The Liability of the International Arbitration Institutions on the Arbitrator's Errors: An Examination of the Influence of Legal Traditions of Civil and Common Law

Dr. Nehad Khanfar
Associate Professor, Islamic College,
Middlesex University, London, UK.

Abstract

Arbitrators enjoy a strict immunity in the countries who adopt the common law systems such as England, the United States, and others. The arbitrators would not be legally liable for the errors occur as a result of the arbitral process. Therefore, some other international arbitration institution such as ICC has adopted this. However, the situation would be different when it comes to the countries who adopt the civil legal systems, where the arbitrators are being held legally liable if errors occur because of the arbitral process.

International arbitration is widely influenced by common and civil legal systems. As a result, both systems must be discussed when examining the immunity of the arbitrators. This paper seeks to critically examine the influence of the civil and common laws on the conceptual and contextual aspects of the arbitrator's legal liability. It also seeks to investigate the philosophical bases of both systems in adopting two different approaches towards the liability and immunity of the arbitrators. Furthermore, an examination of the institutional liability on the arbitrator's error and how is defined and developed by the traditions of the common and civil laws. This will be followed by studying different theories of arbitration that directly impact on the practical issues related to the arbitrator's immunity. Therefore, the jurisdictional theory, the contractual theory, the hybrid theory (or the mixed theory) and the autonomous theory will be subjected to the discussion in this paper.

Keywords: Arbitrator, institution, liability, immunity, civil and common law.

Introduction

The liability of the international arbitration institutions on the arbitrator's errors is the focus of many academic and professional publications, but no further examination on the Influence of legal traditions of Civil and Common Law has been thoroughly conducted on this very topic.

Observing historical evolution of the arbitral immunity shows that there is no record of any case in England or France for holding any arbitrator or arbitral institution liable to any user of arbitration. Logically, the arbitral institutions would always attempt to avoid liability for their arbitration work by articulating extensive immunity articles. Though, the validity of those articles would be depending on the domestic rules where the institution is located.

The attempts have been always there in order to impose some exclusion rules to entirely eliminate the liability of the arbitral institution. One of the clear examples is stated in article 49 of the CAM Rules that was designed to, almost entirely, exclude the liability of the CAM and its arbitrators, unless their errors emerged to be based on wilful misconducts. Similarly, the same situation can be noticed in article 40 of the DIAC Rules that extended the immunity to include the experts of the tribunal. Equally, section 44 of the DIS Rules was not different as it was designed to grant immunity for DIS and its employees from liability, as well as to arbitrators. Likewise, Article 17 of the QICCA includes a similar exclusion.

It is worth noting that some specific rules and rights under common law provide the arbitrator with jurisdictional immunity, but not exclusive though. This does not seem to be the case under French law, where institutional immunity is not conceivable. Therefore, the argument is focused on that sufficient immunity must be provided to the arbitrator to free him/her from any kind of fear or pressure that might occur through judicial reprisals as a result of an arbitration process. However, it has been noticed that the arbitrator might be held liable for actions or errors that can be avoided from his/her end, "such as undue delay in granting an award". Yet, the level and the limitations of immunity to be given would differ from country to another based on national legal systems.

Under the United States common law where the jurisdictional theory is adopted and followed, the scope of the judicial immunity was expanded further. Hence, when arbitrators carry out their duties based on the quasi-judicial role they would be treated as a "functional equivalent" of judges. Supporting this stand courts adopted this approach and decided that the arbitrators would enjoy the protection that is given by the doctrine of judicial immunity.

The stand of the Civil Law system is not significantly different from the Common Law one as it tends to give almost an exclusive immunity to the individual and institutions who work in arbitration. Having said that, both legal systems, recently, started to witness some flexibility regarding the arbitrator's immunity in general but certainly not when it comes to the institutional liability on the arbitrators' errors.

Thus, in this paper, a critical examination will be provided on the influence of the civil and common laws and conceptual and contextual aspects of the arbitrator's legal liability. Furthermore, an investigation on the philosophical bases of both systems in adopting two different approaches towards the liability and immunity of the arbitrators will be conducted. It will also explore the institutional liability on the arbitrator's error and how is defined and developed by the traditions of the common and civil laws. Then, the paper will be studying different theories of arbitration that directly impact on the practical issues related to the arbitrator's immunity. Therefore, the jurisdictional theory, the contractual theory, the hybrid theory (or the mixed theory) and the autonomous theory will be subjected to the discussion in this paper.

Research objectives

The research aims to achieve two main objectives as follows:

1-To investigate the Liability of the International Arbitration Institutions on the Arbitrator's Errors

2-To assess the influence of legal traditions of Civil and Common Law on the institutions liability

Research Questions

This paper will try to answer the following questions:

1-To what extent the arbitration institutions can be held accountable before the court on the arbitrators' error?

2-What are the bases of justifications of the Common and Civil Law systems to provide full or partial immunity to the institutions?

Research Methodology

This paper thoroughly investigates the literature published on the topic. In addition, it focuses on the proffisional reports and gather materials published by the specialised institutions and assosiations. All gathered material will be

critically analysed and examind in order to built up an academic comparative argument that shed light on the differences between the common and civil law systems.

The evolutionary process of arbitral immunity under Common and Civil Laws

The concept of arbitral immunity came as a result of the increased demands of seeking arbitration that started in the 1920s(1). The development of the doctrine was sponsored by the common law courts that recognized arbitrators as an equivalent to judges(2) and reasoned that because of the "quasi-judicial" status that arbitrators enjoy, where they would benefit from the immunity against civil liability(3). The FAA that conduct its arbitral rules under common law stayed silent on "whether arbitrators or sponsoring organizations are immune from civil suits" that might occur as a result of their arbitral duties (4). This did not prevent the doctrine of arbitral immunity to develop progressively through common law courts as they illustrated that arbitrators are parallels to judges (5).

Arbitral immunity can play a crucial role to support the arbitration functionality(6). There is an argument that the immunity can secure the position of the arbitrator to be independent and to focus on the impartiality when making decisions, also can provide protection against "the threat of legal reprisal from their decisional acts"(7). Furthermore, immunity safeguards arbitrators from being attacked by the dissatisfied party who would like to encounter the arbitration decisions(8). It does also encourage individuals to work as arbitrators(9) hence immunity would be instrumental to promote arbitration as an alternative method of solving disputes(10). It is needless to emphasise that

(1) Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith, 477 F.3d 1155, 1158-59 (10th Cir. 2007). («Every... circuit that has considered the issue of arbitral immunity recognizes the doctrine»).
(2) Id.
(3) See infra notes 77–86 and accompanying the text.
(4) Obvious differences, however, exist between judges and arbitrators. Baar v. Tigerman, 211 Cal. Rptr. 426, 428(Ct. App. 1983).
(5) See Hoosac Tunnel Dock & Elevator Co. v. O'Brien, 137 Mass. 424, 426 (1884).
(6) See 9 U.S.C. §§ 1–16 (2006).
(7) See Hoosac, 137 Mass. at 426.
(8) See Corey v. N.Y. Stock Exch., 691 F.2d 1205, 1211 (6th Cir. 1982) ("The functional comparability of the arbitrators' decision-making process and judgments to those of judges and agency hearing examiners generates the same need for independent judgment, free from the threat of lawsuits").
(9) See Corey v. N.Y. Stock Exch., 691 F.2d 1205, 1211 (6th Cir. 1982) ("The functional comparability of the arbitrators' decision-making process and judgments to those of judges and agency hearing examiners generates the same need for independent judgment, free from the threat of lawsuits.").
(10) See Olson v. Nat'l Ass'n of Secs. Dealers, 85 F.3d 381, 382 (8th Cir. 1996) (holding that arbitral immunity "is necessary to protect decision makers from undue influence, and the decision-making process from attack by dissatisfied litigants").

the common and civil laws differ by its nature. Therefore, the rules that govern the arbitration process and its consequences would be expected to be different, this would apply for the arbitrators and arbitration institutions(11).

Until the past two decades, international arbitration was more well known in civil law countries, with less acceptance in the common law countries, and mainly the United States. This continued until after the US ratification of the New York Convention in 1970. As parties and counsels from the United States and the United Kingdom have increasingly participated in the international arbitral system, the system has evolved to incorporate elements of both the civil and common law traditions.

As it will be explained below, the rules and procedures that commonly apply today in international arbitration have been evolving in a reflection of a mixture of common law and civil law norms; though, the system appears to be evolving more in a common law direction that tends to favor counsel trained in the adversarial process(12).

Historically, there is no record of any case in England or France for holding any arbitrator or arbitral institution liable to any user of arbitration. Under English law, this position had changed with the occurrence of Sutcliffe v Thackrah (1975) and Arenson v Arenson (1977) cases where the House of Lords draw a new line around the arbitrator's liability. It has been decided that traditional view for the immunity of arbitrators "might be ill-founded at common law"(13). This is to say that the decision of the house of lords brought a new judicial approach which caused unclarity for the legal position of arbitrators under English law.

Studying the Arbitration Act 1950 of English law there is nothing has been stated about arbitral immunity. Evidently, legal immunity was not granted to the arbitral institutions at common law. In Mustill & Boyd's Commercial Arbitration, which tried to shed light on the future of the arbitrators' immunity under English law(14), the conclusion was that the "arbitrators are not immune

(11) Silke, N.E., Hasaan, A.H., Lozano, L. Arbitral Institutions Through the Magnifier: On the Nature of their Decisions and Exposure to Suit. Cardozo J. of Conflict Resolution. [Vol. 19:309], (2018).

(12) See Cort v. Am. Arbitration Ass'n, 795 F. Supp. 970, 973 (N.D. Cal. 1992) (describing that one of the goals of arbitration is to "ensure that there is a body of individuals to perform the service").

(13) See Corey, 691 F.2d at 1211 (reasoning that because federal policy, as articulated by the FAA and case law, encourages arbitration, arbitrators deserve immunity when acting in their decision-making capacity).

(14) Javier Rubinstein, «International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions Perspective,» 5 Chicago Journal of International Law 303 (2004).

from suit". Based on this fact, it might be always the case that the dissatisfied parties would seek compensation from the arbitrators or arbitration institutions(15). This would open the door widely to question the arbitral ruling and even challenge it. Therefore, the arbitration operator would have to count for further concerns or even fearing to be part of the arbitration in future cases. Practically, this is the situation under French law, where some disputing parties succeeded to hold arbitration institution liable(16). This was reflected in a court ruling which decided that the arbitral institution is liable for breaching its contractual stipulations when it did not comply with some institutional rules. "Hence, the institution's failure to forward a party's pleadings to the tribunal amounted to a breach of due process"(17).

It was settled that no reason to design a public policy in order to exempt arbitrators and arbitral institutions from liability(18). Therefore, there was an evident rejection of the exemption based on the long strand of the English law traditions of arbitration"(19). As mentioned earlier, although the arbitrator could have still claimed to enjoy a special position at common law, the case might differ with regard to an arbitral institution as its relations with the parties would be governed by contractual conditions, where the public policy would have no space to impact on immunity under common law. In contrast to the previous trend, the English Arbitration Act 1996 has introduced a radical change to the concept of immunity regarding both, individual arbitrators and arbitration institutions. The Act undoubtedly granted a clear immunity for arbitrators in article 29 and the same for institutions in article 74. It's been argued that providing the immunity to the institutions is important to avoid giving a reason to the parties of suing the institutions against their employees' wrongdoing(20). Looking at the issue from different angle, the immunity might be vital to create the sense of stability that encourages institutions to safely run and organise the arbitration process.

In a recent case that has occurred in France, the FFIRC case (2010), the plaintiff was granted considerable compensations from an arbitral institution

(15) Roger S. Haydock and Jennifer D. Henderson, Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership, 2 Pepp. Disp. Resol. L.J. Iss. 2 (2002).

(16) Rolf. A. Schiitze, Introduction to Institutional Arbitration: Article-By-Article Commentary 1, 2, (Rolf A. Schtitze ed., 2013).

(17) Barbara Alicja Warwas, Tim Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses 287 (2017).

(18) See Arenson v Arenson [1977] AC 405; Sutcliffe v Thackrah [1974] AC 727.

(19) See Sir Michael J. Mustill & Stewart C. Boyd, Commercial Arbitration, (Butterworth, 1982).

(20) Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, 1re Chambre, July 1, 2010, 07/13724 Paris J. INT›L ARB. 2011, 2, 401 (Fr.).

based on a contract under French law[21]. The arbitration institution was part of a trade association that offer the arbitration services for its members under its own arbitration rules. The dispute occurred between a French company and a Spanish company who contractually agreed to refer to the arbitration institution. The arbitrator who was delegated by the institution decided that the Spanish company had to pay substantial damages to the French one.

The case was taken to a French court of appeal where the judgment came to annul the award because the rights of defense were not observed[22]. The ruling was concluded based on Article 1485 that states "The arbitral tribunal shall rule after having heard the parties or having given them the opportunity to be heard".

It is worth noting that some specific rules and rights under common law provide the arbitrator with jurisdictional immunity, but not exclusive though. This does not seem to be the case under French law, where institutional immunity is not conceivable.

Immunity between relativity and exclusivity

Logically the arbitral institutions would always attempt to avoid liability for their arbitration work by articulating extensive immunity articles. Though, the validity of those articles would be depending on the domestic rules where the institution is located. 8 Most arbitral institutions exclude their liability in their arbitration rules or bylaws. The attempts have been always there in order to impose some exclusion rules to entirely eliminate the liability of the arbitral institution. One of the clear examples is stated in article 49 of the CAM Rules that was designed to, almost entirely, exclude the liability of the CAM and its arbitrators, unless their errors emerged to be based on wilful misconducts.

Similarly, the same situation can be noticed in article 40 of the DIAC Rules that extended the immunity to include the experts of the tribunal. Equally, section 44 of the DIS Rules was not different as it was designed to grant immunity for DIS and its employees from liability, as well as to arbitrators. Likewise, Article 17 of the QICCA includes a similar exclusion[23]. The exclusivity of

(21) See id.

(22) See id. at 192, 194-95; see also Sir Michael J. Mustill & Stewart C. Boyd, Commercial Arbitration 11,224-32 (2d ed., Lexis Law Pub, 1989).

(23) See Socirt6 Filature Fran~aise de Mohair v. Federation Frangaises des Industries Lainibres et Cotonnires, (1 re Chambre 2010) JCP(G) No 51, 20 Dec 2010, ann. Ortscheidt, Dalloz 2011.3023, and T. Clay; see also Charles Price, Liability of Arbitral Institutions in International Arbitration" in "The Practice of Arbitration, Essays in Honour of Hans van Houtte", Edited by Wautelet, Kruger and Coppens, Hart Publishing, 2012.

the institutional immunity is commonly supported by international institutions and committees that are specialised in arbitration[24]. This probably enhance the trend of excluding the liability of the arbitration institutions under national or domestic legal systems. It can be noticed that the tendency of establishing absolute immunity is a shared drift among domestic and international arbitration systems.

The issue of exclusion is also reflected upon in part II of the Arbitration Rules of KLRCA that is designed to exclude the liability of the institution for "any act or omission related to the conduct of the arbitral proceedings"[25]. Not far from that the RCICAL institution reflects the KLRCA's entire exclusion from liability by stating that in a special article[26]. The case is repeated in the 2013 SIAC Rules which state that the SIAC "shall not be liable to any person for any negligence, act or omission about any arbitration governed by these Rules"[27]. The unlimited exclusion of the Centre from liability is clearly established in DIAC Rules[28]. One of the most evident articulations of the complete immunity comes under the ICSID Convention where it stipulates that the institution enjoys immunity from all legal process "except when the Centre [itself] waives this immunity"[29].

The fact that there are no specific and uniform legal models and criteria in place to govern the immunity of arbitrator creates uncertainty, which – coupled with the arbitrator-turned-defendant having to invest resources and time as well as dealing with anxiety – is undesirable for the system.

In 1985 UNCITRAL Model Law did not specify or indicate any intent or tendency to include the arbitrator liability. Nevertheless, in order to design clear standards as benchmark for a good and qualified arbitration, in 2015, Centenary Principles (the 'Principles') (24)[30], had been established in London by the Chartered Institute of Arbitration (CIArb) listing 10 qualities "that a jurisdiction should have in order to be considered a 'safe, effective and efficient' arbitration locus". One of the main principles that were included

(24) Silke, N.E., Hasaan, A.H., Lozano, L., ibid.
(25) Veeder, V. V. «Arbitrators And Arbitral Institutions: Legal Risks For Product Liability?,» American University Business Law Review, Vol. 5, No. 3 (2018).
(26) Dyalá Jiménez Proposal for a Uniform Rule on Arbitrator Immunity, ICC dispute resolution Bulletin 2017, Issue 4, Commentary, p8-9 Principles available at: http://www.ciarb.org/docs/defaultsource/ciarbdocuments/london/the-principles.pdf?sfvrsn=4
(27) Klrca Rules, supra note 66, at r. 16.2.
(28) Critical Arbitration Rules, supra note 40, at art. 22.
(29) Siac Rules 2013, supra note 52, at arts. 38.2, 34.1.
(30) Diac Rules, supra note 8, at art. 40.

in those qualities is about "arbitral immunity" where the undisputed right of "arbitral immunity from civil liability" has been granted to the arbitrators against acts taken or omitted in good faith within their arbitration work.

Furthermore, it is worth noting, "Most arbitration statutes and the New York Convention on the Enforcement of Arbitral Awards do not allow judicial review for error of law. The only particularly egregious arbitral error will lead to the setting aside or non-enforcement of an award".(24) Nevertheless, Julian Lew[31], argues that there is no jurisdiction to deal with arbitrators' liability for their "error of view or judgment in the decisions they reach".

It is fair to argue that the arbitrator needs to be certain and enjoy a high level of confidence when exercising the arbitral work. Therefore, sufficient immunity must be provided to the arbitrator to free him/her from any kind of fear or pressure that might occur through judicial reprisals as a result of the arbitration process. However, it has been noticed that the arbitrator might be held liable for actions or errors that can be avoided from his/her end, "such as undue delay in granting an award". Yet, the level and the limitations of immunity to be given would differ from country to another based on national legal systems.

Despite the fact, the English arbitration act 1996 grants the immunity to the arbitrators and the institutions. Remarkably, under s.24 of the British Arbitration Act 1996, arbitrators do not enjoy unrestricted immunity, instead, the arbitrator may face the exclusion and dismissal from the case he is proceeding when failing to keep and employ impartially or failing to tackle the case according to the reasonable standard and measures.

That is to say if the arbitrator showed any sort of partiality towards any of the disputing parties might end up with being removed from the case. Thus, according to English law, the immunity to be enjoyed by the arbitrator required the arbitrator to act in good faith. Supporting this inclination, the rules under Swiss system of international arbitration provide immunity to the Swiss Chambers' Arbitration Institution unless the arbitration process is proven to be involved with intentional wrongdoing or clear negligence[32].

Changing the direction under Common law

The civil and common law jurisdictions accept the idea of granting immunity to the arbitrators. Though, there are differences between the jurisdictions in considering the exact "extent of the immunity". The common law jurisdictions

(31) ICSID Convention, supra note 30, at art. 20.

(32) United Nations Commission on International Trade Law, Arbitration Rules, art. 16 (2010).

delegated the arbitrators' immunity to an analogical approach as for being compared to "the immunity accorded to judges". In Bremer Schiffman v South Indian Shipping Corp Ltd [1981] AC 999, Donaldson J said:

"courts and arbitrators are in the same business, namely the administration of justice". He added: "the only difference is that the courts are in the public and arbitrators are in the private sector of the industry". This statement is possibly based on the fact that common law jurisdictions had historically praised and recognized Judicial immunity at early 17th in "two English cases, Flood v Barker 77 Eng Rep 1305 (1607) and The Marshalsea 77 Eng Rep 1027 (1612)". In these cases, Lord Coke established the rules, purposes, and limitations of judicial immunity.

However, in its February 1996 report the DAC Committee led primarily by Lord Saville, the question of arbitrators' immunity was reflected upon and confirmed that the law, by then, gave arbitrators some immunity. It added that there was no judicial decision decided on this issue. Nevertheless, the committee emphasized the view that although the immunity should be granted to the arbitrators to a certain degree "(note, not immunity in all circumstances)".

Clarifying the previous discussion, the report at its para 132 emphasized that the immunity is provided to the arbitrators because the nature of their tasks is the same as the courts' judges. That is to say, the nature and purposes of the arbitration and litigation are offering "a means of dispute resolution" that results in binding by "an impartial third party". It is been justified that the necessity of immunity is crucial to provide an assurance for "third party to properly perform an impartial decision-making function". This is in order to avoid any compromise of the conclusiveness of the arbitral process.

Prominent academic experts supported the idea of providing immunity to arbitrators in order to enhance the position of the final decision. It has been argued that diminishing the immunity would discourage qualified arbitrators of carrying out arbitral cases to avoid the risk of being held liable. Compromising the immunity would send a wrong message to the arbitrators as if they would be considered to be one of disputing parties though they "have no interest in the outcome of the dispute".

Granting immunity would be an assurance to the public "judicial functions are truly exercised" throughout the arbitral process.16 Traditionally, the immunity of arbitrators in England and Wales has been justified as the arbitrators carry out a judicial or at least a quasi-judicial task and, for that reason, they should

receive protection in more or less level as a judge(33). Changing the direction under common law towards clearing the arbitrators from liability for their work in relation to arbitration was not something occurred out of sudden. Indeed, it has its deeply rooted foundations. Court cases in 18th century started to recognize and support the position of arbitration for being a method of solving the disputes, hence, recognizing the arbitrators to be in the judge's positions that are chosen voluntary by the parties. In addition, the arbitration as a whole had been given an absolute immunity by exempting the arbitral decisions from being subject to appeal(34).

Providing a vigilant observation to the common law inclination, the immunity that is currently enjoyed by the arbitration institutions does not indicate that institutions or even arbitrators would be exposed to different treatment in the future. There is no indication of any attempt to revoke the level of immunity given to both, the institutions and individuals, as for the fact that arbitration run and managed under common law system is very popular and gaining more confidence and trust by business community. This trust is based on two main factors, the arbitration operators feel that they enjoy high level of protection that can be traced back for decades. Also disputing parties believe that the arbitration is highly organised and easier to solve the dispute within much shorter periods compared to the traditional rout of the court.

Legislative protection is the way through!!

Some argued that there was a need for legislative protection. in 1986 the Board of Governors of the National Academy of Arbitrators' were in favor of supporting "the concept of statutory immunity"(35). It seemed to be that introducing legislation might not be the perfect answer to recognize a potential liability. This is to avoid codifying the immunity of arbitrator under common law. In general, the argument tries to prove that a legislative act is not going to provide a solution, instead, it might make the situation more complex and leave the arbitrators with weaker position and less protection compared to the situation they are already granted under the common law(36).

(33) Tom Ginsburg, «The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration « (John M. Olin Program in Law and Economics Working Paper No. 502, 2009).

(34) Swiss Chambers› Arbitration Inst., Swiss Rules of International Arbitration, art. 45 (2012).

(35) (Julian Lew, The immunity of arbitrators, 1990) (The Immunity of Arbitrators. Edited by Julian D. M. Lew. Lloyd›s of London Press Ltd, 1990. Published in conjunction with the School of International Arbitration

(36) Redfern, A., Martin Hunter, M. et al (2015) Redfern and Hunter on International Arbitration, 6th Ed. Oxford University Press

"Even before the statute, arbitrators had the same immunity as judges, and Baar v. Tigerman involved a situation no judge has to face, a suit for breach of contract. Thus, the law is, in Professor Reginald Alleyne's pithy phrase, "a zero-effect statute"[37]. There is a clear reluctance to decrease the level of immunity given to the arbitrators under common law. It is rather about making more emphasis that the arbitrators should be automatically protected with no need of further statuary rules to do so. The reluctance can be logically understood as the idea of arbitrator immunity could be traced back to the medieval era, where the doctrine of judicial immunity was initiated. The main idea behind the immunity came from the fact that judges should be afforded protection while exercising the work within their judicial capacity. This enhanced the functionality of the judicial system[38]. Under English common law, the doctrine of judicial immunity was derived and developed out of the appellate system[39]. This system, through its procedures, served as the standards and reference to correct judicial error[40].

In a case presented before the court, it started by examining the historical roots of judicial immunity under common law[41]. The court focused on different cases that the rationale of immunity was built on which states that "the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability"[42]. Based on the fact that the doctrine of judicial immunity under common law is clearly becoming recognized as an absolute immunity. The discussion of the court was in favor of extending the doctrine to include the work of "quasi-judicial figures like arbitrators"[43]. However, the court clarified its position that the "immunity for judicial or quasi-judicial officials is not unlimited"[44].

The stand of the courts is seemingly reluctant to support the idea of legislative protection to be introduced under common law. The logic behind this position is that the immunity is granted automatically any way for the arbitrators and arbitration institutions. However, as mentioned earlier, the English arbitration act 1996 conveyed a clear and undoubted legislative message that immunity

(37) Letter from Reginald Alleyne to Dennis R. Nolan (October 13, 1986).
(38) Letters to Dennis R. Nolan from William P. Murphy, President of the National Academy of Arbitrators (January 8, 1987) and from Professor David E. Feller (December 1, 1986).
(39) Bggvfvvcv P. Murphy, President of the National Academy of Arbitrators, April 24, 1987.
(40) Dennis R. Nolan and Roger I. Abrams, Arbitral Immunity, 11 Berkeley J. Emp. & Lab. L. 228 (1989).
(41) Forrester v. White, 484 U.S. 219, 225-26 (1988).
(42) Id. at 225.
(43) See generally Maureen A. Weston, Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration, 88 MINN. L. Rev. 449,476 (2004).
(44) Id. at 139-40.

is fully given to both, the arbitrators and arbitration institutions. Nonetheless, there is undisputed inclination that everyone involved in the arbitration process to be exempted from any kind of liability(45).

Arbitration theories and their impact on the level of immunity

The arbitration and its functionality are initiated based on different theories. The contractual theory is followed by European countries that adopt the civil law was initiated in the nineteenth century(46). The focus of this theory is the arbitration agreement, namely, the arbitrators would derive the authority to make the award from the arbitration agreement. Therefore, the arbitrators are considered to act, as agents of the disputing parties in determining the dispute(47). Under this theory, the countries do not deal with arbitrators and judges to be equivalents(48).

Consequently, arbitrators rather would be viewed to be as professionals where they would be subject to civil liability(49). Nonetheless, this would not be the case regarding the Judges. They are granted complete immunity against civil liability(50). This gained significant support in recent years, where legal commentators favored the immunity that is derived from the contractual model(51). However, it is worth noting that the contractual model may end up holding arbitrators liable to suit if disputing parties and the arbitral institution agreed on this in the arbitration agreement"(52).

On the other hand, the jurisdictional theory gives the arbitrators a position that is parallel to the judges(53). In the United States where the theory is adopted has formed a view towards the arbitration that grants a complete arbitral immunity(54). The justification that stands behind this theory is that complete immunity would be an assurance for the disputing parties to seek arbitration "as an alternative dispute resolution"(55).

(45) Kill v. Hollister, 95 Eng. Rep. 532, 532 (K.B. 1746).
(46) Id. at 140 (quoting Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 435 (1993)).
(47) Id. at 140.
(48) LId. at 140-41.
(49) Anastasia Tsakatoura, Arbitration: The Immunity of Arbitrators, LEx E-Scripta Online Legal. J. (June 20, 2002), available at http://www.inter-lawyer.com/lex-e-scripta/articles/arbitratorsimmunity.htm (last visited Apr. 14, 2009).
(50) Id.
(51) Id.
(52) Id.
(53) Id.
(54) Id.
(55) Id.

The hybrid theory [56]or mixed theory supports qualified immunity, where it's believed that the arbitration nature equally contains some parts from the contractual and jurisdictional theory, Explaining the hybrid theory, Messrs Redfern and Hunter, stated that:

"International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award which has binding legal force and effect and which, on appropriate conditions being met, the courts of most countries of the world will be prepared to recognize and enforce. The private process has a public effect, implemented by the support of the public authorities of each state expressed through its national law"[57].

Under the United States common law where the jurisdictional theory is adopted and followed, the scope of the judicial immunity was expanded further[58]. Hence, when arbitrators carry out their duties based on the quasi-judicial role they would be treated as a "functional equivalent" of judges. The case is not different under English common law. Supporting this stand courts adopted this approach and decided that the arbitrators would enjoy the protection that is given by the doctrine of judicial immunity[59]. The courts concluded that relying upon "the rationales of former decisions regarding judicial immunity" that was initiated by the previous courts' decisions[60]. It is been argued that the "arbitral immunity is crucial to provide protection to the arbitrators so they would be freed from any unnecessary influence and also to give an assurance that the arbitral process would be protected from the complaints of the disappointed plaintiffs"[61].

Conclusion and findings

In general, it seems that the courts that act under common law ruled out "arbitrators and arbitral institutions have absolute immunity" as long as they are conducting their work within their arbitral capacity. This was evident from different cases where the court ruled out that the arbitrators and the ICC are

(56) Id.
(57) Id.
(58) Alan Redfern Et al., Law and Practice of International Commercial Arbitration 8 (2d ed., 1991).
(59) Id.
(60) Sara Roitman, Beyond Reproach: Has the Doctrine of Arbitral Immunity Been Extended Too Far for Arbitration Sponsoring Firms?, 51 B.C.L. Rev. 557 (2010), http://lawdigitalcommons.bc.edu/bclr/vol51/iss2/6.
(61) New England Cleaning Servs. v. Am. Arbitration Ass›n, 199 F.3d 542, 545 (1st Cir. 1999).

"absolutely immune from suit". Decisions are being justified by stating that "all of the acts alleged that gave rise to liability were done "in connection with the arbitration". The justification included that the immunity comes as a result of "both the contractual agreement and arbitral immunity doctrine". Unlike most of the Civil Law countries, the leading common law countries, mainly the USA and UK, give the arbitrators and arbitration institutions an absolute immunity from any liability that can occur in case of errors. Therefore, the arbitration process will be carried out with an assurance to the arbitration operators that they would be protected automatically as long as they are acting within the arbitral capacity. However, this absolute immunity would have an exception. Namely, this immunity would be left or abandoned in the case of substantiated 'bad faith'

In main common law countries, the arbitration operator is gaining immunity as being treated like a judge. It would be understood that under common law the immunity is considered by the functions that it protects, not to whom it applies. Under common law, the analogy was based on the comparison with the judge where case law was established. In contrast, France did not adopt this approach quite early on (CC Civ., 29 January 1960, Houdet). However, in the time where judges enjoy the absolute immunity under the common law. The main Civil Law countries such as France Germany, Switzerland Austria, adopt "the general principle of the judge's liability" when serious personal misconduct occurred. This is justified as being the State measure taken to safeguard the "victims and reserves the right to exercise the action itself in the case of personal wrongdoing".

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