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RECONSIDERING THE LEGAL BASIS OF ARBITRATOR'S IMMUNITY THROUGH THE LENS OF THE *AL MISNAD* CASE

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Introduction

Party autonomy establishes the arbitrating parties' power in determining the seat of arbitration.[1] In the absence of a designation of the arbitral seat in their arbitration agreement, parties may agree to have the arbitration to be subject to arbitration institutional rules or procedural laws that provide either an appointing authority or the arbitral tribunal an undertaking to choose the seat on behalf of the parties.[2] Although Born commented: '[b]oth mechanisms ordinarily function smoothly and result in the efficient choice of a suitable arbitral seat',[3] this was not the case for three arbitrators[4] receiving custodial sentences in 2018. Following the setting aside procedures of the award involving Sheikh Khalid Nasser Abdullah Al Misnad and *Société d'Entreprise et de Gestion* in Qatar, three arbitrators were later charged by the Qatari criminal court in connection with their role as arbitrators.[5] In late 2018, the Qatari Lower Criminal Court imposed custodial sentences upon three International Chamber of Commerce arbitrators for harming the claimant with their decision on the seat of

from the Qatari Lower Criminal Court

[1] Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 8-24 – 8-26.
[2] Arif Hyder Ali, Jane Wessel, et al., *The International Arbitration Rulebook: A Guide to Arbitral Regimes* (2019, Kluwer Law International 2019) 147; Gary Born, *International Commercial Arbitration* (2nd edn 2014 Kluwer Law International) 2054.
[3] Born, *Ibid*. 2054.
[4] Sami Houerbi, Nathalie Najjar and Samir El Annabi.
[5] *Sheikh Khalid Nasser Abdullah Al Misnad v. Société d'Entreprise et de Gestion*, The Qatari International Center for Conciliation and Arbitration (Award, 2016).

arbitration. The judgment confirmed that the relationship between arbitrators and the appointed parties is not based on a contractual relationship when arbitrators are entrusted with the public authority charges. This judgment[6] not only contradicted the belief that the jurisdictional element of arbitration provided a theoretical basis for arbitrator's immunity but also dismissed the claim that '[t]he new arbitration Law has resolved the issue of jurisdictional overreach of Qatari courts in relation to hearing appeals against arbitration awards.'[7] Confirming the Qatari courts grounding arbitration in its jurisdiction, the judgment is a disproof of the belief that "[t]he concept of arbitrators' immunity is widely accepted in both civil and common law jurisdictions, although jurisdictions differ as to the precise extent of the immunity."[8] It also delivered a message to the arbitration community that arbitrators may not enjoy immunity in a jurisdiction upholding the jurisdictional approach defining arbitrators as civil servants, and once again allowed 'jurisdictional overreach by the judiciary'.[9]

In light of this development, the interaction between the role played by an arbitrator and a tribunal's decision to determine the place of arbitration deserves a revisit in order to examine the source of arbitrator's immunity following the Qatari criminal court's decision on the assimilation of arbitrators as public servants, arbitrator's status, duty and liability and their jurisdictional / procedural powers in determining the place of arbitration. Answers are needed to the questions of (1) the legal basis of the tribunal's decision on the place of arbitration, (2) the link between duty of impartiality and the tribunal's decision to transfer the place of arbitration, (3) the scope of arbitrator's liability and immunity, and (4) the role of an arbitrator

[6] Max Walters Qatari Conviction arbitrators 'deeply concerning' , says ICA chief, 3 January 2019, available at <https://www.lawgazette.co.uk/law/qatari-conviction-of-arbitrators-deeply-concerning-says-ica-chief-/5068765.article> accessed on 26 June 2020

[7] Sultan M. Al-Abdulla and Yassin El Shazly, 'The New Qatari Arbitration Law in Light of the Modern Principles of Commercial Arbitration' (2017) 9(1) International Journal of Arab Arbitration 43, 65

[8] The proper limits of arbitrators' immunity. The Master's Lecture, The Worshipful Company of Arbitrators, (2018) 84(3) Arbitration 2018, 84(3), 196, 196.

[9] Amir Ibrahim, 'Saving the Lustre of Arbitration in Qatar: The Time for Reforms' (2016) 8(1) International Journal of Arab Arbitration 15, 25 and 29.

from a wider perspective calling for a wider survey of national arbitration laws for a contextual discussion on the roles played by arbitrators.

A survey of ninety-nine national arbitration laws[10] published on Kluwerarbitration.com is reviewed in this research. Analysing the provisions on the duty of impartiality/ independence, arbitrators' immunity and their power to determine the place of arbitration, this article argues that the definition of the status of arbitrators in the domestic law dictates the level or types of immunity available to arbitrators because of a lack of global or regional consensus according to the survey. The previous argument based on the jurisdictional element for immunity has limited impact. The article will begin with a discussion on tribunal's duty in determining the place of arbitration in the absence of parties' agreement. The discussion will demonstrate that the tribunal's choice of place of arbitration is inherited from their duty upon the contractual acceptance of appointments. It will be followed by a close examination of the potential relationship between the tribunal's contractual or jurisdictional duty on the place of arbitration and the issue of the duty of impartiality and independence. The examination will be followed by an analytical examination of the limited scope of arbitrator's immunity in administering justice concluding with a view that the level of immunity enjoyed by arbitrators is determined by how their status is defined by individual domestic law and not defined by the theoretical belief or approach taken by jurisdiction.

Unfolding the Qatari Lower Criminal Court's Decision

[10] They are Algeria, Argentina, Australia, Austria, Azerbaijan, *Bahrain*, Bangladesh, Belarus, Belgium, Bermuda, Bolivia, Brazil, British Virgin Islands, Bulgaria, Cambodia, Canada, Chile, China, Columbia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, France, Germany, Ghana, Greece, Guatemala, Hong Kong, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Japan, Kenya, Kuwait, Jordan, Latvia, Lebanon, Libya, Lithuania, Luxemburg, Malaysia, Malta, Mauritania, Mauritius, Mexico, Morocco, the Netherlands, New Zealand, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Poland, Portugal, Qatar, Romania, Russia, Saudi Arabia, Scotland, Serbia, Singapore, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syria, Taiwan, Thailand, Tunisia, Turkey, Uganda, Ukraine, UAE, England, USA, Venezuela, Vietnam, Yemen, Zambia and Zimbabwe.

Arbitration is recognised as an important means of settling commercial disputes and the key strategic plan in developing Qatar as an alternative centre for arbitration in the region. The Qatari Civil and Commercial Arbitration Law 2017 (hereinafter the Qatari Arbitration Law) was promulgated in 2017.[11] The Qatari Arbitration Law has been hailed as a welcome development in international arbitration practice.[12] Mirroring the UNCITRAL Model Law, the duties of impartiality and independence are imposed on arbitrators under the Qatari Arbitration Act.[13] Accordingly, impartiality and independence require the arbitrators to treat the parties equally[14] to ensure a fair and swift resolution of disputes. Under Article11.11 of the Qatari Arbitration Act, arbitrators enjoy immunity for carrying out their tasks, with the exceptions of bad faith, collusion, or gross negligence. Based on party autonomy, the parties may agree the seat of arbitration under Article 20. The agreed seat can be inside or outside of the State of Qatar. In the absence of such agreement, the tribunal has the duty[15] to determine the seat of arbitration 'provided that due attention shall be paid to the circumstances of the dispute and how convenient such a seat is to the Parties.'[16] Without the parties' agreement, the tribunal's determination of the juridical seat of arbitration does not prejudice its decision to meet anywhere else to conduct an arbitration proceeding. This may include, but is not limited to,

[11] Sultan M. Al-Abdulla and Yassin El Shazly, 'The New Qatari Arbitration Law in Light of the Modern Principles of Commercial Arbitration', (2017) 9(1) International Journal of Arab Arbitration, 43, 46

[12] Suzannah Newboult, Peter Anagnostou and Ahmed Hammadi, *The New Arbitration Law in Qatar* DLA Piper Publication (16 March 2017) <https://www.dlapiper.com/en/qatar/insights/publications/2017/03/new-arbitration-law-in-qatar/> accessed on 26 June 2020; Julian Bailey, Michael Turrini and Sarah Kelly, *Reform of Qatar's Arbitration Framework* White & Case Publications (24 April 2017) <https://www.whitecase.com/publications/alert/reform-qatars-arbitration-framework> accessed on 26 June 2020; *Qatar Arbitration Law 2017*, Hogan Lovells Publications, 30 March 2017, <https://www.hoganlovells.com/en/publications/new-qatar-arbitration-law> accessed on 26 June 2020; International arbitration developments in the Middle East, Norton Rose Fulbright Publication (June 2017) <https://www.nortonrosefulbright.com/en-gr/knowledge/publications/661d8f0d/international-arbitration-developments-in-the-middle-east> accessed on 26 June 2020.

[13] The Qatari Arbitration Law No. 2 of 2017 Applying the Civil and Commercial Arbitration Law, Article 11.8.

[14] The Qatari Arbitration Law 2017, Article 18.

[15] the word "shall" was used in the provision which states: 'the Arbitral Tribunal shall determine the seat of Arbitration provided that due attention shall be paid to the circumstances of the dispute and how convenient such a seat is to the Parties.'

[16] The Qatari Arbitration Law 2017, Article 20.1.

'hearing the parties, witnesses and / or experts, considering documents, investigating things or property, or conducting deliberations by and between the members of the arbitral tribunal.'[17] The wording used in Articles 11, 18 and 20 of the Qatari Arbitration Act is similar to those contained in sections 3 and 29 of the English Arbitration Act 1996, section 3 of the Arbitration (Scotland) Act 2010 and rule 73 of the Scottish Arbitration Rules and sections 20(1) and 28 of the Australian International Arbitration Act 1974.

However, serious concerns over immunity were raised after an episode in which three ICC arbitrators were convicted of taking part in criminal activity to cause harm to the claimant (a sheikh connected to the Qatari Emir) and sentenced to three years' imprisonment by the Lower Criminal Court in Doha in December 2018.[18] The harm was said to have been caused by the tribunal's decision to transfer the dispute from the Qatar International Centre for Conciliation and Arbitration (QICCA) to *ad hoc* proceedings seated in Tunisia for neutrality.[19] The tribunal subsequently rendered an award against the claimant for more than QAR 93 million.[20] In its judgement, despite Article 11.11 of the Qatari Arbitration Act offering arbitrators immunity, the Qatari Criminal Court found the arbitrators guilty of abusing their power in their capacity as *public servants* in terms of "participation in the criminal agreement and causing damage to the victim [Sheikh] Khalid Nasser Abdullah [Al Misnad] and obtaining illegal benefits out of this association."[21] As well as criminal convictions, a civil action seeking USD 250 million in damages against the three arbitrators concerned was also filed in Qatar.

[17] The Qatari Arbitration Law 2017, Article 20.2.
[18] Walters (n 6).
[19] Tom Jones, Arbitrators Convicted in Qatar, Global Arbitration Review, (12 December 2018) available at <https://globalarbitrationreview.com/article/1177942/arbitrators-convicted-in-qatar> accessed on 26 June 2020; Angela Bilbow, Qatari conviction of arbitrators raises rule of law concerns, Commercial Dispute Resolution News (17 December 2018) available at <https://iclg.com/cdr/arbitration-and-adr/8892-qatari-conviction-of-arbitrators-raises-rule-of-law-concerns> accessed on 26 June 2020.
[20] *Sheikh Khalid Nasser Abdullah Al Misnad v. Société d'Entreprise et de Gestion* (n 5).
[21] Bilbow (n 19).

Responding to this event, Alexis Mourre, the President of the ICC International Court of Arbitration, commented that decisions of this kind are routinely made by the tribunal and the Qatari court's decision was an 'unprecedented interference of a criminal court in international arbitration proceedings, leading to wrongly assimilating international arbitrators as public servants in a procedure that apparently failed to abide by the most fundamental principles of due process and resulted in unprecedented condemnations.'[22]

The information on the case revealed that the arbitration clause concerned contained no agreement on the seat of arbitration or a designated arbitration institution. Mourre pointed out that, in the absence of an agreed seat of arbitration, a privately appointed international tribunal's exercise of its routine jurisdictional and procedural decisions should not result in a criminal prosecution.[23] This viewpoint was dismissed by the Qatari courts which confirmed arbitrators as public servants who may attract criminal sanctions under the Qatari Criminal Code.

The Arbitrator's Duty or Delegated Power in Deciding the Place of Arbitration

The determination of the place of arbitration can be a matter of contractual consensus between the parties or a procedural power or a duty delegated to and performed by the tribunal or an appointing authority. Contractually, the decision is usually jointly carried out by the disputing parties.[24] In the absence of such a consensus, the tribunal's exercise of such procedural power or performance of such procedural duty will depend on the wording of the arbitration law or

[22] Walters (n 6).
[23] Bilbow (n 19).
[24] Born (n 2) 2054; The English Arbitration Act 1996, s 20(2); The Arbitration (Scotland) Act 2010, s 20(2).

arbitration institutional rules which the parties subject themselves to.[25] Most arbitration laws and institutional rules allow the place of arbitration to be decided by "any arbitral or other institution or person vested by the parties with powers in that regard",[26] or by an "arbitral tribunal" with or without authorisation.[27]

The survey of the ninety-nine jurisdictions yields a similar result. The arbitrator's power in deciding the place of arbitration is supported by the majority of the jurisdictions surveyed. According to the survey, the overwhelming majority, seventy-two[28] out of ninety-nine jurisdictions, contain provisions providing parties' choice of place of arbitration or the tribunal's determination in the absence of the parties' choice. The other twenty-seven national arbitration laws[29] fail to provide statutory guidance on how the place of arbitration should be determined. Two jurisdictions, UAE and Oman, indicate that the determination will depend on whether the proceedings involved are an onshore or offshore arbitration.[30] For the other twenty-five jurisdictions, national commentators interestingly confirmed that the practice of offering tribunal members the power to determine the place of arbitration has actually been adopted and

[25] Blackaby Nigel, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (2015, 6th edition OUP) 2.83.
[26] The English Arbitration Act 1996, s 3(b); The Arbitration (Scotland) Act 2010 uses 'any third party' in s3(1)(a)(ii).
[27] The English Arbitration Act 1996, s 3(c) required parties' authorisation; s3(1)(a)(iii) of the Arbitration (Scotland) Act 2010 does not require parties' authorisation. For instance, under the statutory mandate provided in Article 20 of the Australian Arbitration Act or s 3(1)(a)(iii) of the Scottish Arbitration Act or subject to the parties' authorisation as stipulated in s 3 (c) of the English Arbitration Act, tribunals are mandated with the power to decide the place of arbitration in the absence of parties' agreement.
[28] Australia, Austria, Bangladesh, Belarus, Belgium, British Virgin Islands, Cambodia, Canada, Chile, Columbia, Costa Rica, Croatia, Cyprus, Denmark, Dominican Republic, Ecuador, Egypt, Finland, Germany, Ghana, Greece, Guatemala, Hong Kong, Hungary, India, Indonesia, Iran, Iraq, Ireland, Italy, Japan, Kenya, Kuwait, Jordan, Lithuania, Malaysia, Malta, Mauritania, Mauritius, Mexico, Morocco, the Netherlands, New Zealand, Nigeria, Norway, Oman, Paraguay, Peru, Poland, Portugal, Qatar, Russia, Saudi Arabia, Scotland, Serbia, Singapore, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Sweden, Thailand, Tunisia, Turkey, Uganda, Ukraine, UAE, England, USA, Venezuela, Vietnam and Zimbabwe.
[29] Algeria, Argentina, Azerbaijan, Bahrain, Bermuda, Bolivia, Brazil, Bulgaria, China, Czech Republic, El Salvador, France, Israel, Latvia, Lebanon, Libya, Luxemburg, Pakistan, Panama, Romania, Sudan, Switzerland, Syria, Taiwan, Yemen and Zambia.
[30] Arbitrations in the UAE can be seated onshore (i.e., in mainland UAE, typically onshore Dubai or Abu Dhabi) or offshore. Offshore means that arbitration takes place within the two judicial free zones, the DIFC and the Abu Dhabi Global Market ("ADGM") hosted by the UAE. Both DIFC and ADGM constitute autonomous, stand-alone jurisdictions that operate on the English common law model with the judicial free zones.

is in operation in arbitration practice even though the law does not contain specific provisions on this issue.

Returning to the *Al Misnad* case mentioned above, the ICC Arbitration Rules were chosen as the institutional rules governing the arbitration. According to article 18(1) of the ICC Rules, parties can jointly agree on the place of arbitration.[31] Article 18(2) further stipulates that,[32] unless parties agree otherwise, the arbitral tribunal may conduct hearings and meetings at any location it considers appropriate after consultation with the parties. Similar words were also noted in Article 20.1 of the Qatari Civil and Commercial Arbitration Act 2017 where the parties may agree to the seat of arbitration; inside or outside the State of Qatar. Where no such agreement exists, the arbitral tribunal is mandated with a statutory duty to decide the seat of arbitration after due attention has been paid to the circumstances of the dispute and how convenient such a seat is to the parties.[33] The word "shall" indicates that as long as due regards are paid to the circumstances, the tribunal must make such a choice of the seat of arbitration. According to the limited information published on this case, no seat of arbitration exists in the arbitration agreement between the parties. Hence parties' signing up to an institutional arbitration (the ICC) without specifying the place of arbitration provides the legal basis for the tribunal to perform its contractual duty supported by the statutory duty to transfer the dispute from the QICCA (a centre, not the seat) to Tunisia according to Article 18 of the ICC Rules on the basis of the appointment agreement. Their decision does not breach Article 20.1 of the Qatari Arbitration Act which confirms the tribunal's power to determine the seat of

[31] Article 18 (1) of the International Chamber of Commerce Arbitration Rules 2017.
[32] *Ibid.*
[33] Article 20.2 of the Qatari Arbitration Law provides the legal basis for the tribunal to meet anywhere else outside of the seat. It reads: 'The above Article 20.1 shall not prejudice the authority of the Arbitral Tribunal to meet anywhere else, unless the Parties otherwise agree, and only where it is deemed appropriate to conduct an Arbitration proceeding, including, but not limited to, hearing the Parties, witnesses and /or experts, considering documents, investigating things or property, or conducting deliberations by and between the members of the Arbitral Tribunal.'

arbitration,[34] either within or outside Qatar, and hold hearings outside the seat of arbitration under Article 20.2.

Can the Determination of the Seat of Arbitration Be A Harm to the Parties?

Based on international practice, the ICC argued that the tribunal's determination of the seat of arbitration is a routine procedural decision made by the arbitral tribunal which is required by its institutional rules to consult the parties when exercising its power. While these requirements are similar to Article 20.1 and Article 20.2 stipulated in the Qatari Arbitration Law, the questions arising from the Qatari judgment on 'causing harm to parties' are three-fold: (1) whether "due attention has been paid to the circumstances of the dispute and how convenient such a seat is to the parties";[35] (2) whether a disregard of the due attention constitutes the so called "harm"; and (3) the types of remedy available to address such harm caused to the parties.

The question demands an answer as to whether the arbitrator's decision on the place of arbitration based on the tribunal's contractual duty under the ICC Rules should be viewed as a failure to "pay due attention to the circumstances of the case and parties' convenience" under the Qatari Arbitration Law; and further constitutes harm to the parties. In terms of the former, the requirement of consulting the parties is a procedural step to be performed by the tribunal based on the contractual basis operated under the ICC arbitration; that is, the parties' submission to the ICC and the tribunal members' acceptance of the appointment as independent and impartial arbitrators. The same argument can also be advanced for the similar phrase used in Article 20 of the Qatari Arbitration Act. Therefore, based on the contractual duty, it is not the tribunal's decision on the place of arbitration which may cause harm to the parties. Instead,

[34] As long as due consideration is given to the circumstances of the case and the convenience of the seat to the parties.
[35] The Qatari Arbitration Law, Article 20.1.

it is the tribunal's failure in carrying out the appropriate procedural steps which will cause harm to the rights of the disputing parties.

In contrast, the word "harm" used in the judgment delivered by the Lower Criminal Court in Doha is related to the tribunal's decision to have the arbitration seated in Tunisia for neutrality.[36] The "harm" was said to have been caused by the tribunal's abuse of power and caused damage to the Qatari victim. While the Qatari court found the arbitrators guilty of abusing their power in their capacity as *public servants* by participating in the criminal agreement and causing damage to the victim, [37] most jurisdictions focus on the contractual relationship between the arbitrators and the parties. Using Laws of Contract or Tort,[38] most jurisdictions believe that this harm should be punishable in a civil action context. While highlighting the divergence in the willingness to accept contractual obligations as the basis for liability, Franck pointed out 'civil law and several Arab countries emphasize the contractual nature of the arbitrator's *receptum arbitri* and use this as a baseline for establishing potential liability. In contrast, common law approaches tend to focus more upon the potentially tortious nature of an arbitrator's conduct as a violation of a duty of care.'[39] Consequently, this includes the common law jurisdictions arguing for the arbitrator's quasi-judicial status but not defining them as public servants.[40]

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[36] Jones (n 19) and Bilbow (n 19).

[37] Bilbow (n 19); Article 3 of the Qatari Penal Code 11/ 2004 (Law No. 11 of 2004 Issuing the Penal Code 11/2004) reads: 'In the application of the provisions of the present Law, "public servants" means those entrusted with the public authority charges, the employees of the ministries, other governmental departments, and public organizations and institutions.
The words "Public servant" denote a person falling under any of the following descriptions: 1. Arbitrators, experts, receivers in bankruptcy, liquidators, and sequestrators. … Termination of the service or capacity shall not bar the application of the provisions of the present Law if the criminal offence is committed within the course of the service or the capacity.

[38] Susan Franck The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity (2000) 20 N.Y.L. SCH. J. INT'L&COMP.L. 1, 3.

[39] *Ibid*. 4.

[40] For instance, section 29(1) of the English Arbitration Act 1996 and rule 73(2)(a) of the Scottish Arbitration Rules offer the arbitrator immunity for anything done or omitted in the discharge or purported discharge of his or her functions as arbitrator 'unless the act or omission is shown to have been in bad faith' and furthermore '[a]n

The Arbitrator's Impartiality, Independence and Immunity

To avoid being accused of causing harm to the parties and to continue to enjoy immunity, arbitrators must act in good faith and in an impartial and independent manner. With neutrality labelled as one of the main characteristics of international arbitration,[41] the tribunal's decision to have the arbitration held in Tunisia for the reason of neutrality in the Qatari case could be seen as a measure to ensure the neutrality and integrity of the arbitration mechanism. Hence, as long as the tribunal's decision is impartial and independent, the argument of "harm" may not be substantiated.

However, if a tribunal professing neutrality produces a biased decision on the place of arbitration, the tribunal will be in breach of its duty of impartiality and independence. The requirement of impartiality and independence of arbitrators is widely supported. This can attract contractual or tortious liability; in the Qatari's case criminal liability. The survey shows that the arbitration laws of eighty-five countries contain provisions on the duty of impartiality and independence with only seven[42] jurisdictions failing to provide any specific rules. Beyond these seven countries, the requirements are mentioned in five national reports published on Kluwerarbitration and in the case law of two further jurisdictions.[43]

Impartiality and independence Eighty-five jurisdictions have express duty of impartiality and independence, seven jurisdictions do not address this issue, five jurisdictions' national

arbitrator is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator' in the context of civil remedies' under the Australian Arbitration Act, Article 28.

[41] Ali, Wessel, et al. (n 2) 26; Marike R. P. Paulsson, *The 1958 New York Convention in Action*, (2016 Kluwer Law International 2016) 1 and 9; Born (n 2) 74.

[42] Azerbaijan, Bermuda, El Salvador, Kuwait, Lebanon, Syria, Sudan.

[43] Literature confirms the practice in Indonesia, Italy, Pakistan, Luxemburg and Venezuela and Swiss and US cases confirms the requirements.

reports confirm the requirement of the duty and two jurisdictions have the duty confirmed by cases

A tribunal's breach of its duty of impartiality will attract a challenge and removal of arbitrator(s). It is submitted that the absence of immunity for arbitrators could compromise their integrity in such a way that they would be inclined to make an award in favour of a party who is more likely to sue them. Armed with immunity, arbitrators can do their work without constantly looking over their shoulders in the fear of being forced to defend their decisions in court.[44]

In contrast with the topic of impartiality and independence, the issue of immunity fails to achieve a high level of consensus among the jurisdictions surveyed. Among the ninety-nine jurisdictions, only nineteen jurisdictions [45] provide express immunity to arbitrators. Overwhelmingly, eighty jurisdictions contain no statutory provision on immunity. Among them, the Argentinean, Indian, Peruvian and Polish national reports[46] and U.S. cases[47] suggest immunity is offered to arbitrators: some offer qualified immunity and the U.S. allows for near absolute immunity. The default position taken by Romania, Yemen and Spain is negative immunity, that is, arbitrators do not enjoy immunity. Spain further requires professional indemnity insurance to be in place to cover arbitrator's liability. [48] It is also suggested that Israel uses tortious law to address this issue, and Japan, Vietnam and some European countries including Norway, Sweden and Switzerland apply contract law to this issue. At this juncture,

[44] Lew et al. (n 1) 12.39; *Areson v. Casson Beckman Rutley & Co.,* [1977] AC 405, 438, per Salmon.
[45] Australia, Bermuda, British Virgin Islands, Canada, England, Gahna, Hong Kong, Ireland, Israel, (using tort law), Kenya, (The Arbitration (Amendment) Act (No. 11 of 2009), Malaysia, New Zealand, Poland, Portugal, Qatar, Scotland, Singapore, South Africa, Sri Lanka, Thailand, UAE, Zambia, Italy (not in law) Japan (not in law referred to contract law).
[46] Argentina, India, Peru and Poland.
[47] The U.S.A.
[48] Romania (The default position is liable to actions.), Spain (requires insurance) and Vietnam (Arbitrators may be held liable to the parties under the general principles of contract law and tort.)

it is worth mentioning that some literature suggests that some of the ninety-nine jurisdictions acknowledge implied immunity through cases; for instance, the Netherlands, France, Sweden, Poland and Germany.[49] Although most literature explained that immunity can be based on contractual or tortious obligations, the remaining questions are (1) should the decisions taken by the tribunal members constitute "harm", (2) should the status of arbitrators define the limitation of immunity?

Are Arbitrators Considered as Public Servants in Practice and Theories?

Lacking A Regional Uniformity among the Arab Countries

As there is no consensus on arbitrator's status, this part of the research intends to examine whether defining "public servants" as in the Qatari Penal Code is a practice widely accepted among the Arab countries. The research suggests that the practice is shared by Qatar, Saudi Arabia, Kuwait, Egypt, Yemen, Libya and Jordan, but by no means all jurisdictions. With no regional and international consensus on this issue, linking the question with both jurisdictional and contractual approaches debated on the theoretical framework becomes essential.

If "harm" includes bad faith, gross negligence or wilful acts breaching the tribunal's duty of impartiality and independence, the significant difference between the Qatari system and other parts of the world is how the roles played by arbitrators are defined in different jurisdictions. The Qatari definition of "public servants" allows the use of criminal sanctions against arbitrators whereas civil remedies are the main recourse available to the aggrieved party among others. In this section, it is the researcher's intention to highlight the lack of uniformity in defining the arbitrator's status, even within the Arab countries.

[49] Franck (n 38) 9.

As mentioned in the introduction, Article 20.1 of the Qatari Arbitration Law 2017 allows arbitrators to determine the place of arbitration in the absence of parties' agreement. The tribunal's decision is subject to the requirements of arbitrators' duty of impartiality and granting immunity from civil suits under Article 11.11 of the same Act.[50] The language of both provisions gives the readers the impression that the liability would be limited to civil actions as with those provided in the other nineteen jurisdictions; that is, if the Arbitration Act were the only source to be consulted on the arbitrator's liability.

However, Article 11(11) of the Qatar Arbitration Law cannot override Articles 3 and 160 of Law No. 11 of 2004 Promulgating the Penal Code ("the Penal Code"), which provides for the treatment of arbitrators in general as public officers.[51] Both provisions prescribe the arbitrator's criminal liability; a different type of liability from civil liability. Eljaili et al. highlighted that the principles of Qatari criminal law establish 'a mandatory connection between civil and criminal actions with the effect that, if a criminal court finds an arbitrator, for example, to be guilty of any act, the civil court is bound by such a finding and it cannot render any decision to the contrary. As a result, an arbitrator's criminal liability might, if civil proceedings were subsequently brought against him, result in automatic civil sanction.'[52]

As a result, the legal basis for the custodial sentences imposed on the three arbitrators in the Qatari case is not based on the Arbitration Act 2017 but related to the definition and legal status

[50] Article 11(11) of The Qatari Arbitration Act No. 2 of 2017 Applying the Civil and Commercial Arbitration Law reads: 'An arbitrator shall not be held liable for exercising their tasks as arbitrator unless exercising their tasks is based on bad faith, collusion, or gross negligence.'
[51] Sarrah Eljaili, Omar Qouteshat, et al., 'Note: Parties not indicated, Court of Cassation of Tunisia, Case No. 1650/2018, 31 October 2018' (2019) 11(1) International Journal of Arab Arbitration, 220, 220.
[52] Sarrah Eljaili, Omar Qouteshat, et al., 'Note: Parties not indicated, Court of Cassation of Tunisia, Case No. 1650/2018, 31 October 2018' (2019) 11(1) International Journal of Arab Arbitration, 220, 225.

of arbitrators provided by the Qatari Penal Code. According to the Law No. 11 of 2004 Issuing the Penal Code 11/2004 (hereinafter the Qatari Penal Code 2004), arbitrators are viewed as "public servants" whose actions during the dispute resolution have to be scrutinised by the courts. Among others, arbitrators are falling into the definition of public servant prescribed in Article 3.2 of the same Code. Arbitrators' termination of the service or capacity does not bar the application of Article 3.2 of the Code. As long as the criminal offence is committed within the course of appointment and dispute resolution, the offence attracts criminal sanctions. This is because the reading of Article 3.1 reveals that the relationship between arbitrators and appointed parties is not completely based on a contractual relationship as arbitrators are entrusted with the public authority charges.

Although the Qatari approach in defining arbitrators as public servants is not uncommon among the Arab countries, no uniformity is reached within the region. In the case of the Kingdom of Saudi Arabia, both the Saudi Anti-Bribery Law [53] and the Penal Law on Dissemination and Disclosure of Classified Information and Documents [54] similarly and expressly place arbitrators in the category of public servants who are required to comply with "a previous judgment by the Omani courts on the same subject matter of the dispute" as prescribed in the Saudi Arbitration Law 2012.[55] According to Article 8 of the Anti-Bribery Law any arbitrators assigned by the Government or any authority with judicial jurisdiction are considered to be public servants. An arbitrator's 'judicial capacity' was also supplemented by the wording '[a]n arbiter or expert designated by the government or by any other judicial authority' in Article 3(4) of the Penal Law on Dissemination and Disclosure of Classified Information and Documents. Such an approach is also noted in the Kuwaiti Penal Code[56] where

[53] The Saudi Anti-Bribery Law No. M/36 of 1992.
[54] The Penal Law on Dissemination and Disclosure of Classified Information and Documents. No. M/35 of 2011.
[55] Law of Arbitration. No, M/34 of 2012, Article 55.
[56] The Kuwaiti Penal Code No. 16 of 1960.

arbitrators, being defined as public servants, can have criminal sanctions imposed for their breach of public office duties.[57] Additionally, arbitrators are also defined as public servants in the Penal Codes of Egypt,[58] Yemen,[59] Libya[60] and Jordan.[61] In the case of Jordan, an arbitrator is considered as a public servant whose illegal actions related to the dispute resolution process leading to the gain of "any benefit" to perform his/her duty shall be punished by imprisonment for no less than two years and a fine equal to the value of the item he/she asked for or accepted.[62]

In the case of Egypt, the Egyptian Penal Code imposes a similar criminal liability on arbitrators who fail to perform their duty and cause harm to the parties. Arbitrators are said to be "*quasi*-public officials".[63] They are subject to the general principles of liability under the Egyptian law including civil, criminal, and disciplinary liability.[64] This view is confirmed by Sweify[65] who stated: "[t]he recent developments in international trade demonstrate the influence of distinctive bodies of law upon international arbitration, including the influence of criminal law on the integrity of the arbitration system."[66] In other words, apart from the legal and consensual obligations imposed by the arbitration agreement, the applicable substantive law, *lex arbitri*,

[57] The Kuwaiti Penal Code No. 16 of 1960, Article 43.
[58] Egypt, Penal Code No. 58 of 1937 as amended. Article 111, Part 3 (Bribery) of the Penal Code stipulates: 'In applying the provisions of this chapter, the following shall be considered practically as a public servant. 3. arbitrator or experts, trustees in bankruptcy and referees and receivers in bankruptcy.'
[59] Article 1, Penal Code No.12 of 1994, Yemen states 'the public servant, which includes arbitrators.'
[60] Article 16(4) Penal Code No. 48 of 1956 as amended, Libya. It reads: 'A public officer is a person who is entrusted with a public mission at the service of the government, the states or other public institutions, be he employed or hired, a full-time or temp, with or without wages. This definition shall include drafters of contracts, assistance in courts, arbitrators, experts, translators and witnesses in the performance of their duties.'
[61] The Jordanian Penal Code No. 16, 1960 as amended, Articles 170 and 171.
[62] The Jordanian Penal Code No. 16, 1960 as amended, Article 170.
[63] Mohamed Sweify, 'Criminal Sanctions Targeting Arbitrators: An Egyptian Perspective' (2019) 11(1) International Journal of Arab Arbitration, 69, 78-79. The argument put forward was linked to the scope of official documents, including awards, defined in Article 10 of the Egyptian Evidence Law.
[64] *Ibid.* 77; Mercedes Torres Lagarde, 'Liability of Arbitrators in Dubai: Still a Safe Seat of Arbitration' (2015) 33(4) ASA Bulletin780, 798; Asif Salahuddin, 'Should arbitrators be immune from liability?' (2017) 33(4) Arbitration International 571, 575.
[65] Sweify (n 63) 69.
[66] *Ibid.*

or the law of the forum, *lex fori*, arbitrators may find themselves being subject to threats of criminal prosecution against arbitrators under the Egyptian law. Sweify confirmed the real prospect of vexatious criminal threats against arbitrators in Egypt.[67] Echoing the view expressed by Hwang et al.,[68] nevertheless, Sweify expressed concerns about subjecting arbitrators to the threat of criminal investigations raised by the international arbitration community.

Nevertheless, such an approach is not adopted by the UAE, Oman and Bahrain where arbitrators are not defined as public servants. In relation to the UAE, prior to the amended Article 257 through the UAE Federal Decree Law 24 of 2018 omitting any reference to arbitrators, arbitrators had criminal liability imposed on them. According to the repealed 2016 version of Article 257, breaching the duty of fairness and unbiasedness could see arbitrators subject to criminal liability under Article 257 of the UAE Penal Code ('Code') 2016.[69] This provision imposed criminal liability on an arbitrator deemed to have issued a decision contrary to the *duty of fairness and unbiasedness*. Being found guilty under Article 257, a prohibition on undertaking similar responsibilities in the future and sentences of temporary imprisonment, from three to fifteen years, would be imposed upon arbitrators.

Although Article 257 was criticised as being contrary to the IBA Guidelines on Conflicts of Interest and having the potential to weaken arbitration in the UAE,[70] some literature suggested

[67] Sweify (n 63) 72.
[68] M. Hwang, K. Chung and & F. Lee Cheng, "Claims Against Arbitrators for Breach of Ethical Duties", in *Contemporary Issues in International Arbitration and Mediation*, the Fordham Papers (A. Rovine, ed. 2008) 22515/04/2009.
[69] Article 257 came into effect in 2016, following Federal Law No. 7 of 2016. Aishwarya Suresh, 'UAE's Federal Arbitration Law – Another Missed Opportunity?' (July 11, 2018) <http://arbitrationblog.kluwerarbitration.com/2018/07/11/scheduled-court-arbitration-art/?doing_wp_cron=1598607307.0032289028167724609375> accessed on 30 June 2020.
[70] Hassan Arab, John Gaffney, et al., 'The Revision of Article 257 of the UAE Penal Code: Concerns, Context, and a call to Countermand' (2016) 8(2) International Journal of Arab Arbitration 13, 16 and 17.

that arbitrators were unlikely to be found guilty under the provision. Citing the rulings of DIAC Cases 2/2009, 70/2010, 349/2010, 70/2010, 173/2012, Lagarde argued that Dubai remained a safe seat as the Dubai Courts are more inclined to find arbitrators not in breach of contractual or civil duties, hence imposing no criminal liability.[71] He further highlighted that 'it will be very difficult to prove the underlying bias that gives rise to criminal liability';[72] hence arbitrators should "rest assured"[73] and not be dissuaded from serving their arbitrator's mandates in the UAE. The term "an unreceptive local judiciary"[74] was used to describe the approach taken by the courts dealing with vexatious criminal liability claims against arbitrators. To sum up, it was said that the effect of Article 257 should not be exaggerated as the issue of arbitrator's criminal liability would only arise if they (1) had in fact favoured one of the parties to the arbitration (2) with the intention of providing an unfair advantage and (3) acted in a biased manner in issuing a decision / an award or expressing an opinion. A *genuine* error in applying the law or the *unintentional* conferral of a procedural advantage would not be sufficient.[75]

Nevertheless, Lagarde's "rest assured" argument did not answer the concerns over arbitrator's criminal liability raised by the international arbitration community. Other commentators viewed Article 257 as a real danger which may encourage the unmeritorious parties to target

[71] Lagarde (n 64) 798-800; Bryan Dayton and Seri Takahashi, 'Arbitration Developments in the United Arab Emirates' (2018) 20(1) Asian Dispute Review 30, 37.
[72] Gordon Blanke, 'Recent Developments of (International) Commercial Arbitration in the UAE (Part II)' (2017) 83(2) The International Journal of Arbitration, Mediation and Dispute Management 164, 171; Blanke's argument was based on the little concerns caused by the pre-existing criminal liability on court appointed experts and translators prior to the 2016 Amendment.
[73] *Ibid.*171 where he stated: 'Judging by the UAE courts' mature handling to date of vexatious civil liability claims brought by such parties before the Dubai courts, arbitrators can rest assured that the UAE judiciary will only entertain the most serious infringement.'
[74] *Ibid.* 172.
[75] *Ibid.* 172.

arbitrators and carry out the guerrilla tactics[76] in a local arbitration context.[77] In her emphasis on how Article 257 can negatively impact the position of Dubai as a seat of arbitration in the Middle East, Comair-Obeid wrote:

> While an arbitrator has a duty to act independently and impartially, such duty being recognised in arbitration laws and institutional arbitration rules, nonetheless the sanction for the breach of such duty has never been as extreme as this. Exposing arbitrators to criminal liability may lead arbitrators to decline to accept mandates in this jurisdiction and could further open the door to potential dilatory actions. This new development will also affect the position of Dubai as a seat of arbitration in the Middle East. not, however, contain any express reference to such a requirement.[78]

Her concerns were shared by Cole who witnessed the resignation of arbitrators and experts, refusal of appointments or accepting appointments only to three-member tribunals. She feared that the introduction of criminal liability will encourage guerrilla tactics, with parties using the threat of a police report to intimidate arbitrators or experts. Furthermore, 'recalcitrant respondents may submit allegations of criminal wrongdoing to the police in order to disrupt or delay the arbitration while police investigations take place.' [79] Consequently, one sees the reference to arbitrator's criminal liability is removed from Article 257 in the 2018 Amendment in order to maintain the UAE's status as the leading arbitration player within the Middle East. Now, the UAE limits the arbitrator's liability in the course of the performance of his or her duties to the circumstances of bad faith, collusion or gross negligence on the arbitrator's part.

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[76] Adrian Cole, 'Winning Construction Arbitration in the Gulf: Some Strategic Considerations' (2017) 4(1) International Arbitration Review 113, 127-128.
[77] Blanke (n 72) 171.
[78] Nayla Comair-Obeid, 'Arbitration Practice and Procedure in the MENA: You Had Better Watch Out!' in (2017) 83(1) The International Journal of Arbitration, Mediation and Dispute Management, 21, 26.
[79] Cole (n 76) 127-128.

This change disconnects arbitrators from the previous definition of public servant.[80] The change to the Penal Code in 2018 brings arbitration practice in the UAE in line with international best practice argued by Comair-Obeid and helps to cement the UAE's position as the preferred seat for international arbitration in the region.

For Oman[81] and Bahrain,[82] the Penal Codes do not consider arbitrators as public servants. Instead, the requirement is imposed on arbitrators of indirect compliance with "a previous judgment by the Omani courts on the same subject matter of the dispute" for the recognition and enforcement of the arbitral awards under the Omani Arbitration Law in Civil and Commercial Disputes 1997.[83]

Other jurisdictions

Internationally, it is unusual to subject arbitrators to criminal sanctions. International literature suggests that the criminal liability discussed is usually limited to fraud or corruption. As Waincymer pointed out:

> In extreme circumstances, an arbitrator may be subject to criminal liability for egregious behaviour. An example might be accepting bribes. Very few national statutes provide expressly for arbitral liability in such circumstances although general criminal

[80] The UAE Federal Penal Code. No. 3 of 1987 as amended, Article (5). However, the UAE imposes the requirement of compliance of public order and public morals of the UAE for the recognition and enforcement of awards. Article 257 of the UAE Penal Code removed arbitrators from criminal liability. It now reads: 'Any person who, while acting in the capacity of an expert, translator, or investigator appointed by a judicial authority in a civil or criminal case, or appointed by an administrative authority, confirms a matter contrary to what is true and misrepresents that matter wile knowing the truth about it, shall be sentenced to imprisonment for a minimum term of a year and a maximum term of five years.'
[81] Penal Code. No. 7 of 2018, Article (10).
[82] Bahrain Penal Code No. 15 of 1976 as amended, Article 107.
[83] Oman Arbitration Law in Civil and Commercial Disputes, No. 47/97 of 1997.

> statutes would commonly apply in any event. Some countries purport to provide for broad-ranging extraterritorial effect of such provisions.[84]

However, the criminal liability imposed on arbitrators is not unheard of; for instance, the criminal liability imposed by the repealed Articles 315 and 316 of the Swiss Penal Code and by the repealed Article 114 of the Norwegian Penal Code. Currently, most criminal sanctions apply only in limited instances such as money laundering, bribery and illegal negotiation as provided in Articles 331 and 332 of the German Penal Code, Article 339A of the Criminal Law of the People's Republic of China, Articles 419-423 of the Spanish Criminal Code, Article 269 of the Argentine Penal Code.

In relation to China, arbitrators cannot escape the criminal liability imposed by Article 399A of the Criminal Law of the People's Republic of China.[85] Article 339A expressly refers to arbitrators and their criminal liability for "perversion of law". It reads:

> Where a person, who is charged by law with the duty of arbitration, intentionally runs counter to facts and laws and twists the law when making a ruling in arbitration, if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; and if the circumstances are especially

[84] Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 358.

[85] Arthad Kurlekar, '"Perversion of Law" in Chinese Criminal Law – An Indiscriminate Legal Weapon Against Arbitrators', Kluwer Arbitration Blog, September 11 2015, <http://arbitrationblog.kluwerarbitration.com/2015/09/11/perversion-of-law-in-chinese-criminal-law-anindiscriminate-legal-weapon-against-arbitrators/> accessed on 30 June 2020; Justin d'Agostino and Brenda Horrigan, 'Guerrilla Tactics and How-to-Counter Them in National Litigation' 28 International Arbitration Law Library 160,169; Guiguo Wang, 'The Unification of the Dispute Resolution System in China Cultural, Economic and Legal Contributions' (1996) 13(2) Journal of International Arbitration 5, 16; Andrew Shields, 'China's Two-Pronged Approach to International Arbitration' (1998) 15(2) Journal of International Arbitration 67, 81.

serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.

Although arbitrators' criminal liability is levelled against that which is imposed on national court judges, concerns over how criminal liability can impact on the finality of an award was expressed by Kurlekar.[86] He pointed out that 'for a question of criminal liability the court would have to look at the evidence considered by the arbitrator, the law put forth before the arbitrator, witness statements etc. before making a determination of fault which would undermine the integrity of the award.'

Other examples of criminal liability include Austria, Russia, Taiwan and Greece. In Austria, the arbitrator's criminal liability is only limited to fraud, such as inducing a witness to give false evidence[87] and bribery. Based on the Additional Protocol to the Criminal Law Convention on Corruption of the Council of Europe, arbitrators are subject to criminal liability for active bribery of domestic arbitrators (Art 2), passive bribery of domestic arbitrators (Art 3),[88] bribery of foreign arbitrators (Art 4), bribery of domestic jurors (Art 5) and bribery of foreign jurors (Art 6).[89] In the case of Russia, criminal liability was introduced against arbitrators' "improper" decisions in 2015.[90] In the absence of provisions on immunity in the Taiwan Arbitration Act 1998, arbitrators are subject to criminal sanctions in the cases of bribery or rendering of an

[86] Arthad Kurlekar, '"Perversion of Law" in Chinese Criminal Law – An Indiscriminate Legal Weapon Against Arbitrators', Kluwer Arbitration Blog, September 11 2015, <http://arbitrationblog.kluwerarbitration.com/2015/09/11/perversion-of-law-in-chinese-criminal-law-anindiscriminate-legal-weapon-against-arbitrators/> accessed on 30 June 2020.
[87] Franz T. Schwarz and Christian W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International 2009) 500.
[88] Irene Welser, 'The Arbitrator and the Arbitration Procedure, "Sweetening" or "Baiting" – A New Crime for Arbitrators?' (2013) Austrian Yearbook on International Arbitration 151, 159.
[89] Florian Kremslehner and Julia Mair, 'Crime and Arbitration: Arbitration and (Austrian) Criminal Law – Guidelines for Arbitrators and Counsels' (2012) Austrian Yearbook on International Arbitration 289, 312-317.
[90] Olga Boltenko, 'The Rise of Russia's Far East Is Likely to Prompt Changes in Arbitration Geography' <arbitrationblog.kluwerarbitration.com/2015/07/03/the-rise-of-russias-far-east-likely-to-prompt-changes-in-arbitration-geography/?doing_wp_cron=1598629228.8580029010772705078125> accessed 30 June 2020.

award in violation of Articles 121-124 of the Taiwan Criminal Code.[91] With reference to Greece, a similar provision against arbitrators accepting bribery either for the benefit of one of the parties or to the detriment of the other while fulfilling their duties[92] can also be seen in the Greek Penal Code. However, it was reported that no cases of civil or criminal liability of arbitrators or judges have been reported so far.[93]

Depending on the severity of the offense, most of these countries provide differing scales of civil punishment, including the option of paying a fine in lieu of imprisonment.[94] The argument in favour of arbitrator's civil liability is mainly based on the structure of international arbitration. It was argued that in the event of a party's loss of confidence in the arbitrator's integrity or diligence in fulfilling his duty, procedural remedies against his misconduct can be sought from national legal systems and arbitration rules of organizations administering arbitration. The choice of removing or challenging the arbitrators who behaved unfairly is also available to the parties during the arbitration proceedings. Furthermore, the losing party has rights to seek the setting aside of the award at the post-arbitration stage. [95]

Immunity under the Jurisdictional Approach

The theoretical status of arbitrators has been debated for decades with conflicting theories failing to reach a definite answer to the questions of contractual appointment, judicial functions

[91] Nigel N.T. Li and Angela Lin, 'Taiwan' in Michael J. Moser and John Choong (eds), *Asia Arbitration Handbook* (Oxford University Press 2011) 310, 330.
[92] Article 237, The Greek Penal Code.
[93] Ioannis Vassardanis, 'National Report for Greece (2018 through 2020)' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (ICCA & Kluwer Law International 2020, Supplement No. 109, February 2020) 1, 32.
[94] Fali S. Nariman, 'The Role of Arbitrators as Settlement Facilitators – Introduction' in Albert Jan Van den Berg (ed) *New Horizons in International Commercial Arbitration and Beyond*, (ICCA Congress Series, Volume 12, ICCA & Kluwer Law International 2005) 531, 531.
[95] Christian Hausmaninger, 'Civil Liability of Arbitrators-Comparative Analysis and Proposals for Reform' (1990) 7(4) Journal of International Arbitration, 7, 7-8; Marilyn Blumberg Cane and Patricia A. Shub, 'The Arbitrator's Manual' (1992) 9(3) Journal of International Arbitration' (Kluwer Law International 69, 95.

and liability of arbitrators since the 1970s.[96] Like many other issues in arbitration, these issues have been left to national jurisdictions to interpret. Presently, international frameworks, such as the UNCITRAL Model Law on International Commercial Arbitration,[97] take no definitive position in relation to the issue of liability of arbitrators. The survey also indicates that neither any progress is being made nor a consensus being reached on this topic. With no international guidance on this matter and the different approaches adopted by various jurisdictions, international arbitrators are exposed to risk in carrying out the duty as arbitrators.

Overall, the answer depends on the theories adopted by jurisdictions. Arbitrators can be offered a full, a limited or no immunity in their practice. For those offering limited / no immunity to arbitrators, jurisdictions usually view the relationship between the parties and the tribunal as a contractual one and, in general, this issue can be dealt with under Arbitration Laws, Laws of Contract or Tort / Delict, such as in Japan or Sweden as discussed above. In contrast, considering the judicial function arbitrators perform, some jurisdictions offer arbitrators an absolute immunity from civil actions, whereas others offer qualified immunity which distinguishes the liability related to arbitrators' decision making from those concerning arbitrators' misconduct. Hwang et al.[98] argued for immunity to avoid the vexatious claims raised by unscrupulous parties against arbitrators.[99] Similar concerns were also raised by Riegler and Platte who pointed out that the qualified liability approach would see an arbitrator 'become liable if and when the arbitral award has been set aside because of his (substantial)

[96] Julian Lew, *The Applicable Law in international Commercial Arbitration* (Dobbs Ferry NY, Oceana Publications 1978) 53; Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration* (Zurich and Schulthess Polygraphischer Verlag Zurich, 1989) 55; Also see Michael Mustill and Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd edn, London Butterworths 2001) Chapter Four; Doyin Rhodes-Vivour, Immunity of arbitrators, (2017) 83(4) Arbitration 2017, 83(4), 447, 449-450.
[97] Jason Yat Sen Li, 'Arbitral immunity: a profession comes of age Arbitration' (1998) Arbitration 64(1) 51, 51.
[98] Hwang, Chung and Cheng (n 67).
[99] Michael Hwang SC and Kevin Lim, Issue Conflict in ICSID Arbitrations in Michael Hwang SC (ed.) *Selected Essays on International Arbitration*, (Academy Publishing 2013) 472, 530; J.C. Najar, 'Inside Out: A User's Perspective on the Challenges in International Arbitration, (2009) 25 Arbitrational International 515, 516 and 518.

errors. Furthermore, he may become liable for any administrative errors he may commit. Finally, he may become liable for damages due to delay.' [100]

An arbitrator's immunity was believed to be based on the jurisdictional approach.[101] The proponents of this approach argue that arbitrators are not appointed to seek the best interests of his/ her appointing party but instead are performing a quasi-judicial function.[102] The theory provides a strong support for the supervisory powers of states. It provides a theoretical basis for national laws to regulate arbitration procedures and determines the validity of an arbitration agreement and an arbitral award.[103] The proponents maintain that all arbitration procedures have to be regulated by the national law or the rules of law chosen by the parties, those laws in force at the seat of arbitration and the laws of the country where the recognition or enforcement of arbitral awards is sought. They also believe that arbitrators resemble judges of national courts because the arbitrators' powers are drawn from the states via the rules of law.

Following this analogy, an arbitrator's immunity is offered by the states. This is because, in order to settle disputes between parties, an arbitrator must possess a delegated authority offered by a state in which s/he sits to conduct arbitration. Because of the special status granted by the states, arbitrators are regarded as resembling judges of national courts. In order to carry out the judicial tasks smoothly, it is essential to offer the same judicial immunity to arbitrators as that offered to national court judges. The only difference between an arbitrator and a judge, as set out by Niboyet, is that a judge 'derives his nomination and authority directly from the sovereign,' whilst an arbitrator 'derives his authority from the sovereign but his nomination is

[100] Stefan Riegler and Martin Platte, 'Chapter II: The Arbitrator – Arbitrators' Liability', in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Arbitration Yearbook* (2007) (Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2007) 105, 116.
[101] Lew et al. (n 1) 77.
[102] Mustill & Boyd (n 96) 43.
[103] Samuel (n 96) 41.

a matter for the parties.'[104] Both are required to follow the law and observe the mandatory rules and public policy of the *lex loci arbitri* to settle the dispute between the parties.

These different sources of appointment of judges and arbitrators led to the arbitrator's role being defined as quasi-judicial which creates justifications for the arbitrator's immunity. The arguments for immunity rest on the functions performed by the arbitrators, who are chosen by the parties, and can be compared to the acts performed by judges. This argument is supported by Moutulsky, who stated 'arbitrators are individuals whom the legal system permits to perform a function that is in principle reserved to the state';[105] furthermore, arbitration is regarded as an exception granted by the state to the monopoly over the administration of justice in its jurisdiction.[106] Most commentators consider arbitrators' appointment as 'contractually chosen substitutes for judges, performing analogous functions, and assuming similar responsibilities.'[107] For instance, Fouchard, Gaillard and Glodman referred to the arbitrators as 'judges, [in that] arbitrators assume that role as a result of a contract under which they have agreed with the parties.'[108] Immunity is invoked because 'arbitrators carry out a judicial function, they should benefit from protection similar to that enjoyed by judges, both during and after the proceedings'.[109] The protection afforded by arbitrators is to ensure the efficiency of the proceedings during the proceedings and to protect the "vulnerable" arbitrator from dissatisfied parties after the proceedings.[110]

[104]Niboyet, *Traité de Droit International Privé Français*, (1950) para 1985 (p.137); cited from Lew (n 96) 53; A similar view was raised in both *Sutcliff* and *Arenson* cases.
[105]Moutulsky, Ecrits, Dalloz, Paris, (1974) 14; translation from Samuel (n 96) 55.
[106]*Ibid*.
[107] Riegler and Platte, (n 100) 118; Hausmaninger, 'Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform' Journal of International Arbitration (1990) 15.
[108] Emmanuel Gaillard and John Savage (eds) *Fouchard, Gaillard, Golman on International Commercial Arbitration* (Kluwer Law International 1999) para 1101.
[109] *Ibid*. para 1074.
[110] *Ibid.* para 1076.

The jurisdictional element of arbitration sits comfortably with the claim of the arbitrator's quasi-judicial role. The arguments in favour of arbitrator's immunity relied on the quasi-judicial role played by arbitrators. The basis of the quasi-judicial role is mainly based on the jurisdictional element which acknowledges that arbitrators are appointed to administer justice as national court judges.[111] Consequently, one sees the introduction of statutory immunity, such as s 29 of the English Arbitration Act, offering the arbitrators civil judicial immunity for 'anything done or omitted in the discharge or purported discharge of his functions as an arbitrator unless the act or omission is shown to have been in bad faith.'[112] Others rely on the common law immunity[113] confirming the arbitrator's quasi-judicial role, hence immunity. For instance, the statement made in *Hoosac Tunnel Dock & Elevator Co. v. Obrien*:[114] '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 influence, as in the case of a judge or juror' has been seen as the practice of the U.S. courts.[115] The words "judicial functions" were also seen in a later case which emphasised the consideration of public policy as the reason for the immunity allowing arbitrators to be free from the fear of reprisals by an unsuccessful litigant simply because of their acts in arbitration.[116] Born argued that with the exceptions of intentional wrongdoing, qualified arbitrator immunity and the same type of immunity as judges should be a necessary measure in place for arbitrators to fulfil their judicial functions.[117] He also pointed out that, though the statutory immunity is not provided by some national legislation, subject to exceptions of fraud,

[111] *Bremer Vulkan Schiffbau und Maschinenfabrik Respondents v South India Shipping Corporation Ltd.* [1981] AC 909.
[112] The English Arbitration Act 1996, section 29.
[113] Robert Merkin QC, *Arbitration Law* (Informa 2015) 10.39.
[114] *Hoosac Tunnel Dock & Elevator Co. v. Obrien*, 1377 Mass. 424, 426 (Mass 1884).
[115] *Babylon Milk & Cream Co. v. Horvitz*, 151 N.Y.S. 2d 221 (N.Y. S. Ct. 1956).
[116] *Ibid.*
[117] Born (n 2) 2038.

intentional misconduct, gross negligence, and intentional wrongdoing, immunity is offered to the arbitrator by Swiss, Belgian, Dutch, Finnish, German and Spanish courts.[118]

Although, theoretically the parties can offer arbitrators immunity directly through an arbitration agreement or indirectly through the arbitration institutional rules / the applicable laws, such a contractual offering is subject to the application of the national laws by courts. For instance, the example of arbitrator's criminal liability demonstrated in the Qatari case discussed above, and the declaration of unenforceability of a complete exclusion of liability under consumer law by the *Cour d'appel de Paris*[119] in relation to Article 40 of the ICC Arbitration Rules 2012 offering immunity to the arbitral tribunal, the emergency arbitrator, the ICC Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives.

Interestingly, the jurisdictional element does not necessarily guarantee the delivery of an arbitrator's immunity. This is evident in the Qatari case where the jurisdictional element defines the role played by arbitrators but subjects the arbitrators to the criminal sanctions. It is just because Niboyet's argument on the arbitrator derives his authority from the sovereign and Moutulsky's view on the arbitrator's quasi-judicial role in performing a function that is in principle reserved to the state, that Qatar defines an arbitator as a public servant subject to Article 3 of the Penal Code. Instead, it is the 19 jurisdictions which uphold the contractual element of arbitration, define the quasi-judicial role of arbitrators and offer immunity to arbitrators.

[118] Born (n 2) 2032.
[119] ICC, *Final Report on the Status of the Arbitrator*, 7(1) ICC Ct. Bull. 27, 31 (1996) and Judgement of 22 January 2009, *SNF SAS v Chambre de Commerce Internationale*, XXXIV Y.B. Comm. Arb. 263, 265 (2009).

Immunity under the Contractual Theory

According to party autonomy, it is widely accepted that parties are empowered to decide the place of arbitration. This is based on the contractual relationship between the parties. In the absence of such a choice, most institutional arbitration rules and arbitration laws provide the legal basis allowing arbitrators to make such a choice due to the appointment contract between the parties and arbitrators. This appointment contract is frequently mentioned as the product of agent theory. Fridman[120] states that the essence of agency[121] is to allow an agent that status only in so far as his or her acts can result in some alteration of the legal situation of the one for whom he acts or purports to act for. This relationship is fiduciary in nature. It exists between two persons, one of whom expresses or implies consent that the other should act on his or her behalf so as to affect his or her relations with third parties, and the other of whom similarly consents so to act or so acts.[122] His statement suggests that the power possessed by the agent can affect the principal's legal position. Support has been given to this approach. For instance, Seavey stated that agency is a 'consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other'[123] as well as one in which the agent is given a legal power to alter his or her principal's legal relations with third parties.[124] The reverse side of the power possessed by the agent is his or her duties to the principal. They include: duty to performance, obedience, care and skills, non-delegation, no hidden personal gain, respect of principal's title, duty to account and fidelity. However, such rights and obligations are not absolute as they can be altered by the contract between the parties. This is shown in the case of *Kelly v. Cooper*[125] where the court

[120] GHL Fridman, *The Law of Agency* (LexisNexis UK; 7th Revised edition (1 Jun. 1996) 11.
[121] *Labreche v. Harasymiw* 89 DLR (4th) 95, 107.
[122] *Bowstead and Reynolds on Agency* (Sweet and Maxwell 2019) Chapter 6.
[123] Seavey, The Rationale of Agency (1920) 29 Yale LJ 859, 868.
[124] Reynolds 'Agency: Theory and Practice' (1978) 94 LQR 224, 224.
[125] [1993] AC 205.

decided that the contract between principal and agent, both in implied and express terms, governed and defined the content and scope of the agency contract.

Agency theory has also been discussed in the interpretation of an arbitrator's role.[126] Merlin[127] and Foelix[128] argued for the application of the agent theory in arbitration. Accordingly, arbitrators were viewed as the agents of the parties. They dismissed the idea that arbitrators closely resemble judges of national courts and were of the opinion that, due to the fact that arbitrators did not perform any public functions, arbitrators obtained their powers and authority from the appointment agreement between them and the party or the parties. Being the agents of the parties, arbitrators represent the parties who appoint them to resolve the dispute according to the parties' instructions; moreover, arbitral awards made by the agents alter the parties' relationship and have a binding effect on the parties.[129] In short, arbitrators were appointed as the agents of the parties to resolve the disputes on the parties' behalf and their decision which would alter the legal relationship between the parties.[130]

Believing that the decision-making process was wholly dependent on the arbitration agreement between the parties,[131] Foelix[132] agreed with Merlin's argument and claimed that the relationship between the parties and the arbitrators had a private, rather than a public, nature - that is, a relationship of principal and agent. Consequently, Laws of Contract or Tort should be applied to explain the roles, the functions and the tasks carried out by arbitrators based on the

[126] Dario Alessi, 'Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability' (2014) 31(6) Journal of International Arbitration 735, 752-753.
[127] Merlin, *Recueil Alphabétique de Questions de Droit* (4th ed.) Tarlier Brussels 1829 (9) 144; translation from Samuel (n 96), 34.
[128] Foelix, J., *Traité du Droit International Privé* (1847) 461, translation from Samuel (n 96) 35.
[129] Accordingly, in some commodities arbitration, in the case of price disputes oversmen appointed by the parties to put a reasonable price forward are regarded as the agents of the parties.
[130] *Ibid*. at p. 144. See Lew (n 96) 54.
[131] Both Merlin and Foelix regarded compulsory arbitration as outside their definition. See Merlin (n 128) 144; translation from Samuel (n 96) 44.
[132] Foelix (n 128) 461, translation from Samuel (n 96) 35.

appointment contract, duty of performance, care and skills, non-delegation, and independence and impartiality. This can be the reason why some jurisdictions chose not to address the issue of arbitrators' liability in the arbitration laws but left the issues to the parties' agreement or the Laws of Contract or Tort.

Upholding the contractual element of the relationship between arbitrators and the parties does not necessarily see the removal of immunity. Rather the reverse: one sees that some Common Law jurisdictions discussed above support arbitrators' immunity because they define the role of arbitrators as quasi-judicial, resembling judges who deal with legal issues in the dispute resolution process; despite the fact that arbitration was firmly placed in the contractual theory.[133] Others see arbitration as a private court and arbitrators as no more than a private person who is hired to conduct a private job. Consequently, the issue of arbitrators' liability calls for the application of contractual or tortious liability as well as the requirement of a professional insurance on the arbitrators' part.[134] For instance, both *Donoghue v. Stevenson*[135] *and Hedley Byrne and Co. Ltd v. Heller & Partners Ltd*[136] recognised professional liability as a cause of action whereas later *Areson,*[137] *Sutcliffe*[138] *and Bremer Schiffban*[139] recognised the

[133] Fraser Davidson, Arbitration (2nd edn W.Green 2012) Chapters 2 and 4; *Brakenrig v. Menzines* (1841) 4D. 274 at 283; *Dew Group Ltd v. Costain Building & Civil Engineering Ltd*, 1997 SLT 1020; Jan Kleinheisterkamp, Overriding mandatory laws in international arbitration (2018) 67(4) ICLQ 903, 908-909; Moses Oruaze Dickson, Party autonomy and justice in international commercial arbitration (2018) 60(1) Int. JLM 114, 115; Davis Mavunduse and Camilla Baasch Andersen, Party autonomy in international commercial arbitration: a look at freedom, delimitation and judicialisation (2019) 25(2) Int. TLR 92, 93-95; *Vale do Rio Doce Navegacao SA v. Shanghai Bao Steel Ocean Shipping Co* Ltd [2000] 2 Lloyd's Rep. 1*; H v L* [2017] EWHC 137 (Comm), [22.23]; *DTEK Trading S.A. v. Mr Sergey Morozov, Incolab Services Ukraine LLC* [2017] EWHC 94 (Comm) [22].
[134] See Spanish Arbitration Act 60/2003 revised by Law 11/2011, Article 20.1. Ramón Mullerat, 'Arbitration: Back to the Future', (2013) 6(3) *Arbitraje: Revista de Arbitraje Comercial y de Inversiones*, (Centro Internacional de Arbitraje, Mediación y Negociación (CIAMEN)) 675, 710; he mentioned that arbitrators and arbitral institutions, on their behalf, must subscribe to an insurance policy to cover their liability under this Act.
[135] [1932] AC 562.
[136] [1964] AC 465.
[137] *Arenson v. Casson Beckman Rutley & Co.,* [1977] AC 405; Also see *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004; *P v. Q* [2017] EWHC 148 (Comm) [2017] 1 W.L.R. 3800; *Gabriel Politakis v John Despenser Spencely v James Scott Limited* [2016] SC EDIN 27, [2016] 4 WLUK 56.
[138] *Sutcliffe v. Thackrah* [1974] AC 727 (H.L.).
[139] *Bremer Vulkan Schiffbau* (n 111).

judicial role played by an arbitrator. The requirement of "exercising judicial function" for immunity was highlighted by the House of Lords in both *Sutcliff* and *Arenson*. Such a judicial function was confirmed by Lord Morris who stated that 'as a matter of public policy it has been thought to be undesirable to allow an action against an arbitrator … for the reason that his functions are of a judicial nature.'[140] Therefore, because of immunity, arbitrators would not be harassed by actions which would have little chance of success, hence not be influenced in his ultimate decision.[141] *In Bremer Bremer Schiffban v South Indian Shipping Corp Ltd,* Justice Donaldson stated: 'Courts and arbitrators are in the same business, namely, the administration of justice. The only difference is that the courts are in the public and arbitrators are in the private sector of the industry. Their problems are the same and so should be the solutions which they adopt.'[142] The English Arbitration Act 1996 further limits the cause of action against arbitrators to wilful misconduct or gross negligence. Similarly, the USA applies a liability more objectively measured against the yardstick of the 'reasonable competent member of that profession'.[143]

In *Jivraj v Hashwani*,[144] the UK Supreme Court also confirmed that an arbitrator who provides services is not defined as an employee of the parties for the purpose of UK employment discrimination law and the Employment Equality (Religion or Belief) Regulations 2003, implemented Council Directive 2000/78. Lord Clark spoke of the role of an arbitrator 'is not naturally described as employment under a contract personally to do work. That is because his

[140] *Sutcliff* (n 138) 744, 745, per Lord Morris.
[141] *Sutcliff* (n 138) 736, per Lord Reid.
[142] *Bremer Vulkan Schiffbau* (n 111) 921.
[143] *Sinz v. Owens,* 196 F.2d 52 (Cal Dist Ct. App. 1948): 'The duty imposed on a physician or surgeon is to employ such reasonable skill and diligence as is ordinarily exercised in his profession in the same general neighbourhood having due regard to the advanced state of the profession at the time of the treatment.'
[144] [2011] UKSC 40.

role is not naturally described as one of employment at all.'[145] He further clarified this issue by saying:

> As I see it, there is no basis upon which it could properly be held that the arbitrators agreed to work under the direction of the parties ... I would hold that the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.[146]

Agreeing with Lord Clark, Lord Mance highlighted the arbitrator's special character and pointed out that that an arbitrator's position is entirely free, and freer than that of an ordinary judge. He stated:

It does not seem permissible to treat the arbitrator as equivalent to a representative or an employee or an entrepreneur. His office has …. an entirely special character, which distinguishes him from other persons handling the affairs of third parties. He has to decide a legal dispute in the same way as and instead of a judge, identifying the law by matching the relevant facts to the relevant legal provisions. The performance expected from him is the award, which constitutes the goal and outcome of his activity. It is true that the extent of his powers depends on the arbitration agreement, which can to a greater or lesser extent prescribe the way to that goal for him. But, apart from this restriction, his position is entirely free, freer than that of an ordinary judge.[147]

[145] *Ibid.* [23].
[146] *Ibid.* [45].
[147] *Ibid.* [76].

In the European Civil Law jurisdictions, arbitrators are clearly distinguished from judges who are public officials. Consequently, their liability is dealt with from the private law perspective. This is evident in that some European Civil Law jurisdictions do not grant arbitrators special immunities in arbitration laws but interpret liability according to the broad general principles of contractual or tortious liability. For instance, both the Austrian and German Civil Codes apply such a principle which requires a debtor to exercise ordinary care and be responsible for wilful conduct and negligence.[148] The concept of indemnity was used by Austria, Germany and France in their interpretations of arbitrators' liability. They apply a model of liability which is similar to the one being applied to state judicial officials.[149] For this group, arbitrators can be subject to either contractual or tortious liability as both types of liability are not viewed as contradicting each other. [150] Qualified immunity was also raised by Lord Dyson[151] and Lew et al.[152] who said: 'arbitration should have some liability for certain fundamental obligations implied into the contract between arbitrators and arbitrants. After all arbitrators hold themselves out (some arbitrators canvass and seek appointments) as able to undertake certain types of arbitration and as having the requisite skill and expertise necessary for such disputes.'[153] Holding arbitrators liable for contractual or tortious harm does not cause conflict with each other, as Fouchard et al. pointed out that an arbitrator may escape from contractual liability due to a void contract. However, the avoidance would not exclude their tortious liability.[154] For others, without a specific framework, arbitrators may be exposed to criminal liability as we witnessed in the *Al Misnad* case discussed above.

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[148] Werner Melis, 'Immunity of Arbitrators under Austrian Law' in Lew (ed.) *The Immunity of Arbitrators* (Lloyd's of London Press Ltd, UK 1990) 16.
[149] See, for example, Article 1(1) of the Federal Law on the Responsibility of Authorities of Public Law Entities (*Amtshaftungsgesetz BGDL* Nr. 20/1949 (Austria); Article L781.1 *Code de l'organisation Judiciaire* (France); Section 34 of the *Grundgesetz* (Germany). These references are all cited in Lew (n 114).
[150] The Status of the arbitrators was discussed in Gaillard and Savage (n 77) para 1192.
[151] Rt. Hon. Lord Dyson, The proper limits of arbitrators' immunity. The Master's Lecture, The Worshipful Company of Arbitrators, (2018) 84(3) *Arbitration* 196, 197.
[152] Lew et al. (n 1) 12-41.
[153] *Ibid.*; Li (n 97) 54.
[154] *Ibid.* para 1094.

Conclusion: The Changing Perception of the Role of Arbitrators - A Balance between Duty, Liability, Remedies and Sanctions

The difference between modern arbitrators in a lucrative business and the arbitrators who arbitrated for honour in early days was highlighted to support the demands for a balance between duty and liability. [155] Reigler and Platte argued that '[i]n the early days of arbitration it was an honor to be chosen to decide a dispute and arbitrators were not remunerated.'[156] It was argued that it is in the public interest to permit private individuals to decide disputes when the parties have agreed.

However, this assumption can be overruled by application of the local laws and concerns over the arbitrator's liability in the modern arbitration practice where arbitrators are being seen as well-remunerated. Lew el al. raised their doubts whether the existence of possible liability would deter the professionals from accepting appointments as arbitrators.[157] The language used in the Qatari Penal Code is a good example. It categorises arbitrators in the same group as judges. Labelled as public servants, arbitrators attract criminal sanctions and are liable for their wrongdoings. Back in 2007, the potential criminal sanction was acknowledged by Degos[158] who pointed out that, while the focus of this dimension remains on the arbitrator's civil liability, '[c] ivil liability is not the only liability arbitrators can be subject to. There are also penal,

[155] Riegler and Platte, (n 100) 105; T. Oyre, "Professional Liability and Judicial Immunity" (1998) *Arbitration* 45; Lew (n 65) 85.
[156] Riegler and Platte (n 100) 105; T. Oyre, (n 155).
[157] Lew et al. (n 1) 12-41; Li (n 97) 54.
[158] Louis Degos, 'Civil Liability of Arbitrators: New Inroads on the Arbitrator's Immunity from Suit – a Worrying or Welcome Development?', (2007) IV (14) *Revista Brasileira de Arbitragem* (Comitê Brasileiro de Arbitragem CBAr & IOB) pp. 157 – 162, 161.

tortious (pre-contractual faults or where the arbitrator does not have a contract with the claimant) and disciplinary types of liability'[159]

Although Franck,[160] Mullerat and Blanch called for a middle ground to accommodate the convergence of different legal cultures, the reality is that divergence on the issue of immunity exists[161] as the survey has demonstrated. It was noted by Riegler and Platte that '[t]he possible positions as regards the question of civil liability of the arbitrator range from full immunity via "qualified immunity" to full liability. Other remedies include, *inter alia*, loss of the arbitrator's remuneration and other non-legal "remedies" such as loss of reputation.' [162] Mullerat acknowledged that the complication surrounding arbitrators' immunity 'is confronted with its hybrid nature as a child of contract and a child of procedure, as an instrument of merchants' relationships and a co-operator of the administration of justice. This leads to non-uniformity in practice.'[163] Debate continued when Lord Dyson questioned whether securing the arbitrator's independence and impartiality and achieving finality of award should be advanced for and warrant an arbitrator's immunity.[164] While Sabater[165] viewed immunity with a functional purpose, the emphasis was on the non-universal and non-absolute immunity offered to the arbitrators. Based on his Latin American experience, he succinctly concluded: '[n]otably, even though most rules grant arbitrators immunity to the extent allowed by the applicable laws, some applicable laws will significantly limit the effectiveness of such arbitrator-immunity or

[159] *Ibid.*
[160] Franck (n 38) 57-60.
[161] R. Mullerat & J. Blanch, 'The Liability of Arbitrators: a Survey of Current Practice' (2007) 1(1) *IBA Dispute Resolution International*, 106, M. Domke, "The Arbitrator's Immunity from Liability: A Comparative Survey" (1971) 3 U. Tol. Law Review 99.
[162] Riegler and Platte (n 100) 108.
[163] Mullerat (n 134) 710.
[164] Rt. Hon. Lord Dyson (n 151) 197.
[165] See discussion in Aníbal Sabater, 'Survivals and New Arrivals', in Albert Jan van den Berg (ed), *International Arbitration: The Coming of a New Age? ICCA Congress Series*, Volume 17 (Kluwer Law International; Kluwer Law International 2013) 96 – 111.

liability-waiver clauses.[166] Moreover, even though arbitrators may be immune from claims in certain circumstances, almost nowhere in the world are they immune from testifying or producing documents in connection with their services.' [167]

From Qatar to the rest of the world, the choice of the seat of arbitration is to be exercised by the parties or by arbitrators in the absence of parties' agreement. Whether civil remedies or criminal sanctions should be imposed on arbitrators in their choice of the seat of arbitration as a procedural step or a statutory duty depends on the definition of arbitrator's status as one learnt from the Qatari case. Being placed in the same category as judges and defined as public servants in the domestic Penal Code, the jurisdictional element as argued previously does not guarantee arbitrators an absolute immunity. Instead, criminal sanctions are added to arbitrators' civil liability in Qatar, Saudi Arabia, Kuwait, Egypt, Yemen, Libya and Jordan in that region. The contractual element of arbitration agreements and appointment agreements also creates the possibility of pursuing arbitrators in a civil court action for the harm in the forms of gross omission or wilful conduct by their victims in other jurisdictions. Returning to the Qatari case, regardless of the theory or the approach adopted by any jurisdiction, the strong influence of the domestic laws on the imposition of liability on arbitrators can be witnessed in both the Qatari arbitration system with a strong jurisdictional element and other jurisdictions upholding the contractual theory. In other words, the scope of the liability is linked to the arbitrator's status

[166] For example, Article 40 of the 2012 ICC Rules of Arbitration provides that "[t]he arbitrators … 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." (Emphasis added) The laws of Mexico, Spain and several other civil law jurisdictions, by contrast, allow arbitrators to be held liable under certain circumstances even if the applicable rules allow for some immunity waiver. This was observed by Franck, Susan D., The Liability of International Arbitrators: A comparative Analysis and Proposal for qualified Immunity, (2000) 20 J. Int'l & Comp. L. 1, 7-8, who stated that the "contractual approach to liability is usually associated with civil law countries…. In many civil law jurisdictions, arbitrators are merely professionals whose liability is determined by the general principles of contractual liability contained within the civil code." See also Born (n 2) 1653. He notes that the Spanish Arbitration Act, Article 21(1) establishes that "arbitrators who fail to 'faithfully fulfil' their duties are liable for the damage and losses they cause by reason of bad faith, recklessness or fraud'."

[167] Aníbal Sabater (n 165).

defined in the domestic laws. All reveals that no absolute immunity is offered. Consequently, the myth of immunity claimed by the jurisdictional approach deserves a re-think. That is, the search for the basis of immunity does not lie in the theory adopted in arbitration but in the domestic laws defining the status of arbitrators.

However, following the *Al Misnad* decision, caution must be exercised against the commentators' optimism in dismissing concerns over criminal liability being imposed by the local laws or courts. Guandalini's empirical study on arbitrators' utility functions also confirmed that the imposition of civil and criminal liability can influence their decision on the acceptance of appointments. This can be seen in the responses to the question whether arbitrators take into account the civil and criminal liability that the law could impose on them before accepting the function; where 'Only thirty percent said such constraints are irrelevant. Fifty-five percent simply said "yes," they do take into account civil and criminal liability pursuant to the law of the seat. Twenty-five percent said that they usually do not, but they are or will start doing so, as they are aware it is important and that it could potentially threaten them.'[168]

The imposition of criminal liability on arbitrators by the Qatari courts was criticised as a reflection of 'a jaundiced view of the value of arbitration and its foundational principles.'[169] Although the criminal trial in the Qatari Lower Criminal Court was a trial in *absentio*, the judgment has delivered negative impacts on arbitration proceedings, the finality of awards at enforcement stage and Qatar's inspiration to be the alternative arbitration hub in the region.

[168] Bruno Guandalini, 'The Rational Decision-Maker Arbitrator: Unveiling the Arbitrator's Utility Function' (2020) 55 International Arbitration Law Library 211, 242-243.
[169] Thomas D. Halket, 'International Arbitration: Meeting Today's Challenges to Prepare for the Future' (2020) 22(1) Asian Dispute Review 4, 5.

Following this judgment, criminal liability would increase the use of "guerrilla tactics" to prevent or disrupt arbitration proceedings and influence arbitrators' impartiality, its introduction and application will certainly damage arbitration as a whole. In relation to the finality of the award at the enforcement stage, it is now extremely unlikely that *Société d'Entreprise et de Gestion* would be able to bring the award in its favour to a successful enforcement in Qatar after the Lower Criminal Court declared that the claimant was "harmed" by the tribunal's action leading to further questions on the tribunal's impartiality. This judgment alone would enable the losing party to challenge the award under Article V of the New York Convention. Finally, Qatar has landed its arbitration practice in the same debates on the arbitrator's criminal liability which dominated the shortcomings of the UAE arbitration industry prior to 2016. Qatar will re-live what happened to the UAE arbitration practice prior to the amendment of Article 257 of the Penal Code in 2018; that is, the resignation of arbitrators and moving the seat of arbitration from Qatar where arbitrators can be subject to the unpredictability of criminal liability. Consequently, it is further away from its inspiration to be a safe arbitration hub in the region.