is not ordinary but rather similar to the functions entrusted by the states to national judges.

If the arbitrator's contract is closely linked to the contract for the provision of services, Article 4(1)(b) of the Rome I Regulation provides that the latter contract shall be governed by the law of the country where the service provider has his/her habitual residence. This leads to a possibility that in the case of an arbitral tribunal consisting of three arbitrators from three different countries, three different laws may govern arbitrator's contract and, ultimately, arbitrators' civil liability. In other words, it would be possible for every single arbitrator to be liable under different legal rules. This would not be acceptable since the rights and obligations of arbitrators should be equal from the parties' perspective.

Yet, even if one disagrees to apply the rules of the provision of services *mutatis mutandis* to the arbitrator's contract, the result would remain the same: Article 4(2) of the Rome I Regulation determines that where the contract is not covered by general rules, the contract shall be governed by the law of the country where the party required to provide the characteristic performance of the

contract has his/her habitual residence, which would again lead to the application of the arbitrators' national laws. This would create undesirable consequences because different laws may provide for different standards concerning arbitrators' liability. This may lead to situations where the claimant considers all three arbitrators to be liable for the same act, for example, failure to render an enforceable award, but in practice, some of the arbitrators would be liable while others would not.

Therefore, it is more desirable for Article 4(3) of the Rome I Regulation to apply. Pursuant to this provision, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than indicated in other paragraphs, the law of that other country should apply. The same is provided in Article 117(1) of the Swiss Federal Code on Private International Law.

In the author's opinion, for the purposes of the said provision, the country with "a closer/the closest connection to the contract" should be considered to be *lex arbitri*. *Lex arbitri* regulates the numerous procedural aspects of a proceeding, and arbitrators are bound by the mandatory provisions of the seat of arbitration, which speaks for the law of the seat of arbitration as the law most closely connected to the arbitrator's contract. For the same reason, it is the law of the seat of arbitration that should be applied to the issue of arbitrator's civil liability. This approach would also allow avoiding the above-described problem when the arbitrator's contract may be governed by more than one law, and it would ensure the equality of arbitrators and predictability of their liability to the parties.

References

?1 Varapnickas, Tadas. *Arbitrator's civil liability and its boundaries*. Vilnius: Vilniaus universiteto leidykla, 2018. This PhD thesis was defended at Vilnius University on December 3, 2018. A summary of the thesis is available in English here.

?2 BORN, Gary B. *International Commercial Arbitration. Second edition. Volume II: International Arbitral Procedures*. Alphen ann den Rijn: Kluwer Law International, 2014, p. 1973.

?3 KAUFMANN-KOHLER, Gabrielle, RIGOZZI, Antonio. *International Arbitration: Law and Practice in Switzerland*. Oxford: Oxford University Press, 2015, p. 232; *Fouchard, Gaillard, Goldman on International Commercial Arbitration. Edited by Emmanuel GAILLARD, John SAVAGE. The Hague: Kluwer Law International, 1999, p. 607-608*.

?4 YU, Hong-Lin. Who is an arbitrator? A study into the issue of immunity. *International Arbitration Law Review*, 2009, vol. 12(2).

?5 George Watts & Son, Inc. v. Tiffany and Co., 248 F.3d 577 580 (7th Cir. 2001).

?6 LEW, Julian D. M., MISTELIS, Loukas A., KROLL, Stefan M. *Comparative International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2003, p. 277; ALESSI, Dario. Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability. *Journal of International Arbitration*, 2014, vol. 31(6), p. 753-754

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