

SUING ARBITRATORS: A BACK-DOOR FOR SETTING-ASIDE AND RESISTING ENFORCEMENT?

Pelin Baysal & Bilge Kağan Çevik & Vicdan Beyza Öner

Despite recent criticisms, arbitration remains a significantly preferable option compared to the alternatives. It provides an effective means to resolve disputes arising from international commercial transactions. However, at the conclusion of arbitration proceedings, there is typically one dissatisfied party, as there can only be a single winner. The losing party has various options to address this unfortunate situation. They may attempt to have the arbitral award set aside in the state courts of the jurisdiction where the arbitral tribunal rendered the award. Alternatively, they may resist enforcement in any jurisdiction where the prevailing party seeks it.

Furthermore, a party may also be dissatisfied with the performance of the arbitrator. The arbitrator might have resigned without issuing an award, not actively participated in the decision-making process, or failed to deliver the award within the specified timeframe. The arbitrator may have lacked impartiality or independence. The arbitrator may even have committed an error in fact or law that had a substantial impact on the outcome of the arbitration.

In such instances, the procedures and remedies available against the arbitrator differ from those concerning the arbitral award. Depending on the specific circumstances and applicable law, the dissatisfied party may have procedural remedies to address the arbitrator's conduct. Additionally, they may seek to recover damages caused by the arbitrator.

In this article, after discussing the legal status of the arbitrators, the arbitrators' obligations will be briefly explained. Following this, conditions of raising a civil claim against the arbitrators will be delineated by reference to the arbitrator immunities, applicable under different legal instruments. Lastly, whether or not bringing a civil liability claim against the arbitrators can be used as a tool in setting aside proceedings will be evaluated.

The Legal Status of the Arbitrators

The determination of arbitrators' rights, powers, and obligations hinges on their legal status. However, the legal status of the arbitrators has received surprisingly little attention, leading to ongoing uncertainty regarding the legal and conceptual basis for the arbitrator's relationship with the parties and their respective rights and obligations.

The majority of arbitration laws and rules do not explicitly regulate the relationship between arbitrators and the parties. As a result, different theories have been proposed by national courts and legal experts to define the status of arbitrators.

The most widely accepted theory, particularly in civil law jurisdictions, posits that the arbitrator's status is grounded in a contractual relationship with the parties.¹ According to this theory, the arbitrator's liability stems from the terms of their appointment, including agreed-upon arbitration rules and the payment of fees and costs.² It focuses on the contractual aspects rather than the adjudicatory function performed by the arbitrator.

An alternative theory emphasizes the arbitrator's adjudicatory function.³ This approach draws an analogy between arbitrators and judges. Commonly supported in common law jurisdictions, it asserts that arbitrators, like state court judges, are involved in the administration of justice. Consequently, the status of the arbitrator is considered "quasi-judicial," implying that their rights and obligations, akin to those of state judges, are derived from national laws.⁴

However, neither a purely contractual approach nor a functional approach appears to adequately define the status of arbitrators. A more nuanced perspective suggests that the legal basis for the arbitrator's relationship with the parties derives from a combination of these theories.⁵ The various aspects of the arbitrator's rights and duties can only be adequately explained by considering both perspectives.

Without a contractual framework, certain elements lack a convincing explanation, such as the parties' right to choose their arbitrators, the arbitrators' right to decline appointments, the determination of arbitrators' remuneration, and the arbitrators' duty to conduct the arbitration by the parties' agreement. These aspects require a contractual foundation.

On the other hand, the arbitrator's role and obligations are primarily "adjudicatory" or "judicial" in nature. Arbitrators are entrusted with the crucial adjudicative task of impartially resolving the parties' disputes based on their submissions, the evidentiary record, and the applicable law. Additionally, this adjudicative function is subject to certain mandatory legal requirements that cannot be modified through contractual arrangements. For instance, grossly unequal treatment of one party or denial of the opportunity to be heard are matters imposed by applicable law and cannot be overridden by the arbitration agreement.

The Obligations of Arbitrators

The obligations of arbitrators derive from their contractual relationship with the parties and from their adjudicative role in deciding the parties' dispute. Although

¹ Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration*, 276 (Kluwer 2003).

² Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration*, 276 (Kluwer 2003).

³ Christian Hausmaninger, *Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform*, 7 J. Int'l Arb. 16 (1990).

⁴ Christian Hausmaninger, *Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform*, 7 J. Int'l Arb. 16 (1990).

⁵ See, e.g., Judgment of 28 January 2014, DFT 140 III 75, 77, Swiss Fed. Trib.: "The arbitrator's contract is often described as a *sui generis* mandate, but the rules on the mandate (Art. 394 et seq. CO) are largely replaced by the status of the arbitrator [as defined in the applicable arbitration law, institutional rules and customs]".

there is no vast legal authority to define the arbitrators' obligations, these obligations can be summarised as follows:⁶

The duty to resolve the parties' dispute in an adjudicatory manner

This is the fundamental purpose of an arbitration agreement and the primary motivation behind the parties' selection of an arbitrator and presentation of their cases to them. This obligation in turn encompasses several closely related sub-obligations:

- a. *Obligation to act in an adjudicatory manner;*
- b. *Obligation to be and remain independent and impartial;*
- c. *Obligation of disclosure of potential conflicts;*
- d. *Obligations of skill, care and integrity;*
- e. *Obligation of diligence;*
- f. *Obligation to apply the law;*
- g. *Obligations concerning the misconduct of the other member(s) of the arbitral tribunal and*
- h. *Obligation to not delegate duties.*

The duty to conduct the arbitration in accordance with the parties' arbitration agreement

The arbitrator has an obligation to conduct the arbitration in line with the procedures outlined in the parties' arbitration agreement unless such procedures conflict with mandatory legal requirements. One of the key advantages and appeals of the arbitral process lies in the parties' freedom to autonomously agree upon the procedural aspects of the arbitration.

The duty to maintain the confidentiality of the arbitration

The presence of general confidentiality obligations in international arbitration remains a matter of debate. If such obligations are in place, they are binding on both the arbitrators and the parties, as they are incorporated into the arbitrator's contractual agreement.⁷

Even in cases where confidentiality obligations are not explicitly imposed on the parties, arbitrators are still subject to separate confidentiality obligations due to their adjudicative role. One aspect of the arbitrator's responsibility is to uphold the confidentiality of the parties' written and oral submissions, tribunal discussions, evidence, and other materials submitted during the arbitration. It is generally incompatible with the arbitrator's mandate to disclose any materials obtained through the arbitration proceedings to third parties.⁸

The duty to complete the arbitrator's mandate

⁶ For a detailed explanation please see Chapter 13: Rights and Duties of International Arbitrators (Updated August 2022)', in Gary B. Born, *International Commercial Arbitration (Third Edition)*, Volume 3rd edition §1.02[A][2].

⁷ 'Chapter 20: Confidentiality in International Arbitration (Updated August 2022)', in Gary B. Born, *International Commercial Arbitration (Third Edition)*, Volume 3rd edition (© Kluwer Law International; Kluwer Law International 2021).

⁸ 'Chapter 20: Confidentiality in International Arbitration (Updated August 2022)', in Gary B. Born, *International Commercial Arbitration (Third Edition)*, Volume 3rd edition (© Kluwer Law International; Kluwer Law International 2021).

The majority of national arbitration laws and institutional arbitration rules allow arbitrators to resign from their positions, either with or without the consent of national courts or the arbitral institution.⁹ However, there is an argument suggesting that an arbitrator's contractual obligations typically include the duty to fulfil the accepted mandate and refrain from resigning during the arbitration process without valid grounds. When an arbitrator accepts an appointment, there is an implied commitment to complete the mandate by issuing a final award, unless the parties reach a different resolution for the dispute or the arbitration agreement is declared invalid or inapplicable.¹⁰

The duty to comply with the applicable data protection laws

Data protection laws impose several data governance obligations on individuals involved in the “processing of personal data”.¹¹ Arbitrators also record and store personal information such as the names and addresses of parties, witnesses, counsel and other individuals. Therefore, there is a potential argument that the arbitrators are also subject to data protection laws and therefore must comply with such duties.¹²

Suing Arbitrators for Breach of Their Obligations

In theory, if an arbitrator fails to comply with their obligations, then the parties may have claims against him or her for breach of contract. Most legal systems provide no express statutory bases for civil claims against arbitrators, instead leaving such claims to be regulated under generally-applicable principles of contract law. But some legal systems even provide a legal basis for such claims, such as Article 7/E of the Turkish International Arbitration Act states that “*[u]nless otherwise agreed by the parties, the arbitrator who accepts duty in the arbitration proceedings is obliged to pay the damages suffered by the parties if he refrains from performing his duty without just cause*”.¹³

Despite the potential for civil liability, almost all legal systems grant arbitrators a significant level of quasi-judicial immunity against civil claims stemming from their handling of the arbitration process. The nature and extent of these immunities may differ based on the agreement between the parties, relevant institutional arbitration rules, and applicable national laws.

⁹ See, e.g., 2021 ICC Rules, Art. 15(1): “upon acceptance by the Court of the arbitrator’s resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties”; 2016 SIAC Rules; 2020 LCIA Rules, Arts. 10(1), (5).

¹⁰ Sanders, Commentary on UNCITRAL Arbitration Rules, II Y.B. Comm. Arb. 172, 191, 1977: “The [UNCITRAL] Rules do not give any indication as to the circumstances in which a resignation may be justified, and, indeed, they could hardly be expected to do so. Once the arbitrator has agreed to function, he should fulfil his task. Exceptionally there may be good reasons for not continuing, such as a heart attack. If not, an arbitrator who resigns may possibly be sued for damages (costs) consequent upon his resignation”.

¹¹ Regulation (EU) 2016/679, Art. 1(1); Turkish Personal Data Protection Law No. 6698, Art 1.

¹² Rosenthal, Complying with the General Data Protection Regulation (GDPR) in International Arbitration: Practical Guidance, 37 ASA Bull. 822, 824, 2019.

¹³ Article 7/E of the Turkish International Arbitration Act.

Although most international arbitration conventions are silent regarding the subject of arbitrator immunity, the ICSID Convention provides arbitrators in ICSID arbitrations with a very broad grant of absolute immunity from national court jurisdiction or civil liability.¹⁴

On the other hand, a number of national arbitration statutes expressly address the subject of arbitrator immunity, either negatively (by granting arbitrators specified immunities)¹⁵ or affirmatively (by providing that claims may be asserted against arbitrators only in specified cases)^{16, 17} All of these statutory provisions, in one form or another, provide arbitrators with a significant level of quasi-judicial immunity, thereby restricting the situations where civil liability can be imposed. In certain jurisdictions, arbitrators are granted absolute immunity from civil liability for actions or omissions made in the course of their adjudicative functions. In other jurisdictions, arbitrators receive qualified immunity for actions that do not involve fraud, intentional misconduct, or similar behaviours or omissions.

For example, in its judgment dated 2017, the United Arab Emirates Supreme Court established that an error made by an arbitrator causing loss to a claimant must be a "serious mistake" tainted by fraud, deceit, or otherwise inexplicable for the claimant to succeed in a liability claim. This judgment aimed to protect arbitrators from spurious claims brought by disgruntled parties.¹⁸ Likewise, in Canada, the courts have ruled that arbitrators should not be held liable for civil claims, except in the most extreme cases involving intentional misconduct. One notable case illustrating this stance is the *Flock v. Beattie* case in 2010, which reflects the Canadian courts' commitment to protecting arbitrators from liability, except in situations where intentional misconduct jeopardizes the finality of arbitral awards.¹⁹

Even in jurisdictions where national arbitration laws do not explicitly grant immunity to arbitrators, judicial decisions have often adopted approaches akin to the prevailing "negative" grants of arbitrator immunity. These decisions also provide justifications for such immunity. The primary rationale behind these decisions is that the independence and impartiality of arbitrators would be jeopardized if they were susceptible to litigation regarding the performance of their judicial functions. Similar to judges being granted immunity for their judicial acts to safeguard their

14 ICSID Convention, Arts. 21-22 "[...] arbitrators [...] a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity [...]"

15 A leading example of the negative approach is the 1996 English Arbitration Act, which provides §29 that "[a]n arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as an arbitrator unless the act or omission is shown to have been in bad faith".

16 A leading example of the "affirmative" approach to immunity is the Spanish Arbitration Act, which provides that arbitrators who fail to "faithfully fulfil" their duties are "liable for the damage and losses they cause by reason of bad faith, recklessness or fraud."

17 One notable exception is the UNCITRAL Model Law, which is entirely silent on the subject. UNCITRAL, *Report of the Working Group on International Contract Practices on the Work of Its Third Session*, U.N. Doc. A/CN.9/216, para. 51-52, 1982: "In view of the fact that the liability problem is not widely regulated and remains highly controversial, it may seem doubtful whether the model law could provide a satisfactory solution";

18 Hasan Arab, *A High Threshold for Suing Arbitrators in UAE*, published on www.tamimi.com.

19 Aidan L. Cameron and Gordon Lamb, *Canada: Understanding the Liability of Arbitrators*, published on www.mondaq.com, 2017.

independence, arbitrators are entitled to comparable protections against personal liability arising from their adjudicative role.²⁰

Additionally, these immunities granted by national laws can be reinforced through contractual agreements. Typically, arbitration agreements do not explicitly cover the issue of arbitrators' immunities, unless they incorporate institutional arbitration rules. In fact, many institutional arbitration rules include contractual provisions that exclude arbitrators' civil liability. The 2021 ICC Rules, for instance, contain an extensive provision granting absolute immunity to arbitrators in ICC arbitrations, stated as follows:

“The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.”²¹

The enforceability of provisions found in institutional rules or terms of appointment that exclude arbitrator liability is contingent upon the relevant national law. Provisions that seek to exclude liability for deliberate wrongdoing or fraud are likely to be subjected to heightened scrutiny in many legal systems. For instance, under Turkish law, limitations on a party's liability for gross negligence are deemed null and void.²²

6

A Back-Door for Set-Aside and Resisting Enforcement?

It is sometimes said that a remedy for an arbitrator's noncompliance with his or her obligations is the setting aside or non-recognition of the arbitrator's award. Or at least, it has been argued that the disappointed parties can try to set aside the award or resist its enforcement on the grounds of the arbitrators' breach of their obligations. Correctly analysed, this is wrong.

A party has a legal right to annul or prevent recognition of an arbitral award based upon various grounds. This right can exist in the absence of any breach of the arbitrator's contractual obligations. And conversely may not be available even if an arbitrator has breached his or her contractual obligations.

This is not to say that the annulment of an award may not be relevant to, or the basis for, other relief against an arbitrator. If an arbitrator deliberately ignored his or her disclosure requirements, the award can be set-aside and the injured parties

20 U.S. District Court for the Northern District of Ohio - 263 F. Supp. 324, 1967: “[A]rbitrators exercise judicial functions and while not eo nomine judges they are judicial officers and bound by the same rules as govern those officers. Considerations of public policy are the reasons for the rule and like other judicial officers, arbitrators must be free from the fear of reprisals by an unsuccessful litigant. They must of necessity be uninfluenced by any fear of consequences for their acts.”

21 Article 41 of the ICC Rules.

22 Turkish Law of Obligations, Article 115: “Previous agreements to the effect that the debtor shall not be liable for gross negligence shall be null and void.”

might have grounds for civil claims against the arbitrator (subject to applicable immunities). If, however, the civil claim against the arbitrator is based on the alleged breach of his or her data protection obligations, this breach might not even be related to the setting aside of the award.

By the same token, the fact that the award had been set aside should not automatically mean that the arbitrator's breach of their obligations led to the set aside. The claims arise only where the arbitrators breached their obligations and are not protected by any immunity.

For further information, please contact:



Pelin BAYSAL
pelin@baysaldemir.com



Bilge Kağan ÇEVİK
bilge@baysaldemir.com



Vicdan Beyza ÖNER
beyza@baysaldemir.com