Immunity of the arbitrator

Submitted By

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1- The arbitrator's immunity and liability issue was already the subject of a very elevated number of doctrinal contributions, just like most of internal and international arbitrary issues. Some uphold that it is necessary to ward off any vague desire for aggression in properly accentuating the guarantees of the arbitrator's impartiality. Others estimate that there would be a question relating more to the arbitrator personality and experience, if not of his competence, rather than abstracted texts or petitio principii.

This issue was often developed and set out under the signature of personalities recognized for their fundamental contribution in this concern, especially since Article 34 of the new arbitration rules of the ICC stipulates (Article 34) in decisive and peremptory terms, under the title of "exclusion of liability":

« None of the arbitrators, the Court or its members, the International Chamber of Commerce or its personnel, the national Committees of the International Chamber of Commerce, shall be liable to any party howsoever for any fact, act or omission in connection with any arbitration ».

This provision – which does not use the word "immunity"– is not, by far, the only one of its kind. In the rules of the LCIA of January 1, 1998, published following the *English Arbitration Act* (which came into force on January 31, 1997) one can read (article 31.1), - but, either here, the word of "immunity" is not used:

« 31.1- *None of LCIA Court (including its President, Vice-Presidents and individual members), the Registrar, the Deputy Registrar, any arbitrator and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration conducted by reference to these LCIA Rules, save 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».*

These texts are often interpreted as being the seat of what it is agreed to be indicated by "*the immunity of the arbitrator*" [(1)]. It is this expression, suggested for this contribution, which can cause a problem.

[(1)] R. in particular to aforementioned: Pierre LALIVE

2- Without exaggeration, semantics remains of an undeniable importance in the legal field. Certain notions, certain words have an evocative effect; they strike by their dissuasive value. The *notion of immunity* forms a part of these terms, with this difference, sometimes verified in other domains, that some expressions are, apparently, easily translated (from English into French or vice-versa, for instance), however, without that the same word covers the same meaning, from one language to another. The issue becomes worrying when the same word is translated into a third language – it is then literary translated, without adaptation, which means, without research relating to its exact signification or its legal system. The notion of immunity (*immunité,* Hassanat, حصانة) is a typical example of this ambiguous problem.

The immunity of the *arbitrator*, which means a judge who is not a *State* judge, adds to this perilous constant change of words, as well as the association of ideas are the anteroom of the mixture: the State judge is also a judge holding appointment for life (Article 44, L. concerning the organization of the jurisdictional order), unimpeachable (theoretically), irrevocable, independent, etc… The arbitrator is related in these respects (article 770, new Code of the Lebanese Civil Procedure); however, what shall happen concerning the exact immunity of which the State Judge does not enjoy himself, in the literary meaning? It is true that this latter has the policy of the hearing.

Therefore, it is important to distinguish where the translation is subject to the risk of confusion and threats the decrease of immunity to the irresponsibility of the arbitrator.

The abovementioned French and English rules do not exist, and until the present date, do not have equivalents in the arbitrary legislations of Arab countries; these provisions,

like the provisions of the model law of the UNCITRAL of 1985 (Art. 12 & 13) do only reckon the procedure of the arbitrator objection and revocation. The Lebanese Code, inspired by the New Code of the French Civil Procedure does not proceed differently.

In Arab countries, jurisdiction, even not published, does not offer a lot of examples of State judgments rendered concerning the responsibility of the arbitrator. We point out a judgment of the civil tribunal of Cairo in this respect. However, for the remaining, the issue is hardly – or not yet – judged in Jordan, in Lebanon and in Saudi Arabia, etc…

3- The Immunity ("حصانة") infers that, in this respect, it is about a set of privileges deriving from the exercising of a specific mission. The most accepted immunity is the diplomatic immunity whose foundation is generally clear. In this respect, the function states that the immunity is neither a private law nor a prerogative susceptible of cession or renunciation. The arbitrator carries out a jurisdictional function in the same way as the lawyer, the diplomat, the parliamentarian and the judge. The immunity is established in general following the example of *privileges*, in a legislative text.

4- Thus "isolated", the arbitrator's immunity causes a crucial issue: is it reduced to the idea of irresponsibility? Would not these two notions be two manners of expressing the same idea? If we answer positively, the notion of immunity would have the same legal system as the irresponsibility. If we reply in the negative, the arbitrator's immunity notion – whether in total or in part – would not have any legal system other than the inadmissibility of appeal against (and for) the facts and acts deriving from arbitration, in the same way as other immunities. Is this what we want to express by the idea of immunity? However, shouldn't a new legislation be enacted? Can we conceive inadmissibility without text or a conventional

inadmissibility (through reference to an arbitrage system or an arbitration clause referring to an institutional arbitrage which shall decree it)?

5- In fact, in order to measure the immunity of the arbitrator, it is necessary to give way first to what we shall name "misuse of language": the arbitrator is liable in certain cases; thus, his *immunity* is not considered as *irresponsibility* (1st Part); however, we may also wonder if it is not necessary to establish the exact immunity, a French conception in the strict sense, in an *essential protection throughout the arbitral authorities; the arbitrator's responsibility may go hand in hand with an immunity* (2nd Part).

Nevertheless, between this extensive meaning and the limited designation, the main idea should remain the same: "neither compensation, nor reprisals"; neither laxness, nor obsessional tendency to destruct the greater part in every arbitrage, the arbitrator.

A- Immunity is not responsibility

a- A contractual responsibility?

6- It is very difficult to innovate in respect of the arbitrator's responsibility; it shall be also impossible to explain here in an exhaustive manner. The subject does not however only form the subject of numerous and thorough developments(2), it also mainly refers to a custom, a principle of irresponsibility, established in the countries of *common law*, where a tradition aims at the protection of the arbitrator and the arbitration institutions against every breach of the jurisdictional function and, in practical terms, against every action in civil responsibility(3).

(2) Ph. Fouchard, op. cit., n° 63.
(3) Comp. Fouchard, Gaillard et Goldman, n° 1077. 1085.

Most of authors experience this field with a consummate shrewdness. In general we consider in systems of French inspiration that the arbitrator's responsibility has a *contractual* basis, which makes him responsible of his error. However, this should not form a substitute adding to the legal ways of appeal against the settlement by arbitration, neither a responsibility for a misjudgment or for material errors (of calculation) or of procedure. Amongst errors known by the jurisprudence, we should mention the violation of the revelation or dissimulation of connection with one or other of parties, the committing of a fraud, willful misrepresentation or a serious error (untimely demission, lack of diligence to obtain the prorogation of the term of the arbitrary mission). In fact, it is here about incompatible lacks "with the jurisdictional function". In Anglo-American systems, the inclination is in favor of almost absolute irresponsibility of the arbitrator.

This reference to the ***ordinary law of contracts*** causes certain doubts, however. Sometimes, one certainly needs to distinguish if the arbitration clause has been cancelled or not for fraud, which shall render inoperative a responsibility only contractual. In fact, the mission of arbitrators, even if deriving from an act agreed upon (the arbitration clause, the arbitration contract) cannot be included at least, in our opinion, in this context. Arbitrators essentially carry out jurisdictional mission and function; their function derives from an autonomous reference or compromise; the contractual lack shall not be sufficient to establish their responsibility, even less irresponsibility.

In general, the concept of "*personal error of arbitrators*" itself looks less compatible with the idea of the contractual responsibility, however. By virtue of Article 1142 of the French Civil Code, the hereto is committed as soon as the non-execution is noticed. No error shall be necessary in this

respect. A failure of diligence, an incorrect negligence, a failure to observe the constraints of the procedure, even if they form a behavior not conform to the arbitrator normality and mission do not need the contractual responsibility to be implemented.

Without doubt, it is the reason – however this debate is not really new – for which we may wonder, and maybe to have doubts about the argumentation of the first civil chamber of the French court of cassation in one of the rare recent rulings in this concern rendered on December 6, 2005[4].

In this ruling, greatly noticed and annotated, the first civil chamber imposes sanctions and annuls a judgment rendered by the Angers Court of Appeal, concerning a case where the arbitrator let the arbitration term expires without requesting its prorogation from the support judge. The court of appeal stipulated on December 10, 2002 the following judgment:

«However, due to the specificity of the arbitrator's mission, which is jurisdictional in essence, every contractual failure does not necessarily bind the responsibility (of arbitrators), and it shall be the same in the absence of a personal error committed by arbitrators such as a lack of diligence, a failure to respect the term fixed by the parties, these having an active part during the course of process ».

The court of cassation, following an appeal filed against this judgment, ruled:

« By ruling as such, while by letting the term of arbitration expires without claiming its prorogation to the support judge, failure to reach agreement between the parties, or if the parties fail to appeal thereto, then arbitrators, obliged in this respect to observe an obligation of result, committed an error

[4] Bull. civ. I, n°462, p.390 ; Le Dalloz, 2006. 274, P-Y Gauthier; Rev.arb., 2006, n°1, p.126, observ. Ch. JARROSSON ; J.C.P., ed G., 2006.II. 10066, p.852 ; E. LOQUIN, R.T.D. com., 2006, p.299

which led to the annul of the judgment and bound their responsibility. The court of appeal violated the abovementioned text ».

This judgment leaves small doubts about the party selected by the court of cassation: it is related to the non-implementation of an obligation of the result leading, according to Article 1142 of the Civil Code, to a contractual responsibility. However, we are wondering why the court of cassation mentions the *commission of an error*? In fact, the contractual responsibility is implemented as soon as the non-execution of the contract is noticed. Reference to the error, concerning the obligation of respecting the arbitration term, while the parties of the procedure are supposed to take an active part, is not without surprising.

All consequently occurs as if the *summa divisio* criminal responsibility – contractual responsibility must be completely and constantly observed. It is certainly one of the characteristic features which makes at the same time frailty and inconsistency but paradoxically the clearness of the French system of the civil liability.

Marriage is contractual in its formation and institutional in its effects. Thus, why not to consider that arbitration, which is contractual by its formation, would not be institutional by its effects?

b- A specific sanction?

7- However, in our opinion, between these two responsibilities, a grey area seems to exist. In order to be convinced, it shall be sufficient to wonder about the ***extent of the sanction***.

When an arbitrator involves his ("contractual") responsibility, he can only be commanded to make amends for the direct foreseeable prejudice, unlike what would occur concerning criminal or quasi criminal responsibility where even indirect and direct damages must be compensated. However, by concluding an arbitration contract, the parties and the arbitrator do reckon in general neither the sanction, nor the prejudice which could be caused by the non-execution of the arbitration.

In practical terms, we wonder whether the arbitrator should be condemned to compensate, on the basis of the loss of a chance, not only to pay the expenses and fees exposed by a party during the arbitration process, but also the continuations of the cancellation of the settlement by arbitration. But what would such expression mean? Does this mean that the caused prejudice shall be the one caused by the nullity of the reference and the delay "to obtain justice"(٥)? How to assess that in terms of direct prejudice?

It would have been more judicious, even more concrete to retain the principle of a responsibility of the arbitrator without referring to the idea of error or guilty negligence and, undoubtedly, without being concerned only about the contractual liability.

In any event, since we set the debate from this point of view, it would be necessary to think of protecting the arbitrator, and perhaps to even take the insurance policies which are essential in this field. It is undoubtedly on this level that re-appears the difference between the French system and that of the *common law*. Such policies forces are not practiced in Arab countries in general.

(٥) Comp. Ph. Fouchard, Le statut de l'arbitre, op.cit., ns 75 et 76.

8- A quick examination of jurisprudence published in respect of the responsibility of the arbitrator in Arab countries reveals in an obvious manner the rareness, perhaps even the inexistence, of decisions in the matter. That does not certainly mean that tensions between certain parties and the arbitrator do not exist, quite the opposite: the litigants often resemble each other, though with degrees and according to various forms. Thus, Lebanese jurisprudence(6), gives for instance the sad example of a true legal combat between an arbitration court and one of the parties at the arbitration where not less than forty procedures were bound by or against the arbitration court. But in any of its passage of arms, whereas one could expect it, no action of responsibility versus the arbitration court was ever undertaken.

And besides, it should be well observed that certain Arab legislations (Saudi Arabia, State of the United Arab Emirates, etc…), strongly adhering to the Ottoman and Chareh traditions, are not very susceptible to the *summa divisio* of the French law, which would like to definitively arrange the various cases of responsibility either within the framework of the criminal responsibility or in that of the contractual liability.

The reason of the rareness of the decisions taken as regards to the responsibility of arbitrators in Arab countries is undoubtedly bound to the budding generalization of arbitration as an alternative technique of solution of the conflicts. Moreover, when the arbitration is international, it is rare to find cases of ad hoc arbitration. The institutional arbitrations refer to "rules of arbitration". In this event, the national laws are evacuated for the institutional rules.

(6) Refer to one of the decree rendered in the matter: Ass. Plén. c. cass., n° 1/2004, du 26 mars 2004, Sinjab c. l'Etat libanais (action – reçue – en responsabilité de l'Etat du fait de ses magistrats), *al Adl*, p. 197.

In this respect, it is not common to report, for instance, that the rules of the Regional Cairo Centre for the international commercial arbitration, published in the year 2000, include a "Code of ethics", that is to say a number of moral duties binding the arbitrator(7).

(7) **Code of Ethics of the Cairo Centre**

Article 1

Parties to arbitration may not be contacted in order to solicit appointment or choice as an arbitrator.

Article 2

The appointment or choice of an arbitrator should only be accepted if ability and competence for carrying out the designated duty is assured without bias and with the ability to give the necessary time and attention.

Article 3

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

An arbitrator, as soon as appointed, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances. He should in particular disclose the following:

a- Business and social relationships, whether direct or indirect, previous or present, with any of the parties of the arbitration, the witnesses, or the other arbitrators.

b- Family and marriage relationships with any of the parties or the other arbitrators.

c- Previous connections with the subject of the arbitration.

This obligation shall continue as regards all such circumstances which appear after the initial proceeding of the arbitration.

Article 4

The arbitrator should maintain the necessary conditions for a just resolution of the arbitration without bias, influences by outside pressure, fear of criticism or self-interest.

The arbitrator should also devote the time and attention necessary for a speedy resolution of the arbitration taking into consideration all the circumstances of the case.

Article 5

The arbitrator should avoid unilateral communication with any party regarding the arbitration. If any such communication is made, the arbitrator shall inform the other parties and arbitrators of its substance.

But none of these moral obligations appears to be sanctioned in a concrete manner. On the other hand, the challenge of arbitrators is regulated at great length (articles 9 to 13 of the above mentioned rules).

This legislative, jurisprudential and statutory loophole leaves the place to the most various glosses. Probably, once the issue arises, the Arab courts will have to implement a law close to that of the responsibility of common right.

The rules of the *Lebanese Arbitration Center*, established under the authority of the "*Beirut Chamber of Commerce, Industry and Agriculture*" while regulating the procedure of challenge and revocation of the arbitrator (articles 8 and 9 of its rules) remain also silent concerning the responsibility and the immunity of the arbitrator.

Article 6
Arbitrators may not accept gifts or privileges whether directly or indirectly from any of the parties to the arbitration.
This shall apply to gifts and privileges subsequent to resolution of the arbitration as long as they are linked with the arbitration.

Article 7
The arbitrator may not use confidential information acquired during the arbitration proceedings to gain personal advantages for himself or others or to affect adversely the interest of others.

Article 8
The arbitrator should be bound by utter confidentiality in all matters relating to the arbitration proceedings, including the deliberations and the arbitration award

Generally, one can thus think that the responsibility of the arbitrator is far from being excluded in the Arab legal systems, strongly tempted by a francophone legal system. But this matter remains confused; it should leave a place for a legislative intervention introducing a "touch" of immunity in the Anglo-Saxon sense of the term.

B- Responsibility does not exclude immunity

a- A principle of immunity

9- The concept of immunity (حصانة) of the arbitrator may appear surprising for various reasons, in particular because immunity and irresponsibility (عدم المسؤولية) appear to be two aspects of the same reality. However, the arbitrator must be protected from his personal implication so that he can conclude his mission.

We already announced to which point divergences are large, on this subject, between the legal systems.

The arbitrator may be a natural personal as he can be appointed by an institutional manner. In the Lebanese legislation, for example, the arbitrator can be challenged only for the reasons which justify the challenge رد المحكم of the judge provided that they appear or that they intervene after his appointment. This system of challenge points out the one which is in force for the challenge of the State judge (articles 770 and 120 of the Lebanese new code of civil procedure). This challenge obeys to rigorous rules of procedure; it is enclosed within narrow limits and terms. Any decision on this question is insusceptible of appeal. In practice, the immunity of the arbitrator is very related to his irrevocability عـدم امكانيـة عزلـه and to the system of his challenge, at least if prior rendering of the award; it has only one indirect bond with the ideas of independence or impartiality.

It would be necessary that the arbitrator profits from the same guarantees of serenity as the State judge; especially that he is not only undergone, but is also chosen, directly or consensually. It is undoubtedly this concern which governs expectations of the Anglo-Saxon experts of the arbitration.

10- An immunity of the arbitrator during the arbitration procedure can be conceivable. If it is true that the arbitration leads to the same practical consequences as the recourse to State justice, it remains that the function of the arbitrator seems very often being very different from that of the State judge; this difference does not result as well from the jurisdictional character of the arbitration, as from the attitude of the litigants with respect to the arbitrator.

It is true that the State justice also knows difficulties and lay itself open to delaying tactics: challenge, use of the rule according to which the criminal keeps the civil one in good state, action in legitimate suspicion, action in responsibility of the State because of the judge, etc….

However, it is in front of the arbitrator that the aggressiveness of legal councils and the timid susceptibility of certain litigants appear in a particularly important way. It is certainly for this reason that the question of the immunity of the arbitrator arises during the arbitration procedure.

11- If one distinguishes the immunity of the arbitrator from his responsibility, of what shall consist this immunity? Does it mean that any action against the arbitrator is *inadmissible* during the course of the procedure? In front of whom such an action can be undertaken? Of what immunity exactly consists? In what it cannot lead to replace, dismiss, challenge or revoke the arbitrator? Does the immunity of the arbitrator mean that it is unimpeachable?

The immunity of the arbitrator is intended to dissuade the indelicate litigants from having recourse to certain operations or pressures. In this debate, the personality of the arbitrator and his behavior obviously play a crucial role. The litigant, in general, is sensitive; prone to interpret such or such attitude or body movement, he is likely to confuse civility and lack of independence, inelegancy and partiality. In Arab countries in particular, especially when the litigants do not have with respect to the arbitration the deference and the same reverential fear of the official judge, it is to be feared that certain delaying tactics convey actually an attempt of intolerable pressure to lead the arbitrator to submit to their contradictory requirements. One knows to which point what it is agreed to call as "to save face" (حفـظ مـاء الوجـه) appears to be a stake in the arbitration quarrels, when the arbitration is set in motion with events where we confuse his personal honor and the commercial interests.

According to the Arab context of the arbitration, throughout a period when, in spite of its extension, the arbitration remains of an importance relatively nascent, while waiting until the arbitration custom is solidified and becomes established in a generalized manner, it would be good, in our opinion, that the question of immunity of the arbitrator becomes solved and aimed by the law.

Legislation can, indeed, have an impact. One could, for example, imagine that the special legislative texts establish the principle according to which the arbitration court profits from the same guarantees and privileges, not to say immunity, of the State court, since the arbitration court is made in accordance with the agreements of the parties or the institutional and legal procedures into force.

However, immunity as such, i.e. impossibility of blaming the arbitrator that is appointed and insusceptible of challenge or of revocation, is not endowed with a specific decent legal in the tradition of the laws which have a civil or Latin inspiration.

b- A system to define

12- Since immunity is differentiated from irresponsibility, its content thus remains problematic. Would this be thus a concept not endowed with a specific legal system? In fact, there is a place for the concept of immunity, between the implacability and/or irrevocability on the one hand, and irresponsibility on the other hand.

13- The immunity of the arbitrator is also different from the impossibility for the parties and the State judge to criticize his decision in principle. One knows, in this respect, at which point the arbitration is distinguished from the State justice. But this substantial or material immunity, if one can say, should be accompanied, of impossibility of destabilizing the arbitrator and of criticizing him at the point to endanger its serenity, during the procedure.

When the arbitrator is neither challengeable, nor revocable, and when it scrupulously observes the requirement of what is contradictory and of a healthy administration of the arbitration procedure, no appeal should be able to weaken it. It is undoubtedly that which it is necessary to understand, in a

civil system, by the immunity which is essential to the good course of the arbitration, while waiting for the final judgment.

Certainly, his specific characteristics distinguish the arbitration and offer a true immunizing platform to the arbitrator: the autonomy of the arbitration clause, the rule of competence, the autonomy of the arbitrator, the designation of the thoroughly applicable law, the non- dismissability of the referee because of the appeal before the local courts against a partial judgment, etc… This bunch of specific techniques is intended to authorize the arbitrator to be adorned with true armor. In the institutional arbitrations, one can add, obviously, the sagacity with which arbitrators, in particular international arbitrators are appointed, since their independence is established.

However, an effect of announcement, a petition of principle, using the word "Immunity" in French, while at the same time this word would mean "irresponsibility" in other languages, and would strongly help to dissuade from the unrepentant operations and from outrageous or fallacious pressures.

It is true that "neither rewards nor reprisals" should be established here (Pierre LALIVE, that one could speak about total immunity (rules of the CCI) or about limited immunity (rules of the OMPI of the AAA). Nevertheless, if it were necessary to choose, between the suggested terms, a dissuasive form of immunity, it would be necessary to incline in favor of immunity - without epithet. After all, it does not matter that a concept is not equipped with a special system: it is enough that immunity means that any personal action against the arbitrator because of his jurisdictional mission which is declared inadmissible, apart from the cases of challenge and revocation.

The immunity of the arbitrator seems necessary to the safeguarding not only of its serenity but of its independence; a shield, putting to a failure the operations of intimidation and pressure.

The practice teaches that the aggressiveness of the litigants (whether they are Anglo-Saxon, Arab or continental European) is often a counter-productive defense. We do not see what would be the interest of a party to exacerbate the arbitrator. It is true that the substance and the substantial laws in force should not be a function of misconduct or a verbal inelegancy, even of an annoying awkwardness of the expression. A sufficiently experienced arbitrator, sure of himself, will be able to make allowances, to cultivate the art of the lapse of the selective memory, to judge, ultimately, only according to his mind and conscience, without ridiculous resentments or reactions.

On the other hand, one should not neglect that in certain cases, in particular in the *ad hoc* arbitrations, is sometimes stated a usurpation of the quality of the arbitrator, which means of a continuation of the arbitration procedure whereas the times are foreclosed.

14- The jurisprudence of certain Arab countries still offers the example of case where arbitrators were accused of exceeding their powers. We also recorded cases where the arbitration court was setting itself against such or such litigant to claim from him for example, either fees, or the execution of the judgment obliging it thereto. In these borderline cases, all the arbitration is delinquent, whereas a minimum of ethics must govern the administration of the arbitration justice.

In plain language, if certain excesses must be denounced, it remains that it would be necessary to grant and invest the arbitration and the arbitrator with immunity all the more it is indispensable that the arbitrator does not have a status

equivalent to the State judge, as long as the arbitrator cannot resort or rely directly on the State force. He always needs a State judge and does not have a decisive *imperium* and/or full jurisdiction as that which characterizes the hearing policy.

Conclusion

15- It is obvious that the immunity of the arbitrator also proceeds indirectly of the field of the arbitration clause and of the conformation of the behavior of the arbitrator to the extent of his mission. The better an arbitrator observes the limits and the conditions of application of the arbitration clause, the more he is susceptible of protection, of respect against what is wrongly judged, of a decrease of appeal and a brake of the temptation of the litigants to call upon any faux pas.

Moreover, it goes without saying that impossibility, in arbitration law, to implicate what is correctly judged as well as the motivation of the award, completes to equip the arbitrator mission with a nature close to the fact that we would call a substantial impunity. This other form of immunity guarantees the independence of mind of the arbitrator.

In any case, with or without language abuse, the immunity of the arbitrator must remain the rule and the normality. English, French and Arabic languages should be reconciled: the immunity of the arbitrator will maybe allow miracles.

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