Issues of Arbitrator's Legal Status: Who is the Arbitrator?

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Arbitrator's legal status is a topic that never get outdated. On the contrary, in the age of due process paranoia, this subject has become as relevant as never before. Who is the arbitrator and how far he or she can go in the proceedings and why. Those questions while discussed in different contexts are all related to the very roots of arbitration and, in turn, arbitrator's status. This article which is based on the author's PhD and LLM theses attempts to present different approaches to arbitrator's legal status and to explain what the arbitrator's status is in the contemporary international arbitration law.

INTRODUCTION

"The idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers."[1] Indeed, while the arbitration agreement is the cornerstone of international commercial arbitration,[2] arbitration proceedings can only go forward when the arbitral tribunal is formed. But who are those decision-makers resolving a dispute put before them by the parties and adopting a decision that carries the same weight as a court judgment? Although it may appear to be a philosophical inquiry, the answer to this question can have significant implications and outcomes.

Approaches to international arbitration and arbitrators differ dramatically. Two traditional schools of thought – contractual and jurisdictional – perceive arbitration in contrasting manners. While the contractual theory believes that arbitration is based on a purely contractual setting and, as a result, arbitrators are only acting as agents or service providers, the approach of the jurisdictional school is opposite. Proponents of this theory argue that arbitration is a 'surrogate' of court proceedings and that arbitrators are private judges.

While the two classical schools provide for different viewpoints, the third classical theory seeks to reconcile these approaches giving rise to a so called 'hybrid' or 'mixed' theory. This approach recognizes that arbitration encompasses both contractual and adjudicatory elements and the arbitrators are providing adjudicatory services. Consequently, the 'hybrid' school of thought does not categorize arbitrators as mere service providers or private judges. Instead, it recognizes them as providers of a distinct and specialized adjudicatory service, granting arbitrators a *sui generis* status.

Based on these viewpoints this article attempts to evaluate the existing approaches to the arbitrator's status and to determine which theory suits the contemporary international commercial arbitration the best. In other words, the below research aims to answer the philosophical but at the same time practical question: who is the arbitrator?

This article is based on the author's PhD thesis on arbitrator's civil liability (supervisor prof. Valentinas Mikelėnas) that was defended at the Vilnius University in 2018 as well as on the author's LLM thesis 'Arbitrator's *sui generis* status as the main source of arbitrators' inherent

[1] Paulsson, J. (2013). *The Idea of Arbitration*. New York: Oxford University Press, p. 1.

[2] Plavec, K. (2020). The Law Applicable to the Interpretation of Arbitration Agreements Revisited. (2020) *University of Vienna Law Review*, 4, p. 84.

powers' (supervisor prof. Gabrielle Kaufmann-Kohler) that was prepared as a part of the MIDS programme in 2023.

I. ISSUES OF ARBITRATOR'S LEGAL STATUS: INTRODUCTORY REMARKS

When the parties enter into an arbitration agreement, they rarely consider the identity of the person who will be entrusted with resolving their potential conflict. Instead, their primary goal is often to avoid the jurisdiction of national courts, without delving into any philosophical questions.

Indeed, defining who an arbitrator is proves to be a complex task. On one hand, an arbitrator is a judge chosen by the parties. Yet, as noted by Alessi, arbitrators cannot be equated with state judges due to significant differences between the two.[3] On the other hand, an arbitrator provides dispute resolution services to the parties. However, if arbitrators are mere service providers, why do lawmakers and international conventions assign the same legal significance to their awards as they do to judgments rendered by national courts?

During the arbitration process, these questions may not seem immediately relevant, as parties primarily seek efficient and fair dispute resolution at a reasonable cost. However, understanding the status of arbitrators becomes particularly relevant after the conclusion of arbitration proceedings, when the issue of arbitrator liability may arise.

Given the divergent approaches to arbitration, there exist multiple theories explaining the legal status of arbitrators. Drawing upon various academic positions, this article concludes that the arbitrator's status should be considered as *sui generis*. In other words, while an arbitrator is a service provider, their role encompasses the adjudicatory function, which distinguishes it from a mere service.[4]

The understanding of who an arbitrator is largely depends on one's approach to international commercial arbitration as a whole. Four classical visions attempt to explain the phenomenon of international arbitration: contractual, jurisdictional, mixed (hybrid) and autonomous schools of thought.[5] While the first three theories primarily differentiate arbitration based on the arbitrator's status, the autonomous theory focuses on the issues of legal order and attempts to explain the position of international arbitration within that order, placing less emphasis on the arbitrator's status.

II. ARBITRATOR'S STATUS UNDER THE CONTRACTUAL APPROACH

The contractual school of arbitration is considered the most classical theory of international commercial arbitration. However, the views as to arbitrator's status differ under this approach. Two main theories, agency and provision of services, are discussed below.

2.1. AGENCY THEORY

Alessi explains that *"[t]he agency theory rests on the idea that arbitrators or the appointing authority are appointed as agents of the parties to solve the dispute on their behalf. The agency theory is based on the literal approach to the legislation whereby the arbitrator is generally referred as "appointed" or receiving a "mandate"."*[6] Proponents argue that arbitrators do not perform any public functions and derive their powers and authority solely from the parties' agreement at the time of their appointment – *"arbitrators were appointed as the agents of the parties to resolve the*

[3] Alessi, D. (2014). Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability. *Journal of International Arbitration*, 31(6), p. 745.

[4] Alessi, D. (2014). Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability. *Journal of International Arbitration*, 31(6), pp. 753-754.

[5] Bantekas, I. (2015). *An Introduction to International Arbitration*. Cambridge: Cambridge University Press, pp. 2-3.

[6] Alessi, D. (2014). Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability. *Journal of International Arbitration*, 31(6), p. 752.

dispute on the parties' behalf. Being the agents of the parties, arbitrators represent the parties who appoint them to resolve the dispute according to the parties' instructions; moreover, any decisions, that is, arbitral awards, made by the agents have a binding effect on the parties."[7] Alessi further notes that arbitrator's performance is personal and can be terminated according to the same principles as agency law.[8] Onyema summarizes that *"the appointed arbitrator acts as an agent of the disputing parties. The argument is that the arbitrator is appointed to act on behalf of the disputing parties in making a decision over their dispute pursuant to the arbitration agreement.*"[9]

The agency theory is not merely academic. In 2001, the United States Court of Appeals (Seventh Circuit) held that an arbitrator acts as the parties' agent and can do anything that the parties may do directly as their delegate.[10] The agency approach has also been discussed in the Netherlands and Switzerland acknowledging that the relationship between an arbitrator and the parties is unique and departs from the standard agency relationship.[11]

However, considering that an arbitrator becomes the agent of the parties, a question arises regarding the general principle that party's representative cannot act as an arbitrator.[12] While interpretations may vary across legal systems, generally agent's role is to act on behalf of someone else. The term 'agent' itself implies 'a person who acts for or represents another'.[13]

Nonetheless, arbitrators, despite performing the mandate granted by the parties, do not become the agents of the parties in the traditional sense of the notion. If arbitrators were agents, they would be required to strictly follow the parties' instructions without any room for their own discretion. In addition, arbitrators are not bound to act in the interest of the parties but rather to adjudicate a dispute. The purpose of arbitration is not to enter into agreements on behalf of the principal but to resolve one or more disputes.[14] This implication is significant – if arbitrators were the agents of the parties, the essence of arbitration as the method of dispute resolution by independent and impartial individuals would be completely undermined. Case-law supports this view. Fouchard, Gaillard and Goldman describe a decision of the Paris Court of Appeals in 1992, where the award was set aside on the basis that the arbitration clause indicated that any disputes were to be submitted to "representatives". The court deemed this clause to be invalid because *"a stipulation of that kind is incompatible with the actual concept of arbitration since the arbitrators, though appointed by the parties, can under no circumstances become their representatives. […] Such a role, and the obligation it entails, are alien to the functions of an arbitrator, which are judicial in nature.*"[15]

In the author's opinion, although it may initially appear logical to treat an arbitrator as the parties' agent, the very nature of arbitration goes against this approach. The fact that an arbitrator fulfils the mandate granted by the parties does not make them the agents of the parties. Agents have fiduciary duties to their principals

[7] Yu, H. (2009). Who is an arbitrator? A study into the issue of immunity. *International Arbitration Law Review*, 12(2).

[8] Alessi, D. (2014). Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability. *Journal of International Arbitration*, 31(6), p. 752.

[9] Onyema, E. (2010). *International Commercial Arbitration and the Arbitrator's Contract*. Abingdon: Routledge, p. 103.

[10] *George Watts Son Inc. v. Tiffany and Company* [2001] 00-3231 US Court of Appeals (7th Circuit).

[11] Poudret, J-F., Besson, S. (2007). *Comparative Law of International Arbitration* (Second Edition). London: Sweet & Maxwell 2007, p. 368.

[12] Yesilirmak, A. *et al* (2014). *Arbitration in Turkey*. Alphen aan den Rijn: Kluwer Law International, p. 53.

[13] Cambridge Dictionary <https://dictionary.cambridge.org/dictionary/english/agent> accessed 27 July 2024.

[14] Alessi, D. (2014). Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability. *Journal of International Arbitration*, 31(6), pp. 752-753.

[15] Gaillard, E. and Savage, J. (eds.) (1999). *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Hague: Kluwer Law International, p. 606.

and must act in their best interests as well as to follow their instructions. In contrast, arbitrators must act independently, and the parties' instructions either do not bind the arbitrators or are unrelated to the essence of the arbitrator's mandate – their adjudicatory role. For instance, the parties have no right to instruct the arbitrators on what type of arguments to use in the award. The instructions of the parties should remain purely procedural, such as agreeing to postpone a hearing due to settlement negotiations, which the arbitrators should follow. However, these instructions cannot be interpreted as meaning that the arbitrators suddenly become agents of the parties. Born also agrees that *"under most legal systems, that characterization would require the arbitrator to follow the parties' directions and to provide the parties with information and an accounting – all of which can only be assimilated with difficulty, if at all, to the adjudicative role of an arbitrator. Moreover, the role of an agent is inconsistent with the arbitrator's adjudicative function – which is precisely to be independent of the parties, including with obligation in some circumstances to refuse to obey their instructions."*[16]

Treating the arbitrator as the parties' representative also poses difficulties regarding the outcome of their agency – the arbitral award. Yu points out that *"although the agent theory in arbitration asserts that the arbitral awards made by the arbitrators is a contract which binds the parties, this theory does not correspond with the current method of recognition and enforcement of arbitral awards in practice. If an award were indeed a contract made by the arbitrators on behalf of the parties, following the law of agency, the losing party who refused to perform his contractual obligations should be sued for breach of this new contract. However, an examination into the existing legal framework for recognition and enforcement of arbitral awards clearly shows that the ground of breach of contract (the award) was never used as a ground to seeking recognition or enforcement of arbitral awards."*[17]

In summary, although agency is one the main doctrines explaining arbitrator's status in the contractual theory of arbitration, this definition does not align with the essence and nature of arbitration. A dispute between the parties must be examined by an independent and impartial arbitrator who is free to make decisions autonomously. This is not the case with the agents who act on behalf of the principal. Therefore, the agency theory fails to provide a clear and unambiguous explanation of the arbitrator's status and should be dismissed.

2.2. THEORY OF THE PROVISION OF SERVICES

While the agency theory is unsuitable for explaining the arbitrator's role in arbitration, the theory of the provision of services offers a more attractive alternative. Fouchard, Gaillard and Goldman explained in this regard: *"[t]he arbitrators' brief can be seen as a set of intellectual services, which the arbitrators provide for the benefit of the parties, in return for remuneration. The arbitrators, in common with other professionals, undertake to give the parties the benefit of their experience and knowledge, and to accomplish tasks such as investigating the case and hearing the parties within a certain period of time. The arbitrators thus agree to provide services which constitute either best efforts undertaking or undertakings to achieve a particular result."*[18] Put differently, under this approach when an arbitrator accepts the mandate, he basically agrees to provide the parties with his intellectual services resulting in the adoption of the award.

This theory enjoys broader acceptance than the agency doctrine, receiving support from

[16] Born, G. B. (2021). *International Commercial Arbitration* (Third Edition). Alphen aan den Rijn: Kluwer Law International, p. 2120.

[17] Yu, H. (2009). Who is an arbitrator? A study into the issue of immunity. *International Arbitration Law Review*, 12(2).

[18] Gaillard, E. and Savage, J. (eds.) (1999). *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Hague: Kluwer Law International, p. 606.

academia[19] and national as well as international courts. For instance, in *Hashwani v Jivrai* the Supreme Court of the United Kingdom held that an arbitrator *"is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services"*.[20] The Court of Justice of the European Union also recognized arbitrators as falling within the category of service providers for VAT purposes.[21]

Typically, the provision of services involves one party – the service provider – undertaking to supply a service to another party, the client, in exchange for a price.[22] Similarly, an arbitrator agrees to resolve a dispute submitted by the parties, acting as clients, in exchange for compensation. As Onyema put it even more categorically: *"[t]he arbitrator accepts appointment to render a number of services which include, administering the hearing and making a binding decision on the merits of the dispute before him in the particular reference. Clearly these are services that the arbitrator renders for payment."*[23]

Viewing the arbitrator as a service provider seems reasonable: it explains the relationship between the parties and the arbitrator without contradicting the essence of international arbitration. While the service provider has to adhere the client's instructions, they have the discretion to choose the methods by which services are provided and ultimately bear the responsibility for delivering the award.

However, this theory fails to address crucial aspects of the arbitrator's status. It does not explain how an arbitrator can provide services that result in an award carrying the same legal weight as the judgement from a national court operating within the framework of a national Constitution. As noted by Born, *"[a]rbitrators do not merely provide the parties with a service, but also serve a public, adjudicatory function, possessing binding adjudicatory powers and immunities from suit and liability, that cannot be equated with the provision of service in a commercial relationship."*[24]

Furthermore, while a client can provide instructions to a service provider and hold them accountable, it is doubtful that the parties in international commercial arbitration can exert the same level of control over arbitrators – while parties may provide instructions, the ultimate decision-making authority lies with the arbitrators: *"[t]he arbitrators are certainly obliged to comply with the arbitration agreement and arbitration rules adopted by the parties, but the parties cannot go so far as to give "instructions" to the arbitrators as to the way in which the proceedings are to be conducted, let alone the content of their award."*[25]

These substantial questions remain unanswered by the contractual theory, leading to its limited acceptance in contemporary academic works and case-law. Nonetheless, the theory of the provision of services, although not the dominant theory, remains a significant factor in understanding the arbitrator's status. As will be argued below, since the arbitrator's status is *sui generis*, the provision of services is

[19] Lew, J. *et al* (2003). *Comparative International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, p. 277, Onyema, E. (2010). *International Commercial Arbitration and the Arbitrator's Contract*. Abingdon: Routledge, p. 104, Alessi, D. (2014). Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability. *Journal of International Arbitration*, 31(6), pp. 753-754, etc.

[20] *Jivraj v. Hashwani* [2011] UKSC 40.

[21] Case C-145/96 *Bernd von Hoffmann v. Finanzamt Trier* [1997] ECR I-04857.

[22] *See*, for instance, Article IV.C.-1:101 of the Draft Common Frame of Reference (Bar, Ch. *et al* (2009). *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition*. Sellier. European Law Publishers, p. 302).

[23] Onyema, E. (2010). *International Commercial Arbitration and the Arbitrator's Contract*. Abingdon: Routledge, p. 104.

[24] Born, G. B. (2021). *International Commercial Arbitration* (Third Edition). Alphen aan den Rijn: Kluwer Law International, p. 2121.

[25] Gaillard, E. and Savage, J. (eds.) (1999). Fouchard, Gaillard, Goldman On International Commercial Arbitration. Hague: Kluwer Law International, p. 607.

an integral component of that status. In other words, the theory of the provision of services is important to consider when exploring the arbitrator's status.

III. JURISDICTIONAL THEORY: ARBITRATOR AS AN ALTER EGO OF THE JUDGE

While the two above-described approaches derive from the contractual theory, the jurisdictional approach presents a contrasting perspective. According to Belohavlek, *"[a]ccording to the jurisdiction theory, arbitration is analogous to litigation [contentious court proceedings] the purpose of which is the authoritative finding of the law and a final determination of the dispute between the parties on the basis thereof. This theory is therefore based on the assumption that arbitration is a contentious procedure in which the arbitrators exercise their decision-making power. Such power is delegated to the arbitrators by the state (not by the parties)."*[26] In other words, the central idea is that arbitration is analogous to judicial proceedings with the consequences thereof.

Since arbitration proceedings are equated with court proceedings, the proponents of jurisdictional theory argue for an equivalence in the status of arbitrators and national judges. Put differently, both arbitrators and judges perform the very same function – adjudicating disputes brought before them – and both possess the authority to render decisions that bind the parties and can be enforced through state mechanisms. Belohavlek further explains that *"[c]onsidering the fact that the particular international legal framework regulates the status of the arbitrator, we cannot agree with the view that such status is only a private-law relationship established under the agreement between the arbitrator(s) and the parties. It cannot be a "mere" private-law relationship because, inter alia, the arbitrator's status is defined by a particular legislative framework which the arbitrator must not transgress and his or her status cannot be modified by a different agreement of the parties."*[27]

However, despite its appeal, the contemporary arbitration doctrine widely rejects the jurisdictional approach: *"[a]rbitrators are not judges. Their functions are conferred by the parties and not by the state which assigns the case randomly. Arbitrators are not necessarily bound by any law or precedent, nor do they create any precedent. No rules of procedural law or rules of precedent necessarily apply. Arbitrator's awards are subject to a far more limited review than court judgements and therefore enjoy a higher degree of finality. […] Differently from judges, arbitrators lack coercive powers with regard to evidence collection, interim measures, witnesses, and case management, nor can arbitrators decide on the rights and obligations of third parties outside arbitration."*[28] The fact that there can be no equal sign between arbitrators and judges, in the author's opinion, is best proved by the fact that most legal systems (if not all) foresee for the mechanism of court's assistance to arbitration, for instance in case of interim measures or evidence collection. This is exactly because the powers of judges and arbitrators are different with judges having more authority because of their unique, constitutional status.

In addition, arbitrators are not bound by the same principles and laws that govern judges, including codes of conduct.[29] As early as 1977, a United States court held that *"[t]he arbitrator serves as private vehicle for the ordering of economic relationships. He is a creature of contract, paid by the parties to perform a duty, and his*

[26] Belohavlek, A. (2011). The Legal Nature of International Commercial Arbitration and the Effects of Conflicts between Legal Cultures. *Law of Ukraine*, 2, pp. 19-20.

[27] Belohavlek, A. (2011). The Legal Nature of International Commercial Arbitration and the Effects of Conflicts between Legal Cultures. *Law of Ukraine*, 2, p. 23.

[28] Alessi, D. (2014). Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability. *Journal of International Arbitration*, 31(6), pp. 745-746.

[29] Gaillard, E. and Savage, J. (eds.) (1999). *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Hague: Kluwer Law International, p. 590.

decision binds the parties because they make a specific, private decision to be bound. His decision is not socially momentous except to those who pay him to decide. The judge, however, is an official governmental instrumentality for resolving societal disputes. The parties submit their dispute to him through the structure of the judicial system, at mostly public expense."[30]

However, while it might appear that this approach to arbitrator's status lacks coherence, that is not entirely accurate, particularly when considering the issue of arbitrator immunity. Treating an arbitrator as an agent of the parties or a service provider, would negate the basis for asserting that arbitrators should be immune from claims made by the parties, unless a specific limitation of liability clause exists in the contract. Yet, commentators and national courts agree that arbitrators should be immune from the parties' claims to some extent. As discussed by Franck, *"[p]articularly within common law jurisdictions courts appear willing to extend immunity to arbitrators when they are acting in a quasi-judicial capacity since arbitrators are in much the same position as judges, in that they carry out more or less the same functions. […] In the United States, when arbitrators assume responsibilities that are functionally comparable to those of judges, they receive immunity."*[31] This dilemma concerning the judicial aspect of arbitrator's status is resolved by the hybrid theory of arbitration discussed below.

In any case, the main point of criticism to this theory lies in its refusal to acknowledge the influence of the contractual nature of arbitration. It is undeniable that arbitration can only commence through an agreement between the parties, whereby the arbitrators derive their powers from the mandate granted by the parties and the arbitration agreement. In contrast, national judges lack these capacities as they have no contractual or non-contractual relationship with the parties. They are public servants, while arbitrators act for a fee agreed upon with the parties (arbitral institution). Therefore, while the notions of the jurisdictional theory remain significant and are integrated into the *sui generis* status, this theory alone is insufficient to explain the contemporary status of arbitrators and, therefore, must be dismissed.

IV. THEORY OF SUI GENERIS STATUS

The final the most significant approach to the arbitrator's status is the *sui generis* theory, which stems from the mixed (hybrid) theory. As the name suggests, this theory represents a middle way between the two extremes – contractual and jurisdictional theories. In the words of Belohavlek, under this theory *"[a]rbitration proceedings are no doubt based on the will of the parties to exclude the jurisdiction of courts [of law] from the resolution of a particular dispute and, at the same time, select a different entity authorized to adopt a final and authoritative decision regarding the dispute instead of the court. […] At the same time, however, this theory concedes that the contractual approach to arbitration suffers from certain deficiencies, especially with respect to the basis of the arbitrator's status and enforceability of the arbitration award should it be interpreted (according to the contract theory) as a mere finding of the contents of the agreement of the parties […]."*[32]

Indeed, mixed theory recognizes and embraces both – contractual and adjudicatory aspects of arbitration, considering them as two sides of the coin. This dual nature of international arbitration also corresponds to the concept of arbitrator's status. While the arbitrator is in a contractual relationship with the parties, they also perform an adjudicatory role that would typically be carried out by the national judges. The Court of Appeals of California eloquently captured this duality in the well-known

[30] *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex.* [1977] US Court of Appeal (5th Circuit) 551 F.2d 1026, 1033.

[31] Franck, S. (2000). The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity. *New York Law School Journal of International & Comparative Law*, 20, pp. 18-19.

[32] Belohavlek, A. (2011). The Legal Nature of International Commercial Arbitration and the Effects of Conflicts between Legal Cultures. *Law of Ukraine*, 2, pp. 25.

Baar v Tigerman case: *"[w]hile we must protect an arbitrator acting in a quasi-judicial capacity, we must also uphold the contractual obligations of an arbitrator to the parties involved."*[33]

In other words, the hybrid theory does not deny that arbitrators share functional similarities to the national judges. However, these functions primarily arise from a contract. Only when the parties enter into an arbitration agreement does it provide the foundation for the arbitrator's mandate. If approached by the parties, or an arbitral institution, or co-arbitrators, the individual arbitrator has the sole discretion to accept or decline the offer to arbitrate the specific dispute. By accepting the mandate, the arbitrator also agrees to follow the rules established in the arbitration agreement, arbitration rules, as well as applicable *lex arbitri* and any other mandatory provisions.

The mixed theory represents the prevailing approach in international arbitration and is also supported by the author of this article. While recognizing the advantages of the contractual and jurisdictional theories, it acknowledges that these two extremes overlook a fundamental reality: the arbitrator is not a judge and cannot be equated to one, yet they are not merely service provider or an agent of the parties either. The mixed theory combines strengths of both the contractual and jurisdictional theories and provides a comprehensive approach that addresses the questions left unanswered by the previous theories.

The *sui generis* status of the arbitrator arises from the mixed theory: *"[t]he sui generis doctrine rests on the assumption that arbitrators do not merely provide a service, but also serve a sort of public function. This function is judicial and cannot be confused with the provision of service."*[34] This approach is accepted in various countries including Switzerland,[35] France,[36] Belgium,[37] Romania,[38] Germany,[39] Italy[40] and many others. However, it is important to note that the *sui generis* approach is not a panacea – it also leaves some questions open, such as whether the chairperson is indirectly bound by the co-arbitrators' contract with the parties.[41]

Nevertheless, the *sui generis* approach is the most attractive and not surprising that it has been accepted, if not universally, then by the majority of arbitration doctrine and even national courts. It successfully navigates the middle ground between the contractual and jurisdictional schools, harnessing the advantages of both approaches.

CONCLUSIONS (OR WHO IS THE ARBITRATOR)

In their renowned work on international arbitration Fouchard, Gaillard and Goldman stated: *"determining the status of the arbitrators is a task which goes far beyond the resolution of difficul-*

[33] *Baar v. Tigerman* [1983] 140 Cal. App. 3d 980.

[34] Alessi, D. (2014). Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability. *Journal of International Arbitration*, 31(6), pp. 753-754.

[35] Kaufmann-Kohler, G., Rigozzi, A. (2015). *International Arbitration: Law and Practice in Switzerland*. Oxford: Oxford University Press, p. 232.

Smahi, N. (2016). The Arbitrator's Liability and Immunity Under Swiss Rules – Part I. *ASA Bulletin*, 34(4), p. 883.

[36] Gaillard, E. and Savage, J. (eds.) (1999). Fouchard, Gaillard, Goldman On International Commercial Arbitration. Hague: Kluwer Law International, p. 607-608.

[37] Bassiri, N. *et al* (2016). *Arbitration in Belgium: A Practitioner's Guide*. Alphen ann den Rijn: Kluwer Law International, p. 128.

[38] Leaua, C. *et al* (2016). *Arbitration in Romania: A Practitioner's Guide*. Alphen aan den Rijn: Kluwer Law International, pp. 110-111.

[39] Domke, M. (1971). The Arbitrator's Immunity from Liability: A Comparative Survey. *The University of Toledo law Review*, 3(1), p. 100.

[40] Rubino-Sammartano, M. (2001). *International Arbitration Law and Practice*. The Hague: Kluwer Law International, pp. 309, 311.

[41] Torres Lagarde, M. (2015). Liability of Arbitrators in Dubai: Still a Safe Seat of Arbitration 33(4) ASA Bulletin, 33(4), p. 793.

ties with the constitution of the arbitral tribunal. In its broadest sense, the status of the arbitrators covers all their rights and duties throughout the arbitral proceedings. This extends to the arbitral hearings themselves, the determination of the law governing the substance of the dispute, and the making of the award – all matters where arbitrators enjoy considerable powers."[42]

The theories discussed above offer different explanations for the phenomenon of international arbitration and the status of arbitrators. While the contractual theory asserts that arbitrators are in a contractual relationship with the parties, often viewed as an agency or service provision, the jurisdictional school of thought rejects this notion. The mixed (hybrid) theory, however, acknowledges the existence of a contractual relationship between the parties and arbitrator but asserts that this relationship, due to its adjudicatory nature, is distinct and cannot be equated to a mere provision of services. Currently, it is understood that the parties and the arbitrators are in a contractual relationship based on the arbitrator's contract.[43] While the parties and arbitrators are free to decide on many terms of their relationship, such as renumeration, length of the proceedings, etc., there are also certain principles that they cannot deviate from, such as impartiality of arbitrators, an obligation to ensure the equality of the parties, etc. These principles align with those applicable to national judges. This was well explained by Scholdstrom – in his view, certain aspects of the parties' and arbitrators' relationship can be resolved by applying concepts from the administration of a fair justice system, while others can be addressed using contract law principles.[44] In the words of Poudret and Besson, undeniable contractual nature of the arbitrator's mandate should not overshadow the fact that the arbitrator also performs an adjudicatory function and has statutory rights arising out of the law applicable to arbitration.[45] Put differently, *"the arbitrator's obligations are not limited to this contractual field. Substantive law has rapidly accepted that the arbitrator's function was also that of a private judge."*[46]

These reasons and interpretations of arbitrator's functions allow to conclude that arbitrator's status is dual in nature. On the one hand an individual becomes an arbitrator only by entering into an agreement with the parties (or the arbitral institution acting on behalf of the parties). Without such an agreement, that person would not become an arbitrator. On the other hand, upon accepting the arbitrator's mandate, that individual also assumes certain rights and obligations (functions) that render them comparable to a state judge. These functions assumed by arbitrators, are typically mandatory because the arbitrator undertakes to resolve a dispute between the parties in lieu of a national judge. This duality was well explained by Born: *"[t]he better analysis is thus that the contractual relationship between the parties and the arbitrators is situated in an area where important public policies and mandatory law rules apply. These rules and policies provide, and often mandatorily dictate, a number of essential aspects of the relationship between the parties and the arbitrators, including most importantly the basic definition and parameters of the arbitrators' adjudicatory*

[42] Gaillard, E. and Savage, J. (eds.) (1999). *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Hague: Kluwer Law International, p. 557.

[43] Poudret, J-F., Besson, S. (2007). *Comparative Law of International Arbitration* (Second Edition). London: Sweet & Maxwell 2007, p. 367.

[44] Scholdstrom, P. (1998). *The Arbitrator's Mandate – A Comparative Study of Relationships in Commercial Arbitration Under the Laws of England, Germany, Sweden and Switzerland*. Stockholm: Jure AB, p. 438.

[45] Poudret, J-F., Besson, S. (2007). *Comparative Law of International Arbitration* (Second Edition). London: Sweet & Maxwell 2007, p. 367.

[46] ICC's Commission on International Arbitration, 'Final Report on the Status of the Arbitrator' (1996) 7(1) ICC International Court of Arbitration Bulletin 27 <https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0009.htm> accessed 27 July 2024.

authority. This is not, however, inconsistent with the contractual relationship between the parties and the arbitrators, any more than contractual relations in regulated industries (e.g., securities, insurance) are inconsistent with the underlying regulatory regimes in those fields."[47]

While Born draws a comparison between the arbitrator's mandate and contractual relationship in regulated industries, this analogy is not entirely sufficient. In regulated markets, the lawmaker typically provides clear and detailed rules on who can enter into contractual relationships, when they can do so, and under what conditions. However, this is not the case with arbitrators. It is likely that most national arbitration laws as well as the New York Convention and the UNCITRAL Model Law, do not even mention that the arbitrators are in a contractual relationship with the parties involved. Conversely, national laws and the UNCITRAL Model Law generally aim to create a legal framework that grants arbitrators specific rights and obligations, making them comparable to national judges. For instance, these laws oblige the arbitrators to be independent and impartial. Additionally, the laws also provide for mechanisms to review the product that the arbitrators are engaged to deliver – the award – and the possibility to seek its annulment. Therefore, it is not surprising that Born himself later agrees that due to the distinct and specialized nature of the arbitrator's mandate, his status (and in turn, the approach to their contractual relationship) should be considered *sui generis*: arbitrator's *"mandate differs in fundamental ways from the provision of many other services and consists in the performance of a relatively sui generis adjudicatory function. It is therefore appropriate, and in fact necessary, that the arbitrator's contract be regarded as sui generis."*[48]

To summarize, the above perspective and positions support the prevailing notion that the arbitrator's status should be *sui generis*, despite differing opinions on the matter. This is due to the dual nature of the arbitrator's role, that is both contractual and adjudicatory. Arbitrators provide services (adjudicatory services) that are highly specific to be simply categorized as an ordinary provision of services. It would undermine the arbitrator's status and would not explain why the end result of the provided services – the award – has the same legal meaning as the judgement adopted by national judges.

[47] Born, G. B. (2021). *International Commercial Arbitration* (Third Edition). Alphen aan den Rijn: Kluwer Law International, p. 2118.

[48] Born, G. B. (2021). *International Commercial Arbitration* (Third Edition). Alphen aan den Rijn: Kluwer Law International, p. 2120.