THE ARBITRATOR'S LIABILITY
REPORT FROM THE CLUB DES JURISTES

Ad Hoc committee
JUNE 2017

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INTRODUCTION

Why this study on arbitrators’ liability? Quite simply, because the value of international arbitration is currently being questioned. Arbitration is experiencing a reputational crisis. The multiplication of parallel or subsequent litigation in arbitration proceedings, some of which is directed against arbitrators, is a recent trend that reflects a break from consensus. It therefore appeared necessary for the authors of this report to draw up the current state of arbitrators’ disciplinary, civil and criminal liability, in French law and in comparative law, enlightened by existing doctrine, supported by case law and informed by experience. Indeed, the law on arbitrators’ liability provides, beyond its function of regulating individual behavior, an indicator of the trust given to arbitration as an institution. The question is also important for the attractiveness of Paris, as a center of excellence in international arbitration.

The questioning of arbitration is a growing phenomenon. The Tapie/CDR case is on everyone’s mind: the circumstances of this case show that the consensus that forms the basis of arbitration remains fragile. Although the greatest care must be taken where the case is still pending, it can already be seen that, independently of possible civil and criminal liability, the arbitral tribunal was flawed by the lack of independence of one arbitrator and the negligence of the other two. This finding alone, made worse by the personality of the arbitrators concerned, is likely to seriously undermine the reputation not only of arbitrators but also of arbitration as an institution. However, the award was retracted, showing that the legal arsenal was capable of defending arbitration.

But this is not the whole story. Challenging arbitration also affects the international sphere. The drafts of free trade treaties negotiated by the European Union with the United States and Canada have given rise to targeted criticism, both unexpected and unnecessary, if not unfair, on the place of arbitration in dispute resolution between investors and States.
This criticism – a composite made up of a small number of interesting procedural propositions and an extraordinary mass of exaggerations and inaccuracies – have been relayed and amplified without any verification but with zeal by many parliamentarians and activists on social networks, to the point of having a global impact. Therefore, within a few months, international arbitration had become the symbol of all the injustices produced by globalization; it created an uproar which made any argument based on verified facts and rational demonstrations inaudible, and any call for a debate to explore the real trains of thought became useless.

At the same time, other cases show that certain disappointed litigants no longer hesitate before bringing civil liability claims against arbitration centers and arbitrators, or even claims before the criminal courts, most often challenging an arbitrator or seeking annulment of the award.

This development is disappointing as it denotes a decline in the general acceptance of international arbitration to such an extent that it appears to legitimize the fact that the European Union and many European states, including France, are questioning the practice as the only truly international and neutral method of dispute resolution for disputes arising out of international trade and investment. The trivialization and accentuation of para-arbitral and post-arbitral disputes is also regrettable, where in the past such remedies would have seemed out of place and contrary to the spirit of arbitration. But it can also be seen as a proof of its success and the ever-increasing demands placed upon it. Furthermore, dwelling on the matter accomplishes nothing and is as useless as adopting the Coué method, repeating, like Pangloss, that all is for the best in the best of all worlds. As vain as it is counterproductive, the denial of reality does not silence or erase the memory of criticism any more than fear makes danger disappear; worse, denial may reinforce the contradiction, exasperate feelings of frustration and justify the often-heard suspicions of grouping and corruption – is arbitration not sometimes compared to a mafia and the silence of its actors with regard to criticism that they consider unworthy qualified as omerta?

Arbitrators are all the more exposed because they provide a paid service. International arbitration has become an industry in its own right. This is reflected in the development of arbitration centers worldwide and the
competition in arbitration venues – and not just the competition between Geneva, London and Paris, who compete for the top spot as the most chosen venue. We also note that some arbitrators have made this activity a real profession, establishing a team of collaborators and assistants around them, dedicated to their practice as a serial arbitrator. This professionalization of arbitration, an activity with high added value, weighs, even if unconsciously, on the expectations of users in terms of ethics and liability. The time and care devoted to the detailed investigation of the case and the fees received in return give rise to a legitimate expectation for the parties that arbitral proceedings are conducted fairly (i.e. fair, honest, impartial and reasonable duration) and result in a fair arbitration award. This is why public acceptance of arbitration as a general institution depends on the quality of each particular arbitration, which is potentially an opportunity to reinforce or detract from its reputation.

It would be unfair to imagine that self-regulation is foreign to international arbitration. Quite to the contrary, French law was successfully reformed and modernized in 2011, once again becoming a worldwide model in law. Arbitral institutions, first and foremost the International Court of Arbitration of the International Chamber of Commerce, exercise vigilant peer pressure. This is characterized mainly by a set of measures taken in application of the Arbitration Rules to ensure the independence and impartiality of arbitrators, as well as the promptness of the tribunal's constitution, arbitration operations and drafting the award. Beyond this, the academic community, institutions and scientific and professional associations that lead the arbitration community, do not spare their efforts to share the culture of arbitration and in particular the idea that the institution of arbitration is a common asset that all arbitration centers, arbitrators and counsel must be committed to preserving in the name of a well-understood balance between the ideal of justice and individual interests. One could therefore assume, as a categorical arbitral imperative, that the principle of ethical arbitral liability requires each arbitrator to behave in such a way that the effects of their actions are compatible with the expected public use of the arbitral institution.

But without denying the reality of this shared ethic, the “club” spirit and implicit self-regulation are not enough. Contemporary demands
for transparency lead to justifying concrete and effective modalities for self-regulation to be taken seriously. One of the purposes of this report is to question the disciplinary regulation applied to arbitration. The question of adapting disciplinary procedures and sanctions to the regulation of arbitral justice should be taken seriously. The analysis of the English practice by the Chartered Institute of Arbitrators will lead to questioning the advisability of accepting such disciplinary procedures under French law and proposing some possible solutions.

It will also be a question of judicial regulation. Accepting arbitrators’ liability, like the liability of arbitration centers, imposes itself as a necessary part of the freedom and the contractual will which are the basis of arbitration and the essential corollary of the opening of the field of potential arbitrators. In the same way that respect for the will of the parties to resort to arbitration is ensured by jurisdictions who apply the Kompetenz-Kompetenz principle, providing assistance as a support judge and refraining from revising the merits of the award, State courts can be judges of requests to recuse, judges of the award, or even judges of an arbitrators’ liability for breach of duties. This is tantamount to saying that the arbitrator, who is contractually engaged by the parties to the dispute with a judicial mission to settle the dispute between them, must fulfill this mission of trust and assume the contractual liability. As a private judge, the arbitrator is a contractual service provider.

However, it is necessary to take into account the jurisdictional nature of the services provided to the arbitrator in order to define a well-developed, balanced and efficient legal regime. The dual nature of the arbitral mission justifies taking into account the jurisdictional specificity of the contractually vested mission: an arbitrator’s liability cannot in principle be incurred on account of what they have ruled, except for serious personal misconduct, fraud, gross negligence or denial of justice. But with regard to the expected service, alongside the content of the decision, the arbitrator is liable for his misconduct during the course of the arbitration proceedings. It is therefore important to clarify this area, even though the obligations of loyalty and celerity are set out in Article 1464, paragraph 3, of the Civil Procedure Code applicable to domestic and international arbitration, these duties apply to both arbitrators and the parties in the
conduct of the proceedings, so that, except in the case of a formal and exclusive breach attributable to the arbitrator, most often linked to an obligation to achieve a result, it is fortunate that liability is not self-evident. This study will also review the effectiveness of limited liability clauses in the arbitrator contract and the extent of reparable damage.

At the same time, it should be noted that certain common law rights provide the arbitrator with a relative but not exclusive jurisdictional immunity. Claiming institution of immunity for arbitrators, like judicial immunity, does not seem conceivable in the French legal system. However, the comparative analysis carried out here leads to the conclusion that the solutions are essentially equivalent. It should be noted, first of all, that although the recent trend shows a more intense judicial activity than in the past, cases of arbitrators' being convicted by French courts remain extremely rare: five in all since the beginning of the nineteenth century, including two since the beginning of the twenty-first century (once for untimely resignation, twice for lack of independence and twice for exceeding the deadline). Thus, the majority of state laws recognize the possibility of holding arbitrators liable to some extent when they fail to respect the time limits they set. It can even be argued that the civil liability system, as conceived by French law, developed to ensure greater integrity of arbitral justice than systems that provide for arbitrators’ immunity.

French law therefore provides a balanced system, ensuring that arbitration is not paralyzed by abusive judicial remedies, while at the same time allowing the possibility, later on, of arbitrators being held liable for seriously breaching their duties and obligations.

However, in terms of criminal liability, and particularly with regard to the initiation of public action, adjustments seem necessary in order to take into account the specific nature of arbitration. While it would be excessive to grant criminal immunity to an arbitrator for serious offenses such as corruption or forgery, it is legitimate to protect arbitral proceedings against the misuse of criminal proceedings. A solution could be to reserve the implementation of criminal proceedings to the public prosecutor, for example to the National Financial Prosecutor. The French system allows public action to be initiated by complaint with filing of civil proceedings in criminal proceedings, which is not possible in most countries and is a
great disadvantage to French competitiveness as a place of arbitration, as its effects on arbitrations concerning complaints with civil proceedings can be disastrous.

It is important that arbitrators’ liability under French law does not lapse within French law on international arbitration, which is rightly regarded as a global reference: the modernity and durability of its conception, its methods and its solutions, its predictability, its flexibility and its clarity have made Paris one of the most popular places for international arbitration, if not the most popular. This arbitration law which distinguishes Paris, beyond the texts now codified, is anchored in a proven tradition witnessed by the presence in Paris in the wake of the International Chamber of Commerce and its International Court of Arbitration, the world’s largest international community of practitioners, a leading academic population and specialized state jurisdictions. The combined efforts of these actors continue to ensure, in the long term, the regulation of international arbitration and the continuation of the pre-eminent role played by Paris in the world of international arbitration.
Under French law, the question of arbitrators’ liability is not governed by any textual provisions. However, there is now one article relating to the (inherent) obligations of the arbitrator contract, according to which “Parties and arbitrators act expeditiously and in good faith in the conduct of the proceedings.” This reminder of the parties and arbitrators’ obligations necessarily plays a role in identifying cases in which arbitrators can be held liable. Nevertheless, the usefulness of such provision depends on the prior determination of the principles governing the arbitrator’s liability.

Given the legislator’s silence and in the absence of any disciplinary system, case law, judges of lower courts to begin with, followed by those from the French Supreme Court (“Cour de cassation”), have attempted to outline the rules governing arbitrators’ liability starting from the arbitrator contract as identified by doctrine. Acknowledged by case law, again
very recently, the arbitrator contract unites the litigants on the one side, the arbitrator on the other, and constitutes the base of arbitrators’ civil liability.

If one can assume without a doubt that the principle of arbitrators’ civil liability is established in French law (I), certain conditions on its implementation can still be favorably clarified (II).

I. The principle of arbitrators’ civil liability

More than twenty years ago, Sir Michael Kerr stated in the following terms what he rightly considered to be the fundamental question on the arbitrator’s liability: “Whether arbitrators provide a service just like any other person, and are therefore liable for any failure in its reasonable performance, or whether they are immune from such claim because of the judicial character of the service they perform.”

Aware of the necessity to adopt a liability regime that integrates the duality of arbitrators’ missions, French case law tries to take into account the judicial specificity of their mission of contractual origin.

Arbitrators exercise a judicial function and therefore act, on the one hand, as judges. As such, they are granted immunity in the same way that state judges are. Accordingly, they cannot in principle be held liable for what they have ruled on, except if they have committed “personal misconduct equivalent to serious misconduct or constituting fraud, gross negligence or denial of justice,” to repeat the wording recently used by the Cour de

(4) M. KERR, preface of The Immunity of the Arbitrator, J. LEW (ss. dir.), Loyd’s, 1990. See also, Th. CLAY, L’arbitre, Dalloz, 2001, n° 931.
(5) Certain wording, which may simply be careless, created doubt on the continuity of this presentation at the time because it was general (TGI Paris, May 12, 1993 (Raoul Duval), Rev. arb., 1996.411, and Paris, October 12, 1995, Rev. arb., 1999.324, note Ph. FOUCHARD). In the judgment and the ruling, handed down in the Raoul Duval case, the judges considered that “the contractual nature of the link that connects the arbitrator with the parties justifies that his liability be evaluated under common law conditions […]” and “that the arbitrator cannot avoid common law principles of liability by imposing […] proof of serious misconduct that he may have committed.” That being said, the judges did not expressly reserve the case of misconduct committed during the exercise of the judicial mission.
cassation (A). On the other hand, the arbitrators are also a service providers. As such, they should be held liable when they have not executed or have badly executed the service promised (B).

A. Arbitrators’ immunity resulting from their judicial mission

Under French law, it is recognized that an arbitrator “benefits, as a judge, from judicial immunity and is therefore only liable for personal misconduct which, in order for him to be held liable, must be equivalent to serious misconduct or constituting fraud, gross negligence or denial of justice.”

Even if it was only recently acknowledged by the Cour de cassation, the rule according to which an arbitrator enjoys immunity because he has ruled (1) unless he has committed particularly serious misconduct (2) seems well established in French law.

1. Arbitrators’ immunity under performance of their judicial functions

For a long time, French jurisdictions have recognized the necessity to not authorize parties to seek arbitrators’ liability for what they have ruled on. At the beginning of the nineties, in the Bombard case, the Paris Court of Appeal declared inadmissible the action launched against an arbitrator because “the alleged misconduct is directly attached to the content of the judicial act and constitutes criticism of the grounds set out in the award […]”.

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In fact, the opportunity, or even the necessity, to attribute a qualified immunity to an arbitrator because of what they have ruled on, is relatively non-controversial.\(^8\) The actual nature of the mission carried out by an arbitrator requires a specific liability regime: because they carry out judicial activities, arbitrators, like judges, are given a certain level of immunity, without which they could not freely judge. The capacity of a judge implies a freedom of decision that only immunity can preserve.

In addition, immunity is aimed at ensuring the definitive nature of arbitration awards, defying parties’ attempts to take action against the arbitrators every time they are unhappy with the content of the award. Excluding appeals would otherwise make little sense as the content of the award could again be discussed during the proceedings relating to the arbitrators’ liability.

Furthermore, such immunity is widely given to arbitrators in comparative law. On the one hand, common law rights expressly acknowledge the broad immunity for arbitrators because of their judicial mission.\(^9\) On the other hand, the civil tradition rights, even if they do not expressly provide for this immunity,\(^10\) most often provide that an arbitrator cannot be held liable because of what they have ruled on.\(^11\) In reality, an arbitrator is comparable to a state judge on both sides. The liability regime for an arbitrator is based on the judges’ regime.


\(^{(9)}\) In England, the principle that was first established by case law (see *Sutcliffe v. Thackrah* [1974] AC 727) now appears in Article 29 of the *Arbitration Act* 1996 (See Annex n° 1); In the United States, the rule expressly appears in the Revisited Uniform Arbitration Act. Even if this text was not adopted by all the States, all jurisdictions who have had to rule on the matter, have given arbitrators immunity because of the mission they carry out, see, e.g., *Tamari v. Conrad*, 552 F.2d 778 (7th Cir. 1977) ; see. Annex n° 1.

\(^{(10)}\) This is particularly the case in Swiss law that does not have any text nor any case law on this issue. However, predominant doctrine considers that an arbitrator shall enjoy a certain immunity because of what they have ruled on (see Annex 4) For Brazil, see. Annex n° 3.

\(^{(11)}\) In Spain, see Article 21.1 of Law 60/2003 dated December 23, 2003 relating to arbitration; In Portugal, see Article 9 of the Arbitration Law 2011; In Peru, Article 32 of Law n° 1071, Decree relating to arbitration.
The Cour de cassation has recently had the chance to address the rule according to which an arbitrator benefits from immunity whilst performing their judicial mission. In a decision dated January 15, 2014, the Cour de cassation excluded arbitrators’ liability being called into question because “the criticism based on the alleged breach of res judicata, to which the continuity of the arbitral proceedings can be attached, would lead to directly questioning the content of the awards rendered, and also extending to the judicial function of the arbitrators.”

In this case, because of difficulties that arose from the enforcement of the first award rendered, the arbitral tribunal, at one of the parties’ request to this effect, rendered a second award. This was then annulled because of the violation of res judicata attached to the first award. One party took advantage of this misconduct to launch a liability action against the arbitrators. The claim was dismissed at all levels of jurisdiction because “the existing divergence between the tribunal and the Court of Appeal on the term res judicata is not sufficient to prove serious misconduct on the tribunal’s behalf or of each arbitrator personally.”

The solution was unanimously approved. In fact, it was an ideal occasion for the Cour de cassation, especially as it seemed difficult to contest that the accused misconduct came from the performance of the arbitrator’s judicial mission. But, even if there is no discussion about the legitimacy of such immunity, the identification of its precise boundaries appears more delicate.

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(13) Paris, March 1, 2011 (Azran), see above.
(14) See references cited above, footnote n° 6.
(15) The Bompard case provides a second example of arbitrators’ misconduct considered as arising out of the performance of their judicial mission. In this case, the judges considered that they did not have to punish the calculation error, even if obvious, that the parties accused the arbitrators’ of (TGI Paris, June 13, 1990 and Paris May 22, 1991 (Bompard), Rev. arb., 1996:476)
2. The limits to this immunity

Considering that granting absolute immunity to an arbitrator is appropriate, which certainly is not self-evident, this path is in any case not conceivable under French law. The recognition of absolute immunity from liability is prohibited because, in the words used by the Constitutional Council, “nobody can by general provision of law be exempt of any personal liability whatever the nature or the seriousness of their misconduct.”

Similarly, an arbitrator’s immunity can fail when the misconduct committed is particularly serious. More specifically, immunity can be set aside when “proof of facts characterizing personal misconduct equivalent to serious misconduct or constituting fraud, gross negligence or denial of justice” is demonstrated, according to the Cour de cassation. By almost identically copying the list of misconduct allowing, under the terms of Article L. 141-3 of the Judicial Organization Code, to take action against the state judge, the Cour de cassation explicitly acknowledges the influence of the judicial nature of the arbitrator’s mission on their liability being sought. It is true that in doing so, it has not made the interpreter’s task any easier, who has no less than five concepts to analyze. Let us examine them, briefly, one by one.

It appears that misconduct must, in any case, be personal. The choice of this term can be surprising. In administrative law, personal misconduct is distinguished from service misconduct. The personal nature of the misconduct brings the personal liability of the agent into play, as opposed to the liability arising from their service. In fact, this distinction only has minor practical repercussions. The Cour de cassation certainly wanted to give a global qualification to the misconduct that authorizes immunity to be set aside, and took the position to list the misconducts it considers as “personal.”

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(16) C.C., January 17, 1989, no 88-248 DC.
(18) The attorney general also suggested that the Court limit itself to serious misconduct and denial of justice (P. CHEVALIER, under Cass. 1ère civ., January 15, 2014, prec.)
Firstly, personal misconduct can take the form of a **denial of justice** or reveal a **fraud**.\(^{20}\)

Personal misconduct can also be **equivalent to willful misconduct**. This wording, traditionally used for gross negligence, has no sense here. Adjoined to gross negligence, the precision means that gross negligence can, because of its seriousness, have the same consequences as willful misconduct, which is intentional. If the personal misconduct must be equivalent to willful misconduct, we infer that it must be intentional. To summarize, immunity does not protect the arbitrator if they commit "**deliberate breaches of their duties**."\(^{21}\)

Lastly, immunity can be set aside where the arbitrator has committed gross negligence. This last exception has spurred more controversy, in particular because of uncertainty around the very notion of gross negligence.\(^{22}\)

Under French law, gross negligence is generally presented in an objective way, meaning that it does not have to be intentional.\(^{23}\) To be qualified as gross negligence, the misconduct must be "**of extreme seriousness** [...]

and denote the incapacity of the debtor to accomplish the contractual mission it had accepted."\(^{24}\)

Adapted to the specific case of an arbitrator, according to the words of the *Tribunal de grande instance* in the *Bompard* case, "**gross negligence is committed under influence of such a serious error that a magistrate [...] who is normally aware of their duties, had not been trained.**"\(^{25}\)

The definition of an arbitrator who is normally aware of their duties can give rise to various interpretations, but we can assume

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(20) For cases where fraud was held in support of the annulment of the arbitration award, see Cass. 1ère civ., November 4, 2015 (Vasarely), n° 14-22630 : published in Bull. civ. I ; Rev. arb. 2016.235, note F. de BERARD ; D. Actualités 2015.2326, obs. X. DELPECH; Procédures 2016.19, note L. WEILLER; D. 2015, 2598, obs.Th. CLAY : "But, having retained that the conditions under which the arbitration had been decided, organized and conducted made it a sham procedure implemented by the artists' heirs to favor their interests over those of the Foundation, the court of appeal was able to infer, without any distortion, the existence of an arbitration fraud contrary to public policy" see also, Cass. 1ère civ., June 30, 2016 (Tapie / CDR), n° 15-13.755, published in Bull. civ. I, D. 2016.1505, and 2025, obs. L. d’AVOUT, spéc. p. 2034 ; JCP 2016.954, note S. BOLLEE, and 1020, § 10, obs. C. NOURRISSAT ; Procédures 2016.290, note L. WEILLER ; Lexbase Sep. 8, 2016, n° 667, obs. D. MOURALIS ; D. 2016, 2599, obs.Th. CLAY.


(22) E. LOQUIN, op. cit. ; M. HENRY, op. cit. ; n° 6 ; P. CHEVALIER, op. cit. ; J-S. BORGHETTI, op. cit., n° 19.


that the *Cour de cassation* exercises its legal control on this notion and therefore ensures the desired result.

While the exact limit of the immunity arbitrators enjoy remains to be determined, it seems to be generally accepted that only gross negligence can justify setting aside this immunity. And on this point also, French law falls within the very predominant common position in comparative law. The civil tradition countries, failing to acknowledge true immunity, generally provide a strict framework for the possibility of holding arbitrators liable. For example, Spanish law provides that an arbitrator can be held liable “for damages and interest caused by bad faith, recklessness and willful misconduct.”26 With regard to laws that give a priori absolute immunity to arbitrators, they often admit that it can be set aside under exceptional circumstances.27 Therefore, in England, Article 29(1) of the Arbitration Act provides that “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.”28

### B. Arbitrators’ contractual liability

Under French law, arbitrators’ immunity suffers challenge by contractual civil liability principles. One cannot forget that “like all contracting parties, an arbitrator must perform the obligations to which they have subscribed.”29 This is why French law gives the parties the right to damages for the harm suffered each time the alleged misconduct is not intrinsically linked to the content of the arbitrator’s judgment.

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(26) Article 21.1 of Law 60/2003 dated December 23, 2003 relating to arbitration. See also, in Portugal, Article 9 of the Arbitration Law 2011; in Peru, Article 32 of Law n° 1071, Decree relating to Arbitration, (see. Annex n° 3). In the same vein, see in Italy, Article 813 of the Civil Procedure Code ; in Austria, § 594 ZPO.

(27) Even in the United States, where immunity given to arbitrators is sometimes described as absolute, case law has already recognized that an arbitrator can be held liable, in particular when he refrains from rendering an award, see, e.g., *EC Ernst Inc. V. Manhattan*, 551 F.2d 1026 (5th Cir. 1977) ; v. Annex n° 1.


From 1960, the Cour de cassation specified that “the claim for damages and interest against [arbitrators] as a result of their mission can only occur under ordinary common law conditions.” It is true that the question, then asked to the Cour de cassation, referred to the possibility of initiating the procedure of “prise à partie”, which is an extraordinary procedure that allowed, at the time, to seek a state judge’s liability. As an arbitrator is a private judge, the solution seemed to be necessary. However, the Cour de cassation could have used the opportunity to acknowledge a certain immunity for arbitrators. By limiting itself to a reference to common law civil liability, the Cour de cassation already implicitly admitted that there were no obstacles in principle against seeking arbitrators’ contractual liability.

Several decisions from first instance courts have then confirmed that an arbitrator’s liability could be held under certain conditions, pursuant to common law principles, where the misconduct did not directly result from the merits of the award they rendered. However, it is only in the 21st Century that the Cour de cassation has had the opportunity to uphold this solution. The two decisions, handed down in 2005 and 2010, deserve to be developed in this respect.

The facts of the first case are quite simple, and we will limit ourselves to describing them briefly. When executing a share transfer, a dispute arose between the parties concerning the final price. The parties had signed an arbitration agreement in order to resolve this difficulty. Each party appointed an arbitrator, and the two arbitrators chosen were unable to agree on the choice of the chairman, who was then appointed by an order of the judge hearing applications for interim measures. The arbitral tribunal thus constituted issued its award on April 12, 1990. However, the agreement provided that the award should be rendered within four months of the appointment of the last arbitrator. Therefore, the award should have been rendered before March 21, 1990.

Several years later, and for this reason, the Rennes Court of Appeal annulled the award, and ordered an expert assessment of the value of the shares. In light of these events, the parties agreed on a price, equating to approximately 90% of the price retained by the arbitrators. The seller, however, filed a liability claim against the three arbitrators.

The Angers Court of Appeal, to whom the dispute was referred, adopted interesting reasoning. It first ruled that an arbitrator could be held liable under common law. It then noted that the arbitrators had committed misconduct in rendering their award after the time limit. But it then highlighted that “however, the duration of the arbitral procedure does not entirely depend on the arbitrators, and that the parties play an active role in the development of proceedings” before concluding that “it follows that the arbitrators cannot be held liable purely because of the fact they did not comply with the arbitration time limit and that the plaintiff […] must demonstrate the personal misconduct that the arbitrators committed, such as a lack of diligence in the conduct of the arbitration proceedings.”

On appeal of this decision, the Cour de cassation overruled the first instance judges, under Article 1142 of the Civil Code, because: “in ruling as it did, when in letting the arbitration time limit expire without asking for an extension from the support judge [("juge d’appui")], and where there was no agreement between the parties or misconduct by the latter to request the extension, the arbitrators, who have a duty to achieve a result, committed misconduct leading to the annulment of the award, and have incurred their liability, the court of appeal has breached the above referenced text.”

In doing so, the Cour de cassation retains the civil liability of arbitrators, not for having gone over the time limit, like certain commentators have wrongly thought, but for not having requested an extension of this time limit, which is not the same thing.

(34) Ch. JARROSSON, previous note.
In the second case, the parties signed an international agreement for the management of an officer network in maritime ports. A dispute arose on termination of the agreement and an arbitration commenced under the arbitration clause in the agreement.

During 2002, the arbitrators and the parties signed terms of reference organizing the arbitral proceedings. A partial award, ruling on the jurisdiction issues, was rendered in August 2002. One of the parties filed annulment proceedings against this award, but the appeal was dismissed by the Paris Court of Appeal in September 2003. Several weeks later, the arbitral tribunal ordered the proceedings to continue but the President of the tribunal resigned, a few days later, for health reasons. As no agreement was reached between the co-arbitrators, the new president was appointed by the President of the Tribunal de grande instance. The procedure was therefore able to continue and the first hearing was held in January 2004. The following month, the tribunal refused to stay the proceedings, as it had been asked to do so by one of the parties because of ongoing criminal proceedings, and decided that this difficulty would be ruled on at the same time as the merits of the case. A second procedural hearing took place in April 2004, and then a third hearing on oral arguments took place in July. The Tribunal committed to rendering its award before the end of 2004. Due to procedural incidents, the tribunal pushed back this time limit several times, finally announcing September 30, 2005. However, in April, the tribunal asked the parties for new exhibits. In June 2005, after the President refused to resign as he had been asked to do by one of the parties, the Tribunal decided to suspend its deliberations. The parties therefore decided to remove the arbitrators, who acknowledged this decision, without rendering an award on the merits.

One of the parties then launched a liability claim against the arbitrators. Surprisingly, despite so many shortcomings, the judges did not hold the arbitrators liable, stating that the arbitrators had not committed any misconduct and that the duration of the proceedings had resulted from

the complexity of the case and the parties’ attitude. The Cour de cassation dismissed the appeal on the following grounds:

« The decision firstly notes that the arbitral tribunal rendered a previous award on August 26, 2002 on which the appeal for annulment was dismissed by decision dated September 18, 2003, that the president, Mr. A…, resigned and was only replaced by the support judge on November 24, 2003, date before which Mr. B…’s liability can only then be sought after the January 30, 2004 hearing, the CNC have requested a stay on proceedings because of a criminal complaint, a new procedural calendar was fixed and another one at the end of the hearing on oral arguments on July 6-7, 2004, an award was expected at the end of February 2005, then, in December 2004, Mr. X… and the company CNCA-CEC requested that the new time extension request by CNC be dismissed, again, a new hearing was held in March 2005, new exhibits were requested from the parties and the award was to be rendered on September 30, 2005; from these evaluated facts, the court of appeal inferred, without incurring the claims used, on the one hand that the request to the parties for briefs on June 6, 2005 and Mr. B…’s refusal to resign constituted performance of the arbitrators’ judicial power likely to give rise to an appeal for annulment of the award and not characterizing misconduct in the performance of the arbitrator contract, and on the other hand that the procedural calendar had been determined and then updated given the numerous incidents that occurred during the proceedings to take into account the complexity of the proceedings and the antagonism between the parties, and finally that the suspension of the deliberations as from June 10, 2005 could not be attributed to the arbitrators whose divestment was sought, so the liability action against the arbitrators, who were bound by a best efforts duty, could not be accepted."

Two observations must be made with regard to both cases. The first is positive: an arbitrator can certainly be held liable for not having requested a time limit extension, which the 2011 reform authorizes them to do by

themselves even without the co-arbitrators’ agreement (Article 1460 CPC). That being said, the 2011 reform individualizes the civil liability of each arbitrator within the arbitral tribunal, and therefore identifies the existence of independent arbitrator contracts between them. On this point, it is useful to note that the study of comparative law confirms that the question of arbitrators’ compliance with time limits is an essential concern for the parties. Yet, we cannot leave out the fact that several laws expressly provide, if not the possibility to seek an arbitrator’s liability when they exceed the time limit agreed, at least an arbitrator’s genuine duty to render the award within a reasonable timeframe. Beyond this, it appears that the majority of state laws acknowledge the possibility of seeking arbitrator’s liability, in any case, when they disrespect the time limit they committed to comply with.

The second observation is more negative than the first: in the absence of any defined time limit, which is the case in international arbitration, arbitrators can be held liable for lack of rapidity. But this is more difficult to establish. However, the 2010 case was handed down before the new Article 1464 of the Procedural Code was adopted imposing a duty to act expeditiously on arbitrators – and the parties.

(38) This is particularly the case in Argentinean law (see Art. 756 of the Civil and Commercial Procedural Code), of Austrian law (see § 594 ZPO), or Italian law (Art. 813 of the Civil Procedure Code).
(40) This was the ruling in the United States, see EC Ernst Inc. v. Manhattan, 551 F.2d 1026 (5th Cir. 1977) : “where his action or inaction can fairly be characterized as delay or failure to decide rather than timely decision-making, he loses his resemblance to a judge”; see also, Baar v. Tigerman, 189 Cal.Rptr 834 (Cal. App. 1983).
II. The regime of arbitrators’ civil liability

When we look at the details of the arbitrators’ civil liability regime, it cannot be denied that there is still some uncertainty on several issues.

A. The line between what is well judged and how the decision was made

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

For example, what about the breach of the audi alterem partem principle? Does the arbitrator, whose award was annulled for this very motive, run the risk of being held contractually liable, or can they invoke the absence of established misconduct? One would think that French courts would refuse to condemn an arbitrator unless they were accused of a breach with a certain degree of seriousness.

What about the duties of independence and impartiality? Looking at available case law, it seems that the breach of such duties can be sanctioned under common liability law. In the Raoul Duval case, the judges considered that misconduct consisting of a failure to disclose could render the arbitrator liable, based on their breach of contract, under the rules of civil contractual liability.\(^\text{41}\) It was therefore considered that serious misconduct was de facto required for this liability.\(^\text{42}\) The recent recognition of a duty of loyalty by which an arbitrator is bound seems to provide a ground for sanctioning the arbitrator, under common law rules, for breach of their duties of independence and impartiality.

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\(^{42}\) Th. CLAY, L’arbitre, Dalloz, 2001, n° 932 : “Even the Raoul Duval case cited above softened the rigor of his own appreciation by requiring qualified misconduct for an arbitrator’s liability to be held.” See also, Ph. FOUCHARD, note under Paris October 12, 1995, Rev. arb., 1999, p. 327.
B. The nature of an arbitrator’s contractual obligations

Within the context of their contractual liability, the nature of an arbitrator’s obligations is debatable. In French law, there is a traditional differentiation between the obligations related to the means (‘best effort’ obligations) and the result, depending on whether the service debtor has committed to carry it out, or more reasonably, demonstrate all necessary due diligence to accomplish it.

An important consequence is given to the differentiation. Whereas a person subject to the obligation to achieve a result will be held liable for the mere fact that they did not perform the obligation, a person subject to the best effort obligation shall only be liable to pay damages caused for non-performance if they committed misconduct.

Similarly, in arbitration, it can certainly be considered that only obligations “for which performance doesn’t risk being disturbed by the litigants intervention,” 43 can be qualified as obligations to achieve a result, and on the contrary, each time that the parties participate in the performance of an arbitrator’s obligation, this obligation can only be a simple best effort obligation. However, it must be recognized that the distinction between an arbitrator’s obligations to achieve a result and best effort obligations is not always obvious. Firstly, some contest the relevance itself of this distinction and criticize it as useless in arbitration. 44 Also, the others do not always agree on what falls under which of the two categories, as is reflected by case law.

The example of an arbitrator who has to comply with arbitration deadlines is one of the examples of these difficulties. In a decision dated December 6, 2005, 45 the Cour de cassation expressly acknowledged that an arbitrator’s obligation to request that the arbitration deadline be extended was an obligation to achieve a result – which is only up to them – and the obligation to comply with such time limit is a best effort obligation – as it also

(43) Th. CLAY, op. cit., n° 935.
(44) J-S. BORGHETTI, see note, n° 25.
(45) Cass. 1ère civ., December 6, 2005, supra.
depends on the litigants. This solution is upheld in the decision handed down on November 17, 2010\(^{46}\) in which the *Cour de cassation* considered that the arbitrators had a best effort obligation to comply with time limits.

To finish on this point, it is useful to recall that if the duty to disclose has been analyzed as a best effort obligation,\(^{47}\) this was in a decision prior to the very vast expansion that occurred. While it does seem that case law does not intend to make this obligation a true obligation to achieve a result, it must certainly be considered that an arbitrator is bound by an enhanced best effort obligation. In other words, compliance with this obligation will be examined with ”stronger scrutiny” than if it was a simple best effort obligation, however, without any insignificant breach, automatically triggering an arbitrator’s liability. This should allow false conflicts of interest to be avoided and used as unjustified grounds for liability claims.

### C. The effectiveness and scope of exemption clauses

When parties argue that an arbitrator committed misconduct during the performance of his judicial mission, a limitation of liability clause will not play an important part.\(^{48}\) Under French law, such clause can be rejected either if it goes against the essential obligations of the contract,\(^{49}\) or where the debtor has committed gross negligence or fraudulent misconduct. However, in terms of case law, an arbitrator’s liability can only be sought if there is an alleged misconduct “equivalent to serious misconduct or constituting fraud, gross negligence or denial of justice.” Therefore, the protection afforded by a clause is partially overruled – the protection is de jure if in the case of non-qualified misconduct – and otherwise ineffective – the protection is ineffective in the event of a qualified misconduct.

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\(^{46}\) Cass. 1\(^{e}\) civ., November 17, 2010, *supra*.

\(^{47}\) Paris, October 12, 1995, (Raoul Duval). The court required the arbitrator to have committed a personal fault to incur liability. It follows that certain breaches of the obligation to disclose would not allow the arbitrator to be liable.


When it is an arbitrator’s contractual obligations that are at stake, a limited liability clause could have a certain influence. The difficulty has been addressed in several cases.

In one case particularly case specific – as it was the ICC’s liability, and not the arbitrators’, that was sought – the first instance judges considered that the exclusion of liability clause, in the Arbitration Rules of the International Court of Arbitration, was valid. They also highlighted “that no willful, inexcusable or serious misconduct, equivalent to gross negligence – that could limit the application of this non-liability clause – is invoked.” However, the Court of Appeal had a completely different analysis. It considered “that the elusive liability clause that authorizes the ICC to not perform its essential obligations as a non-judicial service provider shall be deemed unwritten […] where it goes against the scope of the arbitrator contract.”

In a decision dated March 31, 2015, the Paris Court of Appeal, confronted this time with the question of the arbitrator’s civil liability, adopted a surprising solution. After having highlighted that an arbitrator’s misconduct was independent from the performance of their judicial mission, the judges considered that the arbitrators “liability was held where they did not take the necessary procedural initiatives they should have, without being able to invoke neither Article 1.5 of the arbitration agreement which provides that “Arbitrators are not liable for any act or omission relating to this arbitration,” nor Article 34 of the International Chamber of Commerce’s Arbitration Rules which provide that “(…) the arbitrators (…) are not liable for any act or omission in connection with arbitration,” as these provisions are only applicable to the immunity arbitrators’ enjoy in the performance of their judicial function.”


To summarize, according to the Paris Court of Appeal, immunity only applies to an arbitrator's judicial obligations. Limited liability clauses do not cover, unless otherwise expressly provided, obligations that are not directly linked to judicial obligations. It is true that immunity is based on the nature of the judicial mission and not the ancillary obligations. These can nevertheless benefit from the limited liability clause provided in the arbitration rules or in the agreement. This also follows a previous case from the Court of Appeal in 2009, already cited, applying common law on limited liability clauses, which recalled that these could not exonerate serious misconduct or non-performance of an essential obligation. This is, moreover, the position that was very rightly adopted by the first instance judges who ruled that "in the presence of such a clause [...], the Debu- lac Bank cannot seek arbitrators' liability by claiming that the arbitration time limit was exceeded, except if serious misconduct is proven."

We can only approve of this position until we can find what would justify that these limited liability clauses of arbitrations not be subject to common law. Such clauses shall be considered as valid in so far as they do not relate to an arbitrator’s essential obligations.

D. The scope of the reparable harm

The determination of reparable harm has also lead to some debate. It is readily recalled on this point that in order to be reparable, the harm incurred must be the direct consequence of the arbitrator’s misconduct. There is no doubt that the costs incurred during the proceedings can be compensated, especially the arbitrators’ fees, at least when the misconduct resulted in the award being annulled.

Similarly, it is probable that compensation for the delay in obtaining justice – even if this is obtained in the end – could form part of the compensation, on the condition that the harm is real.

Generally, we can consider that arbitrators who have failed to the point that they are held civilly liable, shall risk more than just the mere reimbursement of

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their fees, otherwise seeing their liability held would be deprived of its effect, without of course this reaching the amount at stake in the dispute.

A more delicate question is the possibility of claiming compensation for loss of the chance to win the dispute. On this point, case law is far from being set.

In the Raoul Duval case, the judges considered that the claimant “did not justify a real loss of chance of succeeding during the proceedings, for which the result is not demonstrated.” If they did not definitively shut the door on taking into account such harm, the judges were reluctant to the idea of awarding, on the sole basis that a favorable award was annulled, damages and interest corresponding to the loss of chance, despite everything.

In the previously cited decision of the Paris Court of Appeal dated March 31, 2015, one of the parties claimed compensation for the loss of the chance to obtain the financial award, and which was greater than the sum eventually obtained under a settlement, between the parties, following the annulment of the award. The Court of Appeal dismissed the claim because, “in accepting this agreement […] the bank acknowledged that its rights had been fulfilled” and that “it [could] no longer claim the loss of a chance of not being able to benefit from the totality of the sums awarded by the annulled award.”

One cannot fail to observe that the dismissal of these claims, aimed at compensating the loss of chance, was motivated by the circumstances at hand in both cases. In other words, the judges did not consider that such harm, by definition, was excluded from the scope of the reparable harm. They merely acknowledged that the reality of the harm was not established in both cases.

As a result, it may be concluded that even if the risk of being condemned to pay damages and interest for the loss of the chance to win the dispute is not excluded, in practice, French courts are very pragmatic to the point that only exceptional circumstances should justify such damages and interest being awarded.

Further to this analysis on the scope of the reparable harm, it is useful to mention the issue of the arbitrator’s insurance. In France, there is a significant disparity between isolated arbitrators and those who practice as part of an organization (law firms). Perhaps a solution could be found in a certain mutualization of the risk – which, it must be repeated, remains marginal.

At the end of this study on arbitrators’ civil liability under French law, clarified by comparative law, two statements can be made. On the one hand, despite different presentations, common law rights based on the notion of relative immunity, and traditional civil rights, based on an adapted liability regime, in practice, do not offer fundamentally different solutions. On the other hand, the adapted liability system, as designed by French law, ensures a wider integration of arbitral justice than systems that provide for arbitrators’ immunity. In reality, French law offers a balanced system that prevents the arbitration process from being paralyzed, in advance, by improper appeals before the judicial judge, while also allowing the possibility of seeking the arbitrator’s liability later on, in the event that they seriously breach their duties and obligations.
The arbitrator’s criminal liability falls under general law conditions. They are therefore subject to all general law offenses and are also subject to offenses that specifically concern them due to their judicial mission.\(^{56}\)

Although the arbitrators’ civil liability is reduced, specifically because of this judicial mission (see above), the paradox is that their criminal liability is not in any way limited. This difference in regimes can be explained by the fact that behavior referred to in criminal liability is in principle so serious that it cannot go unpunished.

As a result, cases where arbitrators are subject to criminal proceedings are exceptional. Cases that actually lead to prosecution are even more rare. It should be seen as a reflection of the natural virtue of arbitrators, who are chosen by the parties because of their moral, integral and ethical personal qualities. This can also be explained by the dissuasive effect of criminal liability. Added to this is the fact that finding an arbitrator criminally liable is a serious act. No attorney should accept assisting a client who wishes to launch criminal proceedings against an arbitrator without an indisputable factual basis.

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\(^{56}\) This is also the case for magistrates who are subject to general law offenses and specific offenses. Unlike arbitrators, magistrates are also subject to the offenses concerning persons who are the custodians of public authority. Magistrates are, for example, covered by Article 432-12, paragraph 1 of the Criminal Code, which criminalizes the illegal taking of interest. The situation of an arbitrator who would retain or take an interest in a company concerned by the arbitration would be resolved by the arbitrator’s disclosure obligation and the possibility for the parties to challenge an arbitrator or to question the validity of the award for lack of independence and impartiality.
This self-restriction undoubtedly existed when arbitration consisted of a small number of specialists preoccupied with their reputation within the arbitration community. The development of arbitration has, however, lead to a multiplication of actors and increasingly litigious proceedings, with certain parties and their counsel no longer hesitating before launching obstructionist proceedings in an attempt to hinder the conduct of arbitrations.

Should one worry that parties have more and more recourse to the “criminal weapon” to disrupt arbitrations? Should arbitrators’ criminal liability be mitigated? We don’t think so.

The threat that criminal liability imposes on arbitrators is the guarantee that arbitration proceedings run smoothly and therefore, indirectly, the guarantee of the morality and reputation of the arbitral institution (I.).

There is no reason to limit the scope of arbitrators’ criminal liability, which is rarely used but whose dissuasive effect guarantees the morality of arbitration. Questioning arbitrators’ criminal liability would have the perverse effect of comforting the opaque reputation that arbitration, especially international, may have especially among people who are not familiar with this practice. However, today there is an increased risk that a party to an arbitration launches criminal proceedings against one or several arbitrators with a view to destabilizing or blocking the arbitral proceedings. De lege ferenda, an applicable procedural safeguard could be envisaged, only before the final award has been rendered and which consists of subjecting criminal proceedings launched against arbitrators for offenses related to the arbitral proceedings to the public prosecutor’s exclusive control. The latter would have, during the arbitration, the monopoly of initiating criminal proceedings against arbitrators (II.).
I. Criminal liability of arbitrators guarantees the smooth running of arbitral proceedings

The threat of arbitrators’ criminal liability guarantees arbitrators’ proper conduct (A.). The risk for an arbitrator of criminal liability as an accomplice of one of the parties to the arbitration is also a protection from the misuse of the arbitration proceedings by the parties (B.).

A. Arbitrators’ criminal liability guarantees arbitrators’ proper conduct

As part of their mission, an arbitrator is likely to commit several offenses that reprimand the most serious conduct and the most contrary to arbitration principles. The threat that criminal liability imposes on an arbitrator guarantees their proper conduct and therefore the quality of the proceedings, since it is true that “arbitration is only as good as the arbitrator,” and ultimately the reputation of the arbitral institution.

On this point, it is important to state that Article 1450 of the Civil Procedure Code (applicable to domestic arbitration) provides that “an arbitrator’s mission can only be performed by a person enjoying all its rights” and that Article 131-26 of the Criminal Code provides that “the prohibition of civic, civil and family rights applies to (…) 3° the right to exercise a judicial function or to be an expert before a jurisdiction, to represent or assist a party before a court.”

The additional penalty of loss of civic rights is therefore an obstacle to appointing an arbitrator (in domestic arbitrations and international arbitrations where the seat of arbitration is in France). This additional penalty, for a maximum duration of five years in tort, relates particularly to forgery, use of forgery (Article 441-10), fraud, (Article 313-7 of the Criminal Code), accomplice to tax fraud (Article 1741 of the General Tax Code), money laundering (Article 324-7 of the Criminal Code) and corruption (Article 445-3 of the Criminal Code). An arbitrator who commits an offense and is sentenced to the additional penalty of losing their civic rights, other than the decisive reputational impact it would have in practice, would no longer be eligible for appointment as an arbitrator for five years.
Chronologically in arbitration proceedings, the first offenses claimed against arbitrators are forgery and use of forgery during the drafting of their curriculum vitae or their statement of independence whilst performing their disclosure obligation (Article 1456, para. 2 of the Civil Procedure Code applicable to domestic arbitrations and to international arbitration upon referral of Article 1506-2”).

Forgery has also been claimed against an arbitrator at the ultimate stages of an arbitration for false statements included in the award.

1. Forgery and use of forged documents

Forgery is defined by Article 441-1 of the Criminal Code as "any fraudulent alteration of the truth, likely to cause harm and carried out by any means whatsoever, in writing or any form of expressing thoughts that have as their purpose or that can have the effect of establishing proof of a right or fact with legal consequences." Forgery and use of forgery are punished by three years imprisonment and a fine of 45,000 €.

Arbitrators are mainly concerned with intellectual forgery (altering the truth in the content of a written document), rather than material forgery (materially falsifying an existing document or forging someone else’s writing).

Case law refuses to apply forgery to written documents of a purely representative nature, i.e. unilateral declarations for which "falsification provides no gain in proof to its author" and of which curriculum vitae and statements of independence seem to be included. A lie in one of these documents, which does not have "for the purpose or (…) for the effect to establish the proof of a right or a fact," should therefore not constitute intellectual forgery, nor transmitting the use of this forgery to the parties.

(57) Marc Segonds, Fascicule LexisNexis 10 : FAUX, n° 23.
Arbitral doctrine is generally hostile to an arbitrator’s criminal liability being sought for forgery whilst drafting their curriculum vitae or their statement of independence, which it considers inappropriate and excessive.\(^{58}\)

It is clear that the intentional offenses of forgery and use of forgery cannot be invoked in situations where an arbitrator, by negligence or error, has failed to mention a relevant fact in their statement of independence. This is the case, for example, when an attorney of an international law firm makes a mistake because of a technical deficiency when carrying out the firm’s IT procedure for checking conflicts of interest. These omissions or inaccuracies are most often involuntary and cannot be criminally qualified.

However, such incriminations shall not be excluded in more serious cases where the arbitrator knowingly submitted a false statement of independence in order to mislead the parties about their independence and therefore possibility their impartiality. Criminal liability would fulfill its safeguarding role by punishing all serious behavior contrary to arbitration principles.

As a result, an arbitrator was charged with forgery and use of forgery in the Tapie arbitration case (he had also been charged for organized fraud). The investigating judges accused him of minimizing his relations with Bernard Tapie and especially with his attorney and considered that his statement of independence could constitute intellectual forgery by omission.\(^{59}\)

At the last stage of the proceedings, private written forgery could be committed by an arbitrator who would draft an award containing statements he would know to be false. There is no doubt that the award’s “purpose or (..) can have for the effect to establish the proof of a right or a fact with legal consequences.”

\(^{58}\) During a group workshop on “Arbitration Practice” of the French Arbitration Committee on April 16, 2015, “from the general opinion, it was recognized that challenging an arbitrator’s criminal liability for written forgery in the case of an incomplete statement was an excessive and inappropriate sanction for an incomplete statement of independence” (Revue de l’arbitrage 2016 - n° 1 p. 367).

It would be private written forgery (punished by 3 years imprisonment and a fine of 45,000 €, pursuant to Article 441-1 of the Criminal Code), which could become public written forgery (punished by 10 years imprisonment and a fine of 150,000 € by Article 441-4 of the Criminal Code) if the award is given judicial exequatur.

Forgery can also be a constitutive element of fraud. If one party and one or more arbitrators agree for the award to be rendered in fraud of the other party’s rights, lies and omissions in the statement of independence could characterize fraudulent maneuvers required by fraud.

2. Fraud

If the arbitration proceedings themselves are fraudulent due to collusion between a party and an arbitrator, the elements of fraud may be present.

Article 313-1 of the Criminal Code defines fraud as “the fact, either by using a false name or acting under false pretence, either by abusing a truthful pretence, or by using fraudulent maneuvers, to mislead a person or entity and to determine them as such, to their prejudice or to a third-party’s prejudice, to remit funds, values or any property, to provide a service or to consent to an act constituting obligation or discharge.”

Fraud is punished by five years’ imprisonment and a fine of 375,000 €. These penalties are increased to 10 years’ imprisonment and a fine of 1,000,000 € where the fraud is committed by an organized group (Article 313-2 of the Criminal Code).

Three cases, including two recent ones, illustrate the potential application of fraud to arbitration. In the first and oldest case, a Canadian company was brought before the “National Arbitration Centre,” an imaginary arbitration institution created from scratch to conduct the arbitration proceedings. The president of this “institution,” who acted as “arbitrator” in this sham arbitration organized in collusion with the French party, for which the sole purpose was to defraud the respondent, was sentenced to three years imprisonment for fraud, forgery and use of forgery.60

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More recently, in the Tapie arbitration, one of the three arbitrators was charged with organized fraud. Certain facts reported in the press suggested that this arbitrator was criticized for having intervened in favor of Bernard Tapie, with his attorney, before his appointment as arbitrator. Bernard Tapie and his attorney have also been charged with organized fraud.

In the third case, an arbitrator was also charged with fraud. Two regions of a State, which had signed an agreement with a company that was then dissolved without the agreement being executed, launched ad hoc arbitration proceedings in Stockholm under the authority of the UNCITRAL Arbitration Rules. As the respondent had been dissolved, the claimants asked the President of the Nanterre Commercial Court, in a non-adversarial proceeding, to nominate an ad hoc representative to represent the company for the purpose of the arbitration. This representative appointed an arbitrator. The respondent’s parent company filed a criminal complaint against the arbitrator for his conduct because he minimized his relations with the representative, who suggested his appointment and had agreed with him to the respondents detriment. This arbitrator was charged with organized fraud.\(^{61}\)

Beyond fraud, the arbitrator who solicited or accepted an advantage from a party to influence the tribunal in their favor commits corruption and influence peddling.

3. Corruption and influence peddling

Similar to magistrates, there are specific passive corruption and influence peddling charges for arbitrators. These offenses are included in the “obstructing the course of justice” category. (Section 2, Chapter IV, Title II of Book IV of the Criminal Code).

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The criminal code distinguishes between the arbitrator who performs "their mission under domestic law on arbitration"\(^{(62)}\) and the arbitrator who performs their mission "under a foreign state’s law on arbitration,"\(^{(63)}\) without this distinction having any consequence on the definition of the offense, nor on the extent of sanctions, which are identical for these two categories of arbitration.

Passive corruption (ten years imprisonment and a fine of 1,000,000 €, amount which can be increased to the double of any profit made from the offense pursuant to Articles 434-9 and 435-7 of the Criminal Code) is more severely punished than passive influence peddling (five years imprisonment and a fine of 500,000 €, an amount which can be increased to the double of any profit made from the offense pursuant to Article 434-9-1 of the Criminal code).\(^{(64)}\) However, corruption is sufficiently largely defined that recourse to influence peddling is not necessary.

Passive corruption is defined as “requesting or accepting, without any right, at any time, directly or indirectly, offers, promises, donations, presents, or any advantage whatsoever, for oneself or for others, to carry out or for having carried out, to refrain or for having refrained from carrying out an act of their function or facilitated by their function” (Articles 434-9 and 435-7 of the Criminal Code).

An arbitrator who accepts an advantage from a party to influence the arbitral tribunal’s decision in their favor is carrying out an act of their function and committing corruption. They are also committing influence peddling, more specifically defined and less strongly reprimanded, which is defined as the fact of monetizing “a real or alleged influence aimed at obtaining (…) any decision” (Article 434-9-1 of the Criminal Code).

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\(^{(62)}\) Articles 434-9, paragraph 1 of the Criminal Code for corruption and 434-9-1, paragraph 1 for influence peddling.

\(^{(63)}\) Article 435-7 of the Criminal Code for corruption. Influence peddling is not sanctioned in this case (Article 435-8 of the Criminal Code only refers to persons exercising "within or attached to an international court").

\(^{(64)}\) This is not the case of influence peddling committed by a custodian of public authority, entrusted with a public service mission, or invested with a publicly elected mandate that is also punished by ten years imprisonment and a fine of 1 000 000 € (Article 432-11 of the Criminal Code).
An arbitrator who requests or accepts a bribe from a party to make a decision in their favor could also be charged with concealment of abuse of corporate assets.  

Protection of arbitration by criminal law is not limited to an arbitrator’s impartiality, but also extends to an arbitrator’s confidentiality, which does not appear to be as essential.

4. Breach of arbitral confidentiality

Article 226-13 of the Criminal Code provides that “revealing information of a secret nature by a person who is a custodian of this information either by state or by profession, or because of a function or temporary mission, is punished with one year imprisonment and a fine of 15,000 €.”

Arbitrators hold confidential information that the parties provide to them for the purposes of ruling on the dispute. This “temporary mission” with which the arbitrator is entrusted could justify conviction under Article 226-13 of the Criminal Code for an arbitrator who breaches the confidentiality

(65) Article L. 242-6 of the Commercial Code applicable to joint-stock companies and simplified joint-stock companies by reference to Article L. 244-1 of the French Commercial Code and declined for other forms of corporate governance (in particular Article L. 241-3 of the French Commercial Code for limited liability companies): “The following is punishable by five years’ imprisonment and a fine of € 375,000: ... (3) The chairman, the directors or the managing directors of a public limited company to use, in bad faith, property or credit of the company, for a use that they know is contrary to the company’s interests, for personal purposes or to favor another company or company in which they are directly or indirectly interested.

Since the Carignon case (Cass. Crim, October 27, 1997, no 96-83-698), case law considers that “whatever the short-term advantage it may provide, the use of corporate funds for the sole purpose of committing an offense such as corruption is contrary to the company’s interests in that it exposes the legal entity to the abnormal risk of criminal or fiscal sanctions against itself and its directors and affects its credit and its reputation.” See in particular Wilfrid Jeandidier, Fascicule LexisNexis 132-20 : ADMINISTRATION – Abus des biens, du crédit, des pouvoirs ou des voix, n° 57.
of this information. However, no case law exists to support this. The confidentiality principle of domestic arbitrations is provided by the last paragraph of Article 1464 of the Civil Procedure Code, which does not apply to international arbitration, and for whom no text imposes a confidentiality obligation on an arbitrator. However, Article 226-13 of the Criminal Code applies to legally or regulatory recognized secrets. The offense it establishes can only be applied to arbitrators in domestic arbitrations.

Regarding arbitrators’ professional secrecy obligations, certain authors consider that it does not take away the obligation to report any suspicions of money laundering, to which certain professions are held, like attorneys as part of giving advice to clients. And to conclude, an attorney who intervenes as arbitrator in a dispute on which they do not rule because a settlement was reached between the parties, but who participates in the drafting of such agreement remains held by this declarative duty, and possibly subject to criminal prosecution.

An arbitrator who is subject to general law offenses and referred to in several specific offenses is therefore discouraged from breaching the most essential principles of arbitration. This discouragement results both from the importance of the sanctions as well as the damage to professional reputation which is likely to result there from.

(66) Eric Loquin, Fascicule LexisNexis 1015 : ARBITRAGE – L’arbitre – Conditions d’exercice – Statut, n° 87 : “It is true that in French law arbitrators are criminally liable if they reveal the secrets that the parties entrust them with. The arbitrator agreement makes them the custodians, within the meaning of Article 226-13 of the Criminal Code, of the secrets entrusted to them by the parties. It is in fact the relationship of trust created by the function or the state of the custodian with the secret and the depositor that justifies criminal prosecution”. But less affirmative, Eric Loquin, Fascicule LexisNexis 1036 : ARBITRAGE – Instance arbitrale – Procédure devant les arbitres, n° 139 : “It is permissible to ask whether, under French law, the existence of an offense punishable by law for breaching confidentiality gives the obligation of confidentiality a criminal dimension. (…) There is no jurisprudence to support this so the answer to the question is uncertain.” See also Jean-Louis Delvolvé, Vraies et fausses confidences, ou les petites et les grands secrets de l’arbitrage, Revue de l’arbitrage 1996, n° 3, p. 378.

(67) Article 1464, paragraph 4 of the Civil Procedure Code : “Subject to legal obligations and the parties stating otherwise, arbitration proceedings are subject to the confidentiality principle.”


Other than these offenses which reprimand behavior contrary to morale and to arbitration principles, ensuring that an arbitrator behaves well, an arbitrator’s criminal liability, is in a certain way, a guarantee of the parties’ own proper conduct. This is because in intervening in arbitration proceedings that would be part of a criminal offense committed by the parties, an arbitrator is confronted with the risk, if he is not vigilant, of being accused of aiding and abetting.

B. Criminal liability of arbitrators guarantees the parties’ proper behaviour

1. The risk of an arbitrators being held criminally liable as a party’s accomplice

Arbitration proceedings, which generally end in one party being sentenced to pay a sum of money to the other one, could be used by unscrupulous parties to launder money of criminal origin or to commit tax fraud. There are many ways of achieving this and could include creating an artificial dispute to justify transferring illicit money. Parties can also modify the characteristics of an existing dispute to unduly benefit from a more favorable tax treatment.

To avoid any risk about the final decision, parties could agree on a settlement and ask the tribunal to acknowledge their agreement in an award made by consent of the parties. Such award, which can be summarized as a formal acknowledgment and not a ruling on the dispute, does not qualify as a judicial act. It nevertheless benefits from the favorable enforcement conditions provided by the New York Convention.

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The signing of this award by an informed arbitrator could also characterize money laundering or collusion of the offense committed by the parties.72

Article 324-1 of the Criminal Code provides that: "money laundering is an act of facilitating, by any means, the false justification of the origin of goods or revenues from the perpetrator of a crime or an offense which provided the latter with a direct or indirect profit…Money laundering is punished by five years imprisonment and a fine of 375,000 €." Therefore, an arbitrator who knowingly participated in such a fraud by acknowledging the settlement agreed between the parties could be sentenced for money laundering, and their decision would constitute a "dissimulation (…) operation" or an act "falsely justifying the origin" of a revenue that the party receiving the funds at the end of the arbitration benefits (Article 324-1 of the Civil Code).

It is interesting to note that given the very wide definition of money laundering ("facilitate," "help"), that recourse to complicity in money laundering is unnecessary.

Money laundering is an intentional crime, it is therefore necessary to prove that the arbitrator knew about the criminal origin of the funds and their wish to justify their origin or to help in dissimulating them. The arbitrator’s intention can be proven by a body of corroborating evidence or by presumption,73 in particular given the inexistent or abnormal nature of the proceedings. An arbitrator therefore needs to be vigilant in order that what would only be a negligence be characterized as money laundering.

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(72) The 1998 ICC Arbitration Rules were updated in 2011 to allow arbitrators to refuse an award by consent. Article 26 of the 1998 rules provides "If the parties reach a settlement after the file has been transmitted to the Arbitral Tribunal in accordance with Article 13, the settlement shall be recorded in the form of an Award made by consent of the parties if so requested by the parties and if the Arbitral Tribunal agrees to do so." The new Article 32 now provides that "if the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with Article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so."

(73) Morgane Daury-Fauveau, Fascicule LexisNexis 20 : INFRACTION GENERALE DE BLANCHIMENT - Conditions et constitution, n° 32.
The risk of collusion or laundering of tax evasion is similar and the sanctions comparable. Article 1741 of the General Tax Code provides that “anyone who fraudulently avoided or attempted to fraudulently avoid” tax, “either by voluntarily concealing part of sums subject to tax, or by organizing their insolvability or using other maneuvers to make obstacles to tax recovery, or by acting in any other fraudulent manner, is punished, independently from any applicable tax sanctions, by a fine of 500,000 € and five years imprisonment.” The arbitrator must exercise the same vigilance to avoid such an accusation.

Finally, there also exists another hypothesis where the disputed agreement in the arbitration itself constitutes an offense. This is the case for example when the disputed agreement constitutes or dissimulates a corrupt agreement. Arbitrations relating to payment disputes on remunerations due to agents and in international sales agreements almost systematically present this question.

If the agreement put to the arbitrators is a corrupt pact and constitutes itself an offense, the arbitrator’s decision that would give an effect to the agreement could make them an accomplice by providing “aid or assistance” (Article 121-7 of the Criminal Code) or committing corruption laundering.

Even if the seat of arbitration is located abroad, the arbitrator could be criminally sanctioned in France if the main offense was committed in France. Inversely, if the seat of arbitration is in France, the arbitrator could be sanctioned even if the main offense was committed abroad if this offense is punished both by French law and the foreign law and if it has been formally acknowledged by a final foreign decision (Article 113-5 of the Criminal Code).

The arbitrator who knowingly allowed for illicit commissions to be paid in their award could also be accomplice to abuse of corporate assets committed by the disputed party or commit laundering of corporate assets (see above). This risk would be even greater if the agreement gives rise to the payment of retro-commissions.

(74) Romain Dupeyre, Les arbitres et centres d’arbitrage face à leurs responsabilités : le droit français à son point d’équilibre, Bulletin ASA 2014.
2. The arbitrator’s duty to prevent the parties from committing offenses

In each of these hypotheses (money laundering, tax fraud collusion, corruption, or any other offense committed by parties), the arbitrator, faced with sufficient proof that the arbitration is a sham organized by the parties to launder money or commit tax fraud or the agreement falls otherwise under criminal law, must refuse to give any effect to the agreement between these parties or the illicit underlying agreement or even from ruling on the dispute. If they gave any effect to these agreements, an arbitrator would risk committing money laundering or tax fraud collusion, corruption or any other offense committed by the parties to the arbitration.

The evaluation of intention by the criminal judge sometimes results from a body of corroborating evidence or mere presumptions. An arbitrator, a professional who is given judicial liability, must expect a rigorous application of criminal law. This applies even more so where the criminal judge could be inclined to consider that the arbitrator was confronted with sufficient elements and evidence to reveal an offense was committed and necessarily knew about it. An arbitrator therefore needs to be vigilant that they don’t make themselves an accomplice to the parties by negligence and carry out appropriate diligence when an agreement or a situation appears suspect to them.

The collegiality of the arbitral tribunal does not mean impunity and gives no protection against criminal sanctions. Under the co-respective accomplice theory according to which, in the absence of any evidence to the contrary, the members of a collegial body or a group can see their personal criminal liability held for offenses committed by this body or group, criminal law can individually sanction the members of an arbitral tribunal. In certain cases, an arbitrator who refused to sign an award or who has issued a dissenting opinion could prove that they did not participate in the offense committed by the majority of the other arbitrators. In addition, the arbitrator who wants to prove his innocence by dissociating himself from the arbitral tribunal majority will not be held by the secrecy of the
award rendered, which is an exception to exercising the defense rights of its party.\textsuperscript{76}

In certain cases, namely those where parties organized a fictitious arbitration to launder money or evade tax, it may be necessary for the arbitrator to resign.\textsuperscript{77}

It seems, however, that if an arbitrator was confronted with such a situation, he would have no obligation to report the parties. On the one hand, an arbitrator is not concerned by Article 40 of the Criminal Procedure Code which only refers to "any constituted authority, and public official or civil servant." On the other hand, the duty to report ongoing crimes or crimes that are likely to be repeated, provided by Article 434-1 of the Criminal Code, does not relate to offenses with which an arbitrator is likely to confront. Moreover, domestic arbitrators are sworn to secrecy under Article 226-13 of the Criminal Code, an exception expressly provided by the last paragraph of Article 434-1 of the Criminal Code.

It follows from the study of offenses potentially applicable to arbitrators that the most serious abuses of arbitration proceedings by an arbitrator or a party - fraud committed against another party or corruption - or by an arbitrator and all the parties - arbitration award fraud - fall under criminal law. This way, criminal law prohibits sham arbitrations and fraud and imposes a criminal risk on the arbitrator and protects arbitration against such abuses. The criminal risk therefore helps in protecting arbitral justice and its reputation.

However, this protection of arbitration by criminal law could itself be used by a party to block the arbitration by criminalizing an arbitrator in a completely unjustified and abusive manner.

Therefore, if the scope of the arbitrator’s liability must not be limited as it guarantees the integrity of arbitral proceedings and, indirectly, the arbitral institution itself, it could be necessary to limit its implementation in one particular case to avoid any risk of abuse.

\textsuperscript{77} Alexis Mourre, Arbitration and Criminal Law : Reflections on the Duties of the Arbitrator, Arbitration International, LCIA 2006, Vol. 22, no 1, p. 113 : “If the arbitrators realize that the arbitration has been simulated from the outset, which is to say that, in reality, there is actually no dispute, they should resign (…).” David Chilstein, Droit pénal et arbitrage, Revue de l’Arbitrage, 2009, p. 3, n° 25.
II. The protection of arbitrators and arbitration against the manipulation of criminal justice

A. The risk of manipulation of criminal justice by a party to the arbitration

Contrary to state judges, arbitrators are chosen by parties taking into consideration their personal qualities. They are therefore not easily replaceable. The procedure for recomposing an arbitral tribunal can be long and complex, especially if one party is acting in bad faith.

A party could be tempted to initiate criminal proceedings against an arbitrator to destabilize the arbitral proceedings. This could be the case particularly if an interim award was rendered, for example on the principle of a party’s liability, and that the arbitral tribunal still needs to render an award on damages.

Seeking criminal liability of one or several arbitrators by a party and initiating criminal proceedings during arbitration proceedings could paralyze the arbitration proceedings.

On the one hand, because the aforementioned offenses question an arbitrator’s impartiality and/or go against public policy, it seems difficult to conceive that the arbitral tribunal can render an award before the question of arbitrators’ liability is decided. On the other hand, the mere fact that a party seeks criminal liability of an arbitrator could introduce an objective doubt about the arbitrator’s impartiality towards this party. Therefore, the difficulties raised by criminal liability of one or several arbitrators are more delicate that those raised by a challenge.

1. The situation of an arbitrator subject to a criminal complaint is radically different from an arbitrator subject to a challenge

One could be tempted to compare the situation between an arbitrator subject to a complaint by a party and the request by a party for an arbitrator’s challenge. On the one hand, the decision deciding on a
challenge can also have an effect on the validity of the award rendered by the arbitrator concerned. On the other hand, the mere fact of bringing a legal action concerning an arbitrator’s independence can also lead to an objective doubt on an arbitrator’s impartiality relating to the party who questioned their independence.

In the case of a challenge, the arbitral tribunal can stay the proceedings until a definitive decision has been handed down about the challenge. However, it is clear that the arbitrator who is subject to an ongoing challenge can continue to perform his mission until this question has been ruled on, contrary to the judge who is faced with the same request who must “refrain until the recusal has been ruled on.” (Article 346 of the Civil Procedure Code).

If the request is dismissed, the arbitrator cannot ipso facto be considered as partial towards the party who initiated the challenge. On the contrary, at least when the decision is taken by the support judge and not by the arbitral institution, the dismissal decision of the challenge has res judicata and is binding on the annulment judge.

These two answers to a challenge – a stay on proceedings whilst waiting for a decision on the challenge and considering that in principle the dismissal of this request does not oblige the arbitrator concerned to resign – do not seem adapted to criminal proceedings launched by a party against an arbitrator. This type of procedure will be too long as such charges are much more serious than a simple challenge.

Criminal proceedings are much longer than a challenge

The victim of a criminal offense can trigger public prosecution itself, despite a public prosecutor’s inaction, by either summoning a defendant before a criminal court, or filing a criminal complaint with an investigating judge.

In the first case, the party directly summons the perpetrator before the criminal courts. This summons triggers public prosecution and the hearing date is generally scheduled for within one year. An appeal against the decision handed down several months after the hearing will generally double the duration of the procedure to several years. The total duration of such proceedings can easily reach three years. It is highly unlikely that a party wishing to block an arbitration opts for this possibility which is the shortest and assumes that the plaintiff has sufficient evidence.

In the second case, the victim triggers public prosecution by filing a criminal complaint with the investigating judge. This must be preceded by a simple complaint filed with the criminal prosecutor. Indeed the plaintiff can only petition an investigating judge "under the condition that the person justifies either that the State Prosecutor has advised them (...) that it will not itself launch proceedings, or that a three month delay has passed since the complaint was filed" (Article 85 of the Criminal Procedure Code).

Filing a complaint with the senior investigating judges, who upon receipt of the State Prosecutors opinion, opens a judicial investigation. Very exceptionally, the investigating judge can hand down an order refusing to inform ("ordonnance de refus d’informer") if they consider that the criminal proceedings are not legally possible, if the alleged facts do not constitute an offense or if "it is manifestly established" that they have not been committed (Article 86 of the Criminal Procedure Code). These orders refusing to inform are extremely rare and do not constitute an efficient filter to avoid abusive attempts to seek arbitrators criminal liability.

The normal duration of a criminal investigation is between one and two years. The investigation ends with an order to dismiss which the civil party can appeal. Given the delays for scheduling hearings at the investigation chamber, it seems that there is at least a two year delay.

The delay in which the criminal proceedings end cannot be compared to the one month delay that Article 1456 of the Civil Procedure Code,
imposes on the judge who has to rule, on the challenge of the arbitrator where there is no arbitral institution, with no appeal possible.\textsuperscript{81}

Arbitral proceedings cannot be suspended for several years because a party has launched criminal proceedings against an arbitrator. The timing for arbitration proceedings cannot be compared to the timing for criminal proceedings.

Other than the fact that rapidity is one of the criteria that leads parties to choose arbitration, such a stay on proceedings could have serious consequences, for example, if there is a risk of substantive evidence for the arbitration disappearing or financial difficulties of parties making enforcement of the award impossible. In particular, this paralysis of the arbitral proceedings could lead, specifically in \textit{ad hoc} arbitrations, to the arbitration time limit expiring, with irremediable consequences in terms of the arbitrator’s liability and statute of limitations on parties’ claims.

A stay on proceedings, often advised when a challenge request against an arbitrator is pending, is not an adapted solution in the case of criminal proceedings initiated by a party. Even if such stay could be ordered, it would make criminal complaints for dilatory purposes even more efficient.

- An arbitrator subject to a criminal complaint filed by a party to an arbitration becomes their adversary and this impartiality with regards to this party is \textit{de facto} challenged

A party seeking an arbitrator’s criminal liability does not have the same implications nor the same seriousness as a challenge request.

An arbitrator who is criminally charged can be put into custody or be subject to a search. The media coverage of such investigation acts is important and necessarily damages an arbitrator’s reputation. The arbitrator subject to criminal proceedings becomes a party in the proceedings from the summons or the placement under investigation by the investigating judge. Contrary to the case of a challenge request, the arbitrator is not only the object of the procedure, but also becomes, as a party to the proceedings, the adversary of the party who criminally denounced them.

\textsuperscript{81} The time limit for challenging an arbitrator is 30 days in the ICC Rules (Article 14.2) and 14 days in the LCIA Rules (Article 10.3) as from the date when the party knew about the facts it is invoking.
It is therefore difficult to assert that, in principle, as is the case for challenges requests, a party seeking an arbitrator’s criminal liability does not call into question an arbitrator’s impartiality with regard to such party.

However, it would be completely counterproductive to impose recusal on an arbitrator whose criminal liability was sought by a party, either automatically or at the request of a party. Indeed, such systematic reactions would make it even easier to manipulate criminal proceedings by a party unhappy with an interim award and wishing to block the arbitration procedure.

It thus seems difficult, in the state of positive law, for arbitrators to fight against a manipulation of criminal law by a party seeking to paralyze arbitral proceedings.

2. The lack of measures allowing arbitrators to effectively fight against a manipulation of criminal justice

If a party tries to block the arbitration proceedings by launching criminal proceedings against an arbitrator, certain authors suggest that the arbitral tribunal can defend itself by moving the arbitration to a protective jurisdiction.\(^82\) However, such transfer should be authorized by the arbitration rules and/or applicable law to the arbitration proceedings.\(^83\) In particular, such a transfer does not eliminate the risk that the criminal prosecution of an arbitrator may affect the validity of the award or the doubts that prosecution by a party may raise as to the arbitrator’s independence in their respect.

We can also imagine that the arbitral tribunal sanctions the unfair behavior of a party when allocating the costs of the arbitration. However, such


\(^{83}\) For example, Article 18 of the ICC Rules, entitled “Place of the arbitration” allows arbitrators to hold hearings and deliberate in any place they deem appropriate: “1. The place of the arbitration shall be set by the Court, unless agreed upon by the parties. 2. The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the party. 3. The arbitral tribunal may deliberate at any location it considers appropriate.”
a decision would come too late and would have a limited deterring effect on a party who thinks, or knows, that it has already lost the arbitration and is likely to bear all of its costs.

What then? It is possible to stick to the observation that, fortunately, the parties are still hesitant to push their defense strategies to such extremes. Those who are the least optimistic about the virtues of the parties and their lawyers will probably consider that it might nevertheless be judicious to deprive them of any temptation.

B. The need to protect arbitration and arbitrators from manipulation of criminal justice

If an arbitrator’s criminal liability is the guarantee of their good behavior and the smooth running of the proceedings, it is necessary to avoid parties manipulating this liability to paralyze the arbitral proceedings by initiating dilatory criminal proceedings against one or more arbitrators.

It therefore seems necessary to limit the capacity of a party to initiate public proceedings during the arbitral proceedings, the party regaining its full right of action after the award is rendered, since the risk of paralyzing the arbitral proceedings and manipulating criminal law would have disappeared at this time.84

Such protection should not afford impunity to arbitrators which would be counterproductive and would undermine the deterrent and protective effects of criminal liability.

(84) Admittedly, in the case of domestic arbitration, where an appeal for annulment does not, in principle, suspend the enforcement of the award (Article 1496 of the Criminal Procedure Code, to be set against Article 1526 in international arbitration). A party could therefore delay the proceedings on this appeal by initiating a dilatory criminal procedure and seeking a stay of proceedings on the basis of Article 4 of the Criminal Procedure Code (Cass. 1° Civ. October 25, 2005, n° 02-13252: “Article 4 of the Criminal Procedure Code is applicable, even in international matters, to an appeal for the annulment of an arbitral award if the criminal proceedings are held in France, and the application for a stay of proceedings cannot be accepted if the alleged facts constituting the offense have a direct bearing on the cause of annulment of the award and if the criminal decision to be handed down is likely to affect the civil decision,” see also Paris January 16, 1986, Europmarkets / Argolicos Gulf Shipping and December 8, 1988, Sté Chantiers Modern / CMGC). However, such an instrumentalization of criminal justice after sentencing would have far less serious consequences.
A mechanism for the protection of arbitrators against the manipulation of criminal law can be found in the public prosecutor's complaint procedure.

For some offenses, an exception is made to the victim's right to initiate public action and the exercise of the right of action is solely for the benefit of the public prosecutor.

Article 113-8 of the Criminal Code thus establishes a mandatory "prosecution" mechanism for the public prosecutor for offenses committed outside of France. This monopoly gives the public prosecutor a genuine opportunity to assess the discretionary prosecution, which they normally share with those who can justify personal and direct damage caused by the offense (Article 2 of the Criminal Procedure Code).

Since the December 18, 2013 Law, this prosecution mechanism for the public prosecutor applies to crimes "committed in the performance of its mission by a military engaged in an operation mobilizing military capabilities, occurring outside French territory or French territorial waters" (Article 698-2 of the Criminal Procedure Code). This monopoly of the public prosecutor has been justified by the legislator in order to prevent facts which do not require criminal treatment from being submitted to the criminal court for the pure purpose of unjustified media coverage, which would increase the pressure on military and thus limit the audacity of command and the ability of soldiers to immediately obey orders.\(^{85}\)

The legislator insisted on the fact that Article 698-2 of the Criminal Code does not in any way "establish any exceptional criminal immunity for the benefit of the military."\(^{86}\)

The public prosecution mechanism could be applied to offenses with which an arbitrator is accused during an arbitration in connection with his arbitration mission, since the public prosecutor's monopoly acts as a filter to avoid any unjustified criminal action.

\(^{85}\) Opinion n° 56 (2013-2014) by Jean-Pierre Sueur, in the name of the laws commission, filed on October 9, 2013.

\(^{86}\) Report n° 50 (2013-2014) by Jean-Louis Carrère, in the name of the foreign affairs, defense and armed forces, filed on October 8, 2013.
As with the military, it would be necessary to take into account the special status of arbitrators and the specific risk of criminal justice being used against them.

Any criminal proceedings brought against an arbitrator in pending arbitral proceedings for an offense committed in the course of their arbitral mission could only be initiated by the public prosecutor. If a party denounces the facts as constituting such an offense, the public prosecutor would then have a period of three months to decide on the outcome of the denunciation. If they decide to pursue prosecution of the accused conduct, the party would recover all its rights. On the contrary, if the public prosecutor refused to prosecute, the party would be deprived of its right to initiate public proceedings by way of direct summons or civil party proceedings. The parties would have full powers of action once the award had been rendered.

This procedural mechanism has the advantage of not granting substantial immunity to arbitrators, which would give a negative image of arbitration and would be counterproductive.

The effectiveness of such a mechanism would be enhanced if the public prosecutor’s monopoly was concentrated in the hands of the national financial prosecutor. This would allow a specialization of judges likely to decide on discretionary prosecution, who would have an excellent knowledge of the arbitration and the rules applying to it, and ensure the quality and consistency of the decisions. It is also natural that the great majority of arbitrations taking place in France are in Paris and that the President of the Paris Tribunal de Grande Instance, by default, plays the role of support judge in international arbitration (Article 1505 of the Civil Procedure Code).
PART 2
The extrajudicial control of arbitrators

CHAPTER 1
Control by peers

Discipline and arbitration in the transparency era. Discipline is both a rule of conduct imposed on oneself, the rule imposed by an authority on which one depends, and an individual’s aptitude to obey with these rules.

Although it is not a purely legal matter, it is an integral part of the world of law. Contrary to deontological and ethical responsibilities attached to morale, disciplinary liability is generally categorized within legal liabilities, alongside civil and criminal liabilities.\(^{(87)}\) The sanctions regime attached to non-compliance with disciplinary rules is autonomous "as regards to the competent authorities and the procedure as well as the definition of offences and the nature of the penalties."\(^{(88)}\)

Discipline is therefore first and foremost a matter of conduct. Disciplinary rules are not rules as strict or precise as laws or decree, they are in between law and non-law, very well described by Dean Carbonnier. Arbitral justice, as it is not merely a private clone of state justice, and has

\(^{(88)}\) G. Cornu (dir.), Vocabulaire juridique, article “Discipline”, p. 313.
developed with a certain flexibility, according to the specificities of cases submitted to it.

At a time where transparency is important, “moralization” becomes the key word for many areas of public life. In this context, confidence in arbitral justice – left to develop outside of the state giants – corresponds more than ever with the requirement of perfection addressed to its actors, at the forefront of which are arbitrators and counsel.⁸⁹

The question asked can be worded as such: are disciplinary procedures and resulting sanctions adapted to the regulation of arbitral justice? If so, using what legal structure could such disciplinary procedures be implemented?

In an attempt to respond, we will focus on the English example of the disciplinary procedure instituted under the authority of the Charted Institute of Arbitrators (I), before questioning the place that the French system could leave for disciplinary liability of arbitrators (II).

I. The English example of the CIarb’s disciplinary procedure

A disciplinary procedure already exists in certain cases, like for example in sport arbitration,⁹⁰ but also at the Kuala Lumpur Regional Center for Arbitration⁹¹ or the English Chartered Institute of Arbitrators (CIarb). Certain arbitration centers or associations have also published ethical charters (namely including the due diligence required of the arbitrator to favor the expeditiousness of the proceedings and to manage the costs): this is the case of the American Arbitration Association (AAA), the Association Française d’Arbitrage (AFA) and the Singapore International Arbitration Center (SIAC).

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(⁸⁹) These two bodies do not form two clearly distinct categories, but a heterogeneous group in which the roles are often exchanged from one procedure to another.

(⁹⁰) Sport arbitration is not dealt with in this study, as these specificities prohibit it from being equated with international commercial or investment arbitration. However, disciplinary procedures and sanctions are well developed within sports federations.

(⁹¹) To the best of our knowledge, the procedure and the possible decisions are not published and will not be developed in this study.
We propose to more specifically study the disciplinary procedure implemented by the CIArb (A), which seems to be the relevant starting point for reflecting on possible developments for France on this point (B).

A. Description of the CIArb’s disciplinary procedure and sanctions

The Chartered Institute of Arbitrators is an English professional organization promoting alternative dispute resolution (ADR), in particular arbitration and mediation. Based in London, the CIArb has 14,000 members in 133 countries.\(^{92}\) In addition to its training functions and its meeting platform for ADR practitioners, the CIArb has its own disciplinary bodies, which have the powers to impose sanctions on its members for any misconduct committed by them during the performance of their duties as arbitrator, adjudicator, mediator or other roles.

**Overview of the procedure.** The scope of CIArb’s jurisdiction to impose sanctions on its members is defined by its definition of misconducts it can accuse its members of. Section 15.2 of the CIArb By-laws sets out 5 cases of misconduct:

- Conduct which is harmful to the reputation of the CIArb, rendering the person unfit to remain a member or likely to bring discredit on the institute;

- A significant breach of professional or ethical conduct, which shall include the Code of Professional and Ethical Conduct or other similar documents published by the CIArb;

- The fact that a member falls significantly below the standards expected of a competent practitioner or a competent person acting in the field of private dispute resolution;

\(^{92}\)\) There are several ways to join the CIArb, depending of the level of experience (in ascending order: student, associate, member, fellow). Membership is free for students, and all other members must pay. The transition from one degree to the next takes place with additional qualifications in MARC organized by the CIArb itself.
- A failure without reasonable excuse to comply with a direction and/or a recommendation of a Peer Review Panel constituted under By-law 15.1;

- A significant breach of any of the Articles the CIarb or the By-laws (or any Regulation or rule published by the CIarb).

The CIarb disciplinary procedure is mainly a written procedure (even if an oral hearing on arguments is possible) and can be split into four stages:

1. Exchange of correspondence between the "plaintiff" and the accused members.

2. A prima facie review by the Professional Conduct Committee ("PCC").

3. A review of the merits by the Disciplinary Tribunal.

4. A second review by the Appeals Tribunal, subject to an appeal being authorized.

This procedure may be initiated by any person concerned, by means of a letter addressed to the Director of Legal Services of the Center and accompanied by the relevant documents. The plaintiff may have been a party to arbitral proceedings where a member of the CIarb has served as arbitrator, be member of the CIarb, the CIarb itself or any other person.

**Four procedural stages.**

The first stage of the procedure consists of an exchange between the plaintiff and the CIarb member involved: the letter is sent to the member in question who has 28 days to respond and file a reply, which is then sent to the plaintiff who in turn has 14 days to file a rejoinder.

Once these adversarial exchanges are over, the PCC reviews the application and makes a briefly motivated decision. The PCC is an independent committee composed of:

- seven CIarb members (including at least two who are attorneys and one who is or has been a judge);

- between one and five external members (from the list established under Article 15.1 (3) of the CIarb By-laws).
The PCC conducts a *prima facie* review of the case, to determine whether disciplinary sanctions are appropriate. If the case passes the PCC’s examination, it is forwarded either to the Peer Review Panel (composed of experienced CIArb members, specialized in the accused member’s field of practice); or directly to the Disciplinary Tribunal.

Finally, the case is examined by the Disciplinary Tribunal. The tribunal is composed of at least three people:

- a president (who must be or have been a judge, or be an attorney with more than ten years experience);
- an external member;
- a CIArb member specialized in the same field of practice as the accused member).

The Disciplinary Tribunal shall issue a reasoned decision, imposing or not a sanction on the accused member. There are 5 possible sanctions:

- a reprimand or formal warning for the future;
- a suspension from the CIArb for a maximum of twelve months;
- the temporary or permanent loss of chartered status granted by the CIArb, if the accused member was a chartered member;
- exclusion from the CIArb;
- liability for costs (under the provisions of paragraph 8.6 of the Annex to the CIArb By-laws).

The CIArb disciplinary proceedings also provide for an appeal mechanism before an "Appeals Tribunal", under certain conditions described below. The members of the Appeals Tribunal come from the same lists as those of the Disciplinary Tribunal, but cannot be the same persons (as otherwise their impartiality would not be guaranteed). If a sanction is imposed, and within 28 days of its notification, either the CIArb or the accused member may seek the authorization to file an appeal.\(^{93}\) If the Tribunal dismissed the case and considers that there is no need to

\(^{93}\) The authorization to start an appeal, sought directly from the higher court, is a common mechanism under English law, contrary to French law that ignores it.
impose sanctions, only the CIArb can file an appeal. The appeal is only authorized in two cases: error of fact or law.\(^9^4\) The Appeals Tribunal’s decision is final and cannot rule on the costs.

Pursuant to paragraph 12 of the Annex to the CIArb By-laws, the Board of Directors can decide to publish a report relating to any disciplinary hearings held under its aegis.\(^9^5\)

### B. Evaluation of the CIArb’s procedure and sanctions

**Examples within the CIArb.** The CIArb does not provide any comprehensive statistics on its disciplinary procedures and it is therefore not possible to know the number of registered applications, the number of proceedings incurred and their consequences. To our knowledge, however, the CIArb disciplinary procedure has already given rise to disciplinary sanctions against two members, which were made public.

On May 5, 2011, a first Disciplinary Tribunal imposed a fine of 3,000 pounds and excluded John Campbell QC, former president of the CIArb, who rendered an award four years late, which was considered excessive.

The second sanction pronounced by a Disciplinary Tribunal constituted under the aegis of the CIArb was the Astapov case, in which the Board of Directors decided to publish during its winter session of 2015. Surprisingly, the Board of Directors specifies that this decision will be published for six months, or until the monetary part of the case is resolved. Mr. Astapov was accused of a false statement relating to the employment of a Kazakh tax law expert, in an ICSID arbitration involving the Republic of Kazakhstan. After having asked the parties for sums intended to remunerate the first expert, Mr. Astapov had in fact transferred them to an account in the Virgin Islands. This first expert finally refused to produce a report, and a second one was chosen by the parties. Mr. Astapov pretended to try and get back the first sum paid by the parties to pay the second expert, who ultimately was only partially paid. In October 2013, the PCC referred the

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\(^9^4\) This is a remedy half way between what French law calls *l’appel* and *la cassation*.

\(^9^5\) These publications may be anonymized.
case to the Disciplinary Tribunal. A disciplinary hearing took place on July 20, 2015. The Tribunal imposed a particularly severe sanction: Mr. Astapov’s definitive and immediate exclusion from the CIArb and the payment of 25,000 pounds to cover the costs of this proceeding.

Although published decisions sanctioning CIArb members remain rare – fortunately – the Disciplinary Tribunal does not hesitate from excluding members who default, which is a real deterrent.

Other forms of liability. In parallel with this almost unique CIArb procedure, in the United Kingdom there are mechanisms for disciplinary sanctions in two legal professional bodies: the Barristers’ and the Solicitors’ organizations.

Anyone is authorized to act as an arbitrator. Indeed, since acting as arbitrator does not appear among the “legal activities” mentioned in Article 12 of the Legal Services Act of 2007, no regulatory authority can prohibit a barrister, solicitor or any other person from doing so, even if the order is aware of any breaches. However, if a barrister acting as an arbitrator violated the Core Standard 5 of the Bar Code of Conduct,⁹⁶ they could be suspended or excluded from the bar, which would clearly lessen their chances of being appointed arbitrator in another case.

The Director of Professional Conduct at the Bar Standards Board, however - informally - confirmed that, to the best of her knowledge, there was no case in which a barrister was disciplined because of their conduct as an arbitrator.

Usefulness of the procedure. In the current context of increased competition between applicants for being arbitrators, the existence of a disciplinary procedure is an undeniable competitive advantage for both the parties to an arbitration and practitioners (arbitrators, counsel and experts).

Moreover, even if there are no statistics on this point, the existence of a disciplinary procedure specific to CIArb arbitrators should logically have the effect of limiting the number of judicial claims seeking the civil or

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⁹⁶ This core standard prohibits Barristers from behaving “in a way which is likely to diminish the trust and confidence which the public places in [them] or in the profession.”
criminal liability of CIArb member arbitrators. In fact, analogous to the
management of conflicts between attorneys during court proceedings, the existence of a disciplinary body for complaints on defaulting arbitrators, generally has the effect of limiting the number of liability claims before the state courts.

Moreover, unlike civil liability proceedings, such disciplinary procedures do not affect the course of arbitral proceedings, which is a major advantage to be taken into account.

Lastly, even though it has been noted that the CIArb is struggling to gain international recognition despite its efforts, no one seems to think that the disciplinary powers of the CIArb have any negative effects on the attractiveness of London as a place of arbitration.

As already stated, the very limited number of public precedents and the lack of comprehensive statistics on both disciplinary and judicial procedures for a same case does means that a definitive conclusion cannot be drawn on the impact of the CIArb disciplinary procedure on dispute resolution involving an arbitrator.

II. Possible solutions for France

After having recalled the inexistence of specific disciplinary procedures for arbitrators in France (A), we will analyze the appropriateness and possible methods of implementing such a procedure (B).

A. Absence of disciplinary procedures

The need to provide a framework for behavioral conduct. Arbitration undoubtedly has the confidence of the French public authorities, and as Professor Jarrosson notes: “The arbitrator is the only individual to whom the State legal system considers a judicial power can validly be entrusted.”

Paris has been able to assert itself as a strong place for arbitration, and

(97) Namely, arbitration by the Chairman, which has the effect of limiting the interference of a judge in professional disputes between attorneys.

has no difficulty in attracting users of this judicial mode of dispute resolution. However, this confidence must be maintained and the equal quality of arbitral justice be ensured.

Whether this movement comes from the practitioners themselves (through the rise of the discourse on ethics in arbitration)\(^9\) or from others (through virulent criticism of arbitration by the public opinion during the most mediatized affairs or during the negotiations of transatlantic treaties), the world of arbitration is particularly sensitive today to the behavioral issues that are precisely those that could be subject to disciplinary liability. However, the question has not yet been dealt with exhaustively, or in any case has given rise to little written material. In 2008, the IBA Arbitration Committee established a working group on counsels’ behavior in international arbitration, but did not extend its study to arbitrators.

**A heterogeneous body.** This is the main difficulty in regulating arbitration using the disciplinary process. If many arbitrators come from the legal professions, including law professors, attorneys or magistrates, anyone can be appointed as arbitrator. As Professor Thomas Clay points out, the arbitral function is not a uniform profession in the same way as attorneys or magistrates: “Since arbitration is not a profession, it slips into the cracks of regulation and latches on to the regulation of other professions: no insurance, no specific taxation, no professional body for arbitrators, no ethics, etc.”\(^10\) It is therefore impossible in practice to establish a single disciplinary liability regime for the arbitrator.

**A implementation of the disciplinary regimes for attorneys or magistrates is insufficient and often inadequate.** For the reasons set out above, the submission of arbitral disciplinary litigation to the regulatory bodies of attorneys or magistrates would not lead to a uniform regime for the management of these disputes, since many arbitrators are neither attorneys nor magistrates. Such a solution also has many limitations.

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\(^101\) Article 6-2, paragraph 5 of the Règlement Intérieur National.
In the case of attorneys, where the arbitrator is an attorney registered with the French bar, their mission theoretically falls into the professional practice field of attorneys. They must therefore comply with the principles governing the profession, and in particular the principles of diligence, dedication and prudence. Failure to comply with one of these principles would, therefore, expose the attorney acting as an arbitrator to disciplinary sanctions such as a warning, blame, temporary ban from practicing or permanent exclusion. In practice, however, it appears that the Ethics Commission of the National Bar Council or the Bar Association of Paris has never issued an opinion sanctioning a breach of attorneys’ essential principles whilst acting as arbitrator. This tends to show that ordinal justice is not a natural way of resolving disciplinary difficulties that may be encountered in arbitration and/or that the regulatory bodies of attorneys are not sufficiently aware of the specific problems posed by arbitration.\(^{103}\)

A pure and simple implementation of the disciplinary liability regime of magistrates is not conceivable either: “[...] holding no public office, an arbitrator can in no case see their personal misconduct guaranteed by the State under the provisions of Article L. 781-1 of the Judicial Organization Code or Article 505 of the former Civil Procedure Code, which remain applicable only to non-professional competent courts.”\(^{104}\)

We must therefore note the legal vacuum in French law on the question of arbitrators’ disciplinary liability,\(^{105}\) and ask ourselves now about possible developments in France.

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(102) Article 1-4 of the Règlement Intérieur National.
(103) The situation is relatively similar in the United Kingdom, where there are two legal professional bodies that can impose disciplinary sanctions: the Barristers’ and the Solicitors’ organizations. Anyone is authorized to act as an arbitrator since this activity does not figure in the “legal activities” of Article 12 of the Legal Services Act of 2007. No regulatory authority could therefore theoretically prohibit a barrister, a solicitor or any other person from acting as arbitrator. However, if a barrister acting as an arbitrator breached Core Standard 5 of the Bar Code of Conduct, he could be suspended or even removed from the bar, which would clearly lessen his chances of being reappointed arbitrator in another case. It should also be noted that the Director of Professional Conduct within the Bar Standards Board, in a purely informal manner, confirmed that, to her knowledge, there was no case where a Barrister was disciplined because of their conduct as an arbitrator. As in the French system, the disciplinary sanctions applicable to attorneys or barristers could theoretically be applied when they act as an arbitrator, but in practice they are not.
(104) S. Guinchard, Répertoire de procédure civile, Dalloz, June 2013, §89.
(105) It should be noted that in 2013, S. Guinchard deplored the fact that there was no “true disciplinary liability worthy of the name for a judge’s misconduct in his judicial activity” (S. Guinchard, Répertoire de procédure civile).
B. Proposed solutions

Reflecting about ethics in arbitration, Professor Jarrosson spoke of the possibility of considering disciplinary procedures at the same time as he observed their non-existence: "Halfway between corporate and legal, discipline could be considered. In the judiciary, ethics sometimes merges with discipline, but discipline does not exist in arbitration, except perhaps marginally, within an arbitration institution."

We propose to envisage a real and practical development of discipline in arbitration, through the establishment of appropriate procedures.

**Types of conduct to be sanctioned by disciplinary action.** Before looking at the practical modalities for the implementation of possible disciplinary hearings, their interest and the risks they may entail, it seems necessary to attempt to draw up a typology of the most frequently criticized behavior that could be subject to disciplinary procedure. In a schematic way, it seems to us that it is possible to suggest the following categories:

- **Arbitrators’ lack of independence and impartiality:** if this type of breach is now mainly apprehended using the appeal for annulment of an award, the latter refers to the award and not to the arbitrator who rendered it. Moreover, as we state at the beginning of this report, liability claims against arbitrators are still relatively limited. It therefore seems appropriate to envisage that failure by an arbitrator in their statement of independence and impartiality can also be subject to sanctions by a disciplinary procedure, which would actually be against the arbitrator and not against their award.

- **Conduct of the proceedings in accordance with the principles of natural justice and the *audi alterem partem* principle:** this type of breach is also apprehended by the appeal for annulment of an award, but certain behavior is not covered by any sanctions. This is notably the case of communications between an arbitrator and a party outside of the proceedings, which are not sanctioned today,

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(106) Ch. Jarrosson, "Ethique, déontologie et normes juridiques dans l’arbitrage," L’Ethique dans l’arbitrage, Actes du colloque Francarbi, Bruylant, 2011, p. 9 ; see also infra, Chapter 2 of this report on the role of institutions.
and often because of lack of proof. In this respect, a disciplinary procedure could be an appropriate forum to focus the debate on these issues, or even allow those concerned to provide the necessary evidence (with the assurance of confidentiality if this is required).

- **Length of proceedings and the time limit for rendering the award:** this type of breach is currently and mainly apprehended by the arbitration institutions (who are in charge of ensuring the conduct of proceedings complies with their rules) and by the way in which the arbitration "market" functions (less diligent arbitrators are marginalized or excluded from the system). Although the excessive delay in rendering an award can result in the arbitrator being held civilly liable, this civil sanction in extreme cases could be coupled with disciplinary measures that would formalize the implicit rules of the arbitration "market."

- **The quality of the award:** The same applies to the question of the quality of the award rendered, which also largely depends on the confidence in arbitral justice, which is only legitimate if it offers decisions that are at least equal to those of national jurisdictions. Although the quality of the award is partly ensured by vigilance and control of institutions, and then by the review of the reasoning by the annulment judge, the quality of the award could be reinforced by the existence of disciplinary measures sanctioning arbitrators who repeatedly demonstrate lack of seriousness and nonchalance when performing their main mission: ruling on disputes relating to their jurisdictional power.

**Sufficiency of the “club” phenomenon?** In view of the above categories, it is possible to ask whether the current arbitration practice, concentrated around a limited pool of practitioners, is not self-regulating. Indeed, the club phenomenon has advantages: in the event of unlawful conduct, the member in question is generally *de facto* excluded from the body by no longer being appointed. The self-police phenomena would therefore already exist.

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However, this argument does not stand up to analysis. It must indeed be admitted that there is still a certain *omerta* in the arbitrators’ club. The case of Pierre Estoup in the Tapie case is frequently mentioned even if it is necessary to await the outcome of the ongoing judicial proceedings in order to assess the reality of the misconduct committed. Clubs therefore seem to oscillate between the risk of an over-protective *omerta* and that of a too informal circulation of information within the group, threatening to relay accusations without any way of contestation or even verification of their reality actually being provided sometimes.

Disciplinary law is original because the sanctions it inflicts strike the agent in their interests as member of a group.\(^\text{108}\) If arbitration is a “club,” the regulation of its members’ conduct would therefore have every interest in using a disciplinary form of liability.

**Risks inherent in disciplinary self-regulation.** The second question is whether disciplinary regulation is adapted to the quest for greater transparency, quality and confidence in arbitral proceedings. Indeed, self-regulation creates a certain mistrust, which could be prejudicial to arbitration by giving the impression that one is trying to conceal and keep it within the group: “The spontaneous recourse of certain professional circles to ethics makes many authors suspicious, who fear the manipulation which could be incurred, especially when it intervenes through codes of conduct.”\(^\text{109}\)

Moreover, the creation of a uniform disciplinary regulation would reinforce the professionalization phenomenon of the practice, which is not free from risk, as some doctrine states: “the professionalization of the activity as arbitrator has resulted in making arbitration tend more towards its economic component rather than towards its jurisdictional dimension. It also reduces the potential pool of arbitrators and thus reduces this “land of freedom”\(^\text{110}\) that arbitration constitutes.”\(^\text{111}\)


The real need for disciplinary self-regulation. Difficulties do exist, and the implementation of disciplinary sanctions would neither be easy, nor without requiring a certain method of explaining the approach and anticipating possible criticism explained above. However, the need to regulate arbitral justice is real, and it would be wrong to deprive it of a tool as flexible as disciplinary liability.\footnote{112}

Moreover, a higher degree of moralization of behavior may be necessary in the field of arbitration, because of the field’s specific requirements: not only quality and efficiency (as for state justice) but also legitimacy. This is all the more true given that there is more risk when a judge or arbitrator rules on their own (and the risks are greater in proceedings where there is only one judge, which explains for example why one of the possible sanctions for magistrates is the prohibition to act in such formations). This is also all the more true because one of the fundamental principles of arbitral justice is the freedom given to the parties to choose “their” arbitrator, and that the impartiality of the arbitrator is sometimes questioned. This was the case recently in a dramatic dispute between Croatia and Slovenia in a dispute concerning the location of their respective borders. An Arbitration Commission dedicated to the resolution of this conflict had been established in 2012, which Croatia left on 27 July 2015, accusing the arbitrator appointed by Slovenia of being biased. Faced with such events, a disciplinary response had already been proposed by Chief Justice Sundaresh Menon, who suggested more frequent recourse to disciplinary procedures such as the CIArb procedures, for which he highlights the merits of a neutral organization, which is more capable of conducting such proceedings than an arbitral institution.\footnote{113}

\footnote{112} The same is true of magistrates’ liability. There is currently a movement (probably linked to the transparency trend) of strengthening the liabilities and sanctions of judges. In September 2004, the Institut Montaigne advocated “organizing a procedure for dealing with the complaints of litigants, disciplinary punishment for under-performing magistrates who commit professional misconduct, whether or not they are detachable from the judicial service, and establishing a mechanism for evaluating judges on the basis of their quantitative and qualitative results.” (Opuscule de l’Institut Montaigne published in September 2004, p. 12).

\footnote{113} S. Menon, “Menon’s lesson from the Croatia-Slovenia case”, Global Arbitration Review, November 25, 2016.
Another risk is specific to arbitral justice: the dissonance between the personal interest of the arbitrator and the collective interest of the arbitration users. The arbitrator's personal interest is to be appointed as much as possible (and this is quite normal, since the arbitrator only holds their judicial power from the arbitrator's contract). In this respect, it seems that the reputation that arbitrators make themselves over time when ruling on disputes would play a "disciplinary role." Consequently, and if the issue for arbitrators is to have the best reputation possible, they and the parties would have every incentive for an outside body to ensure that that reputation is directly related to the arbitrator's probity. This could well be the role played by disciplinary proceedings, which would then be virtuous for all.

Possible modalities for disciplinary self-regulation. Again, analogous to the regulation of attorneys, it seems that one of the guarantees of the effectiveness of any disciplinary procedure is the predictability of sanctions and their publication.

It would therefore not be so much a question of adding a new way to contest with those already offered to dissatisfied parties in an arbitration, as this would risk weakening the arbitration system. The establishment of publicly available disciplinary sanctions, for example within an existing or new association, to which arbitrators may or may not voluntarily apply for membership, and benefitting from an ethics charter, could acquire a certain value from users. By appointing a member as arbitrator, the users would then be guaranteed the right to refer the matter to the institution or association concerned in the event of the arbitrator's disciplinary misconduct.

In addition to the guarantees that the establishment of such an association would offer to arbitration users, it seems to us that it would protect the appeal for annulment whose object must remain the award. The opening of a new forum where users could make claims of a disciplinary nature against the arbitrator could allow for litigation on the annulment of disciplinary complaints against arbitrators to be decontaminated, as it would

be dealt with by the association of which the latter are members and the
claims against the award are dealt with by the competent courts. Thus,
recourse to the national courts would not be distorted from its primary
purpose.

**Establishing a specific Association.** Given the heterogeneity of the arbitral body, these disciplinary procedures could be implemented via an Association specifically in charge of disciplinary matters. The establishment of such an Association would indeed make it possible to respond to the difficulty posed by the heterogeneity of the arbitral body, since all the arbitrators are therefore entitled to become members of the said association without having to be members of the same bar, or even of the same profession. As a result, in spite of the great diversity that exists among the arbitrators appointed in France and elsewhere, the same ethical charter defining the main lines of blameworthy or laudable conduct could be adopted and the same disciplinary procedure for warning or condemning members drifting from these practices could be put in place. Consequently, such an Association cannot function satisfactorily without guaranteeing that a maximum number of arbitrators could join it. In order to do so, access to the Association must be opened up as much as possible, and any breach of confidentiality obligations of the arbitral tribunal must be avoided, and cooperation with the arbitral institutions must be ensured.

**Open access as a guarantee of efficiency.** For such an Association to be efficient, it is absolutely necessary that it brings together the largest possible pool of arbitrators. It would therefore be good if some of the leading figures in arbitration, whose reputation is no longer to be proved, agree to sponsor the Association at the same time as when they become members. Access to this Association should, however, remain as open as possible, whether in terms of membership cost or selection criteria.

Regarding the financial aspect, the membership for the CIArb which provides for progressive fees according to members’ seniority seems judicious to us, at least in principle. In any event, care should be taken to ensure that membership does not appear to be a “certificate of good conduct”

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(115) In the CIArb system, membership is free for students. It then varies from 246.00 to 386.00 pounds per member and per year, depending on the level of membership (associate, member, fellow).
issued automatically against payment. Perhaps it would be necessary to lay down a free membership policy, which would be a radically effective protection against any suspicion of selection by money. Funding from arbitral institutions may be feasible, especially since it is essential that the latter work with the Disciplinary Association. The institutions would have a clear interest in promoting the transparency of arbitral practice, which is now partly dependent on its attractiveness, and thus to be associated with such projects.

As far as the selection criteria for members are concerned, a co-opting mechanism would not seem to be appropriate to the spirit sought since it might well over-close the scope of an association which, on the contrary, is meant to be open. Any person liable to act as arbitrator for a dispute should be able to become a member of this Association, jurist or not, experienced or not, without this membership being intended to be a guarantee of the "quality" of arbitrators. It would not be a matter of offering a list of experienced and trusted arbitrators to users of arbitral justice, but rather of setting up a sufficiently common mechanism for membership to become almost automatic and therefore genuinely work for the moralization of behavior within the arbitral community.

The confidentiality challenge. The first principle of an association dedicated to the disciplinary control of arbitrators would therefore be that of a quasi-free access. For such a control to function in a virtuous way, it seems essential to us that association membership should be as widespread as possible, and that it should be as natural as trade unionism can be in certain professions.

In this perspective, one of the major challenges will undoubtedly be confidentiality. Without the necessity of entering into the debate about the value of the confidentiality obligation in international arbitration, it is clear that confidentiality is often sought by users. Whether it is a matter of principle in domestic matters or expressly provided for by the parties

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(117) Pursuant to Article 1464 of the Civil Procedure Code, the fourth paragraph which provides that: "Subject to legal obligations and unless otherwise agreed by the parties, the arbitral procedure shall be subject to the principle of confidentiality."
(as is often the case in arbitration clauses or arbitration agreements), the question of confidentiality will necessarily arise in the disciplinary proceedings we are considering. However, this question does not appear to preclude the introduction of disciplinary proceedings if the parties were informed that the arbitrator is a member of the Disciplinary Association at the time the Tribunal is being constituted and that it is provided that disciplinary proceedings should be confidential and that the names of the parties to the arbitration in any sanction decisions be anonymized. This would also ensure that disciplinary proceedings are not diverted from their purpose and used by litigants who are actually seeking to bring the dispute to public attention in order to put pressure on their opponents. In the most serious cases, a brief report could make a summary of the condemned facts public to ensure the strict anonymity of the persons concerned.

**The necessary cooperation with institutions.** Protecting the spirit of arbitration and the commitments of its actors therefore prohibits disregarding any obligation of confidentiality. However, it is essential to ensure that the most serious breaches will have consequences other than a closed-door conviction, without which one would fall back into the omerta described above. The only way to balance these conflicting obligations seems to be cooperation with the arbitral institutions. The latter could indeed have an interest in requiring that the arbitrators they appoint be members of the Disciplinary Association described above, as this would offer a new guarantee to the parties submitting their dispute to the administration of that institution without them bearing any further obligation (as all disciplinary litigation would be dealt with by the Association). Hence, arbitrators would be encouraged to join in order to be appointed, and the Disciplinary Association would fulfill an essential condition for its proper functioning (the large number of members) and the institutions could guarantee their users not to appoint arbitrators under (temporarily or definitive) disciplinary sanctions.

Alternatively, institutions could merely outsource the treatment of possible disciplinary breaches brought to their attention, by assigning a disciplinary body attached to a neutral association on a case-by-case basis to decide on the conduct of an arbitrator who had been appointed
by the institution. This is what has been proposed for the CIArb by some commentators in the light of the Slovenian-Croatian border conflict.\footnote{S. Menon, “Menon’s lesson from the Croatia-Slovenia case,” previously cited.} This alternative – although interesting – if implemented by the Association would, however, risk making it more of a restricted rather than a very broadly open group as we were contemplating. Consequently, it would seem preferable for us that the Disciplinary Association’s role is not limited to the subcontracting of disciplinary matters brought to the attention of the institutions, but rather that it be the direct representative of the parties having claims against those who have arbitrated their dispute.\footnote{In any case, the question of cooperation with institutions will evidently depend on their place in the extrajudicial control of the conduct of the arbitrators. See infra Chapter 2}

Whatever the form of cooperation chosen, the sanctions issued by disciplinary bodies of such an Association could, firstly, prevent arbitrators having committed serious breaches from being appointed again, but also to remind everyone of the importance of demonstrating exemplary conduct, the only guarantee of trust given to arbitration as a system. The word "discipline" derives from the Latin noun *disciplina*, which means the action of learning. To continue to develop harmoniously, arbitral justice could only benefit from a benevolent control of its actors by their peers in the form of common discipline, allowing some to learn from the mistakes of others.

It has to be said that the question of the moralization of behavior is nowadays particularly acute in the world of arbitration and that the ideal answer has not yet been found. The establishment of possible disciplinary procedures and sanctions may not be a miraculous solution for preserving arbitral justice from any misconduct. They could, however, be a sort of third way balanced between the impunity of certain arbitrators (whose wrongful behavior is harmful beyond the dispute submitted to them because they involve the image of the arbitral justice as a whole) and the repeated complaints of some litigants (whose contentious motives would not go beyond the early stages of the proceedings and would not pollute the already overcrowded state courts).
Outside of cases where arbitrators are held liable, arbitrators’ conduct does not escape all control. In an “institutional arbitration,” that is to say, supervised by an existing arbitration center, commonly referred to as an “arbitration center” or “arbitration institution,” the arbitrator is bound to the institution by a set of obligations of a contractual nature. These obligations are, according to doctrine, the result of a so-called “arbitral collaboration” contract or a *sui generis* contract. Failure to comply with their obligations under this contract may lead to the implementation of a contractual sanction mechanism known and accepted by the arbitrator. Their conduct may then be subject to a contractual sanction (I), but the role of the institution in controlling the conduct of the arbitrators is not limited to the application of the measures provided for in the arbitration rules or other applicable contractual documents. The institution can also exercise genuine disciplinary power (II).

## I. Contractual sanctions

In accepting its mission, the arbitrator shall comply with the express or implied obligations in a set of contractual documents. It is therefore necessary to consider the source of the contractual obligation referred to (A) and then the type of sanctions (B).
A. The source of the sanctioned contractual obligation

The variety of documents governing an arbitrator’s mission can make it difficult to identify their obligations. The institution’s arbitration rules impose a number of obligations on the arbitrator: to conduct the proceedings impartially, within the prescribed time limits, to render an award, to correct the award if necessary, not to derogate by special agreement with the parties to the institution’s fee schedule, etc. The number and scope of these obligations under the arbitration rules vary from one institution to another. However, the arbitration rules do not necessarily exhaustively set out an arbitrator’s obligations. Other institutional documents such as internal regulations, promotional brochures, guides and guidelines, notes, ethical codes or principles, template documents to determine if such behavior is imposed, recommended, accepted, tolerated or prohibited.

The institution’s arbitration rules impose obligations taken from a legal or regulatory text, for example the obligation of independence and impartiality, by adding certain requirements and implementing rules. Thus, the regulation may require the arbitrator to satisfy a continuous obligation of disclosure for which the standard of assessment is contractualized with the center, and governed by positive law, or even contractualized and governed by positive law, where these two situations are not mutually exclusive. If the arbitrator fails to comply with this obligation of independence and impartiality, the arbitration center may, at the request of a party or on its own initiative, initiate a procedure eventually leading to the replacement of the arbitrator.


(121) Amongst “guidelines,” one can cite the IBA guidelines on conflicts of interest in international arbitration, published for the first time in 2004, the English version was updated in 2014.

(122) See for example, ICC Arbitration Rules, Articles 11(2) and 11(3).
Implementation of the obligations imposed by the rules may also lead the arbitration institution to require that any proposed arbitrator complete a form indicating that they accept their mission and are in a position to accomplish it. The arbitrator may have to declare that they are available, that they have an adequate insurance policy, that they are able to receive the amounts corresponding to the payment of their fees and reimbursement of expenses. Proof of the accuracy of the arbitrator’s statements is not necessarily straightforward. Moreover, if the proof of the completion of the required formality can be demonstrated, the precise identification of its scope can be difficult. Proof of availability may be made by the arbitrator by providing the arbitration center with a list of dates or periods during which they can, cannot or are only sporadically available to respond to the parties’ requests. Arbitrators appointed to conduct the proceedings in a case may, for example, provide the arbitration center with a calendar in which they have taken out their leave and hearing dates in other cases. The issuance of a cover note for a civil liability insurance policy by the arbitrator is generally not requested by the arbitration institution and such a certificate does not guarantee that any future damage is covered by the policy. This may be due to the nature of the dispute or conviction constituting the damage, for example in criminal matters, or to the fact that such damage could only be covered by local insurance.

In this situation, the sanctioned obligation is not in the institution's rules but in "derivative" documents. The different origin of the obligation does not, however, mean that the conduct considered as deviant by the institution is less severely punished. The arbitrator who is unavailable without valid reason may be dismissed on the institutions’ own initiative or at a party’s request.

The terms of reference contractualizes the obligations set out therein. The institution will ensure that these obligations are respected by the arbitrators, especially when the institution approves these terms of reference.

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(123) The ICC requires that a statement of acceptance be signed in which the arbitrator commits to their impartiality, independence and their availability (the form is available online at the following address: https:// crms.iccwbo.org/content/uploads/sites/3/2017/03/ICC-Arbitrator-Statement-Acceptance-Availability-Impartiality-and-Independence-ICC-Arbitration-Rules-FRENCH.pdf).
and does not limit its role to merely taking note of their existence. Failure to comply with the act by the arbitrator would at least lead to a questioning of the latter by the institution and, failing a satisfactory explanation to the arbitration institution, a series of measures ranging from a decrease in the arbitrator’s remuneration to their replacement.

B. The types of sanctions

All arbitration rules must provide for the methods of regulation of arbitrators’ contractual obligations. In an institutional arbitration, the institution implements the sanctions provided in the rules.

The sanction may consist of a financial measure or losing the status of arbitrator.

In financial matters, the institution has two means of ensuring that their obligations are met by arbitrators. It may impose a reduction of fees on offenders or deprive them of their fees altogether. This power of limitation, or even total deprivation of remuneration, sometimes encounters practical difficulties.

Arbitrators may claim that they did not know about this ability given to the institution because of the ambiguity or the silence of the contractual documents. The institution should make its position public and the way in which it exercises its right to sanction, for example by specifying whether the financial penalty is taken on a case-by-case basis depending on the circumstances of the case or whether a scale or a fixed sum is applied.

Certain regulations, in particular professional regulations, may provide for a minimum remuneration for certain tasks. For example, the bar’s rules may set a minimum fee for the services of an attorney. Can the lawyer acting as an arbitrator be paid at a lower rate than the one provided for by the rules of the bar? Total deprivation of remuneration can be considered as abusive, the sanctioned arbitrator having nevertheless worked, having never agreed to work pro bono and should be compensated. In order to avoid a challenge of the decision by an arbitrator and prosecution before the judge for arbitrator contracts, the institution sometimes pays a minimum amount to the arbitrator for the work performed. In this
case, it is proposed that the institution fixes a lump sum, depending on the progress of the procedure and the tasks performed by the arbitrator, and publically communicates information related to this policy in order to minimize the risks of claims.

The financial penalty is imposed on all the arbitral tribunal as a whole, yet there may be only one or two wrongdoers in an arbitral tribunal of three members. An arbitrator could therefore refuse to be deprived of part of their fees as a result of the conduct of another member of the arbitral tribunal. The arbitrator considering themselves to have occurred damages may seek compensation from the co-arbitrator whom they consider to be responsible for their pecuniary damage. This arbitrator could also ask the arbitration institution to carry out a finer and differentiated control of the arbitral tribunal members’ behavior in order for each of them to be paid more precisely according to their diligences. The greater the center’s supervision of the arbitration, the more serious this argument seems to be taken by the institution. It is therefore necessary for the center to make known explicitly, and even before the arbitrator accepts their task, the rules which the center intends to apply to sanction deviant behavior.

Failure of the arbitrators to comply with their obligations considered by the parties and the institution to be the most serious misconduct can lead to the dismissal of arbitrators. Implementation of the dismissal procedure does not automatically result in the loss of the status of arbitrator. Proceedings may be initiated by the parties who agree to dismiss the arbitrator. The initiative may also come from a party making a challenge request. The initiative can finally come from the institution. If, except for in the case of fraud or unlawfulness of the disputed contract, the parties’ agreement to dismiss the arbitrator raises few questions in practice, since it is difficult to imagine that an arbitrator would continue despite the contrary intention of all the parties, the unilateral initiative of a party or institution requires that the arbitrator be given notice of the complaints made against them, so they may make the arguments they consider relevant to their defense, or even that other potential members of the arbitral tribunal are also informed and able to submit their observations. They may choose to remain silent or, on the contrary, submit their observations in defense of the challenged arbitrator or in support of the challenger.
request. This attitude raises the question of the role of arbitrators in monitoring compliance with their obligations. Is there a duty of vigilance on arbitrators that would oblige them to report to the institution a deviant member of the tribunal? In order to clarify the practice and clarify the behavior expected by the institution in such circumstances, should there be an express obligation to be vigilant, for example in the arbitration center’s rules, in an ethics code or another document from the center?

The implementation of these sanctions raises the question of the possibility offered to sanctioned arbitrators to defend themselves. The arbitrator must be able to understand what they are being criticized for. For this reason, the institution must specify which grounds are likely to lead to dismissal, inform the arbitrators and the parties124 and, where a challenge or a replacement of the arbitrator arises, inform the arbitrator of the claims made against them and warn them of the possible sanction. Transparency and completeness of information are all the more necessary in that the questioning of behavior before the institution exerts strong moral pressure on the arbitrator, in particular where the institution submits the matter to a court or a collegial body of peers. Damage to the arbitrator’s reputation can be significant.

II. Non-contractual sanctions

The arbitration institution may refuse to enter into a contractual relationship with an arbitrator. The institution would not appoint the prospective arbitrator or would refuse to confirm them if they had been proposed by one or more parties. This refusal to enter into contracts could be explained by the insufficient information provided by the arbitrator, making it impossible for the arbitration institution to fulfill its obligations towards the parties. Such a situation could arise if an arbitrator refused to comply with the obligation to disclose their independence.

(124) For example, the institution can publish notes, articles or sets of decisions about this issue to inform arbitration actors of the center’s practice. See A. Carlevaris et R. Digon, “Arbitrator Challenges under the ICC Rules and Practice,” ICC Dispute Resolution Bulletin, 2016, p. 23.
The institution may implement a behavioral policy by withdrawing unsatisfactory individuals from its list of arbitrators, if one exists, by boycotting them or by putting them on a real or virtual "blacklist." The question then arises as to what rules and by whom the conduct found to be punishable is assessed and sanctioned. In this context, in addition to issues relating to rights of defense, the question arises of the collection, retention and exchange of personal data. Relevant legislation must be complied with, which requires the institution to clarify the purpose of the processing of the information and to allow a right of access and rectification to the persons whose data has been collected.

These questions also arise when the institution is likely to transmit the collected information to a legal jurisdiction that is different from the collection one. This will be the case, for example, in situations of information exchange between arbitration institutions or between offices and legal or natural persons in charge of administering arbitration cases.

(125) Namely in the context of the Regulation (EU) 2016/679 of April 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
CHAPTER 3
Control by co-arbitrators

Undoubtedly a co-arbitrator is an actor whose role is becoming more important in the arbitration process. If the co-arbitrator is traditionally the arbitrator who is not the president of a collegial arbitral tribunal, they can also be defined by their function, that is, the one who serves with other arbitrators.

But this function, in addition to the classical obligations imposed on each arbitrator, necessarily leads to relations between the arbitrators, including mutual rights and obligations.

Certainly, all arbitrators are individually appointed by the parties, each also has a specific contractual relationship with the litigants together, and since they each have arbitration contracts as arbitrators, certainly the fate of each arbitrator in an arbitral tribunal is personal, but they are subject to the same risks. Consequently, each co-arbitrator is necessarily concerned by the conduct of those who serve with them and who could incur their personal liability, even though they themselves would not be at fault. This is the case, for example, when an insufficiently diligent arbitrator who, by his own fault, allows the time limit of an arbitration to be exceeded, which can give rise to a claim against all three arbitrators.

The only way for the co-arbitrator not to be criticized by a form of passivity that allowed the misconduct by one of the arbitrators to occur is to be vigilant towards those with whom they are serving.

Due to the double effect of the increase in both the number of persons appointed as arbitrators and their liability, the duty of vigilance between arbitrators is undoubtedly one of the most striking facts in the developments
The control of an arbitrator’s conduct is now also ensured by the co-arbitrator, in a form of self-control within the arbitral tribunal (I) likely to incur their personal liability (II).

I. Co-arbitrators’ duty of vigilance

It is the arbitrator contract that essentially sets out the obligations, and therefore the conduct, of each co-arbitrator. They know what to expect: the arbitrators are not linked to each other by a contractual link and can be prosecuted individually. Therefore, in order not to be driven by the errors of a co-arbitrator who one did not choose and sometimes even had to withstand, the co-arbitrator must be particularly vigilant throughout their mission, that is to say, both before, during and at the end of the proceedings.

What must a co-arbitrator do when confronted with the deviant behavior of one of the arbitrators with whom they are serving? We can imagine several levels of deviance, of varying degrees.

First, there is the overworked, insufficiently diligent co-arbitrator who fails to propose dates within a reasonable timeframe, as a result of other proceedings in which he is engaged, as counsel or as arbitrator. This is not the most serious breach, but it is perhaps the most widespread. It goes against the duties of diligence and availability in the arbitrator's contract, which are now referred to in Article 1464 of the Civil Procedure Code. These obligations involve vigilance not only with regard to oneself, but also with respect to litigants, and even with respect to co-arbitrators. Indeed, these obligations of diligence and availability are borne by each of the co-arbitrators individually, whatever the behavior of others, which will not exempt them from their own liability. If a procedure goes on abnormally, even by the misconduct of a single arbitrator, the three co-arbitrators can be blamed. It is the responsibility of each arbitrator to ensure that the proceedings do not drag on.

Then there is the more serious case of the co-arbitrator, who obviously communicates information to a party, usually the party who appointed him. With some experience, such breaches of the secrecy obligation are detected immediately. It is the responsibility of the co-arbitrator to raise this conduct and to ask the president to obtain two things: first, that all the information previously given to one party be equally given to the other party; secondly, that this abuse should be put to an immediate end. In the event of the president's refusal to intervene, or if the president is involved, the co-arbitrator must do it themselves.

Finally, there is a third level of deviance, the most serious one: when the co-arbitrator is a party to the arbitration, and maybe even an accomplice to an arbitration fraud. Examples exist, and some are very publicized. If the liability of the wrongdoing co-arbitrator is not questionable and can be sought on civil or even criminal grounds, the conduct of the co-arbitrators who let them do so may also be questionable. Each co-arbitrator must do everything in their power not to be carried away by the unlawful conduct of one of the members of the arbitral tribunal, first by denouncing them to the arbitral tribunal.

On this point, it may be asked whether the "virtuous" co-arbitrator may resign in order not to become an accomplice. It would be better to avoid this because it would leave the arbitration to the fraudsters. They may of course threaten to resign, since in case law such a threat does not rise to the level of a resignation, but only do so as the last resort. The Paris Court of Appeal accepted deportation of a co-arbitrator in such circumstances, and such resignation should not give rise to civil liability.

All this demonstrates that there are ways, in the legal arsenal, to fight the deviant behavior of co-arbitrators. But beyond the Civil Procedure Code, there are other, more effective and fearsome alternatives if the behavior of the co-arbitrator allows their personal liability to be sought.

(128) Versailles January 24, 1992 (Sté Degrémont), Rev. arb. 1992,625, obs. J. Pellerin (the issue of threatening to resign is not discussed in this presentation of the decision).

II. Co-arbitrators’ liability

The personal misconduct of the co-arbitrator mentioned above may involve their liability, which may be sought either by a party or even by a co-arbitrator.

In addition to the allegations against any arbitrator, there are others that are specific to co-arbitrators, such as not being sufficiently vigilant with regard to deviant behavior, and whose turpitudes would have ended up causing damage to the acting litigant. One might imagine, for example, that a co-arbitrator literally seizes the arbitral proceedings in order to render a partial award solely for the benefit of the party that appointed them, and that they were able to do so only through passivity, if not the laziness, of their two other co-arbitrators. This is precisely what happened in the CDR/Tapie case, which the Paris Court of Appeal sanctioned in very harsh terms: "[The co-arbitrator], in defiance of the impartiality requirement which is the very essence of the arbitral function, has, by ensuring an unlimited control of the arbitral proceedings, presented the dispute unequivocally and then deliberately and systematically directed the tribunal's reflection in favor of the interests of the party that he intended to promote by collusion with the latter and their counsel, exercised a decisive influence and took the decision of the arbitral tribunal by surprise by fraud; In this regard, the fact that the award was rendered unanimously by the three arbitrators is inoperative if it is established that one of them has circumvented the other two for fraudulent purposes."130

Going further, it is also possible to criticize the co-arbitrator for a lack of discernment in the choice of a president who is at fault or is not sufficiently available.

Such actions are conceivable and tend to multiply, even if positive law has granted arbitrators immunity on the merits of the decision they hand down. But this limitation of liability should not be interpreted as a license

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to look over co-arbitrators’ misconduct. Each co-arbitrator may be personally liable, regardless of the attitude of the other co-arbitrators, which is by no means exonerating.

Criminal liability is also, of course, individual, and can be sought, not only against the defaulting arbitrator,\(^{131}\) but also against their co-arbitrators who can be blamed for passive complicity.

The mutual character of the arbitrator contract implies that if a party can act against an arbitrator, the reverse is also possible and the co-arbitrator may therefore act if they have claims to make either against a party, if, for example, they have not paid them the fees due or have not reimbursed them for the costs they incurred,\(^{132}\) or against one of their co-arbitrators, whom they consider caused them damage.

This second action, which is rarely mentioned,\(^{133}\) is all the more interesting because, this time, the co-arbitrator will no longer benefit from the immunity attached to their judicial function, since they are not the judge of the dispute with their co-arbitrator. It will therefore be subject to the ordinary civil liability regime, and even tort liability, not contractual, as there is no contract between co-arbitrators.

The action of one co-arbitrator against another may either be a direct claim or a cross claim. First, it may be direct if the co-arbitrator seeks compensation for the harm they claim to have suffered as a result of their co-arbitrator. One can imagine, for example, a prejudice related to the violation of the confidentiality of deliberations against the talkative co-arbitrator who gave out confidential information. But one can especially think of reputation damage – the most valuable capital of an arbitrator.\(^{134}\)

\(^{131}\) D. Chilstein : “Arbitrage et droit pénal”, Rev. arb. 2009, p. 3.
\(^{133}\) See the questions raised, for the first time to the best of our knowledge by Pierre Duprey and the answers by Laurent Aynès : “Débats”, in W. Ben Hamida et Th. Clay (dir.) : L’argent dans l’arbitrage. Lextenso, 2013, p. 186.
due to the turpitudes of one of the co-arbitrators in the arbitral tribunal. There is nothing preventing a co-arbitrator whose name, as in the CDR/Tapie case, for example, was thrown into the press for having served in an arbitral tribunal guilty of fraud to which they personally had nothing to do with, from acting against the offender. Failure to do so may even sometimes give the impression of condoning improper behavior.

The action of one co-arbitrator against another may then be a cross claim if the former has been convicted on account of the action of a party or even of an arbitration center. This will happen in particular if a party seeks the liability of only one co-arbitrator either because they consider they have committed misconduct or because they consider them as more solvent.

No doubt the prospect of legal action between co-arbitrators arises from a somewhat conflicting view of arbitration. Legal action between co-arbitrators is also probably not the best way to ensure a peaceful climate within the arbitral tribunal and a peaceful development of arbitration. And no doubt, above all, they must not be encouraged.

However, it is clear that in recent years there have been developments in civil contractual or tortuous liability against arbitrators, contractual civil liability against litigants, contractual civil liability against centers of arbitration, criminal proceedings against arbitrators, with sometimes heavy prosecution such as organized group fraud or forgery and use of forgery for an incomplete statement of independence. It is therefore reasonably foreseeable that the next step, in particular by co-arbitrators in such proceedings, would be claims between co-arbitrators. So it is better to anticipate and try to draw the first lines of an efficient legal framework, as proposed in this report. Let us also hope that talking about it will have a sufficient deterrent effect to prevent irregular behavior.

At the end of this study on the French system of arbitrators’ civil liability, with comparative law, the Commission finds firstly that, in practice, common law rights and civil rights do not offer, in spite of the different approaches they adopt, substantially different solutions.

The Commission then considers that the approach chosen by French law ensures greater integrity of arbitral justice than the rights that confer immunity to arbitrators. While protecting the judicial function of arbitrators, French law therefore provides a balanced regime, strictly upstream avoiding that dilatory remedies do not paralyze arbitration, while at the same time avoiding downstream the possibility of seeking an arbitrator’s liability when his misconduct has caused damage to the parties.

The Commission acknowledges, however, that the detailed analysis of case law reveals that some points could be usefully clarified or slightly modified. The Commission makes the following proposals in this respect.

Proposal n° 1: Misconduct of a nature that waives the immunity enjoyed by an arbitrator in the performance of their judicial function could be more precisely defined. The Commission considers that French law would gain in legibility and predictability by limiting the types of misconduct that are not covered by immunity.

Proposal n° 2: The exact nature of an arbitrator’s duty to disclose should be detailed. The Commission proposes to consider that for this duty, arbitrators have a reinforced best efforts obligation.

Proposal n° 3: The principle validity of limited liability clauses should be confirmed. The Committee considers that there is no justification for not subjecting such clauses to common law. As a consequence, such clauses will not apply in the event of gross misconduct.
Proposal n° 4: The Committee agreed on the role arbitrators can play themselves in the supervision of the arbitral tribunal. The Commission proposes to establish an obligation of vigilance for arbitrators in respect of their co-arbitrators.

With regard to criminal liability, the Commission considers that it plays an essentially role in that it guarantees the good behavior of arbitrators and thus protects the reputation of arbitral justice. Conduct sanctioned under criminal law is extremely serious and it is quite legitimate to want to protect arbitral proceedings. If an arbitrator commits or participates in a fraud or accepts an occult commission, the integrity of the arbitral tribunal requires that they be sanctioned.

The Commission considers, however, that the dilatory use of criminal proceedings should be prevented. Filing a criminal complaint against an arbitrator during the arbitral proceedings has much more far-reaching consequences than a challenger request. It is therefore important that the criminal procedure is used properly. The Commission proposes to limit the ability of the parties to initiate public action during the arbitral proceedings by setting up a system of public prosecution applications.

Proposal n° 5: Only the Public Prosecutor's Office may institute criminal proceedings against an arbitrator for an offense alleged to have been committed in the context of their arbitral mission while the arbitration proceedings are under way – the parties recover their full ability to initiate claims after the award has been rendered. The committee considers that the monopoly of the public prosecutor's office could be usefully concentrated in the hands of the national financial prosecutor.

Finally, the Commission observes that French law does not offer any alternative means of sanctioning arbitrators other than recourse to the courts. The Committee believes, however, that the opening of such an alternative could be adapted to arbitration. It would enable users to effectively present their disciplinary complaints against the arbitrator before a specialized body without recourse to the national courts being deprived of its primary purpose – the review of the lawfulness of the award.

The Committee recognizes that arbitration institutions already carry out disciplinary supervision of the arbitrators acting under their auspices and
allow themselves to a certain extent to sanction arbitrators, for example when they exceed deadlines. But these mechanisms do not seem sufficient. Firstly, because they are not or are hardly formalized. Secondly, because they only relate to institutional arbitration.

Proposal n° 6: The Commission considers that it would be beneficial for all actors in arbitration to have an association, separate from the arbitration centers, responsible for this disciplinary control. This association would have a public ethics charter. To ensure a certain efficiency in this disciplinary process, it is of course necessary that a large number of arbitrators agree to become members. On this point, arbitration centers could play an essential role if they agreed to require that their arbitrators be members of the association in order to be appointed.
In the U.S., arbitrators have historically been granted immunity analogous to judicial immunity on the ground that they perform a quasi-judicial function. The courts have only found two exceptions to arbitral immunity that remain very limited in scope.

1. Principle: Arbitral Immunity

1.1. Federal and State Courts Doctrine of Arbitral Immunity

In the U.S., federal and state courts have developed a strong doctrine of arbitral immunity derived from common law doctrines of judicial and quasi-judicial immunity.136 This doctrine firmly protects arbitrators (and usually also the sponsoring organizations) both from personal liability for their actions and from compelled involvement in post or pre-award legal proceedings.

In Corey v. New York Stock Exchange for example, the claimant brought a suit against the NYSE for the conduct of its arbitrators and the Sixth Circuit held that:

“it is appropriate that immunity be extended to arbitrators for acts within the scope of their duties and within their jurisdiction (…) Arbitrators have no interest in the outcome of the dispute and should not be compelled to become parties to the dispute.”137

This case put a ban on actions against arbitrators in order to collaterally attack arbitral awards.

In another case, a property owner brought an action against arbitrators who found against him in proceedings. The court, on the ground of federal common law doctrines of judicial and quasi-judicial immunity, found that the arbitrator was immune not only to claims arising out the performance of his duties as an arbitrator, but also to challenges to his authority or jurisdiction to arbitrate at all.138

The courts also ruled on the liability of a commercial organization sponsoring arbitration proceedings. In Austern v. Chicago Board Options Exchange, Inc., the plaintiffs sought compensation from Chicago Board Options Exchange which sponsored the arbitration for improperly noticing the arbitration hearing and improperly selecting the arbitration panel. The Second Circuit dismissed the appeal and 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.”139

All Circuits have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity.140 As such, in International Medical Group, Inc. v. American Arbitration Association, Inc, after the plaintiff brought suit against the arbitrators asserting claims for abuse of process, malicious prosecution, and bad faith arbitration, the Second Circuit held

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(140) See, Wasyi, Inc. v. First Boston Corp., 813 F.2d 1579, 1582 (9th Cir. 1987); Ozark Air Lines, Inc. v. National Mediation Board, 797 F.2d 557, 564 (9th Cir. 1986); Austin Municipal Securities, Inc. v. National Ass’n of Securities Dealers, Inc., 797 F.2d 676, 686-91 (5th Cir. 1985).
that federal cases uniformly provide that arbitral immunity protects all acts within the scope of the arbitral process, citing Tamari\textsuperscript{141} and Austern\textsuperscript{142}.

Similarly, the California Court of Appeals ruled that “even corrupt or biased acts are subject to immunity”, and dismissed the appeal brought by the claimant on the basis of bias and fraud of the arbitrator.\textsuperscript{143} The court also noted that:

*“although arbitrators may be held liable for complete nonperformance of their contract with the parties, anything short of complete nonperformance would be protected by arbitral immunity”*.\textsuperscript{144}

### 1.2. Legal Bases: The Revised Uniform Arbitration Act

Relying on federal and state case law, the Revised Uniform Arbitration Act ("RUAA") (drafted by the National Conference of Commissioners on State Laws as a model act) was introduced in 2000 and expressly grants immunity to arbitrators (and their organizations) to the same extent as judges acting in a judicial capacity (RUAA at Section 14 (a)). Some states have also codified common law immunity for arbitrators through their own statutes. However, the RUAA has only been enacted in less than a quarter of the states and many states continue to rely on common law as the basis for arbitral immunity.

The *Malik v. Ruttenberg* case presented state courts with the first opportunity to interpret the RUAA’s immunity provision.\textsuperscript{145} In this case, the plaintiff brought an action against an arbitrator who presided over the arbitration proceedings on a contract dispute, seeking recovery for personal injuries incurred during the arbitration hearings. The claimant brought his case

\textsuperscript{(141)} See infra.
\textsuperscript{(142)} International Medical Group, Inc. v. American Arbitration Association, Inc., 312 F.3d 833 (7th Cir. 2003).
\textsuperscript{(143)} See Moore v. Conliffe, 871 P.2d 204 (1994) ("This rule – immunizing arbitrators in private contractual arbitration proceedings from tort liability is well established in California.").
on the ground of the New Jersey Arbitration Act which was adopted from the RUAA. The Court held that arbitrator and arbitration association were immune from liability for injuries sustained during the course of arbitration proceedings. Because the New Jersey Act provided that its immunity provision supplements any immunity pursuant to other law, the court examined state and federal law to define the bounds of an arbitrator’s immunity. Consequently, the Appellate Division concluded that:

"Whether a common law or statutory immunity applies to a party is a question of law. (...) Once the threshold issue of the applicability of the statutory arbitral immunity has been resolved in favor of the arbitrator and the arbitral organization, the complaint must be dismissed. It is of no legal consequence that the arbitrator may have exercised his authority differently. Immunity trumps liability."

From now on, state courts may look to Malik for guidance in interpreting immunity provisions.

Despite this broad application of arbitral immunity, federal and state courts have found two limited exceptions to this principle: nonfeasance and equitable relief.

2. Exceptions to Arbitral Immunity

2.1. Failure to Render a Timely Judgment/Nonfeasance

There are only three cases that deal with this exception and they are very limited in scope.

One of the earliest cases against a nonperforming arbitrator, or "nonfeasance", set a limited exception to arbitral immunity in the U.S. The claimants brought a suit against the arbitrators for failure to act and the Fifth Circuit concluded that:
“where his action, or inaction, can fairly be characterized as delay or failure to decide rather than timely decision-making (good or bad), he loses his claim to immunity because his loses his resemblance to a judge.”

However, this case involved an architect acting in the position of an arbitrator and is distinguishable on its facts with little precedential value.

In another case, a claimant brought a suit against the arbitrator for damages sustained as a result of the arbitrator’s failure to render a timely award. It observed that cases establishing arbitral immunity concerned “alleged misconduct in arriving at a decision” and thus did not control a case involving “failure to make an award.” The contractual agreement in this case specifically set forth the time period within which the award was to be made, compelling the court to state that:

“[w]hile we must protect an arbitrator acting in a quasi-judicial capacity, we must also uphold the contractual obligations of an arbitrator to the parties involved.”

The California Court of Appeals concluded that the arbitrator could be potentially held liable for damages for breach of contract but did not rule on the validity of the claims. Nevertheless, it is unclear whether damages were awarded on remand – not reported.

In *Morgan Phillips v. JAMS*, the court limited the arbitral immunity to the failure of the arbitrator to render an award entirely and its resignation without justification. The court found that there is:

“a narrow exception to arbitral immunity: the immunity does not apply to the arbitrator’s breach of contract by failing to make any decision at all.”

(147) *Baar v. Tigerman*, (1983) 140 Cal.App.3d 979 [189 Cal.Rptr. 834]. Exception to California’s common law arbitral immunity doctrine but analogous to judicial immunity that would not apply to judges who fail to act.
Despite that he "acted with malice, oppression and specific intend to injure [a party that was in a] dire financial situation", the arbitrator was not held liable – the trial court's judgement, which dismissed the plaintiff’s claim who sought the liability of arbitrator and arbitral institution on the ground of arbitral immunity was reversed. The court made no ruling on whether the withdrawal could be justified, but only that the claims were not barred.\textsuperscript{148}

However, on remand, the trial court granted defendants' motion for summary judgment because it found that the arbitrator had not failed to make a decision but rather had properly recused himself because of substantial doubt of his ability to be fair and impartial. Second time on appeal, the court affirmed the summary judgment finding that the arbitrator recused himself from providing a binding resolution because of his inability to be impartial. The California Court of Appeals held that:

"An arbitrator’s decision to withdraw based on ethical standards is integral to the arbitral function (...) the act itself, as well as the consequent failure to render an arbitration award, is covered by arbitral immunity."

Thus, the California Court of Appeals concluded that the arbitrators’ conduct was integral to his quasi-judicial function and was covered by absolute and/or quasi-judicial immunity.\textsuperscript{149}

### 2.2. Equitable Exception to Immunity

Doctrines of judicial immunity traditionally provide an "immunity from damages... not an immunity from declaratory or injunctive relief" which means that judicial immunity is not a defense against equitable relief.\textsuperscript{150}

\begin{flushleft}
\textsuperscript{149} Morgan Phillips, Inc., v. JAMS, Cal.App.2nd (2010)
\textsuperscript{150} Henriksen v. Bentley, 644 F.2d 852, 855 (10th Cir. 1981) ("[I]mmunity from liability in damages may not bar prospective relief, injunction, for example, against a judge."); Partington v. Gedan, 961 F.2d 852, 860 n.8 (9th Cir. 1992) (noting that claims for declaratory relief "are not jurisdictionally barred" by the judicial immunity doctrine, which merely "protects judges and their agents from suits involving monetary damages").
\end{flushleft}
As such, in *Pulliam v. Allen*, the Supreme Court found that judicial immunity does not preclude an award of injunctive relief against judicial officers.\(^{151}\)

Since courts have generally granted arbitrators the same immunity as judges on the basis that an immunity doctrine that is derivative of judicial immunity “should not be broader than the judicial immunity from which it is derived”,\(^{152}\) arbitrators are also presumably subject to claims for equitable relief, including injunctive and declaratory remedies.

The rationale behind the equitable exception is that judges or arbitrators need only to be free from the fear of adverse personal consequences to maintain the impartiality necessary to the proper performance of their duties. As an author points this out:

”[A]n injunction…, does not threaten 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.”\(^{153}\)

However, courts have expressed contradictory views on this issue.

*Kemner v. District Council of Painting and Allied Trades No. 36* is the leading case on whether arbitral immunity also applies to equitable relief claims. The claimant brought an action against the arbitrators arguing that they had exceeded their authority. The defendants moved to dismiss the complaint, arguing that arbitrators were immune from suit and the district court granted the motion without discussion. On appeal, the Ninth Circuit reversed and refused to extend immunity from civil liability for acts arising out of arbitral functions to claims for equitable relief. The Ninth Circuit hold that:

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\(^{152}\) *Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir. 1983).

“[The claimant] has sued only for relief from those acts allegedly taken in excess of the [arbitrators’] jurisdiction, not for damages.”154

The same conclusion was reached by a federal district court in *TWA, Inc. v. Sinicropi* which, relying on *Pulliam v. Allen*, ruled that although arbitrators may be immune from damage awards, they are not immune from awards of prospective equitable relief.155 In this case, the claimant asked the court to vacate the board’s decision on the ground that it exceeded its authority.

An opposing view was expressed in *Tamari v. Conrad*. This case involved investors who requested an injunction prohibiting any further arbitration proceedings and a declaration that any award issued by the panel would be void on the ground that the tribunal was improperly constituted. The court dismissed the action on the ground that arbitral immunity extends to cases in which the plaintiff is only challenging the arbitrator’s authority to resolve the parties’ dispute. The Seventh Circuit reasoned that:

"Individuals such as defendants 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. Defendants have no interest in the outcome of the dispute between [the parties to the arbitration proceedings], and they should not be compelled to become parties to that dispute."156

The same was concluded in *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners*. In this case, the court, despite acknowledging prior case law holding that arbitral immunity does not protect arbitrators from equitable claims, noted that there is no meaningful distinction between damage claims and claims for equitable relief.157

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(154) *Kemner v. Dist. Council of Painting & Allied Trades No. 36, 768 F.2d 1115, 1118 (9th Cir. 1985).*
(156) *Tamari v. Conrad, 552 F.2d 778, 780 (7th Cir.1977).*
As a conclusion, in the absence of further decision from the Seventh Circuit since *Tamari v. Conrad*, it is far from certain that *Kemner*, which extends the Pulliam precedent to arbitrators, will be adopted by all Circuits of the United States.
ANNEX 2

Liability of arbitrators under English law

I. Civil Liability of Arbitrators under English Law

After briefly giving an overview of English law prior to the entry into force of the Arbitration Act 1996 (A), the arbitrator’s liability regime under this act will be described (B).

A. The state of English Law on Arbitrators’ Liability prior to the Arbitration Act 1996

Prior to the entry into force of the Arbitration Act 1996, the arbitrator’s liability regime, created by case law, gave the arbitrator broad immunity, subject to fraud. Although case law has not always clearly defined the scope of this liability, cases cited below enable to identify this principle.

In the case of Sutcliffe v. Thackrah, Lord Reid held that:

“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.”

In the same case, Lord Morris of Borth-y-Gest endorsed this opinion by deciding that:

"I think that it must now be accepted that an action will not lie against an arbitrator for want of skill or for negligence in making his award. The reason for this may be that the public interest does not make it necessary for the courts to exercise greater powers over arbitrators than those which they possess, such as the power of removing for misconduct or of correcting errors of law which appear on the face of the award. Furthermore, as a matter of public policy it has been thought to be undesirable to allow an action against an arbitrator (for lack of care or skill) for the reason that his functions are of a judicial nature."\(^{159}\)

Finally, in the case of\textit{ Arenson v. Casson Beckman Rutley & Co.}, Lord Salmon stated unequivocally that:

"The law also accords the same immunity to arbitrators when they are carrying out much the same functions as judges."\(^{160}\)

Without questioning the arbitrators’ immunity principle, some doubts have nevertheless been expressed by English courts regarding the legal basis of this principle, in particular by Lord Kilbrandon:

"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 arbitrer."\(^{161}\)

\(^{(159)}\)\textit{Sutcliffe v. Thackrah} [1974] AC 727 (p. 744)
B. B. The Civil Liability Regime of Arbitrators under the Arbitration Act 1996

\textit{i. Article 29 of the Arbitration Act 1996}

Despite this criticism, the approach of Lords Reid, Morris and Salmon has prevailed. In fact, the drafters of the Arbitration Act 1996 introduced the express recognition of arbitrators’ immunity, so that the arbitrator “exercises his judging functions impartially.” Without this immunity, “the finality of the arbitral process could well be undermined.”

Hereafter, the arbitrators’ civil liability regime is based on Article 29 of the Arbitration Act 1996, a public policy provision to which parties cannot derogate by contract:

“1) 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.

[...]

(3) TThis section does not affect any liability incurred by an arbitrator by reason of his resigning (but see Article 25).”

Therefore, the arbitrator enjoys a general immunity in the performance of his mission. However, this immunity may be waived when the act or omission for which the arbitrator is accused results from the arbitrator’s bad faith.

In order to justify the use of the notion of good faith to define the scope of arbitrators’ immunity, the Advisory Committee on Arbitration Report on the Arbitration Bill 1996 (hereinafter “The Report”), stated that:

“Our 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: see, for example, Melton Medes Ltd v Securities and Investment Board [1995] 3 All ER.”

It is true that the English judge has already had to analyze the conduct of a party from a good faith standpoint. For example, in the case of Melton Medes, Judge Lightman stated during a tort action for abuse of authority by a public official in the course of his duties that bad faith was either 

\[
(a) \text{ "malice in the sense of personal spite or a desire to injure for improper reasons; or } \\
(b) \text{ knowledge of absence of power to make the decision in question."}^{164}
\]

Some authors have attempted to define the actions that can be considered as characteristics of bad faith. According to Mustill & Boyd, “the concept of dishonesty (or bad faith, to use the terminology of section 29) involves, we consider, conscious and deliberate fault on the part of the arbitrator.”^{165}

English courts do not seem to have ruled on any cases that gave rise to the definition of such concept under the application of Article 29 of the Arbitration Act 1996. We are also not aware of any case applying Article 29 of the Arbitration Act 1996.

**ii. Article 25 of the Arbitration Act 1996: the case of an arbitrator’s resignation**

It must be clarified that an arbitrator’s liability due to his resignation is not covered by Article 29 paragraph 1 of the Arbitration Act 1996 but is governed by Article 25, as recalled in Article 29 paragraph 3.

Under Article 25 of the Arbitration Act 1996, an arbitrator who resigns from a case may request that the English judge waive any liability which he might otherwise incur as a result of his resignation.

The English judge will only grant such an exemption if he is satisfied that given the factual circumstances of the case the resignation was reasonable. The Report provides several practical examples of the judge’s prerogative:

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“For example the arbitrator may (reasonably) not be prepared to adopt a procedure agreed by the parties (ie under Clause 34) during the course of an arbitration, taking the view that his duty under Clause 33 conflicts with their suggestions (the relationship between the duty of arbitrators in Clause 33 and the freedom of the parties in Clause 34, is discussed in more detail below). Again, an arbitration may drag on for far longer than could reasonably have been expected when the appointment was accepted, resulting in an unfair burden on the arbitrator. In circumstances where the Court was persuaded that it was reasonable for the arbitrator to resign, it seems only right that the Court should be able to grant appropriate relief.”

II. The existence of disciplinary sanction mechanisms

Anyone can act as an arbitrator. Since acting as an arbitrator is not listed among the “legal activities” by Article 12 of the Legal Services Act 2007, no regulatory authority can prevent a barrister, a solicitor or any person from doing so. However, professional arbitration associations can impose dissuasive sanctions on their members. After describing the sanctions that may be imposed on arbitrators by the English Bar (A), we will look at the ones that can be imposed by the Chartered Institute of Arbitrators (“CIArb”) on its members (B).

A. Sanctions imposed by the English Bar

The Bar Standards Board may impose disciplinary sanctions (including disbarment) on a barrister who breaches the Core Standard 5 of the Bar Code of Conduct in performing his mission as arbitrator. This Core Standard prohibits barristers from behaving “in a way which is likely to diminish the trust and confidence which the public places in [them] or the profession.”

However, it should be noted that the Director of Professional Conduct within the Bar Standards Board has—in a purely informal context—confirmed that, to her knowledge, there is no case involving a barrister under disciplinary sanctions for his misconduct as arbitrator.

B. Sanctions imposed by the Chartered Institute of Arbitrators on its Members

The CIArb has set up its own disciplinary procedures for those its members who would breach the Code of Professional and Ethical Conduct.

When a complaint is deemed admissible, the case will be investigated before being submitted to the Professional Conduct Committee (hereinafter the “PCC”). The PCC registers the complaint as Category A or B, the former relates to complaints for minor breaches and/or not based on prima facie evidence of wrongdoing, the latter refers to complaints regarding substantial breaches and/or based on such evidence.

While a Category A complaint may only be dismissed or submitted for review by a peer panel, a Category B complaints can also be referred to a Disciplinary Tribunal or be subject to an agreement on the imposed penalties.

In the event that the Disciplinary Tribunal to which the case has been referred to finds that the alleged charges in the complaint are proven, it is empowered to (i) order sanctions, (ii) reprimand, (iii) suspend the “Chartered” status of the CIArb member for a period of no longer than 12 months, (iv) indefinitely withdraw such status or for a fixed period, or (v) permanently exclude the member.

There are a few cases of disciplinary sanctions imposed by the Disciplinary Tribunal.

For example, on May 5, 2011, a decision to exclude with immediate effect has been rendered by the CIArb against Mr. John Campbell QC, former president of the CIArb, for unusual delays in rendering a decision.
Furthermore, an arbitrator named Andriy Astapow was excluded for having fraudulently asserted that a sum of € 10,000 had been paid to an expert when it had actually been paid into the bank account of his own firm in the Seychelles.\(^\text{167}\)

The CIArb or the sanctioned member have the right to appeal the decision of the Disciplinary Tribunal. Disciplinary hearings are public. However, the publication of the disciplinary proceedings requires the authorization of the Board of Trustees, which was, for example, granted in the Astapov case.

### III. Cases where a Criminal Action has been initiated

To our best knowledge, there are no cases of criminal proceedings initiated against an arbitrator before the English jurisdictions.

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\(^{167}\) The tribunal was composed of Mr. Georg von Segesser and Professor John Uff QC (as well as a non professional member).
Introduction and Context

The purpose of this Annex is to briefly present the various approaches to arbitrators’ immunity and liability under Spanish and some Latin America States' law.

Taking into account the wide regional scope of this presentation, the study will be more thematic than descriptive. Examples will be provided for States concerned by each theme.

This presentation focuses on arbitrators' civil liability (A) and criminal liability (B).

A. Civil Liability

In the majority of the States studied, civil liability is held either in cases of fraud or serious misconduct (1) or, regarding more specifically the exercise of the arbitral function, in cases of breach of arbitral duties (2).

It should be pointed out that many arbitration laws do not deal with the issue of arbitrators' civil liability. Several of these arbitration laws were inspired by the UNCITRAL model law. However, this law does not contain any express provisions relating to the immunity and/or liability of arbitrators. This has an impact on the national laws of some States, who have used the model law as inspiration and therefore, do not, in turn, contain any express provisions relating to the immunity or liability of arbitrators.
Where the law is silent, arbitrators' civil liability is either regarded as similar to judges' liability, or is subject to common law (3).

1. Arbitrators' contractual civil liability for fraud or serious misconduct

Article 21.1 of the Spanish Arbitration Act provides that arbitrators (or, when applicable, the arbitral institution) may be considered liable for damages due to their bad faith, serious misconduct or fraud.168

This general mandate has been implemented by Spanish courts in well-known cases. The Spanish Supreme Court ("Tribunal Supremo") held liable two members of an arbitral tribunal who rendered an award violating the collegiality and due process principles. In this case, the two arbitrators held a meeting to deliberate and vote on the award, despite being aware that the third arbitrator was travelling and therefore unable to attend the meeting. According to the Spanish Supreme Court, the "rash" conduct of the two arbitrators "is identified with inexcusable negligence, with a manifest, serious and unjustified misconduct, which is not tied to the annulment of the award, but to a risky action on the part of those who know (168) Spain: Article 21.1, Law 60/2003 of December 23, 2003 on arbitration: "1. Acceptance requires arbitrators and, if appropriate, the arbitral institution, to perform their mission in good faith. If they fail to do so, they may be held liable for damages resulting from bad faith, serious misconduct, ordeceit. In arbitration under the supervision of an institution, the damaged party may file an action directly against this institution, irrespective of any action for indemnity brought against the arbitrators. Arbitrators or arbitral institutions on their behalf will be bound to take liability insurance or equivalent insurance for the amount established regulatory ways. Public entities and arbitral systems integrated in or under the aegis of governmental Authorities are exempted from this obligation." [In Spanish: "1. La aceptación obliga a los árbitros y, en su caso, a la institución arbitral, a cumplir fielmente el encargo, incurriendo, si no lo hicieren, en responsabilidad por los daños y perjuicios que causaren por mala fe, temeridad o dolo. En los arbitrajes encomendados a una institución, el perjudicado tendrá acción directa contra la misma, con independencia de las acciones de resarcimiento que asistan a aquélla contra los árbitros. Se exigirá a los árbitros o a las instituciones arbitrales en su nombre la contratación de un seguro de responsabilidad civil o garantía equivalente, en la cuantía que reglamentariamente se establezca. Se exceptúan de la contratación de este seguro o garantía equivalente a las Entidades públicas y a los sistemas arbitrales integrados o dependientes de las Administraciones públicas."] This high legislative threshold led an author to call it immunity: see, T. Clay, L'arbitre, Dalloz, 2001.
their duties and who should have respected them in the interests of those who entrusted them with the task of carrying out the arbitration.\footnote{169}

Article 32 of the Peruvian Arbitration law also provides that arbitrators can be held liable in cases of recklessness deceit or inexcusable conduct.\footnote{170} This civil liability derives from the so-called “arbitrator contract” between the arbitrator and the parties.\footnote{171}

In these two cases, as soon as the arbitrator's liability derives from the acceptance of his mission, it can be qualified as a contractual liability.\footnote{172} According to some authors, this threshold is so high that it equates to a quasi-immunity.\footnote{173}

This immunity is also expressly provided for in the Chilean Arbitration Center's Rules, although the law is silent on this issue.\footnote{174}

\footnote{169} Spanish Supreme Court, Civil chamber, Award No. 102/2017 of February 15, 2017. [In Spanish: “se identifica con una negligencia inexcusable, con un error manifiesto y grave, carente de justificación, que no se anuda a la anulación del laudo, sino a una acción arriesgada por parte de quienes conocen su oficio y debieron aplicarlo en interés de quienes les encomendaron llevar a buen fin el arbitraje.”]

\footnote{170} Article 32, Law No. 1071, Decree law on arbitration in force since September 1, 2008: “The acceptance obliges arbitrators and, where applicable, the arbitration institution, to carry out their mission, at the risk, if they do not fulfill it, that their liability would be incurred and that they would be required to repair the harm done by their recklessness or gross negligence.” [In Spanish: “La aceptación obliga a los árbitros y, en su caso, a la institución arbitral, a cumplir el encargo, incurriendo si no lo hicieren, en responsabilidad por los daños y perjuicios que causaren por dolo o culpa inexcusable.”]

\footnote{171} See also, F. Cantuarias S., “Capítulo XX Peru”, in A. Zapata de Arbaílz (ed), El arbitraje interno e internacional en Latinoamérica regulación presente y tendencias de futuro, 2010, p. 655.


\footnote{174} See for example, Chile: Article 4, Rules for international arbitration, Santiago Arbitration and Mediation Center: “Neither the CAM Santiago nor its administrative staff nor the members of the arbitral tribunal shall be liable to any person or institution for deeds, acts or failures relating to the arbitral process they are conducting.” [In Spanish: “Limitación de Responsabilidad: Ni el CAM Santiago, ni su personal administrativo, ni los miembros del tribunal arbitral serán responsables frente a persona o institución alguna, por hechos, actos o omisiones relacionados con el proceso arbitral de que conozcan.”]

Colombia: Article 3.4, Rules for international arbitration, Arbitration and Concilation Center of Bogota Chamber of Commerce: “Neither the Center nor its administrative staff nor the members of the arbitral tribunal shall be liable to any person or institution for any act, omission or omission in connection with the arbitral proceedings of which they are aware or in which they participate.” [In Spanish: “Ni el Centro ni su personal administrativo, ni los miembros del tribunal arbitral serán responsables frente a persona o institución alguna, por hechos, actos o omisiones relacionados con el proceso arbitral de que conozcan o en el que participen.”]
An arbitrator's liability cannot be held for the parties' mere dissatisfaction with the award rendered or for any error of law committed by the arbitrator.\textsuperscript{175} While Argentinean law does not explicitly provide for arbitrators' civil liability in cases of fraud or serious misconduct, the National Court of Appeal stated in a relatively old judgment where the parties disputed the validity of the award:

"The liability that the arbitrator might incur for omission or bad performance of his duties can only derive from circumstances revealing bad faith or negligence. It cannot derive from the parties' appreciation of the award."\textsuperscript{176}

Yet, Argentinean law does not expressly provide for arbitrators' civil liability in cases of fraud or serious misconduct. However, it provides for a specific contractual liability limited to the arbitrator's duties, as described below:

2. **Arbitrators' civil liability based on the specificities of their mission**

Arbitrators' civil liability can be strictly limited to the exercise of their mission (i). Some laws contain provisions on the arbitrator's liability in the specific case where the award is rendered behind schedule (ii). Others focus, though in a more ambiguous way, on arbitrators' liability in cases of breach of their ethical duties (iii).


\textsuperscript{176} [In Spanish: "La responsabilidad en que podría incurrir el árbitro por omisión o mal cumplimiento de sus funciones no puede derivarse de la apreciación de las partes respecto a la eficacia del laudo, sino de circunstancias de las que resulte acreditada fehacientemente la negligencia o mala fe."]
i. Arbitrators' liability in the exercise of their mission

Although the Argentinean Code of Civil and Commercial Procedure does not provide any threshold regarding potential fraud or serious misconduct by the arbitrator, Article 745 states that the arbitrator’s acceptance to perform his mission may lead to his liability for damages resulting from the failure to perform his duties and obligations as arbitrator.  

ii. Arbitrators’ specific liability to render the award within the time limit

More specifically, irrespective of the existence of provisions relating to arbitrators’ civil liability, numerous laws hold the arbitrator liable for damages caused by failing to make the award within the time limit. Thus, Article 37 (2) of the Spanish Arbitration Law provides that the arbitrator shall incur liability if he fails to render the award within the prescribed period, without thereby affecting the validity of the award. Article 756 of the Argentinean Code of Civil and Commercial Procedure provides that an

(177) Argentina: Article 745, Code of Civil and Commercial Procedure: “The acceptance by the arbitrators opens up the right of the parties to compel them to perform their duties at the risk of being held liable for all damages.”

[In Spanish: “La aceptación de los árbitros dará derecho a las partes para compelirlos a que cumplan con su cometido, bajo pena de responder por daños y perjuicios.”]

(178) Spain: Article 37.2, Law 60/2003 of December 23, 2003 on arbitration: “Subject to any contrary agreement by the parties, arbitrators must render the award within six months following the date of submission of the defense referred to in Article 29 or at the expiration of the time limit to render the award. Unless otherwise agreed by the parties, this time-limit may be extended by the arbitrators for a period of no longer than two months by a duly justified decision. Subject to any contrary agreement by the parties, failure to deliver the award within the time limit will not affect the validity of the arbitration agreement or of the rendered award, without prejudice to the liability that may be incurred by the arbitrators.”

[In Spanish: “Salvo acuerdo en contrario de las partes, los árbitros deberán decidir la controversia dentro de los seis meses siguientes a la fecha de presentación de la contestación a que se refiere el artículo 29 o de expiración del plazo para presentarla. Salvo acuerdo en contrario de las partes, este plazo podrá ser prorrogado por los árbitros, por un plazo no superior a dos meses, mediante decisión motivada. Salvo acuerdo en contrario de las partes, la expiración del plazo sin que se haya dictado laudo definitivo no afectará a la eficacia del convenio arbitral ni a la validez del laudo dictado, sin perjuicio de la responsabilidad en que hayan podido incurrir los árbitros.”]
arbitrator who fails to render the award on time shall not receive his fees and shall be held liable to the parties for the resulting damages.\textsuperscript{179}

Although Panamanian law is silent on this point, Article 45 of the Center for Conciliation and Arbitration of Panama Rules, in force since August 1, 2015, provides that arbitral proceedings may be terminated, "without prejudice to the liability of the arbitrators" where the award is not rendered within the time limit.\textsuperscript{180}

\textbf{iii. Arbitrators’ liability regarding their ethical duties}

Some laws also sanction the possible breach of an arbitrator’s duties of impartiality and independence, which would lead him to recuse himself once the arbitration proceedings have been initiated.\textsuperscript{181}

\begin{flushleft}
(179) \textbf{Argentina:} Article 756, Civil and commercial procedure code: "Arbitrators who, without a legitimate justification, do not issue the award within the provided time limit, will forfeit their right to be paid. They will be liable for any resulting damage". [In Spanish: “Los árbitros que, sin causa justificada, no pronunciaren el laudo dentro del plazo, carecerán de derecho a honorarios. Serán asimismo responsables por los daños y perjuicios.”]

(180) \textbf{Panama:} Article 45, Rules of Arbitration of the Center of Conciliation and Arbitration: "The arbitral mission shall be terminated upon the rendering of the final award or by order of the arbitral tribunal made in any of the following cases: […] 5. Lack of time for arbitrators to render the award, without prejudice to liability thereby.” [In Spanish: “Las actuaciones arbitrales terminan con el laudo definitivo o por una orden del tribunal arbitral dictada en cualquiera de los siguientes supuestos: […] 5. Por caducidad del plazo conferido a los árbitros para dictar laudo, sin perjuicio de la responsabilidad en que éstos puedan incurrir por esta causa.”]

(181) See for example, \textbf{Peru:} Article 29.3, Law No. 1071, Decree law on arbitration, September 1, 2008: “Unless otherwise agreed, once the time to render an award has begun to run, any withdrawal will be ineffective. Nevertheless, the arbitrator must consider his withdrawal, under his responsibility, if he finds himself in a circumstance which affects his independence and impartiality”. [In Spanish: “Salvo pacto en contrario, una vez que se inicie el plazo para la emisión de un laudo, es improcedente cualquier recusación. Sin embargo, el árbitro debe considerar su renuncia, bajo responsabilidad, si se encuentra en una circunstancia que afecte su imparcialidad e independencia.”]
\end{flushleft}
Such liability also exists in the event of an arbitrator’s failure to respect the confidentiality of the arbitration.\(^\text{182}\)

3. The silence of the law on arbitrators’ civil liability

The laws of Brazil, Chile and Colombia are silent on arbitrators’ civil liability. As a result, civil liability of an arbitrator may be subject to ordinary laws (i) or assimilated to judges’ liability (ii).

i. Arbitrators’ civil liability is ordinary civil liability

Brazilian law is silent on arbitrators’s civil liability. The Brazilian Arbitration Act contains only one provision in Article 13.6 according to which the arbitrator must act with impartiality, independence, competence, diligence and discretion.\(^\text{183}\)

Just after this provision, Article 14 provides that an arbitrator may be challenged only for acts that occurred before his appointment, which led some authors to identify an immunity for the exercise of the arbitral function under Brazilian law.\(^\text{184}\)

\(^\text{182}\) Peru: Article 51.1, Law No. 1071, Decree law on arbitration, September 1, 2008: “Unless otherwise agreed between the parties, the arbitral tribunal, the secretary, the arbitral institution and, where appropriate, witnesses, experts and others involved in the arbitration proceedings are required, under responsibility, to maintain confidentiality over the course of the proceedings, including the award itself, as well as any information known through such actions.”

[In Spanish: “Salvo pacto en contrario, el tribunal arbitral, el secretario, la institución arbitral y, en su caso, los testigos, peritos y cualquier otro que intervenga en las actuaciones arbitrales, están obligados a guardar confidencialidad sobre el curso de las mismas, incluido el laudo, así como sobre cualquier información que conozcan a través de dichas actuaciones, bajo responsabilidad.”]

\(^\text{183}\) Brazil: Article 13.6, Law No. 9.307 of September 23, 1996, amended by law No. 13.129 in 2015: “In performing his duty, the arbitrator shall proceed with impartiality, independence, competence, diligence and discretion.”

[In Portuguese: “No desempenho se sua função, o árbitro deverá proceder com imparcialidade, independência, competência, diligência e discreção.”]

Other authors considered that an arbitrator’s civil liability must, given the silence of the law, remain limited to cases of fraud or serious misconduct. In the absence of such a threshold, the arbitrator would be under too much pressure when rendering his award.\textsuperscript{185} Doctrine agrees with regard to the Panamanian Arbitration law.\textsuperscript{186}

\textit{ii. Arbitrators’ civil liability is judges’ civil liability}

The Chilean law inspired from the UNCITRAL model law lacks any express provision with regards to arbitrators’ liability. According to parts of the doctrine, rules applicable to judges’ immunity should apply to arbitrators due to the similarity of their functions. However, an opposing part of the doctrine considers that, given the silence of the law, arbitrators’ civil liability follows ordinary contractual or tortious civil liability – which corresponds to the above mentioned point.\textsuperscript{187}

The Colombian arbitration law is silent on arbitrators’ immunity and/or liability in international arbitration. Judges benefit from a certain degree of immunity.

\textsuperscript{185} Brazil: C.A. Carmona, Arbitragem e Processo, Um Comentário à Lei n° 9.307/96, 3e ed., Atlas, 2009, p. 265. It is to be noted that Article 18 of the Brazilian Law states that: “An arbitrator is the judge in fact and in law, and his award is not subject to appeal or recognition by judicial court.” [In Portuguese: “O árbitro é juiz de fato e de direito, e a sentença que proferir nã fica sujeita a recurso ou a homologação pelo Poder Judiciário”]

Yet, it does not imply that arbitrators and judges could be assimilated. It is more a way of reinforcing the arbitral award’s value: \textit{ibid}, p. 269; see also, W. Barral Oliveira, A. Silva Maillart, \textit{Capítulo VI Brasil}, in A. Zapata de Arbaláez (ed), \textit{El arbitraje interno e internacional en Latinoamérica regulación presente y tendencias de futuro}, 2010, p. 196.


Arbitrators in domestic arbitration matters are considered as temporary state judges, while arbitrators in international arbitration matters are not. In any case, they cannot benefit from such immunity by analogy.

B. Criminal Liability

Arbitrators' criminal liability in these States usually derives from specific legal provisions regarding arbitrators (1). However, Brazilian law (and Colombian law in domestic arbitration matters) differ as arbitrators are assimilated to state judges with regards to criminal liability (2).

1. Arbitrators' criminal liability

Some laws contain specific provisions relating to arbitrators, suggesting that their criminal liability is incurred only in these cases. Prevarication and corruption are two offenses for which arbitrators can be punished under many of these laws.

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(188) **Colombia**: Constitutional Court, Award C-431/95, September 28, 1995. See also, Article 116 of the Constitution: "[...] Individuals may be entrusted temporarily with the function of administering justice as jurors in criminal proceedings, as mediators or as arbitrators authorized by the parties to issue verdicts in law or in equity in the terms defined by the law." [In Spanish: "[…] Los particulares pueden ser investidos transitoriamente de la función de administrar justicia en la condición de jurados en las causas criminales, conciliadores o en la de árbitros habilitados por las partes para proferir fallos en derecho o en equidad, en los términos que determine la ley."]

(189) **Colombia**: According to Articles 73.1, 73.2, 92 and 101 of the Law No. 1563 of July 12, 2012 on domestic and international arbitration, as opposed to the situation in domestic arbitration, an arbitrator in an international arbitration matter may be from a foreign country and may not be an attorney, and the arbitration may not be subject to Colombian law nor Colombian procedural rules. As a consequence, international arbitration does not fall within the scope of the Colombian judicial system.

(190) **Colombia**: See Former Article 45, Decree law No. 2279 from 1989, see also, regarding disciplinary review: Article 19, Law No. 1563 of July 12, 2012: "Disciplinary review. Under the Statutory Law of the Administration of Justice, disciplinary supervision of arbitrators, secretaries and auxiliaries of arbitral tribunals is governed by the disciplinary norms of the judicial services and the auxiliaries of justice." [In Spanish: "Control disciplinario. En los términos de la Ley Estatutaria de la Administración de Justicia, el control disciplinario de los árbitros, los secretarios y los auxiliares de los tribunales arbitrales, se regirá por las normas disciplinarias de los servidores judiciales y auxiliares de la justicia."]


(192) Prevarication is the result of a series of actions for the holder of an office or a warrant not to fulfill the obligations arising from that office or warrant. This term is absent from the French Criminal Code.
Therefore, with regards to prevarication, Article 269 of the Argentinean Criminal Code expressly refers to the arbitrator's criminal liability according to which a fine ranging from AR$ 3000 to AR$ 75 000 or a prison sentence can be pronounced.193

Article 227.3 of the Chilean Criminal Code contains provisions for state judges regarding prevarication, which are applicable to arbitrators:194

(193) Argentina: Article 269, Criminal code: "Will suffer a fine from three thousand pesos to seventy-five thousand pesos and absolute disqualification, a judge who dictates decisions contrary to the law invoked by the parties or himself, or quotes, false facts or resolutions. […] The first paragraph of this article shall be applicable, when it is the case, to arbitrators and amiable compositors."

[In Spanish: "Sufrirá multa de pesos tres mil a pesos setenta y cinco mil e inhabilitación absoluta perpetua el juez que dictare resoluciones contrarias a la ley expresa invocada por las partes o por el mismo o citare, para fundarlas, hechos o resoluciones falsas. […] Lo dispuesto en el párrafo primero de este artículo, será aplicable, en su caso, a los árbitros y arbitradores amigables compenadores" ]

(194) Chile: Article 227.3, Criminal code: "The penalties mentioned in the previous articles shall apply respectively to: […] 3° Delegates, experts and other persons who, by exercising similar powers deriving from the law, the court or the will of the parties, are in the same position."

[In Spanish: "Se aplicarán respectivamente las penas determinadas en los artículos precedentes: […] 3°. A los compromisarios, peritos y otras personas que, ejerciendo atribuciones análogas, derivadas de la ley, del tribunal o del nombramiento de las partes, se hallaren en idénticos casos." ]
these are Articles 223, 224 (paragraphs 2, 3, 6 and 7) and 225 (paragraphs 1 or 3).

(195) Chile: Article 223, Criminal code: “Members of the collegiate or single-person courts of justice and assessors shall be absolutely and perpetually dismissed from office, from public functions, from political rights and titular and reclusive professions in any of its ranks: 1° When, in knowledge of the facts, they infringe the express and current law in criminal or civil matters. 2° When, by himself or by interposed person, they admit or arrange to admit a gift of abandoning a charge. 3° When in the exercise of the duties of his office or in asserting the power given to him by the latter, they shall appeal or solicit an accused or plead before them”

[In Spanish: “Los miembros de los tribunales de justicia colegiados o unipersonales y los fiscales judiciales, sufrirán las penas de inhabilitación absoluta perpetua para cargos y oficios públicos, derechos políticos y profesiones titulares y la de presidio o reclusión menores en cualesquiera de sus grados: 1° Cuando a sabiendas fallaren contra ley expresa y vigente en causa criminal o civil. 2° Cuando por sí o por interpuesta persona admitan o convengan en admitir dádiva o regalo por hacer o dejar de hacer algún acto de su cargo. 3° Cuando ejerciendo las funciones de su empleo o valiéndose del poder que éste les da, seduzcan o soliciten a persona imputada o que litigue ante ellos.”]

(196) Chile: Article 224, Criminal code: “Shall suffer the punishment of being removed from office and public offices in an absolute and temporary manner in all his ranks and of minor reclusion in his minor or average ranks. When, knowingly, they will contravene the laws that govern the conduct of judgments, so as to lead to the nullity of all or part. 3° When, maliciously, they deny or delay the administration of justice and the help or protection that is legally requested. […] 6° When they reveal the secrets of the judgment or assist or advise an interested party, harming the opposing party. 7° When, with obvious voluntary involvement and without first informing the parties, they are missing in a criminal or civil case.”

[In Spanish: “Sufrirán las penas de inhabilitación absoluta temporal para cargos y oficios públicos en cualquiera de sus grados y la de presidio o reclusión menores en sus grados mínimos a medios: […] 2° Cuando a sabiendas contravinieren a las leyes que reglan la sustanciación de los juicios, en términos de producir nulidad en todo o en parte sustancial. 3° Cuando maliciosamente nieguen o retarden la administración de justicia y el auxilio o protección que legalmente se les pida. […] 6° Cuando revelen los secretos del juicio o den auxilio o consejo a cualquiera de las partes interesadas en él, en perjuicio de la contraria. 7° Cuando con manifesta implicancia, que les sea conocida y sin haberla hecho saber previamente a las partes, fallaren en causa criminal o civil.”]

(197) Chile: Article 225, Criminal code: “Shall incur penalties for suspension of office or employment in all his ranks, and a fine from eleven to twenty monthly tributary units, or only in the latter, when, through negligence or excusable ignorance: 1° Make a manifestly unjust sentence in a civil cause. 2° Contravene the laws that regulate the conduct of judgments so as to lead to the nullity of all or part of the merits. 3° Deny or retreat the administration of justice and the assistance and protection that is legally required of them.”

[In Spanish: “Incurrirán en las penas de suspensión de cargo o empleo en cualquiera de sus grados y multa de once a veinte unidades tributarias mensuales o sólo en esta última, cuando por negligencia o ignorancia inexcusables: 1°. Dictaren sentencia manifiestamente injusta en causa civil. 2°. Contravinieren a las leyes que reglan la sustanciación de los juicios en términos de producir nulidad en todo o en parte sustancial. 3°. Negaren o retren la administración de justicia y el auxilio o protección que legalmente se les pida.”]
Article 265 of the Argentinean Criminal code sanctions acts of corruption committed by arbitrators.\(^{198}\) The Peruvian Criminal code also applies some of its provisions regarding corruption to arbitrators,\(^{199}\) and so does Spanish law.\(^{200}\)

\(^{198}\) Argentina: Article 265, Criminal code: “Shall be punished with imprisonment from one to six years and special disqualification the public official who, directly, through an intermediary or simulated act, is interested in a benefit for himself or a third party’s in any contract or transaction in which he is involved in by reason of his function. This provision shall apply to the arbitrators, mediators, surveyors, accountants, guardians, executors, trustees and liquidators, with respect to the functions performed in the nature of such.”\[In Spanish: “Será reprimido con reclusión o prisión de uno a seis años e inhabilitación especial perpetua, el funcionario público que, directamente, por persona interpuesta o por acto simulado, se interesare en miras de un beneficio propio o de un tercero, en cualquier contrato u operación en que intervenga en razón de su cargo. Esta disposición será aplicable a los árbitros, amigables como componentes, peritos, contadores, tutores, curadores, albaceas, síndicos y liquidadores, con respecto a las funciones cumplidas en el carácter de tales.”]\(\)

\(^{199}\) Peru: Article 395, Criminal code: “Judges, Arbitrators, Experts, Members of the Administrative Tribunal or any other analog thereof, who accept or receive a gift, promise, or any other benefit or benefit in full knowledge of cause and effect with the objective of influencing or deciding in a matter subject to his knowledge or competence shall be punished by a custodial sentence of not less than six nor more than fifteen years and dismissed in accordance with paragraphs 1 and 2 of article 36 of the Criminal Code and with one hundred eighty to three hundred and sixty-five fine days. Magistrates, Arbitrators, Experts, Members of the Administrative Tribunal, or any other analog thereof, who under any form directly or indirectly solicit a gift, promise, or any benefit or benefit, to influence the decision of a case brought before them, shall be punished by a custodial sentence of not less than eight and not more than fifteen years and removed from office in accordance with paragraphs 1 and 2 of Article 1, Article 26 of the Criminal Code and three hundred and sixty-five to seventy-five days fine.”\[In Spanish: “El Magistrado, Árbitro, Fiscal, Perito, Miembro de Tribunal Administrativo o cualquier otro análogo a los anteriores que bajo cualquier modalidad acepte o reciba donativo, promesa o cualquier otra ventaja o beneficio, a sabiendas que es hecho con el fin de influir o decidir en asunto sometido a su conocimiento o competencia, será reprimido con pena privativa de libertad no menor de seis ni mayor de quince años e inhabilitación conforme a los incisos 1 y 2 del artículo 36 del Código Penal y con ciento ochenta a trescientos sesenta y cinco días-multa. El Magistrado, Árbitro, Fiscal, Perito, Miembro de Tribunal Administrativo o cualquier otro análogo a los anteriores que bajo cualquier modalidad solicite, directa o indirectamente, donativo, promesa o cualquier otra ventaja o beneficio, con el fin de influir en la decisión de un asunto que esté sometido a su conocimiento, será reprimido con pena privativa de libertad no menor de ocho ni mayor de quince años e inhabilitación conforme a los incisos 1 y 2 del artículo 36 del Código Penal y con trescientos sesenta y cinco a setecientos días-multa.”]\(\)

\(^{200}\) Spain: Article 440, Criminal Code: “Experts, arbitrators and executors who behave in the manner described in the previous article, regarding assets and items in the appraisal, distribution or award of which they have intervened, and guardians, carers or executors in relation to the properties of their pupils or the heirs to the estate, shall be punished with the penalty of a fine from twelve to seventy-four months and special barring from public employment and office, profession or trade, safekeeping, guardianship or care, as appropriate, for a term of three to six years.”
2. The assimilation of arbitrators to state judges regarding criminal liability

According to Article 17 of the Brazilian Law No. 9.307, arbitrators' criminal liability is assimilated to judges' criminal liability due to the similarity of their functions. Consequently, Articles 312 to 327 of the Brazilian Criminal code are applicable to arbitrators.

However, it is to be noted that only Articles 316, 317, 319 and 325 really apply to them.

[In Spanish: “Los peritos, árbitros y contadores partidores que se condujeren del modo previsto en el artículo anterior, respecto de los bienes o cosas en cuya tasación, partición o adjudicación hubieran intervenido, y los tutores, curadores o albaceas respecto de los pertenecientes a sus pupilos o testamentarios, y los administradores concursales respecto de los bienes y derechos integrados en la masa del concurso, serán castigados con la pena de multa de doce a veinticuatro meses e inhabilitación especial para empleo o cargo público, profesión u oficio, guarda, tutela o curatela, según los casos, por tiempo de tres a seis años, salvo que esta conducta esté sancionada con mayor pena en otro precepto de este Código.”]

Article 439, Criminal code: “The authority or public officer who, having to intervene, due to his/her office, in any kind of contract, matter, operation or activity, takes advantage of that circumstance to force or facilitate any kind of participation, either direct or by an intermediary, in such transactions or actions, shall incur a sentence of imprisonment of six months to two years, a fine of twelve to twenty-four months and special barring from public employment and office for a term of one to four years.”

[In Spanish: “La autoridad o funcionario público que, debiendo intervenir por razón de su cargo en cualquier clase de contrato, asunto, operación o actividad, se aproveche de tal circunstancia para forzar o facilitarse cualquier forma de participación, directa o por persona interpuesta, en tales negocios o actuaciones, incurrirá en la pena de prisión de seis meses a dos años, multa de doce a veinticuatro meses e inhabilitación especial para empleo o cargo público y para el ejercicio del derecho de sufragio pasivo por tiempo de dos a siete años.”]

(201) Brazil: Article 17, Law No. 9.307 of September 23, 1996, amended by Law No. 13.129 from 2015: “By performing their service, or as a result thereof, the arbitrators shall be considered comparable to public officials for the purpose of criminal law.”

[In Portuguese: “Os árbitros, quando no exercício de suas funções ou em razão delas, ficam equiparados aos funcionários públicos, para os efeitos da legislação penal.”]

I. Nature of the relationship between the arbitrator and the parties to the arbitration

Like France, Swiss law also has a dual regime and provides different rules for domestic arbitration and international arbitration. Domestic arbitration is governed by Title III of the Civil Procedure Code (“CPC”) and international arbitration is governed by Chapter XII of the Federal law on Private International Law (“LDIP”).

Neither the CPC nor the LDIP provide general rules on the nature of the legal relationship between the arbitrator and the parties to the arbitration.

Some case law has touched on the subject but no answers have been given to all the questions asked.

In an old case (1985), the Federal Tribunal ruled that the arbitrator “is linked to the parties by contractual relations (…) that fall under procedural law, private law applicable by analogy” (ATF 111 Ia 72, 76). This assertion was linked to the arbitrator’s obligation to disclose, which, was then enshrined in the law (the 1985 case was handed down before the CPC came into force and at a time when arbitration was still governed by the Intercantonal Concordat on Arbitration).

The full excerpt states the following:

“When he accepted to proceed as such, the arbitrator is linked to the parties by contractual relations (Article 14 CIA) that fall under procedural law, private law being applicable by analogy (ATF 101 II 170, ATF
96 I 338-340 and the references cited). Like before the conclusion of any other contract, the future contracting parties have an obligation to reciprocally inquire about any fact likely to influence in a substantial way the will of the other party to contract when there are reasons to believe that it does not know about such facts (ATF 108 II 313, ATF 105 II 79, ATF 102 II 84 and the case law cited). The arbitrator is not an exception to this rule. He must then do everything in favor of the smooth running of the arbitration proceedings and refrain from doing anything that can compromise it, as an incidental contractual obligation (see in general on such obligations MERZ, n. 260/262 ad art. 2 CC, DESCHENAUX, Le titre préliminaire du code civil, p. 165, GUHL/MERZ/KUMMER, Das schweizerische Obligationenrecht, p. 13, ENGEL, in RDS 1983 II 64).

In a case from 2008, the Federal Tribunal had to rule on the nature of a decision made by an arbitral tribunal on its own fees.

It ruled that the arbitral tribunal had no jurisdiction to render an enforceable decision about its own fees, which are based on the contract (receptum arbitri) between the arbitrators and the parties (ATF 136 III 597, c. 5.2.1). As a result, a decision made by an arbitrator about his fees is not enforceable and has no greater value than that of an “invoice.”

Lastly, in a case from 2014, the Federal Tribunal seems to accept the theory of the predominant doctrine in Switzerland, according to which the arbitrator contract is a form of “sui generis mandate” but for which the most common rules on mandates are “largely precluded”, namely those relating to the termination of a contract (ATF 140 III 75, c. 3.2.1).

The relevant excerpt states the following:

"The arbitrator contract - receptum arbitrii ou arbitri (cf. ATF 136 III 597 consid. 5 p. 600; on the terminology, see THOMAS CLAY, L’arbitre, Paris 2001, p. 487-498) - refers to the contractual relationship that forms between an arbitrator and the parties. It participates in the mixed nature of arbitration, which has a contractual nature because of its source and a jurisdictional one because of its object (FOUCHARD/GAILLARD/GOLDMAN, Traité de l’arbitrage commercial international,
Paris 1996, n. 1122). The arbitrator, like the national judge, has the power to rule on a dispute by an award equivalent to a court ruling, but he holds his power from the parties’ wishes (KAUFMANN-KOHLER/ RIGOZZI, Arbitrage international, Droit et pratique à la lumière de la LDIP, 2e éd. 2010, n. 24). The arbitrator contract is often qualified as a mandate sui generis, but the mandate rules (Article 394 et seq CO) are largely precluded by the arbitrator’s status, especially in relation to the conditions under which this contract is terminated (PIERRE-YVES TSCHANZ, in Commentaire romand, Loi sur le droit international privé, Convention de Lugano, 2011, n° 55 ad art. 179 LDIP)."

The Federal Tribunal has again specified that “the arbitration contract is not a pure and simple mandate, it escapes the rule, enshrined in Article 404, para. 1 CO, according to which the mandate can be repudiated at any time”, in such a way that it is “common understanding that an arbitrator can only resign on valid grounds.”

None of the above mentioned cases specifically deals with the liability of an arbitrator and the conditions of such liability.

The contractual theory, which analyses the legal relationship between the parties and the arbitrator as a contract, is predominant in doctrine203 but is not unanimously accepted.

Two influential commentators (Berger/Kellerhals) consider that the legal relationship between the arbitrator and the parties does not fall within the scope of contract law. They note that, frequently, one of the parties (or both) has/have not accepted the appointment of an arbitrator (who was appointed by the other party, or by an institution or juge d’appui (“support judge”)), and that Swiss law is very reluctant to acknowledge an “obligation to enter” a contract and that, subsequently, the arbitrator contract (receptum arbitri) “is not the appropriate way to characterize the relationship between the arbitrators and the parties.” 204

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(203) Bernet/Eschment, p. 190-191.
(204) Berger/Kellerhals, p. 343, para. 965.
According to these authors, the relationship between arbitrators and parties is governed by a statutory legal relationship based on law, which does not exclude that, on certain specific points, the parties and the arbitrators agree to specific agreements. (“In our view, the relationship between arbitrators and parties cannot therefore be deemed based on contractual arrangements between them, but instead on a statutory legal relationship (Gesetzliches Schuldverhältnis). This does not exclude that parties and arbitrators may enter into specific agreements on subsidiary matters such as, for example, the general conduct of the proceedings, details concerning the arbitral procedure, variations of non-mandatory provisions of the applicable arbitration law or the arbitrators’ fees and expenses”).

According to the predominant theory, which seems to have the Federal Tribunal’s support, the arbitrator contract is a “mandat sui generis” contract, reflecting the “mixed” nature of arbitration (contractual and jurisdictional), to which private law rules are applied (directly, rather than by “analogy,” as confirmed by the old case law from 1986).

Ordinary rules on mandates (Article 394 et seq. CO) are “largely excluded by the arbitrator status,” and, in particular, Article 404 para. 1 CO allowing the mandate to be terminated at all times is not applicable.

The arbitrator’s contract gives rise to rights and obligations.

The arbitrators’ obligations include, in particular, the following duties:

- Duty to rule on the dispute brought before him;
- Duty to render an award within a reasonable delay and, if necessary, in the delay provided in the agreement or the applicable procedural rules;
- Duty to personally fulfill his mission;
- Duty of diligence and fidelity;
- Duty of confidentiality;

(205) Berger/Kellerhals, p. 344, para. 967.
(206) Bernet/Eschment, p. 191; Kaufmann-Kohler/Rigozzi, p. 234-235, para. 4.188.
Duty to reveal any reason that could lead to any doubt on his independence and impartiality given the parties involved;

Duty to respect all fundamental procedural principles, and in particular the right to be heard.

According to the non-contractual theory defended by Berger/Kellerhals, arbitrators have these same duties under a legal obligation (Berger/Kellerhals, p. 343 et seq., para. 971 et seq.).

One can note that some of the above mentioned duties are based both on a contractual obligation (according to the contractual theory) and a legal obligation (for example, the duty to reveal any potential conflict of interest, which is expressly provided in Article 363 para. 1 CPC).

II. Arbitrator’s liability

No legal provision (from the LDIP or the CPC) deals with arbitrator’s liability.

To my knowledge, no case law from the Federal Tribunal has addressed this question. Furthermore, I am not aware of any cantonal case law that has addressed this subject either.

Subsequently, Swiss law is solely based on doctrinal opinions on the subject of arbitrators’ liability.

It is recognized that an arbitrator can be held liable as part of his activity as arbitrator. According to the predominant conception, this liability is of a contractual nature and based on Article 398 CO (agent’s liability) and/or on Article 97 CO (general provision on contractual liability).\(^{207}\)

The common conditions for contractual liability apply, which are (i) a breach of a contractual duty, (ii) a loss/damage, (iii) a causal link between the breach of the contractual duty and the loss/damage, and (iv) a fault, which however is assumed.

The unanimous doctrine considers that the arbitrator’s liability shall be limited.\(^{208}\) Sometimes, but not always, one refers to the idea of an “arbitral immunity.”

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\(^{207}\) Bernet/Eschment, p. 191.

\(^{208}\) Bernet/Eschment, p. 192; Kaufmann-Kohler/Rigozzi, p. 236, para. 4.192.
If the restriction, or immunity is admitted in principal, the controversy is on the ground for this limitation of the arbitrator’s liability.

Certain authors have suggested applying by analogy the rules on the (limited) liability of judges (in reality, State liability for judges’ activities).\footnote{209}

Other authors, inspired by German case law, consider that arbitral immunity comes from the implicit agreement between the parties providing that the arbitrator, when he carries out his jurisdictional mission, is only liable for fraud or serious misconduct.\footnote{210}

Certain authors analyze the question from a negligence standpoint – rather than from the breach of a contractual duty standpoint – and consider that the specific nature of an arbitrator’s activity leads to a different evaluation of his “negligence” which could be evaluated like it is done so for a judge’s negligence.\footnote{211}

Lastly, certain authors propose the existence of an unwritten general principle of private law providing that the arbitrator is only liable in case of fraud or serious misconduct.\footnote{212}

Whatever the ground for limiting liability, the generally recognized effect is that the arbitrator is only held liable in case of fraud or serious misconduct.\footnote{213}

Furthermore, and even if all the authors do not expressly specify it, the limitation of liability only relates to the acts or omissions relating to the jurisdictional function, for example a wrong decision made about the merits.\footnote{214}

27. For the acts and omissions unrelated to the jurisdictional function (that are sometimes, known as the arbitrator’s “accessory” obligations), ordinary standards on liability seem to apply. In particular, certain authors

\footnote{(209) Bernet/Eschment, p. 193.} 
\footnote{(210) Bernet/Eschment, p. 193.} 
\footnote{(211) Bernet/Eschment, p. 194; Göksu, para. 1087.} 
\footnote{(212) Bernet/Eschment, p. 194; Hoffet, p. 307.} 
\footnote{(213) Bernet/Eschment, p. 192; Berger/Keilerhals, para. 996; Poudret/Besson, para 446; Kaufmann-Kohler/Rigozzi, p. 236, para. 4.192.} 
\footnote{(214) Kaufmann-Kohler/Rigozzi, p. 236, para. 4.192-4.193.}
have expressly specified that the liability was ordinary (and not limited) in the cases of breach by an arbitrator of his duty to disclose, breach of his duty of confidentiality, and on termination of his mandate without due cause.\textsuperscript{215}

The annulment of the award is not in itself a case of liability. Inversely, certain authors have claimed that the annulment of the award is a condition precedent to the arbitrator’s liability.\textsuperscript{216}

Predominant doctrine considers that arbitrators are severally liable (under Article 403 para. 2 CO), in a way that a party could freely chose to act against one or against all of the arbitrators.\textsuperscript{217} An arbitrator against whom liability is sought could then pursue his colleagues (Article 148 CO).

It should be however clarified that the rules on severable liability would not apply if only one arbitrator is liable because there would not be a common breach (typically in the case of breach of duty of confidentiality by one arbitrator or breach by an arbitrator of his duty to disclose).

The parties and the arbitrators can agree to exclude the liability of arbitrators. They can namely do so through an arbitration.

The Swiss Rules of International Arbitration provide such provision at Article 45 (1):

\textit{"Neither the members of the board of directors of the Swiss Chambers’ Arbitration Institution, the members of the Court and the Secretariat, the individual Chambers or their staff, the arbitrators, the tribunal-appointed experts, nor the secretary of the arbitral tribunal shall be liable for any act or omission in connection with an arbitration conducted under these Rules, except if the act or omission is shown to constitute intentional wrongdoing or gross negligence."}\textsuperscript{218}

\textsuperscript{215} Boog/Stark-Traber, p. 170, para. 42.
\textsuperscript{216} Bernet/Eschment, p. 195.
\textsuperscript{217} Bernet/Eschment, p. 192.
This exclusion covers all the arbitrator’s acts, and not only those of “jurisdictional” nature. It is valid within the limits of Article 100 para. 1 CO which provides that “is void any provision aimed at liberating in advance the debtor of the liability it could incur in case of deceit or serious misconduct.”

The arbitrator can also be held liable under precontractual liability, typically related to a breach of duties to disclose (ATF 111 Ia 72, 77).

To my knowledge, no rule exists providing for disciplinary liability in case of breach by an arbitrator of his contractual or legal duties. In particular, it does not appear to me that the rules and practices of the bar can be applied in this context.

Lawyers must have civil liability insurance. Theses insurances cover all the lawyer’s professional activities, including arbitration activities and those linked to being an arbitrator. Civil liability insurance does not seem to be a problem in this context.

I know a few cases – not many – in which Swiss arbitrators’ liability has been sought. I however do not know of any cases before the Swiss courts. I also do not know of any case where an arbitrator had to pay damages to a party because of arbitrator activities. It goes without saying that such cases can exist or happen in the future, and that the question needs to be taken seriously. I am not aware of any similar study, in Switzerland, to the one carried out by the Club des juristes on arbitrators’ liability.
III. Limited bibliography


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