CHAPTER 14

Approaches to Arbitrators' Liability: Immunity or Liability?

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§14.01 INTRODUCTION

The global economy has turned arbitration into a big business.[1] Historically, arbitration was a special honour rather than a profession, and the arbitrator's fees were merely of nominal character.[2] In the past few decades, there has been a notable change in the use of arbitration as a dispute resolution mechanism. The increasing number of international commercial disputes has led to a growth in demand for arbitration and consequently a professionalisation of arbitration as a business activity.[3]

Arbitration has become more complex and time-consuming, often leading to significant arbitration costs, including arbitrator fees and costs.[4] One of the effects of this changing nature of arbitration has been an increase in the parties' expectations to the arbitrator and the fulfilment of the arbitrator's task. Since the parties place their trust and confidence in the arbitrator, the expectations to his/her skills, experience and integrity are often considerably high. In the event the arbitrator negligently or

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1. Julian D M Lew (ed.), *The Immunity of Arbitrators,* 1 (Lloyd's of London Press Ldt 1990).
2. Tamara Oyre, *Professional Liability and Judicial Immunity* 64 Arbitration 45 (1998).
3. Lew (*supra* n. 1) 1.
4. Jason Yat Sen Li, *Arbitral Immunity: A Profession Comes of Age* 64 Arbitration 51, 55 citing Mustill & Boyd (1998).

fraudulently disregards his/her duties, not only the confidence in the arbitrator will be lost, but the parties might sustain significant economic loss.[5]

The available remedies in case of such arbitrator misconduct are generally limited to the removal of the arbitrator, vacating the award, and potential criminal liability in case of extreme misbehaviour. As none of these sanctions gives any account to economic losses or damages suffered by an aggrieved party, such redress is often considered inadequate or ill-suited. Prompted by the high economic risks at stake in arbitration, civil liability claims against arbitrators have emerged in recent years.

Arbitrator liability is, however, controversial and subject to various opinions among legislators, national courts and commentators as to the existence, legal basis and scope of such liability.[6] The contentiousness of this legal area originates from the hybrid nature of the relationship between the parties and the arbitrator; the latter being a contract partner as well as a private judge. The judicial nature of the arbitrator's profession has led to the controversial question of whether arbitrators should be immune from liability?

At this point, there are no international binding instruments that regulate arbitrators' liability.[7] Hence, the question is determined solely by local lawmakers and national courts from different legal systems.

The use of local applicable conflict-of-law rules is resulting in divergent approaches.[8] The inevitable result is uncertainty for all parties involved in the arbitration process, as the consequences of a potential future lawsuit against the arbitrator are unknown. While some jurisdictions have dealt with this issue through legislation or case law – other jurisdictions have not provided a clear approach to arbitrator liability.

Despite the existence of various divergent approaches prompted by the use of local applicable conflict-of-law rules, there seems to be a general movement from an absolute immunity to a qualified immunity (or limited liability) norm. The magnitude of the move seems to depend on whether the jurisdiction is regulated by civil or common law.[9] However, the commonality in recent developments in case law is, that arbitrators *can* be liable to the parties under certain circumstances.

In view of the above, this chapter seeks to identify the underlying considerations for and against arbitrators' liability. Further, the aim is to examine the different approaches to arbitrators' liability and the legal bases for these approaches, using various jurisdictions as examples, and to provide a recommendation on the preferred approach to arbitrators' liability.

5. Christian Hausmaninger, *Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform*, 7 J. Int'l Arb. 7, 8 (1990).
6. Susan D Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y. Sch. J. Int'l. & Comp. L. 1, 2–3 (2000).
7. Neither the UNCITRAL Model Law on International Commercial Arbitration, 2006 ('Model Law') or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 regulate this matter. *See* Franck I, *supra* n. 6, at 3 and Hausmaninger, *supra* n. 5, at 8.
8. Since the potential liability often depends on the law of the arbitration seat. *See*, e.g., Franck I *supra* n. 6, at 49–53.
9. The US standing out from the crowd as the only jurisdiction providing the arbitrator with nearly absolute immunity except from situations where the arbitrator lacks jurisdiction or where the misconduct does not relate to his/her judicial acts. *See*, e.g., Franck I *supra* n. 6, at 31–32.

§14.02 THE STATUS OF THE ARBITRATOR

Determining the *status of the arbitrator* aims at defining the legal relationship between the arbitrator and the parties, and, thus, concerns the source of the arbitrator's rights and obligations in relation to the parties. For this reason, the determination of the arbitrator's status is paramount for questions concerning liability and immunity.[10] As the majority of arbitration laws and rules do not regulate the relationship between arbitrators and the parties, different theories have been suggested by national courts and legal commentators for defining the status of the arbitrator.[11]

The most widely recognised theory, particularly among civil law jurisdictions, is that the status of the arbitrator is based on a contractual relationship with the parties ('*Contractual Status Approach*').[12] According to the Contractual Status Approach, the arbitrator's liability is based on the terms of the appointment as arbitrator, including agreed arbitration rules and terms of payment of arbitrator fees and costs, and not the adjudicatory function which the arbitrator performs.[13] The applicable rules of contract law will therefore be determining for the arbitrator's liability.[14] Consequently, the arbitrator incurs liability for breach of contract[15] in the event of documented faults committed during the arbitration proceedings, which violate the terms of the appointment.[16] However, the Contractual Status Approach does not necessarily exclude liability on legal principles that are non-contractual. Thus, the arbitrator might – despite the contractual relationship with the parties – be held liable on the basis of national rules of tort law at the seat of arbitration if (s)he fails to demonstrate the expected level of care and skill following from his/her profession.[17]

The main alternative theory to the Contractual Status Approach is based on the adjudicatory function performed by the arbitrator rather than the contract with the parties ('*Functional Status Approach*').[18] The Functional Status Approach rests on the supposed analogical relationship between the arbitrator and the judge.[19] Central for this theory, which typically attracts support from common law jurisdictions, is that

10. Gary B Born, *International Commercial Arbitration,* 1963 (2nd ed, Kluwer 2014).
11. Born, *supra* n. 100, at 1967.
12. Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration,* 276 (Kluwer 2003); Patrik Schöldström, *The Arbitrator's Mandate,* 27 (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet 1998). This approach is coined the 'Contractual Status Approach' by the author and will be used throughout this chapter.
13. Franck I, *supra* n. 6, at 7.
14. Franz T Schwarz and Christian W Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria,* 178 (Kluwer 2009).
15. Absent an explicit provision in the agreement or applicable arbitration rules.
16. Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration,* 1144 (Kluwer 1999); Franck I, *supra* n. 6, at 5.
17. Franck I, s*upra* n. 6, at 10.
18. Hausmaninger, *supra* n. 5, at 16. This approach is coined the 'Functional Status Approach' by the author and will be used throughout this chapter.
19. Dario Alessi, *Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability* 31 J.Int'l Arb. 735, 742 (2014).

arbitrators are involved in the administration of justice just as state court judges.[20] The status of the arbitrator is therefore 'quasi-judicial' in nature, meaning that the arbitrator's obligations and rights, similar to those of state judges, are founded in national law.[21] Contrary to the Contractual Status Approach, the legal basis for arbitrator liability is tort in common law and damages in civil law. However, given the perception that arbitrators are exercising a function comparable to that of state court judges, advocates of this theory have suggested that arbitrators enjoy the same immunity from liability as judges (judicial immunity).[22]

Although the adjudicative function of the arbitrator undoubtedly has an important influence on the status of the arbitrator, arbitrators differ from judges in fundamental ways.[23] A central distinction is the mandate; the arbitrator derives his authority from the parties while judges derive their jurisdiction from the state.[24] Furthermore, arbitrators and judges differ in respect of how they are remunerated and selected. While parties are in control of the appointment procedure of arbitrators and solely responsible to pay their fees, judges are randomly assigned to cases and their salaries are paid by the state.[25] Judges and arbitrators also differ in terms of their administrative functions. Whereas judges are strictly bound by rules of civil procedure and evidence, arbitrators often have the discretion, subject to the parties' agreement, to decide on the applicable rules of the procedure.[26] Finally, as correctly pointed out by *Born,* a range of aspects of the arbitrator's rights and duties[27] can only be explained by a contract between the arbitrator and the parties, and the functional approach does not provide sufficient legal basis for those.[28]

As a result of the fundamental differences between judges and arbitrators, especially the source of their adjudicative power and authority (*public versus private nature*), it would in the author's opinion be erroneous to characterise the status of the arbitrator as strictly functional.

Nevertheless, due to the hybrid nature of arbitration, neither a traditional contractual approach nor a strict functional approach seems to fit for defining the status of the arbitrator. As correctly argued by some commentators, the better view is that the legal basis for the arbitrator's relationship with the parties derives from both theories ('*Hybrid Status Approach'*).[29] This Hybrid Status Approach classifies the arbitrator's

20. Stefan Riegler and Martin Platte, *Chapter II: The Arbitrator – Arbitrators' Liability,* 108 in Christian Klausegger and others (eds), *Austrian Arbitration Yearbook 2007* (Manz'sche Verlags- und Universitätsbuchhandlung 2007).
21. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration*, 72 (Kluwer 2012).
22. Schwarz and Konrad, *supra* n. 144, at 178.
23. Susan D Franck, *The Role of International Arbitrators,* 12 ILSA J Int'l L 499, 504 (2006); Franck I, *supra* n. 6, at 24; Hausmaninger, *supra* n. 5, at 17.
24. Franck II, *supra* n. 233, at 508.
25. Franck II, *supra* n. 233, at 508; Alessi, *supra* n. 19, at 745.
26. *See* Franck II, *supra* n. 233, at 512.
27. For example, the arbitrator's remuneration and other terms of engagement.
28. Born, *supra* n. 100, at 1973. *See also* the courts comments on this point in *Baar v. Tigerman*, 140 Cal. App. 3d 979, 189 Cal. Rptr. 834, 835 (1983).
29. For a supportive view *see*, e.g., Schöldström, *supra* n. 122, at 28. *See* however Dario Alessi who advocates for a strict contractual approach Alessi, *supra* n. 19, at 735–784. This approach is coined the 'Hybrid Status Approach' by the author and will be used throughout this chapter.

status as a sui generis contract,[30] which provides a unique set of rights and duties of the arbitrator.[31] Thus, the Hybrid Status Approach recognises the function of the arbitrator as dual and views the arbitrator as both a service provider and a private judge ('quasi-judicial'). The effect is that the arbitrator's rights and obligations are derived from the terms of appointment, national/international law, and from rules applicable to state judges to the extent necessary to protect the arbitrator's impartial and independent judgment of the dispute.[32]

§14.03 THE ARBITRATOR'S OBLIGATIONS TO THE PARTIES

Arbitrators have several duties originating from the contract, institutional rules, national law and ethical duties; some of them both contractual and general in nature.[33]

The main obligation of the arbitrator is to *finally settle the dispute between the parties*. The finality aspect of this obligation implies that the arbitrator must render a valid award not open to challenges. From this duty follows that the arbitrator should conduct the arbitral procedure in a way which does not compromise the validity of the award, e.g., review all issues submitted by the parties, refrain from exceeding his/her authority/jurisdiction, treat the parties fairly and equally, etc.[34]

By accepting to act as an arbitrator, the arbitrator is obliged to *resolve the parties' dispute*.[35] This duty is only fulfilled if the arbitrator renders an award or the parties settle the case.[36] Thus, any resignation without a good cause is a violation of the arbitrator's obligations to the parties. In the event of any undue resignation, the parties risk a considerable loss of resources (time and money) already invested in the arbitration, as proceedings may have to be repeated and/or will be delayed.[37]

One of the essential obligations of the arbitrator is to *be and stay independent and impartial*. This obligation continues to exist after the appointment stage throughout the arbitral proceedings.[38] The obligation requires the arbitrator to be unbiased and to be free of personal, contractual, institutional or any other relationship that would compromise his/her impartiality and independence.[39] These personal obligations imply a pre-contractual and continuing contractual duty[40] to disclose all relevant facts, which might, in the eyes of the parties, affect his/her impartiality or independence.

The arbitrator shall *conduct the arbitration in a fair, equal, diligent and expeditious manner*.

30. Rather than an agent contract or a contract for the provision of services.
31. Fouchard, *supra* n. 166, at 607; Oyre, *supra* n. 2, at 45.
32. Born, *supra* n. 100, at 1979; Assif Salahuddin, *Should Arbitrators Be Immune from Liability?* 33 Arb Intl 571, 578 (2017); Hausmaninger, *supra* n. 5, at 22.
33. Salahuddin, *supra* n. 322, at 578; Fouchard, *supra* n. 166, at 609–610.
34. For example, English Arbitration Act 1996 (EAA) s. 33. *See* Born, *supra* n. 100, at 1986–1987; Lew et al., *supra* n. 122, at 280.
35. Born, *supra* n. 100, at 2008.
36. Lew et al., *supra* n. 122, at 281.
37. *Ibid*.
38. Lew et al., *supra* n. 122, at 282; Born, *supra* n. 100, at 1988.
39. Born, *supra* n. 100, at 1989.
40. Based on the general duty of good faith in bargains. *See*, e.g., Alessi, *supra* n. 19, at 778.

Finally, the arbitrator is under a duty to *keep the arbitration confidential* in order to preserve the private nature of arbitration.[41]

§14.04 *IMMUNITY VERSUS LIABILITY*

Immunity for arbitrators originates from the concept of 'Judicial Immunity' according to which judges cannot be held liable for their judicial acts.[42] While judges tend to enjoy absolute immunity from civil claims in common law countries,[43] no such concept exists in civil law jurisdictions, where liability is at least a theoretical possibility.[44]

[A] Arbitrator Immunity

According to one school of thought, who favours the Functional Status Approach, it is argued that immunity should be extended to arbitrators in order to protect their impartiality and independence (arbitrator immunity).[45] Thus, acts related to the *adjudicatory function*, in other words, the decision-making process, will be covered by arbitrator immunity, unless they represent a manifest disregard of the law.[46] Hence, arbitrators will be immune from, e.g., lawsuits based on wrongful application of legal principles, unjustified reliance on facts of the case or arbitrary conclusions based on submitted evidence in the arbitration.[47]

Various justifications for arbitrator immunity have been proposed by commentators, legislators and courts.[48] One of the primary reasons for immunity is to protect arbitrators' integrity and independence.[49] The rationale is that arbitrators should not fear being threatened, harassed or sued by unsatisfied parties to the arbitration, as this would risk affecting the arbitrator's decision-making.[50] Another argument is that arbitrator immunity preserves the finality of the award by preventing unsuccessful parties from attempting to re-litigate the case by bringing legal action against the

41. For example, LCIA Rules Art. 30 and Arts 34 and 35 of the Rules of Arbitration Procedure adopted by the Danish Institute of Arbitration. *See also* Lew et al., *supra* n. 122, at 283; Born, *supra* n. 100, at 2003–2004.
42. Franck I, *supra* n. 6, at 16; Martin Domke, *The Arbitrator's Immunity from Liability: A Comparative Survey*, 3 Toledo L. Rev. 99 (1971).
43. For example, US. *See also* Hausmaninger, *supra* n. 5, at 9–14.
44. Franck I, *supra* n. 6, at 17; Hausmaninger, *supra* n. 5, at 13.
45. *See also Hoosac Tunnel Dock & Elevator Co v. O'Brien*, 137 Mass 424, 426 (1884): 'An Arbitrator is a quasi-judicial officer exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror.'
46. Hausmaninger, *supra* n. 5, at 47. As regards the common-law test applied in respect of the determination whether an act falls within the decision-making process and thereby covered by immunity *see* Franck I, *supra* n. 6, at 18–23 incl. note 208.
47. Domke, *supra* n. 422, at 101.
48. For example, *Sutcliffe v. Thackrah* [1974] AC 727 (HL) 736 (Lord Reid), 744 (Lord Morris).
49. Hausmaninger, *supra* n. 5, at 17; Domke, *supra* n. 422, at 99; Schöldström, *supra* n. 122, at 339.
50. Franck I, *supra* n. 6, at 28.

arbitrator.[51] Additionally, it has been argued that the number of skilled arbitrators willing to accept assignments as arbitrators would be considerably reduced without immunity as protection.[52] Such effect is alleged to adversely affect the quality of arbitration.[53]

[B] Arbitrator Liability

Critics of the concept arbitrator immunity, supportive of the Contractual Status Approach, generally claim that arbitrators should be liable for any type of misconduct, including acts related to the arbitrator's quasi-judicial role.[54] The typical arguments for this approach are as follows.

First, immunity encourages arbitrators to act carelessly as misconduct will not be penalised. Second, in contrast to judges, there are no disciplinary sanctions available against arbitrators. Third, arbitration should not favour finality of the award rather than individual justice.[55] Finally, critics have suggested that the alternative remedies against arbitrators do not sufficiently compensate the parties for their economic loss caused by the arbitrator's misconduct.[56]

[C] Qualified Immunity/Limited Liability

The two schools presented above – i.e., arbitrator immunity and arbitrator liability – represent two ends of a spectrum, a concept of full immunity on the one side; and on the other, a concept of full liability (provided that the misconduct reaches a certain level of seriousness). Originating from the Hybrid Status Approach, there are, however, various types of qualified immunity/limited liability in between, which to some extent recognise liability for arbitrators but exempts some types of actions from liability.[57]

In fact, the majority of jurisdictions agree that absolute immunity is undesirable.[58] The reason is first of all that, in situations of serious misconduct of the arbitrator, the parties should have the opportunity to be indemnified for the financial loss caused by the arbitrator.[59] In such cases, the parties, which remunerate the arbitrator, should not bear the economic risk of the arbitrator's negligent failure to meet his/her obligations.

51. Lord Justice Saville and others, *Departmental Advisory Committee on Arbitration Law 1996 Report on the Arbitration Bill,* 13(3) Arb Intl 275–316, para. 132 (1997); Franck I, *supra* n. 6, at 28–29; Andrew I Okekeifere, *The Parties' Rights Against a Dilatory or Unskilled Arbitrator,* 15 J. Int'l Arb. 129, 139 (1998). For a critical view *see* Schöldström, *supra* n. 122, at 336.
52. Hausmaninger, *supra* n. 5, at 16.
53. Franck I, *supra* n. 6, at 29.
54. Alessi, *supra* n. 19; Schöldström, *supra* n. 122, at 340.
55. Salahuddin, *supra* n. 322, at 577; Franck I, *supra* n. 6, at 30.
56. Franck I, *supra* n. 6, at 30.
57. *Ibid.,* 31.
58. With the US being one of the only extreme jurisdictions providing for absolute immunity for acts related to the decision-making process. *See* Franck I, *supra* n. 6, at 31–32.
59. Schöldström, *supra* n. 122, at 340.

Second, absolute immunity might influence the arbitrators' conduct adversely during the arbitration as absolute immunity has the potential to remove his/her incentive to act fairly and professionally. A complete lack of responsibility for misconduct may potentially foster carelessness, irresponsibility and even recklessness. It is, however, unlikely that the effect of a total absence of sanctions would be as profound as set out above. Assumedly, the average arbitrator will have many reasons for conducting him/herself in a professional manner. Arguably, the primary rationale for acting professional is not the existence of sanctions, but other reasons, such as the desire to further his/her own brand in order to get reappointments. Another contributing factor could be a sort of 'pride' in the profession as arbitrator, i.e., a desire, which is not prompted by financial or reputational reasons, to perform professionally and render an arbitral award of high quality. Thus, clear incentives exist for any serious arbitrator to conduct the proceedings in a manner which comes across as fair and reasonable to the parties.

In addition, the radical difference between court litigation and arbitration has also been highlighted in support of arbitrator liability. While appeal proceedings are likely to address and correct any errors in the first judgment, including abuse of immunity and misconduct, arbitral awards are generally subject to a very limited review. This supports that arbitrators, in situations of serious misconduct, should be susceptible to liability. Otherwise, parties may be deterred from choosing arbitration as their dispute resolution method as they perceive the system as unjust and unpredictable.[60] There is, however, room for challenging this line of reasoning as situations of serious misconduct in most jurisdictions will enable a successful challenge of the award. Thus, the possibility to set aside the award functions as a safety valve against abuse of immunity and cases of serious misconduct of the arbitrator. However, successfully setting aside the award does not compensate the parties for the potential economic loss related to the arbitration proceedings not being successfully completed.

On the other hand, supporters of the qualified immunity standard acknowledge that the arbitrator, whose assignment is to decide the parties' dispute in a neutral and objective manner, should be granted protection in his/her decision-making. Such point of view is indeed eligible. If arbitrators could face liability for every breach of contract or every negligent act during the arbitration process, regardless of the nature of the breach/misconduct, it would be impossible to preserve the arbitrator's integrity and independence. Furthermore, it would disturb the arbitration process. A scenario, where it became the norm that parties commenced legal action against the arbitrators in the event of an unsuccessful outcome of the arbitration, would potentially lead to the risk of affecting the arbitrators' independent judgement. This fear of repercussions could lead to unfounded decisions, depriving the parties one of the fundamental features of a judicial process.[61]

60. Hausmaninger. *supra* n. 5, at 33.
61. Franck I. *supra* n. 6, at 54.

§14.05 DIFFERENT JURISDICTIONAL APPROACHES

[A] Arbitrators' Liability Regulated in National Arbitration Acts

A number of jurisdictions have chosen to actively deal with the subject of arbitrator immunity/liability by passing national legislation. The national arbitration statutes generally either grant arbitrators specified immunities (the '*Negative Approach*') or provide liability for arbitrators in specific circumstances (the '*Affirmative Approach*').[62]

[1] United Kingdom

The United Kingdom has granted arbitrators immunity on a statutory level through section 29(1) of the English Arbitration Act 1996 (EAA).[63] This mandatory provision provides an arbitrator with general immunity for any act or omission in the discharge or purported discharge of his/her functions as arbitrator unless the act or omission is shown to have been in bad faith.[64]

In line with the common law tradition, section 29(1) EAA provides arbitrators with a high level of protection by granting them a broad form of immunity, although not absolute. The scope of the provision is the 'functions as arbitrator' and there is no distinction between acts related to the arbitrator's decision-making and other functions of the arbitrator task.[65] As stated in section 29(1), the immunity does not extend to cases where the arbitrator has acted in bad faith.[66] Seen from a civil law perspective, the immunity standard in section 29(1) is too protective as it provides immunity for acts of gross negligence.[67] The underlying considerations of arbitrator immunity do not support an approach where arbitrators are immune from civil actions in such situations. Thus, the quasi-judicial nature of the arbitrator far from justifies that he/she seriously ignores his/her duties to the parties and the general duty to act with care and skill in conducting the arbitration process. Furthermore, the immunity standard is too broad and should, in the author's opinion, be restricted to acts falling within the adjudicatory function of the arbitrator leaving him susceptible to liability for breach of contract. Based on a textual interpretation of section 29(1) it could, nevertheless, be argued that there is room for a conclusion where the arbitrator's failure to disclose and

62. Born, *supra* n. 100, at 2028.
63. Arbitration Act 1996.
64. Similar provisions can be found in s. 25 of the Singapore International Arbitration Act 2012 and s. 73 of the Scotland Arbitration Act 2010.
65. One important exception to this rule is s. 29(3) which exempts liability incurred due to the arbitrator's unreasonable resignation from immunity.
66. About this notion *see* DAC Report, *supra* n. 511, at para. 134 incl. the reference to *Melton Medes Ltd v. Securities and Investment Board* [1995] 3 All ER 880 and Lord Fraser of Carmyllie during the Grand Committee on the arbitration bill, HL Deb 28 February 1996, vol. 569, col CWH7.
67. In support of the contention that the notion bad faith does not include acts of gross negligence *see* Matthew Rasmussen, *Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France*, 26 Fordham Int'l L.J. 1824, 1856 (note 190) (2003).

the failure to act at all falls outside the scope of the immunity (functions as arbitrator).[68]

[2] Spain

Article 21(1) of the Spanish Arbitration Act (SAA)[69] establishes that arbitrators, who do not faithfully fulfil the task entrusted to them, can be considered professionally liable for their conduct, if their actions were carried out with bad faith, recklessness or wilful misconduct.[70] Additionally, Article 37(2) SAA, concerning the time limit for issuing an award, provides basis for a potential liability of arbitrators who fail to comply with the statutory time limits.

Both provisions establish a legal basis for the arbitrator's liability and, concurrently, raise several questions regarding the scope of applicability.[71] One of the questions is which liability standard that applies to the liability regime in Article 21(1) SAA. This issue became one of the main issues for the Spanish Supreme Court in the recent and well-reasoned *Puma* decision.[72]

The case arose out of an ad hoc arbitration seated in Spain between the claimant, 'Studio 2000', and the respondent, 'Puma', resulting in an award ordering Puma to pay Studio 2000 EUR 98.19 million. The award was signed by the arbitrator appointed by Studio 2000 and the chairman, but not by the arbitrator appointed by Puma, who had no knowledge of the award having been issued. Based on that the arbitral tribunal had deliberated, voted, and issued the award without the participation of the third arbitrator, the award was set aside at the request of Puma.[73] Under Spanish law, this amounted to a breach of the principle of collegiality and constituted a violation of the right of defence and in turn a violation of public policy.[74] After the award was set aside,[75] Puma initiated professional liability actions against the two arbitrators, claiming the fees and costs paid by Puma to both arbitrators plus interests. Puma succeeded in all three court instances and was awarded EUR 750,000 per arbitrator.

One of the key issues for the Spanish Supreme Court was whether the arbitrators' conduct met the requirement of recklessness in Article 21(1) SAA. Studio 2000 argued that the assessment of recklessness should not only be based on whether the arbitrators have acted with gross negligence but also include an analysis of the intent of the

68. Van Vechten Veeder and Ricky H Diwan, *National Report for England,* 34, in Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration* (supp 98, Kluwer 2018); Schöldström, *supra* n. 122, at 71.
69. Spanish Arbitration Act 60/2003 of 23 December 2003.
70. Similar approaches in Portuguese Voluntary Arbitration Act 2011, Art. 9 and Peruvian Arbitration Act (Legislative Decree 1071 of 2008), Art. 32.
71. A more detailed analysis of these questions is included in the authors dissertation, *supra* n. *.
72. Supreme Court Civil Chamber, Judgment 102/2017 of 15 February 2017.
73. Provincial Court of Madrid, Judgment 200/2011 of 10 June 2011.
74. SAA Art. 41(1)(f).
75. Regional Appeals Court (Audiencia Provincial) of Madrid, Judgment of 10 June 2011.

arbitrators. In this regard, the court found that recklessness should not be assessed subjectively. In other words, the assessment is independent of the arbitrators' intent and instead based on an objective evaluation of what is deemed a professional standard. In addition, the court stated that:

> Recklessness is equal to an inexcusable negligence, with a manifest and serious error, without justification, that is not linked to the annulment of the award, but to a perilous action on the part of those who know their office and should have respected it in the interest of those who entrusted them to carry out the arbitration.[76]

Additionally, the court clarified that arbitrators can only be liable in cases where the conduct is intended to cause harm or amounts to gross negligence, engaging in conduct which is 'extraordinary or unforeseen conduct that is beyond the good judgment of anybody'.[77]

Applying this standard, the court found that the arbitrators' conduct of deliberately excluding the Puma-appointed arbitrator from the deliberations and voting of the matter amounted to a reckless violation of the fundamental principles of collegiality and contradiction, which resulted in personal liability for the arbitrators.[78]

The Spanish Supreme Court's decision constitutes an authority for the position that the liability threshold in Article 21(1) SAA is gross negligence, and that the assessment is based on a *bonus pater* approach. In this regard, *Puma* confirms the liability standard laid down in a former Spanish Supreme Court decision,[79] which established that arbitrators are susceptible to liability for substantive errors in the award.[80] Based on the reasoning of the court, the successful setting aside of the award seems to be a prerequisite for the finding of liability.[81] Furthermore, *Puma* recognises liability for the arbitrator's breach of fundamental principles in the arbitral process without being restricted to clear breaches of procedural rules following from the applicable law and rules. As *Puma* concerned the deliberations of the arbitral tribunal, it touched upon one of the central adjudicatory obligations of the arbitrator. Arguably, the same high liability threshold does not apply to acts and omissions which are not adjudicatory in nature, but which rather relate to case management.

76. B. Cremades & Asociados *Unofficial Translation of the Supreme Court Judgment Dated February 15, 2017*, pp. 7–8, 2nd chapter, subsec. 3, para. 1, https://www.cremades.com/pics/contenido/7729b459e44f750f4ee0e6fe7d8e3c3e_398872_1.pdf (accessed 14 May 2020).
77. Unofficial translation, *supra* n. 766.
78. The arbitrators being fully aware that the third arbitrator was travelling and did not summon him to the meeting where the outcome of the award was agreed. In other words, it was gross negligence to confuse the provision of SAA Art. 37(3), which allows the majority to render an award, with the fundamental principle of collegiality.
79. Supreme Court Civil Chamber, Judgment 429/2009 of 22 June 2009.
80. The case involved a calculation error in the award. *See also* Bernardo M Cremades Román and David J A Cairns, *National Report for Spain,)*, International Handbook on Commercial Arbitration (2018), *supra* n. 688, at 15.
81. Unofficial translation, *supra* n. 766, at pp. 7–8, subsec. 3, para. 1.

[3] Austria

The Austrian approach is dual in nature as it is based on the specific arbitral liability regime in the Austrian Code of Civil Procedure (ACCP) as well as the general contract/tort law regime.

According to section 594(4) of the ACCP,[82] an arbitrator is liable to the parties in cases where he negligently refuses to act or does so with unreasonable delay.[83] For breaches which do not amount to the arbitrator's non-fulfilment or delay, the Austrian Supreme Court has found that the general rules of contractual liability and tort law applies.[84] Thus, the arbitrator's liability arising from failure to make a correct award or to comply with the arbitration procedure applicable to the specific case is governed by the general rules of the law of damages.[85]

As for the cases falling outside the scope of section 594(4) ACCP, case law has set forth two prerequisites for arbitrator liability, which was recently confirmed by the Austrian Supreme Court, and that restricts the liability of arbitrators to exceptional circumstances.[86] First, a successful challenge of the arbitral award leading to either annulment or non-recognition is necessary in order to succeed with a liability claim against the arbitrator.[87] Under Austrian law, an award can generally not be contested because of any mistake in law or wrongful evaluation or essential defects in the proceedings.[88] As a result, the arbitrator is generally accountable for intentional infringement of the principles and rules pertaining to arbitral proceedings, but the arbitrator will be liable for damage only when his action leads to the inoperability of the award.[89] The second prerequisite for arbitrator liability laid down by Austrian case law is that the arbitrator's misconduct shall amount to intentional harm or gross negligence.[90] Gross negligence has by Austrian commentators been defined as 'negligence so severe that a diligent person would never act like this in the circumstances'.[91] The approach laid down by Austrian courts therefore shows that arbitrators in fact enjoy a high degree of protection.

82. The predecessor was s. 584(2).
83. Schwarz and Konrad, *supra* n. 144, at 181. Examples of such conduct is the total failure to render an award or at least with unacceptable delay.
84. OGH 17 October 1928, ZBl 1929/79.
85. Schwarz and Konrad, *supra* n. 144, at 183.
86. OGH 17 October 1928, ZBl 1929/79; OGH 6 June 2005, JBl 2005, 800/9 Ob 126/04a; OGH 28 February 2008, 8 Ob 4/08h; OGH 22 March 2016, 5 Ob 30/16x.
87. For example, OGH 6 June 2005, JBl 2005, 800/9 Ob 126/04a and OGH 22 March 2016, 5 Ob 30/16x.
88. OGH, 17 October 1928, ZBl 1929/79.
89. Schwarz and Konrad, *supra* n. 144, at 183–184.
90. Stefan Riegler and Martin Platte, *Chapter II: The Arbitrator – Arbitrators' Liability*, 120 in Christian Klausegger and others (eds), *Austrian Arbitration Yearbook 2007* (Manz'sche Verlags- und Universitätsbuchhandlung 2007). *See also* Nigel Blackaby and others, *Redfern and Hunter on International Arbitration*, 323 (6th ed., OUP 2016).
91. Schwarz and Konrad, *supra* n. 144, at 183 incl. note 28. This prerequisite of gross negligence is argued also to apply to liability under s. 594(4), cf. Riegler and Platte, *supra* n. 900, at 119.

[B] Arbitrators' Liability Without Statutory Guidance

In contrast to jurisdictions which have statutory provisions regulating the existence and scope of arbitrator liability/immunity, a range of countries have refrained from addressing the issue on a statutory level and left it to the national courts. Finland, the Netherlands and France, which lack statutory provisions on arbitrator liability, provide some recent and interesting examples of national court approaches.

[1] The Finnish Supreme Court in 'Ruola Family'

By its decision in *Ruola Family,*[92] the Supreme Court of Finland ruled on the question of arbitrators' liability for the first time.

After the rendering of an award, the claimant was made aware that the chairman, both before and during the arbitral proceedings, had acted as legal consultant to the respondent by providing them legal opinions.[93] This information was not disclosed during the arbitration. On this ground, the award was challenged and was later set aside by the Helsinki Court of Appeal,[94] which found that the chairman had been disqualified to act as an arbitrator in the case and thereby had exceeded his authority.[95] Based on the annulment of the award, the claimant filed a civil claim for damages[96] against the chairman to recover the loss caused by his misconduct as they had to re-arbitrate the case in order to obtain a decision in the matter.

The case went all the way to the Finnish Supreme Court, which overturned the decisions of the two lower courts and held the chairman responsible for the financial loss suffered by the claimant.[97] Contrary to the lower courts, the Supreme Court held that the relationship between the parties and the chairman was comparable to a contractual relationship, and that the question of liability therefore should be decided according to the rules of contract law instead of tort. However, the court did state that, in order to preserve the independence and integrity of arbitrators, they are only susceptible to liability in *exceptional circumstances*. Only in situations of clear procedural faults or negligence displayed by the arbitrator there will be a basis for liability.[98] As for the chairman's conduct, the court found that the chairman should have disclosed his consultancy role to the claimant during the arbitration. When assessing whether this failure to disclose was negligent, the court attached considerable importance to four expert opinions provided to the respondent *during* the arbitration for

92. Supreme Court, Judgment of 31 January 2005, KKO 2005:14.
93. The legal opinions had been provided to the respondent, two banks who were the sole owners of the respondent and subsidiaries of the respondent.
94. Judgment of 10 October 1997.
95. Section 41(1) of The Finnish Arbitration Act.
96. EUR 166,725.70.
97. The ruling remained final but the amount of compensation was returned to the district court to be decided.
98. Jan Waselius and Tanja Meinander, *The Ruola Family v. X, The Supreme Court of Finland, 2005:14, 31 January 2005,* in *A Contribution by the ITA Board of Reporters* (Kluwer).

which he had charged EUR 38,010.47.[99] The Finnish Supreme Court found that the chairman should have foreseen how his consulting work, for which he received substantial remuneration, would appear in the eyes of the claimant. Taking due account of the chairman's education, experience and substantial remuneration for his consulting work, the court found that he should have foreseen that his consultancy work was likely to give rise to justifiable doubts about his impartiality and independence.

This case touches upon the relationship between the parties and the arbitrator and considers which type of misconduct can lead to liability for an arbitrator under Finish law. The judgment also raises an important question regarding the required standard of liability. While the lower courts, which based the liability assessment on rules of tort, found that the negligence was only minor, the Finnish Supreme Court does not address the question. The court seems to have deliberately left out a discussion on the liability standard (slight or gross negligence) by only referring to 'negligence'. One could argue that the Finnish Supreme Court's express restriction of arbitrator liability to 'exceptional circumstances' supports a high threshold of liability amounting to acts of intentional misconduct and gross negligence.[100] This view is in accordance with liability standards laid down in other civil law jurisdictions. This interpretation is, however, difficult to reconcile with the court's finding that clear procedural faults or negligence displayed by the arbitrator can provide a potential basis for liability. The same applies to the court's reasoning related to the specific misconduct of the chairman which does not extend to an account for gross negligence. An alternative interpretation of the judgment is that the court deliberately refrained to set out a liability threshold of gross negligence as the misconduct related to a 'contractual' duty rather than the arbitrator's adjudicatory function. If one acknowledges the latter interpretation, the judgment leaves open whether an arbitrator can be liable for acts and omissions based on breaches of its adjudicatory duties under Finish law, and if so, which liability/immunity standard should be applied.

[2] The 'Greenworld Standard' in the Netherlands

The Dutch Supreme Court has ruled on the standard and scope for arbitrators' liability in two landmark cases.[101] The first case was *Greenworld*[102] which laid down the standard for arbitrators' liability in a dispute regarding the tribunal's competence to rule on its own jurisdiction.[103] The Dutch Supreme Court confirmed that arbitrators can

99. Gustaf Möller, *The Finnish Supreme Court and the Liability of Arbitrators* 23 J. Int'l Arb. 95, at 98 (2006). The expert opinions were provided to the two banks who were the sole owners of the respondent.
100. *See* Born, *supra* n. 100, at 2032–2033 who categorises the Finnish approach as a 'relatively broad arbitrator immunity, subject to exceptions for fraud or similar intentional misconduct'.
101. Supreme Court, 4 December 2009, ECLI:NL:HR:2009:BJ7834, NJ 2011/131 (Greenworld) and Supreme Court, 30 September 2016, ECLI:NL:HR:2016:2215 (Qnow).
102. Greenworld, *supra* n. 1011.
103. The appeal to the Dutch Supreme Court failed after the claim was dismissed in the two lower instances.

incur liability for wrongful acts as a quasi-judicial, but only if they 'in relation to the annulled award, intentionally or knowingly acted recklessly or with a gross misjudgement of what a proper fulfilment of their duties entails'.[104] In other words, the court laid down a standard of gross negligence leading to arbitrator liability only in exceptional circumstances. This would be the case when an arbitrator violates fundamental principles of law, such as impartiality and the right to a fair hearing, making the award incapable of being enforced.[105]

In a recent decision in *Qnow*,[106] the Supreme Court clarified the scope of the application of this gross negligence standard (qualified immunity). It thus confirmed that the standard not only applies in cases where the award is annulled on the basis of substantive grounds but also when the award is annulled due to a violation of purely procedural or formal requirements (the chairman's failure to have the two co-arbitrators sign the award amounted to gross negligence).

[3] The Status on French Case Law

The rules on arbitrators' liability applicable in France have been outlined by French courts in a range of decisions. Examples included in the author's research[107] show that arbitrators benefit from a limited liability standard (implied immunity) in relation to the performance of judicial acts, in principle not being liable for error of judgment, factual or legal errors or for infringement of res judicata.[108] However, liability will arise in case of particularly serious breaches such as breaches caused by wilful or gross misconduct, fraud or denial of justice.

French courts have in several cases acknowledged the contractual obligations of the arbitrator to the parties and held the arbitrator liable where there is a breach of contract.[109] Such examples include the arbitrators' failure to comply with a deadline to render the award without requesting an extension of the time limit,[110] the arbitrator's failure to disclose,[111] unjustified resignation[112] and fault in the implementation or

104. Greenworld, *supra* n. 1011, para. 3.6.
105. Gerard Meijer and Marike M P Paulsson, *National Report for The Netherlands (2018)* International Handbook on Commercial Arbitration, *supra* n. 688), at 31.
106. Qnow, *supra* n. 1011.
107. Judgment of 13 June 1990, 1996 Rev Arb 475–476 (Tribunal de grande instance Paris) aff'd judgement of 22 May (the *Bompard* case), Judgment of 15 January 2014, No. 11-17 196 (Azran), Bull. Civ. 2014 1, no 1 (Cour de Cassation, First Civil Chamber).
108. *See also* Yves Derains and Laurence Kiffer, *National Report for France (2018)* International Handbook on Commercial Arbitration, *supra* n. 688, at 40–42; Fouchard, *supra* n. 166, at 591–592.
109. Le Club des Juristes, *Report – The Arbitrator's Liability*, 27, http://www.leclubdesjuristes.com/rapport-responsabilite-de-larbitre-disponible-anglais/, (accessed 26 March 2020).
110. Judgment of 6 December 2005, 2006 Rev Arb 126 (Cour de Cassation, First Civil Chamber).
111. Fouchard, *supra* n. 166, at 595–596 (note 179 regarding the Raoul Duval case) *See also* Juristes Report, *supra* n. 10909, at 32.
112. Fouchard, *supra* n. 166, at 620–621 incl. note 312.

conduct of the arbitral proceedings.[113] Common for this category is that liability depends on general rules of contract law and that no implied immunity is available.[114]

[C] Summary on Jurisdictional Approaches

Based on the above selection of jurisdictional approaches to arbitrator liability, a trend towards a qualified immunity/restricted liability standard seems apparent in international arbitration practice. Divergent approaches within the large spectrum of this standard do, however, exist. As we have seen, the support for the Functional Status Approach in the United Kingdom has led to express statutory immunity for arbitrators, whereas, in Austria and other civil law countries, the adherence to the Contractual Status Approach has implied contractual liability. Yet, statutory provisions and/or case law in, e.g., Austria, Spain, Finland and France show that lawmakers/national courts to a certain extent restrict the liability in order to protect arbitrators whereby an implied qualified immunity is achieved (Hybrid Status Approach). In addition, and more uncertain, are the jurisdictions, such as Denmark and Switzerland, which so far have been completely silent on the question of arbitrators' liability and where no approach seems to have been taken, neither by legislators, nor the national courts.[115]

§14.06 THE RECOMMENDED APPROACH TO ARBITRATORS' LIABILITY

Integrity and independence are two fundamental constituents of both court litigation and arbitration. Despite the fundamental differences between state judges and international arbitrators, the integrity and independence in the arbitration process – leading to a valid and enforceable award – can only be preserved if arbitrators are provided with some form of protection. In other words, the liability for arbitrators must to some extent be subject to restrictions.[116] Furthermore, unlimited liability would potentially lead to an abundance of lawsuits against arbitrators which would risk interfering with two of the most fundamental principles in arbitration: the finality of the award and the integrity of the arbitration process. On the other hand, arbitration will only function properly if the arbitrator is incentivised to exercise careful case management and decision-making, thereby respecting and fulfilling his/her obligations to the parties. In other words, a balance between policy and the sanctity of contract is of utmost importance.

113. *Ibid.*, 620.
114. For example, under the common law standard of Art. 1147 French Code of Civil Procedure for contractual liability.
115. For example, Denmark (Ole Spiermann, *National Report for Denmark*, International Handbook on Commercial Arbitration (2009), *supra* n. 688, at 15 and Marie-Louise Holle, *Voldgiftsdommeres erstatningsansvar i lyset af professionsansvaret*,U.2016B.43 (2016), and Switzerland (Juristes Report, *supra* n. 10909, at Annex 4, 132; Nadia Smahi, *The Arbitrator's Liability and Immunity under Swiss Law – Part II*, 35(1) ASA Bull. 67, 68 (2017).
116. *See* Salahuddin, *supra* n. 322, at 579 who disagrees with this notion. For a supportive view *see* Smahi, *supra* n. 1155, at 73–78.

[A] Liability/Immunity Standard

The assessment of arbitrators' liability should be submitted to a distinction between adjudicatory acts (acts related to the decision-making) and those acts which, still part of the arbitrator's quasi-judicial role, are purely contractual and unrelated to the adjudicatory function ('administrative' acts and omissions).

[1] Adjudicatory Acts

Acts falling within this category relate to the arbitrator's principal obligation; the administration of justice. Hence, wrongful acts and omissions are tied to the decision-making process and typically include the arbitrator's misjudgment, errors of law, errors of fact, disregard of fundamental principles of justice, etc.

In the author's view, the need to reach an appropriate compromise between the two extremes, absolute immunity and unlimited liability, merits a restricted liability – or qualified immunity – standard as the preferred standard for arbitrators' liability for acts under this category. Misconduct related to the arbitrator's adjudicative function should therefore be protected from liability unless the act classifies as gross negligence, intentional misconduct (bad faith) or denial of justice (e.g., fraud).[117] Fixing the liability standard at this level achieves a reasonable balance between respecting the arbitrator's obligations owed to the parties and the protection of the arbitrator. The gross negligence standard should be assessed objectively and not requiring any intentional harm on the part of the arbitrator. Making arbitrator's liability subject to a fixed and objective standard allows the arbitrator to exercise control over the risk of potential liability, which, in turn, serves to preserve the integrity and independence of the arbitration process.

[2] Non-adjudicatory Acts

The liability standard for conduct falling outside the adjudicatory function of the arbitrator is more complex. Acts and omissions falling within this category are, for example, the duty to disclose, the duty to possess agreed qualifications, the duty to comply with time limits.[118] Although such obligations relate to the arbitrator's role as quasi-judicial, they derive from the contractual relationship with the parties, and the considerations supporting qualified immunity do not justify limitations of the arbitrator's liability for breach of contract. On the contrary, policy concerns support that arbitrators should be liable for acts and omissions that do not concern their administration of justice.[119]

The rather delicate question is which legal basis of liability should apply to acts falling within this category. As the assessment of breach should be based on national

117. The manifest disregard of the law is not protected by immunity. *See*, e.g., Hausmaninger, *supra* n. 5, at 47.
118. For a supportive view *see* Hausmaninger, *supra* n. 5, at 28–33.
119. Schöldström, *supra* n. 122, at 32.

contract law in each jurisdiction, it is neither possible nor appropriate to seek harmonisation in this area of liability.[120] In the author's view, the determining factor should be that the arbitrator acts with the degree of professional care, which could generally be expected from other members of the profession. In other words, an arbitrator should not be liable of damages in the event of a mere contractual breach, nor should he be protected by the high threshold applicable to misconduct in the arbitrator's adjudicatory capacity.[121]

[B] Other Prerequisites for Liability

As is the case in a range of jurisdictions, e.g., Austria and Spain, a prerequisite for arbitrator liability should be either the premature termination of the arbitration proceedings or the successful setting aside of the award. This standard serves to avoid discrepancies between court rulings rendered on arbitrator liability and in setting aside proceedings. Furthermore, the prerequisite reinforces the finality and binding effect of arbitral awards by limiting the possibilities of parties to attempt to re-litigate the case through liability proceedings.[122] In addition, in the event of early termination or successful setting aside, any costs associated with the arbitral proceedings will always (at least to some extent) have been incurred by the parties in vain. Consequently, making arbitrator liability subject to early termination or successful setting aside proceedings seeks to limit the cases of arbitrator liability to situations where it is likely that at least one of the parties have suffered an actual loss.

[C] Consequences of Arbitrator Liability

The divergent approaches to arbitrators' liability entail uncertainty about the consequences of arbitrators' liability. This will be discussed in the following section.

[1] Damages

When liability has been established, the question arises on how to assess the damages. Different jurisdictions tend to base the assessment of damages on principles of either contract law or tort law. Basing the assessment of damages on contract law principles is the expected method in jurisdictions of civil law tradition while, historically, common law jurisdictions have used tort law principles.[123]

One of the key issues when assessing damages is whether the scope of the arbitrator's liability should be limited to the forfeiture of fees and costs of the arbitrator,

120. While English law of obligations is based on case law and the liability for breach many civil law countries have a general civil code regulating the law of obligations providing for professional liability, often based on a standard of fault. *See*, e.g., Schöldström, *supra* n. 122, at 44 and 46.
121. *See* Fouchard, *supra* n. 166, at 621 who advocates for the French approach to distinguish between obligations of result and best effort obligations.
122. *See* Schöldström, *supra* n. 122, at 337–339 for a critical discussion of this prerequisite.
123. Waincymer, *supra* n. 211, at 357 incl. note 570.

or whether the arbitrator should also be held liable for the additional loss the party has suffered.[124]

From a civil law perspective, damages should generally entail full compensation for the harm suffered by the aggrieved party[125] to the extent the financial loss is well substantiated by evidence. Thus, the mere reimbursement of the arbitrator's fees and expenses is from a traditional civil law perspective insufficient to indemnify an aggrieved party.

A party should undoubtedly be reimbursed for the arbitration costs that have been paid, including fees and other expenses paid to the arbitrators and arbitral institution.[126] Also, counsels' fees and additional costs incurred for the unnecessary arbitral proceedings together with any travel expenses paid in vain to witnesses, experts, etc. should be reimbursed.[127] The parties should also be able to recover costs of proceedings and legal fees incurred in the challenge and liability proceedings.[128]

In addition, compensation for the loss suffered as a consequence of the award being delayed should be recoverable on the condition that the loss can be substantiated. Although the assessment of this type of damages can be hard to evaluate,[129] the assessment can be made in the same way as damages for late payment under any commercial contract.[130]

A more controversial question is whether the parties should receive compensation for the loss of the chance to win the dispute. As a rule, this type of loss should be recoverable provided that substantial evidence for the loss is submitted by the plaintiff. However, such loss might be hard to prove, and to lift the burden of proof will in some cases require an effective rehearing of the matter to determine which of the parties ought to have won the case.[131] The claim should in any event be based on the same grounds as the sum at issue in the underlying dispute as the claim should reflect the party's loss and has to be caused by the arbitrator.[132] Indeed, the claimant has not lost a chance to win if he can re-arbitrate the case after the original award has been set aside. In this scenario, the claimant will still have a chance to obtain the damages through the second arbitration.

Damages relating to the impact on the economic capacity of the aggrieved party towards third parties (e.g., bankruptcy, insolvency) or other business damage should also be recoverable.[133] In practice, it will, however, be close to impossible to establish the necessary causation for such type of loss.

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124. France is an example of the latter. *See* National Report for France, *supra* n. 108, 41.
125. Alessi, *supra* n. 19, 780.
126. The damages in *Ruola Family* amounted to the unnecessary fees incurred, cf. Louis Degos, *Civil Liability of Arbitrators: New Inroads on the Arbitrator's Immunity From Suit – a Worrying or Welcome Development?* IV (14) Revista Brasileira de Arbitragem, 157–162 (note 9) (2007). *See also* Fouchard, *supra* n. 166, at 596.
127. Fouchard, *supra* n. 166, at 597.
128. National Report for France, *supra* n. 108, at 41.
129. Lew et al., *supra* n. 122, at 294.
130. Waincymer, *supra* n. 211, at 357.
131. In particular, a loss will be hard to establish where the liability claim is founded on bias or improper imposition of provisional measures, cf Waincymer, *supra* n. 211, at 357.
132. Degos, *supra* n. 1266, at 162.
133. Alessi, *supra* n. 19, at 780.

[2] Reputational Harm

Apart from the direct financial consequences resulting from liability, one of the gravest consequences for the arbitrator is the loss of reputation that could follow from his/her liability/challenge. Frequently, arbitrators are well-known and respected within their field, appointed as such, and a liability scenario could potentially have a serious impact on their future appointments. As noted by *Born* the 'loss of such reputation, through parties' complaints, removal of the arbitrator, or annulment of an award that is by far the most effective deterrent against unsatisfactory performance'.[134]

Reputational harm might lead to the arbitrator being 'blacklisted' and removed from lists of arbitrators administered by appointing authorities. Such exclusion from future appointments can follow directly from statute[135] or through policy and practice of the appointing authorities.[136] This type of sanction is likely to have an adverse effect on the career prospects of a successful arbitrator and, as a result, might cause even more severe financial damage than the damage claim he has been faced with. 'Blacklisting' should therefore be restricted to cases where liability of the arbitrator has been established by the courts.

Given the trend towards a qualified immunity standard, it is likely that we will see more cases where arbitrator liability is proven, although such cases still will be exceptional. Hence, new developments are expected in this legal area, particularly from arbitral institutions, which will urge the arbitrators to fulfil their obligations to the parties with due care and skill in an effort of limiting liability situations. A recent example is the new practice at the ICC,[137] which in an attempt to address the issue of delays in the drafting of awards has introduced new rules on timelines for the reception of drafts and fee reductions on a sliding scale up to 20% if the arbitrator fails to adhere hereto (except for exceptional circumstances).[138] Such initiatives are welcome provided that they are reasonable and do not eliminate the necessary basis for a sound effective decision-making process.

[3] Insurance Coverage

The diversity in national approaches extends to issues concerning arbitrators' insurance coverage, or the lack of it. While, e.g., Article 21(1) of the SAA requires arbitrators to take out professional indemnity insurance, there is no such obligation under English law. The effect is that the majority of arbitrators in the United Kingdom, not covered by a professional indemnity insurance related to another profession, are not insured for legal expenses or for liability for damages stemming from their misconduct as

134. Born, *supra* n. 100, at 2013.
135. For example, the Arbitration Law of the People's Republic of China 1994, Art. 38.
136. *See* Born, *supra* n. 100, at 2016–2017 (note 333) referring to the AAA and the Milan Chamber of Commerce.
137. International Chamber of Commerce.
138. ICC, *ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency*,https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/ (accessed 26 March 2020).

arbitrators.[139] One of the principal motives for arbitrators not taking out insurance policies is, apart from the expense, the immunity arbitrators are provided as quasi-judicials by law or arbitral rules.[140]

Considering a restricted liability standard as proposed above, the question is whether arbitrators should be required to take out insurance? To the extent the insurance policy exempts coverage in situations of gross negligence and/or intent, it could be argued that insurance would be without any effect.[141] Additionally, the prospects of personal liability are limited due to the high threshold of liability (although the claims can be substantial). On the contrary, even if the arbitrator is immune from liability, he is not automatically sheltered from lawsuits which can be both time-consuming and expensive to defend. Generally, such expenses are covered by a professional indemnity insurance. Finally, to the extent arbitrators are subject to liability for breach of contract, without meeting the high liability standard of gross negligence, a professional indemnity insurance will achieve its purpose.

In the author's opinion, a requirement by law upon arbitrators to take out professional insurance cover is not desirable. This question should be left to negotiations between the professional parties and the arbitrator. This should, however, not be perceived as a recommendation that arbitrators should refrain from obtaining professional indemnity insurance. Arbitrators are professionals, who like any others offering professional services in the marketplace, should have insurance. In addition, insurance effectively mitigates the negative impact of the legal uncertainty caused by the different approaches to arbitral liability. Hence, arbitrators, who are not covered by an existing professional indemnity insurance policy,[142] which includes the conduct as arbitrator, or covered by an insurance obtained by an arbitral institution, should take out an appropriate civil liability insurance covering their potential liability as arbitrators (most advisable for all types of negligence). Given that the majority of arbitrators are lawyers covered by a professional indemnity insurance, the issue of insurance is in practice limited to situations where the insurance does not cover arbitrator's conduct or where the arbitrator is not a lawyer or other professional covered by a similar insurance.

Although *Hausmaninger* argues that the costs of the arbitrator's insurance cover for potential wrongdoing will lead to increased fees, and hence the parties in a way will become liable for the arbitrator's liability,[143] this is not distinct from other professions

139. National Report for England, *supra* n. 688, at 33.
140. María Pilar Perales Viscasillas, *Liability Insurance in Arbitration: The Emerging Spanish Market and the Impact of Mandatory Insurance Regimes,* Kluwer Arbitration Blog (8 January 2014) http://arbitrationblog.kluwerarbitration.com/2014/01/08/liability-insurance-in-arbitration-the-emerging-spanish-market-and-the-impact-of-mandatory-insurance-regimes/ (accessed 26 March 2020).
141. According to Danish law, lawyers are legally required to obtain professional indemnity insurance covering all types of negligence (s. 61 of the Bye-Laws of the Danish Bar and Law Society: https://www.advokatsamfundet.dk/Service/English/Rules/Bye-laws.aspx (accessed 26 March 2020). The insurance normally covers the lawyer's profession as an arbitrator, but not necessarily in relation to arbitrator conduct outside Denmark.
142. For example, as part of their profession as lawyers.
143. Hausmaninger, *supra* n. 5, at 22.

where professional indemnity insurance generally is taken out and should not be a determining factor.

[D] Prospects of an International Harmonised Approach

Considering the unambiguity and lack of transparency surrounding arbitrators' liability, the delicate question is whether an international harmonisation of this legal area is desirable. Yet more importantly, if it is at all achievable?

International harmonisation of the rules on arbitrators' liability is undoubtedly desirable, as it would bring a higher level of certainty and transparency among the various stakeholders in the international arbitration field. It would indeed provide parties to the arbitration, arbitrators, arbitral institutions and national courts with an improved basis to assess the legal basis and scope of arbitrators' liability. Hence, arbitrators would have an increased transparent basis for accepting the arbitrator's task in respect of potential liability concerns and an opportunity to adjust their insurance cover accordingly. The parties would, on the contrary, be ensured that gross and flagrant misconduct was subject to sanctions and compensation and that arbitrators were held responsible for their breach of contract.

Based on the research of the predominant policy grounds in the selected common and civil law jurisdictions and the trend towards a qualified immunity standard, the proposed restricted liability standard largely seems tolerable in both legal systems. There is, however, an underlying reason why the issue of arbitrators' liability was deliberately ignored during the preparation of the UNCITRAL Model Law; that is, the different national approaches.[144] Apart from the controversial nature of the subject, an international regulation of the subject has implications for a range of contractual and liability issues.[145] The fundamental differences as to how the legal relationship between the parties and the arbitrator is perceived are deeply rooted in the distinct legal traditions which impede a harmonisation of the rules. In addition, the assessment of arbitrators' liability cannot be completely emancipated from national laws on tort, contract and damages. This will inevitably – regardless of any attempts to harmonise – preserve divergent approaches on the basis and scope of arbitral liability and the consequences of such liability. In other words, an international harmonisation does not appear practicably feasible.[146]

§14.07 CONCLUSION

The question of arbitrators' liability does not merely relate to the arbitrator's performance of duties but touches upon the very foundation and nature of arbitration. The way the relationship between the parties and arbitrator is perceived is determining for the legal basis for potential liability or immunity. The legal relationship is hybrid in

144. Franck I, *supra* n. 6, at 33 incl. note 213.
145. Waincymer, *supra* n. 211, at 73.
146. Due to the complexity and magnitude of this subject the prospects of an international approach have not been further explored in the author's research.

nature, which entails that the arbitrator's rights and obligations are not only derived from the contract and applicable arbitration rules and laws but also by analogy from principles applicable to state judges.

Striking a balance between the benefits of immunity and the equality between the arbitrator and parties as contract partners warrants a compromise. Hence, a qualified immunity or restricted liability standard is the appropriate way to proceed, provided that 'immunity is "not" an absolute protection, but only a limitation of the liability that otherwise exists'.[147]

Among proponents of arbitrator immunity, there is a fear that the pool of arbitrators will diminish if arbitrators can be susceptible to civil lawsuits. However, this is not likely to be the effect of the proposed liability standard, as it must be assumed that arbitrators will accept appointments regardless of a potential liability, which can only be triggered by clearly unacceptable behaviour.[148] Arbitration is a fully developed profession, where arbitrators – as other service providers in other professions – take full responsibility for their actions.[149] Responsible arbitrators will not have to concern themselves with the risk of liability lawsuits.[150] In addition, the risk of civil claims based on alleged failure in the conduct of the profession is a calculated risk which the arbitrator to a certain extent can, and should, obtain insurance coverage for.[151] Insurance serves as the arbitrator's 'second line of defence' and constitutes a way of moderating the risks of arbitrator liability by filling the inherent gaps in a non-harmonised legal area.

Although we in recent years have seen a range of examples operating with a (implied) qualified immunity/limited liability standard, the diversity of liability standards in the various legal systems (*civil law versus common law*) will inevitably turn out to be a major obstacle in global harmonisation of the approach to arbitrator liability. To the extent the scope of arbitrator liability depends on national laws on tort, contract and damages – as is the case with the liability approach proposed in this chapter – international harmonisation is arguably not practicably achievable. Despite this, the international arbitration community should urge national jurisdictions to provide clear statutory rules on arbitrators' liability (qualified immunity/restricted liability), which would add a higher level of transparency and certainty to an increasingly important area of international arbitration.

147. Nadia Smahi, *The Arbitrator's Liability and Immunity under Swiss Law – Part I*, 34(4) ASA Bull. 876, 878–879 (note 11) (2016).
148. Schöldström, *supra* n. 122, at 335.
149. Including legal liability for loss caused by the arbitrator's misconduct. *See* Okekeifere, *supra* n. 511.
150. Hausmaninger, *supra* n. 5, at 39.
151. Emmanuela Truli, *Liability v. Quasi-Judicial Immunity of the Arbitrator: the Case Against Absolute Arbitral Immunity*, 17 Am. Rev. Int'l Arb. 383, 395 (2006).