The Accused Arbitrator:

Will the Increased Focus on Arbitrator Liability Affect Arbitration as We Know it?

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Main points

- In a civilized society it is the privilege for *us all* to challenge *anybody* for *anything* and to take our complaints to *all kinds* of panels and courts etc.
- We all know an *insisting complainant,* when we see him – often disappointed and frustrated (but occasionally they create new law ···).
- And now we also know parties with *deep pockets,* who retain professional law firms to *challenge awards* and thereby, indirectly, *accuse* arbitrators.
- Indeed, arbitrators *may* be accused for alleged wrongdoings.
- And arbitrators may even face *claims for damages* arising hereof.
- **But**: Such accusations force *arbitrators* and *arbitration institutes* to consider their opposing "*business strategies*", and (under the circumstances) to take preventive measures before accepting appointment.

In what kinds of *arbitration* are such considerations relevant?

In general, by "arbitration" we refer usually to any

- out of court *procedure* that aims to create a
- ***final*** and
- ***legally binding*** settlement of a
- dispute according to **procedural rules** that are
- ***agreed*** upon, or at least known to, the parties.

In practice, the "finality" of arbitration means that the award may be *enforced* under the 1958 **New York Convention**.

Mediation and conciliation are, due to their different roles, beyond this topic.

This perception has changed over time:

- In Denmark the said definition was *partly* anticipated in the 1683 Code of Denmark (**1-6-1**), where it is based on a proxy theory:

  »Dersom Parterne voldgive deris Sag og Tvistighed paa Dannemænd, enten med Opmand, eller uden, da hvad de sige og kiende, saa vit deris Fuldmagt dennem tillader at giøre, det staar fast og kand ej for nogen Ret til Underkiendelse indstævnis, dog Kongen sin Sag forbeholden«.

- However, the arbitrators of that kind would be "**Dannemænd**", i.e. *men of honor* – someone to be trusted, not necessarily a judge.
- **Not even a *lawyer*** (no *law degree* at that time). Same profile as mediator, however *with* power (of attorney) to decide.

Arbitration in international law

- In international law, arbitration came about in the **late 1890's.**
- This arbitration is still referred to as ***equitable*** (as opposed to legal). And decisions are not necessarily intended to be **enforced**.
- For example, the International Court in den Haag was established in 1899 as "**The permanent Court of Arbitration**".
- The only Dane to be awarded a *Nobel's Peace Price* is **Fredrik Bajer** – an officer and peace activist, who presented the idea of arbitration as a means to settle international disputes in the 1880's.
- As of today, one of the limitations on **investor-state-arbitration** is exactly that fact: Enforceability.

Other kinds of arbitration

There are many kinds of arbitration, each with their own characteristics, originating from various branches and cultures:

- **Labor disputes**: Related to the employer and employee organizations;
- **Commodity disputes:** Related to commodity industries
- **Organizational arbitration** (in Danish "foreningsvoldgift"), e.g. known in sports organizations
- **Construction disputes** related to the building and construction industry.
- **Binding complaint systems** of various forms, including the WIPO "domain name arbitration"

Some general observations, looking upon this diversity

- All these different variations of arbitration will involve
    - Different **cultures** (e.g. court-like, mediation-like, organization-like)
    - Different **levels of trust** towards the tribunal and its members
    - Different **incentives** for parties to prove themselves "right"
    - Different **financial resources** for parties who might want to accuse arbitrators for wrongdoings
- Therefore, to conclude *anything* about how arbitrators should react to the said tendencies, one must take *all such differences* into consideration.
- And those aspects have also **changed over time** …

Arbitration as a profession?

- **Lawyers** and **judges** have always been part of each their profession; **arbitrators** have not;
- For this reason, there has never been an **ideological framework** for what arbitrators do, other than the framework applicable for each their profession (e.g. as academics, advocates, judges, technicians or others);
- When new debatable issues have come up, they are only **occasionally discussed**, e.g. on meetings like the present.
- Some arbitration **associations** (e.g. the Swiss and the Chartered Institute of Arbitrators) promote rule making for arbitration. So does UNCITRAL.
- But **not** in their capacities of **"professional" bodies**.

The emergence of commercial arbitration

- In the 20th century, commercial arbitration grew under **inspiration from state courts** as a "*close cousin of justices – a kind of privatized judiciary*" (Philip R. Wood, 2016, p. 222)
- In Denmark arbitration hearing would even **take place in state court rooms** (made available against payment to the government).
- Up until an important legislative change in **2006**, the chairman of the tribunal would usually be a sitting judge, often a Supreme Court justice.
- It was presumed that a such judge would **conduct** the proceedings in the same way as in a **state court**.
- The same would go for **reasoning** and **mediation efforts**.
- Mindful that the counsels would sooner or later meet the judges in court, they would be **reluctant to litigate** "against" judges.

Following its success, arbitration became a legislative object

- The 1985 UNCITRAL model law (as amended in 2006) led numerous states to enact **arbitration laws** with new regulatory rules for *what used to be* a purely **contract-based** dispute resolution;
- Although the idea behind the model law was quite opposite, to some commentators, this development brought arbitration **closer to state court procedures.**
- Statutory rules (e.g. within procedural law) do indeed play an important role in contemporary arbitration. But the **interplay** between contract law and procedural law is often **blurred.**

But does this development imply that arbitration should now be seen as a privatized kind of state court litigation?

Nordic legal doctrine presents different theories on what legal grounds, arbitral tribunals conduct their services

- *Lindskog* (2020), p. 395: The tribunal and the parties take part in a *sui generis* "**procedural association**" with its basis in the arbitration clause, i.e. a contractual phenomena.
- *Juul & Thommesen* (2017), p. 203: The contract between the tribunal and the parties is a *sui generis* **contract for services**, but it is subject to substantial modifications from general rules for such contracts.
- *Schæffer* (2020), p. 253: A quasi judiciary **legal hybrid**, i.e. "both a service provider and a private judge".

Does it make sense to discuss such topics without taking the differences of various sorts of arbitration into account?

The diversity of contemporary arbitration

- **First, and generally:** It is (in my opinion) difficult, if at all possible, to deny that the *basis* for **commercial** arbitration is **contractual**.
- But even if we *narrow* our view to commercial arbitration, it has **many forms** and reflects **different** dispute resolution *cultures* and *products,* each with their own **history** and **values**.
- Within these sub-subsets, parties, counsels and arbitrators may have **different expectations** that may cause *disappointment* and *frustration*.
- Such frustrations etc. may incite loosing parties to **challenge** awards and – if successful – claim **damages** from tribunal.

Let's take two examples from each end of the "arbitration scale":

High-end commercial arbitration

- This sub-sub-subset of arbitration concern cases with huge (i.e. +50 M€) amounts in dispute. Here, arbitration is a profitable **business case** – at least from **counsel's perspective**.
- In such cases, **no stone is left unturned**. Huge teams of lawyers focus on different aspects of the dispute – just like in *M&A transactions*.
- This is not the case from the **tribunal's perspective**. Although tribunals *may* rely on secretaries, the assignment as arbitrator is strictly *personal* – something you **cannot delegate** to assistants;
- Because of this imbalance, counsel's command over the factual and legal circumstances of the case will often far **outweigh** the tribunal's.
- The tribunal may therefore more easily **overlook details** in a complicated pattern of facts, thus creating basis for challenges.

High-end ··· (continued)

- Furthermore, counsels in these cases are often instructed to do **whatever necessary** to pursue claims;
- Because arbitrators in international cases are picked in a huge international market, there will often be **no personal connection** between plaintiff and the accused arbitrator;
- The claims have a well-defined **contractual** basis (which is more accurate if one should compare to a claim raised towards a state court judge);
- Sometimes there may even be **insurance coverage** to take into account.

All these factors serve to explain the emergence of challenge and liability disputes in these high-end cases.

Low-end commercial arbitration

- Commercial arbitration of **smaller claims** will often be conducted under less costly procedures and within a shorter timeframe.
- The arbitrators **will be known** to the parties (like in domestic arbitration).
- The parties may even accept a large degree of **discretionary power** to the tribunal in deciding the case;
- For the same reason, the **risk of misunderstanding** details is generally lower.

When we discuss the perspective towards accusing litigation against arbitrators, this difference must be taken into account:

How should arbitrators perceive *accusations*?

Coming back to my first point: It is the privilege of any party to raise claims against arbitrators

- In civilized societies, everybody is secured a right to **access justice**.
- **Difficult** to see what should be the reasoning for not allowing a harmed party from its right to claim damages for procedural misconduct.
- Judges are **human beings**, it is human to make mistakes.
- A society without legal rules to sanction wrongdoings would fail basic **rule of law** standards.
- This right may even **prevail** over an agreement to arbitrate.

This is even so for state court judges

The idea that even *state court judges* may be subject to some kind of personal liability is not unknown in Danish law

- Article 1-24-35 of the ancient **1683 Code of Denmark** ("Danske Lov") made the bailiff liable for failure to pursue its obligations.
- Until 2006, the Danish Land Registration Act gave rules for the liability of the **land registration *judge*** ("tinglysningsdommeren") for losses caused by incorrect land registrations – the liable party is now the *court*.
- Section 48 of the Danish Administration of Justice Act ("Retsplejeloven") provide for **disciplinary sanctions** against judges who neglect their duties – unless such negligence give basis for criminal liability. Such complaints occur from time to time without much fuzz.

Arbitrators may also be subject to other kinds of liability

- By ignoring mandatory rules in its decision, the tribunal **assists** the parties in their *criminal actions* that – in turn – causes damage to third parties.
- This may be the case, if tribunals fail to identify (and thereby facilitate) **corruptive practices**.
- Article 24 of the **Whistleblower Directive** (2019/1937) establishes that its rights and remedies "… cannot be waived or limited by any agreement, policy, form or condition of employment, *including a pre-dispute arbitration agreement*."

Whereas such *criminal* cases are rare (or at least not known), litigations in which awards have been *challenged* (and the arbitrators indirectly accused of wrongdoings) have increased.

The possible claims for damages

- *Under the circumstances* tribunals may be **liable** for the economic consequences of their failure to handle the case diligently, e.g.
  - If the award is *set aside* because of this and **new procedural costs** arise in retrial;
  - If the arbitrator with no legitimate cause ***resigns*** **or** ***fails to conduct*** the arbitration
  - If the tribunal **deprives a party** from its *legitimate rights* in bad faith*;*
  - The arbitrator causes damage by revealing ***trade secrets***

- But should **any error** lead to liability for the **arbitrator**, the **tribunal** (as such) or for the arbitration **institute**?

- **No**. There seems to be consensus that even though arbitrators are *not immune*, liability is only relevant under **qualified circumstances**:

For an answer in more detail, one has to study the laws and practices of the state in which the tribunal is seated

- The overall picture seems to be the following:
- Arbitrators are (generally) **not immune** to claims of liability.
- But such liability **depends on the mistakes** that give rise to the claim:
- In regard to **procedural errors**, courts accept liability if it is plausible that the error had an impact on the **outcome** of the case;
- In regard to **errors in substance** the *ban against material revision* (cf. Article 34 of the UNCITRAL Model law) only leaves a narrow scope for annulment, and a similar narrow scope for liability claims.

All reported cases concern procedural errors

Finnish Supreme Court (31 01 2005), Roulas v. Professor J Tepora:

- After the Helsinki Court of Appeal had set an award aside because its chairman, professor Tepora, should have been disqualified due to conflict of interest (he provided an expert opinion to one of the parties prior to and during the arbitration proceedings without disclosure) the Court found that Mr. Tepora had been in fault which resulted in the monetary contractual compensation of 81,000 EUR *to the parties*.

Danish Eastern High Court (16 05 2011), reported in U 2011.2407 Ø

- An expert witness ("syn- og skønsmand") was liable towards one of the parties for damages caused by his flawed conduct, including excess of his mandate. Damages were awarded on a discretionary basis to 10.000 DKK.

Reported cases …

- **The Netherlands**: A Supreme Court judgement of 30. September 2016 in the **Qnow** case held an arbitrator liable for a procedural error (the president *neglected to have the award signed* by his fellow arbitrators).
- The ruling follows the principle set forth in the 2009 **Greenworld** case that liability might occur in relation to an annulled award, if the arbitrator *intentionally* or *knowingly* acted recklessly or with a *gross misjudgement* in fulfilling his duties.
- **Spain**: A judgment of 15. February 2015 of the Spanish Supreme Court (102/2017) in the co-called **Puma case** annulled an award that had been conducted contrary to the principle of arbitral collegiality, because one of the arbitrators *had not participated in the final deliberation*. The party could therefore recover arbitrator fees paid to two arbitrators.

Considerations of legal policy

If liability requires so much – is there a real problem?

- Perhaps not.
- But do the said cases *reflect* the standard of liability in other regards?
- And how does the *potential* for challenging litigation and liability affect the *teamwork* between the tribunal and the parties (and their counsel)?
- *Some consequences* are apparent, e.g. the tribunal's attitude to
  - *Conflict of interest* disclosures (to the detriment of confidentiality protection)
  - The Tribunal's decisions on *document production*
  - The Tribunal's efforts to *streamline* and shorten the procedure
  - The willingness to have *informal dialogues* during hearings etc.

Should the arbitration community then call for statutory rules on immunity of arbitrators?

- **Some jurisdictions** have rules indicating the scope of liability for arbitrators.
- Most of them provide a **limited kind** of "immunity", except for cases of bad faith, gross negligence etc.
- **No jurisdiction** seems to accept unconditional immunity for arbitrators in all circumstances.

Example 1: Section 29 of the English Arbitration Act 1996.

Immunity of arbitrator.

(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator *unless the act or omission is shown to have been in bad faith.*

(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.

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

Example 2: Section 21(1) of the Spanish Arbitration Act 2003.

Article 21. Liability of arbitrators and arbitral institutions. Provisioning funds

1. Acceptance requires arbitrators and, as appropriate, the arbitral institution, to comply with their commission in good faith. *If they fail to do so, they will be liable for any damages resulting from bad faith, recklessness or mens rea*. In arbitration commissioned from an *institution, the damaged party may file suit directly against it*, irrespective of any action for indemnity lodged against the arbitrators.

Arbitrators or arbitral institutions on their behalf will *be bound to take liability insurance* or equivalent security for the amount established in the rules. Public entities and arbitral systems integrated in or under the aegis of governmental authorities are exempted from this obligation.

Example 3: Section 21(a) of the ICSID Convention

- According to Article 21 (a) of the ICSID Convention arbitrators "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*."
- Rule 31 of the ICSID Rules (under the title "Waiver of Immunities") states that "the Secretary-General may waive the immunity of the Centre; (···) and the Chair may waive the immunity of the Tribunal", when immunity *impedes the cause of justice* and that such waiver *would not prejudice the interest of the Centre*.

Similar provisions are adopted by most arbitration institutes

- 2021 ICC Rules (article 41):
  - 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**.
- 2021 DIA Rules (article 51):
  - The members of the Arbitral Tribunal, the secretary of the Arbitral Tribunal, see Art. 30, or other persons appointed by the DIA or the Arbitral Tribunal, and the DIA, including the members of the Council of Representatives, the Board, the Chair's Committee, the Secretariat and the Secretary-General shall not be liable for any act or omission in connection with commencement of an arbitration, the processing of an arbitration or an award made by the Arbitral Tribunal, **except to the extent such limitation of liability is prohibited by applicable law**.

Provisions ··· (2)

- 2014 London (LCIA) rules, (article 31.1):
  - None of the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice Presidents, Honorary Vice Presidents, former Vice Presidents and members), the LCIA Board (including any board member), the Registrar (including any deputy Registrar), any arbitrator, any Emergency Arbitrator, any tribunal secretary and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration, save: (i) where the act or omission is shown by that party to constitute **conscious and deliberate wrongdoing** committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be **prohibited by any applicable law**.
- 2017 Stockholm (SCC) rules (article 52):
  - Neither the SCC, the arbitrator(s), the administrative secretary of the Arbitral Tribunal, nor any expert appointed by the Arbitral Tribunal, is liable to any party for any act or omission in connection with the arbitration, **unless such act or omission constitutes wilful misconduct or gross negligence**.

Conclusions

- What all these practices, rules and contractual provisions say, is – quite fairly – that arbitrators may be liable for **substantial wrongdoings**, that have caused harm to the parties (or at least one of them).
- In non-obvious cases, **the risk of facing challenge litigation** may in itself be used as a *threat to affect* decision making of the tribunal.
- On the on hand, general and **unconditional contractual disclaimers** are generally *unfair* and may thus be subject to *invalidity*, but
- On the other hand, **contractual limitations** (e.g. maximizing the damage to the fee paid or to an insurance maximum) may stand a better chance. To my knowledge, they are not in use.
- The arbitrator's risk of liability claims could be **transposed** to a **business strategy** – just like other parts of the appointment may be.

Considerations of business strategies

Will this affect arbitration as we know it?

This may be re-formulated to a number of more particular questions:

- Will arbitrators **resemble** any other **service provider** when negotiating their possible liability before contracting?
- Will we need general **liability insurance** – and for what types of claims?
- Should the tribunal and the parties in all circumstances **agree on the details** of the procedure at its outset?

The answers to these questions may be **yes** for **high-end** arbitration, but might otherwise be **no**.

But *even here* negotiations and insurance planning is rare, although the planning of other details is commonplace (e.g. in Terms of Reference).

Should arbitrators take other preventive steps?

- Yes. If they are fearful of challenges etc., they should have a **close look** on the appointing parties and their counsel – some may have a history of pursuing claims to the bitter end.

- Secondly: Arbitrators should be careful about **scenarios**, where the arbitrator may be **summoned** as a witness in *challenge litigations*, e.g. to testify on why and how certain decisions were made.

- Testifying on such a matter, by any member a tribunal, would entail a breach of the **duty of confidentiality** regarding the deliberations that arbitrators owe to the parties.

Preventive steps …

Nevertheless, such witness examinations do take place in Denmark:

- In **U 2010.802 H** the president (a Supreme Court justice) had agreed to testify in a challenge litigation.
- In **U 2016.1558/2 H** the president (a law professor) agreed to testify, but only in regard to procedural matters in the arbitration.
- In **U 2013.687 ØLK**, decided that such a testimony (to which both parties agreed) might not "clearly" be unimportant to the challenge litigation. The city court had denied this evidence as unimportant to the outcome.

But should arbitrators *at all* appear as witnesses in regard to cases?

Preventive steps …

- Article 169(1) of the Danish Court Procedures Act (Retsplejeloven) **exempts** "officials or other individuals acting in public or equivalent positions" from the obligation to testify, is applicable by analogy to arbitrators.
- That provision **should be tried**, should the matter occur. Our courts are already reluctant to hear state judges as witnesses (**U 2020.2413 ØLK**).
- It is therefore **unfortunate** that the DIA asks prospective arbitrators to sign the following statement:
  - "In certain circumstances, arbitrators may be summoned before the Danish Courts to give witness if there, for example, is a claim to annul the final award.
  - *In these circumstances, the arbitrator has a duty to give evidence* in accordance with the general rules on witness testimony, cf. The Danish Administration of Justice Act."

What role should arbitration institutions play?

- Arbitration institutes should be more **transparent** on how arbitrators and secretaries etc. are covered by **insurance**.
- They should also be more **transparent** about their role in cases where awards are **challenged** – do they generally side with the parties or with the arbitrators? Do they always avoid taking positions? Or does it depend on the circumstances?
- They should have a clear and **well-balanced approach** to fact finding in regard to requests raised by parties in subsequent proceedings (e.g. witness summons against involving arbitrators).

Thanks for your attention

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