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## ***Baar v. Tigerman: An Attack on Absolute Immunity for Arbitrators!***

### INTRODUCTION

An influential and potentially far reaching case decided by a California Court of Appeal ultimately may have great impact on arbitration in the state of California and possibly in other jurisdictions as well.<sup>1</sup> Traditionally, arbitrators have been granted an immunity similar to the absolute judicial immunity given to judges in the decisionmaking process; they have not been held personally liable for acts and conduct associated with arbitration proceedings.<sup>2</sup> In contrast, the second district appellate court in *Baar v. Tigerman* denied such arbitral immunity to an arbitrator who failed to make a timely award, and permitted a cause of action in breach of contract directly against him.<sup>3</sup>

No California court had addressed the problem of arbitral immunity until *Baar v. Tigerman*, and the decision represents a significant inroad into the doctrine of automatic immunity for arbitrators.<sup>4</sup> Essentially, blanket protection for an arbitrator's misconduct was rejected and a court must now examine the factual context out of which the claim arose. If the alleged wrongful acts by the arbitrator are sufficiently remote from the decisionmaking process, arbitral immunity may not be automatically granted. After *Baar*, other disgruntled parties to arbitration are likely to pursue their grievances against arbitrators and other courts will be asked to decide similar issues. Therefore, this Note will examine whether the denial of automatic immunity for all conduct related to the arbitration proceeding will necessarily be a burden on the process, and whether the denial will promote the essential integrity of arbitration and consequently help to preserve it as a successful and useful alter-

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1. Only a few state jurisdictions have had occasion to rule on arbitral immunity. See *infra* notes 61-68 and accompanying text.

2. Domke, *The Arbitrator's Immunity From Liability: A Comparative Survey*, 3 U. Tol. L. Rev. 99 (1971) [hereinafter cited as Domke, *Arbitrator's Immunity*]. See *infra* notes 52-60 and accompanying text.

3. *Baar v. Tigerman*, 140 Cal. App. 3d 979, 985, 189 Cal. Rptr. 834, 839 (1983). A hearing was denied by the California Supreme Court in a 4-3 decision. The trial court sustained defendant's demurrer and granted dismissal of the suit based on the doctrine of arbitral immunity. In reversing, the court of appeals stated: "a cause of action at the least was stated in breach of contract . . ." Presumably, the trial court would now decide whether the other causes of action listed were applicable. See *infra* note 103.

4. *Id.*

native method of conflict resolution.<sup>5</sup>

The focus of this Note is arbitral immunity in the context of commercial arbitration and the attendant procedure; however, application of the doctrine is not necessarily limited to such private contractual agreements.<sup>6</sup> As will be demonstrated, dissatisfied plaintiffs have also tried to sue arbitrators personally in labor arbitrations,<sup>7</sup> New York Stock Exchange arbitrations<sup>8</sup> and in judicially mandated arbitrations.<sup>9</sup>

Since arbitration has specifically been identified as a desirable alternative solution to the congestion of the courts and is likely to gain even more in favor,<sup>10</sup> the *Baar* decision may have wide ranging influence not only in California, but also on the concept of arbitral immunity in other jurisdictions. This Note will analyze the case in the context of its particular fact pattern, and in its relationship to existing California law. It will also reflect upon the ramifications of the decision with respect to the broader context of public policy.<sup>11</sup>

## I. HISTORY AND BACKGROUND OF ARBITRATION

### A. Historical Background

Arbitration is a voluntary, private method of settling disputes without making use of the court system.<sup>12</sup> Early accounts indicate that arbitration was used in Iceland to settle bloody feuds, in Greece to decide disputes between towns and by the Yurok Indians, who brought in non-relatives from outside their community to help settle conflicts.<sup>13</sup> Arbitration was commonly used in medieval

5. See *infra* notes 91-98, 149-55 and accompanying text.

6. See *infra* notes 26 and 32.

7. See *Calzarano v. Liebowitz*, 550 F. Supp. 1389 (S.D.N.Y. 1982), *infra* note 81. See also *Delta Lines, Inc. v. International Bhd. of Teamsters*, 66 Cal. App. 3d 960, 136 Cal. Rptr. 345 (1977).

8. *Corey v. New York Stock Exch.*, 691 F.2d 1205 (6th Cir. 1982). See *infra* notes 84-87 and accompanying text. See *Tamari v. Conrad*, 552 F.2d 778 (7th Cir. 1977), *infra* note 81.

9. See *Raitport v. Provident Nat'l Bank*, 451 F. Supp. 522 (E.D. Pa. 1978), *infra* note 81. See also CAL CIV. PROC. CODE §§ 1141.10-1141.32 (West 1982), *infra* note 33.

10. Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274 (1982) [hereinafter cited as Burger, *Better Way*]. This article is a reprint of Chief Justice Burger's annual address to the ABA Convention in 1982. Briefly, because of an overload in the court system arbitration has lately been accorded attention with renewed vigor as a way to relieve the burden on the conventional litigation process. See *infra* notes 91-94. See also Hiltzik, *Cures for Caseload Crisis Prove Elusive*, L.A. Times, Feb. 20, 1984, at 1, col. 4 (Chief Justice Burger again reiterates the problems in civil litigation in his annual speech to the ABA Convention).

11. See *infra* notes 91-98, 149-55 and accompanying text.

12. M. DOMKE, COMMERCIAL ARBITRATION § 1.01.1 (G. Wilner ed. 1968 & Supp. 1983) [hereinafter cited as DOMKE, COMMERCIAL ARBITRATION].

13. E. TEPLE & R. MOBERLEY, ARBITRATION AND CONFLICT RESOLUTION 1-2 (1979).

Spain, in North Africa and in Germany. When the Romans barred the Jews from their civil courts, the Jews resorted to a clandestine private system of arbitration.<sup>14</sup> Even Paul exhorted the early Christians to avoid the courts and submit their disputes to private settlement.<sup>15</sup>

The Merchant Guilds in England had a particularly well developed and traditional method for settling conflicts amongst themselves, although the procedures lacked the characteristics that arbitration has now.<sup>16</sup> Yet, early common law courts developed a hostility to arbitration, because the common law judges viewed arbitration as a threat to their social power and prestige and they feared the loss of income.<sup>17</sup> Furthermore, modern courts only reluctantly recognized agreements to arbitrate and such agreements were deemed revocable at will.<sup>18</sup> The last fifty to seventy-five years have finally brought both statutory and judicially recognized changes to arbitration<sup>19</sup> along with an almost universal recognition of its value as a viable alternative to civil litigation.<sup>20</sup>

### B. Modern Practices in Arbitration

Presently, trade and business associations, chambers of commerce, labor unions and other institutions have developed various rules, procedures, and methods for the arbitration process. By tailoring these regulations to the specific needs and criteria of particular business or industry practices, it is easier to provide convenient, knowledgeable and efficient resolution to disputes.<sup>21</sup>

Additionally, the American Arbitration Association emerged in

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14. *Id.* at 2.

15. *Id.* Paul wrote to the early Christians in Corinth: "When any of you have a grievance against another aren't you ashamed to bring the matter to be settled before a pagan court instead of before the Church? . . . Are you really unable to find among your number one man with enough sense to decide a dispute between one and another of you, or must one brother resort to the law against another and that before those who have not faith in Christ?" 1 *Corinth* 6:1-5 (The New Testament in Modern English).

16. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 137-38 (1934) (Since traders and merchants traveled it is possible that the common law courts simply had no jurisdiction and so the method outside the courts developed as an alternative).

17. *Id.* at 141-43.

18. *Id.* at 138-40.

19. See *infra* notes 30-43 and accompanying text.

20. See generally Domke, *Arbitrator's Immunity*, *supra* note 2. See *supra* note 10 and *infra* notes 91-94 and accompanying text.

21. DOMKE, COMMERCIAL ARBITRATION, *supra* note 12, § 2.01.

The very refinements and complexities of our court machinery often make it cumbersome and dilatory when applied to controversies involving simple issues of fact or law. This is especially true in the case when the issue of fact turns upon expert knowledge as to the nature or quality of merchandise or the damage consequent upon the failure to perform a contract for its delivery . . . which can be better determined by a layman having training and experience in

1926 as a nonprofit organization which is independent of any particular industry trade or interest group.<sup>22</sup> It administers arbitrations, maintains panels of experts and has developed rules and procedures especially suitable for each specialty and area of expertise.<sup>23</sup>

Typically, parties write an arbitration clause into their contract specifying various appropriate methods by which they wish to arbitrate, one of which may be to direct the American Arbitration Association to facilitate the proceeding.<sup>24</sup> The Association will provide the list from which parties select an arbitrator; he or she may be paid depending on the type, length, and complexity of the proceeding.<sup>25</sup> Neither the arbitrator nor the Association would have any power over the parties unless they have agreed to submit

a particular trade or business than by a judge and jury who have not had that training and experience.

*Id.* (quoting Harlan F. Stone, 10 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 197 (1923)).

22. *Id.* § 2.02.

23. See generally AAA General Counsel's Annual Report, *Arbitration & the Law, 1982* (an overview of the range of activities of the American Arbitration Association). See also AAA, *Modern Dispute Settlement Through the American Arbitration Association*. (The AAA has developed special procedures that are adapted to business, to the construction industry, to labor and even to International Trade for just several examples.)

24. American Arbitration Association, *Commercial Arbitration Rules* (1982) [hereinafter cited as AAA, *Rules*]. The Association provides a sample contract clause that can be used to incorporate their rules. Parties can also write their own provisions as they may wish. The suggested language of the Association Clause for inclusion in a contract reads:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.

*Id.*

For submission to arbitration of existing disputes for which parties did not previously have an agreement to arbitrate:

We, the undersigned parties, hereby agree to submit to arbitration under the commercial Arbitration Rules of the American Arbitration Association the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one) (three) Arbitrator(s) selected from the panels of Arbitrators agree that we will faithfully observe this agreement and the Rules and that we will abide by and perform any award rendered by the Arbitrator(s) and that a judgment of the Court having jurisdiction may be entered upon the award.

*Id.*

25. See AAA, *Rules, supra* note 24, No. 51 which provides in part:

In prolonged or in special cases the parties may agree to pay a fee, or the AAA may determine that payment of a fee by the parties is appropriate and may establish a reasonable amount, taking into account the extent of service by the Arbitrator and other relevant circumstances of the case. When neutral Arbitrators are to be paid, the arrangements for compensation shall be made through the AAA and not directly between the parties and the Arbitrators.

to arbitration; thus, the arbitrator's power to make a decision comes from private contract.<sup>26</sup>

The Association has established technical rules that cover time limits, fees, location, evidence, and general conduct of proceedings.<sup>27</sup> The Association has also developed an Arbitrator's Code of Ethics which serves as a guideline for the participation and conduct of the arbitrator.<sup>28</sup>

### C. Statutory Schemes and Case Law

Federal<sup>29</sup> and state statutes<sup>30</sup> now control and facilitate arbitrations of all kinds. These include labor,<sup>31</sup> private,<sup>32</sup> and judicially mandated arbitrations,<sup>33</sup> as well as those sponsored by organizations,<sup>34</sup> and those otherwise required by specific statute.<sup>35</sup>

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26. CAL. CIV. PROC. CODE § 1281 (West 1982) provides: "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." *Straus v. North Hollywood Hosp.*, 150 Cal. App. 2d 306, 309-10, 309 P.2d 541, 544 (1957) ("An arbitration proceeding is grounded in the mutual assent of the disputants to the resolution of their controversy by such tribunal and the arbitrators derive their powers from the submission agreement."). *Accord* *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1209 (6th Cir. 1982) ("By agreement, the parties invoked the arbitrator's independent judgment and discretion.").

27. AAA, *Rules*, *supra* note 24, No. 41, Time limit; Nos. 7, 51, Fees; No. 11, Location; No. 31, Evidence. *See also* American Arbitration Association, *Voluntary Labor Arbitration Rules (1979)* (similar procedures tailored to labor arbitration).

28. American Arbitration Association, *Code of Ethics for Arbitrators in Commercial Disputes (1977)* [hereinafter cited as AAA, *Code of Ethics*].

29. 9 U.S.C. §§ 1-14 (1982).

30. CAL. CIV. PROC. CODE §§ 1280-94 (West 1982). DOMKE, COMMERCIAL ARBITRATION, *supra* note 12, at Appendix I. (All states have enacted an arbitration statute (including District of Columbia and Puerto Rico).) *Id.* § 4.02. (Not all states have enacted statutes that allow for arbitration clauses that will govern future disputes).

31. 45 U.S.C. §§ 155-59 (1982) (arbitration provisions in Railway Labor Act). CAL. LAB. CODE §§ 1700.44, 1700.45 (West 1971) (arbitration provision for artist/management agreements).

32. *See supra* note 26. Arbitration that is agreed upon between two parties not otherwise required to do so would be considered "private." Their written agreement to arbitrate will, however, be covered by the statute. *See generally* DOMKE, COMMERCIAL ARBITRATION, *supra* note 12, §§ 4.01, 4.02, 4.03. *See also infra* note 38 regarding common law arbitration.

33. Voluntary, as opposed to judicially mandated arbitration, as the term is used in this Note refers to arbitration that parties agree upon either initially in their contract or at the time of their dispute. *See supra* notes 26 and 32, and *infra* note 40 and accompanying text. CAL. CIV. PROC. CODE § 1141.10 (West 1982) is an example of a judicial arbitration statute. Arbitration is mandated in disputes of certain types as set forth in the statute. A trial de novo can be had at all times, even though parties have gone through arbitration. Arbitral immunity in such a case is not the subject of this Note, even though in certain instances an analogous situation to *Baar* is possible. *See also* DOMKE, COMMERCIAL ARBITRATION, *supra* note 12, § 1.03.

34. *See Corey v. New York Stock Exch.*, 691 F.2d 1205 (6th Cir. 1982) (Arbitrations sponsored by the New York Stock Exchange).

35. For an example *see* ARIZ. REV. STAT. ANN. 12-1518 C (1982) which provides for mandatory arbitration of public works contract disputes for less than \$100,000.

California has enacted arbitration statutes,<sup>36</sup> which encourage parties to use arbitration and to find alternative methods to conventional court proceedings for their conflict resolution. The statutes provide the framework through which the arbitration agreement is given effect.<sup>37</sup> Although at early common law California courts were reluctant to do so,<sup>38</sup> they now look with favor upon private resolutions of disputes by enforcing contractual agreements to arbitrate.<sup>39</sup> The agreement to arbitrate is contractual, voluntary and private between the parties.<sup>40</sup>

When parties agree to arbitrate either future or present controversies, they give up certain civil and legal remedies which they would ordinarily enjoy should they choose to litigate conventionally. An arbitrator is not bound by strict adherence to legal procedure.<sup>41</sup> He has power to decide issues of law as well as fact.<sup>42</sup> The

36. CAL. CIV. PROC. CODE §§ 1280-96 (West 1982).

37. CAL. CIV. PROC. CODE § 1281 (West 1982), *see supra* note 26. *Lauria v. Soriano*, 180 Cal. App. 2d 163, 170, 4 Cal. Rptr. 328, 332 (1960). ("The purpose of the law in recognizing arbitration agreements and in providing statutory means of enforcement is to encourage persons to avoid delays by obtaining adjustment of their differences by an agency of their own choosing.")

38. *See supra* notes 16-18 and accompanying text. For the role of common law arbitration in California today *see* 6 CAL. JUR. 3d *Arbitration and Award* §§ 4-6 (1980). All agreements in writing are governed by the California Statute; however, if an agreement is oral, common law rules possibly would apply; such an agreement is revocable any time and is not binding, i.e., a trial de novo can be had after an arbitration. *See generally* DOMKE, *COMMERCIAL ARBITRATION*, *supra* note 12, § 3.02. *See also* Feldman, *Arbitration Law in California*, 30 S. CAL. L. REV. 375, 390-1 nn.54-58 (1957) (There is some question whether common law arbitration still exists; but it does not exist as to a writing).

39. *Lehto v. Underground Const. Co.*, 69 Cal. App. 3d 933, 939, 138 Cal. Rptr. 419, 422 (1977) ("The policy of the law is to favor arbitration, and every reasonable intendment is indulged to give effect to such proceedings."). *Pacific Inv. Co. v. Townsend*, 58 Cal. App. 3d 1, 9, 129 Cal. Rptr. 489, 493 (1976) ("Arbitration is highly favored as a method of settling disputes."). *Crofoot v. Blair Holdings Corp.*, 119 Cal. App. 2d 156, 184, 260 P.2d 156, 170 (1953) ("Such statutes evidence a strong public policy in favor of arbitrations, which policy has frequently been approved and enforced by the courts.")

40. *Tipton v. Systron Donner Corp.*, 99 Cal. App. 3d 501, 505, 160 Cal. Rptr. 303, 305 (1979) ("Arbitration . . . has been defined as a 'a voluntary procedure for settling disputes. . . .'" ). *See supra* notes 33, 38, 39 and accompanying text.

41. *Lauria v. Soriano*, 180 Cal. App. 2d at 170, 4 Cal. Rptr. at 333 ("Furthermore, arbitrators are not bound by strict adherence to legal procedure and to the rules on the admission of evidence expected in judicial trials.")

42. *Lehto v. Underground Const. Co.*, 69 Cal. App. 3d at 937, 138 Cal. Rptr. at 442 ("Once a valid award is made by the arbitrator it is conclusive on matters of fact and law . . ."). *Marcus v. Superior Ct.*, 75 Cal. App. 3d 204, 210, 141 Cal. Rptr. 890, 892 (1977) ("However, to the extent real party is maintaining that an arbitrator cannot pass upon legal issues, as distinct from factual issues his contention is without merit."). *Compare* *Crofoot v. Blair Holdings Corp.*, 119 Cal. App. 2d at 185, 260 P.2d at 171 ("The earlier cases held that the court had the power to review errors of law." Courts were reluctant to give up the power to review all the issues, but later cases support the view that even if an arbitrator makes error of law an award cannot be vacated for this reason.)

merits of the controversy, the nature and sufficiency of the evidence, the nature and credibility of the parties and alleged errors of law are not subject to judicial review.<sup>43</sup> When disgruntled parties agree to submit their conflict to arbitration, they additionally give up their right to a judge and a jury in exchange for swift, effective and economical resolution of their dispute.<sup>44</sup>

The courts will construe agreements or contract clauses to arbitrate with every possible intention to give them effect.<sup>45</sup> The only grounds for vacating an award are found in the statute<sup>46</sup> and there

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43. *Pacific Vegetable Oil Corp. v. C.S.T. Ltd.*, 29 Cal. 2d 228, 238, 174 P.2d 441, 448 (1946) ("The form and sufficiency of the evidence, and the credibility and good faith of the parties . . . are not matters of judicial review."). *Id.* at 233, 174 P.2d at 445 ("The merits of the controversy between the parties are not subject to judicial review."). *Straus v. North Hollywood Hosp.* 150 Cal. App. 2d 306, 310, 309 P.2d 541, 544 (1957) (citing *Pacific* with approval). See also CAL. CIV. PROC. CODE § 1286.2 (West 1982) which provides:

Subject to Section 1286.4, the court shall vacate the award if the court determines that:

- (a) The award was procured by corruption, fraud or other undue means;
- (b) There was corruption in any of the arbitrators;
- (c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;
- (d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or
- (e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

Compare *Crofoot v. Blair Holdings Corp.*, 119 Cal. App. 2d at 186, 260 P.2d at 172, where the court indicates that "in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law may not be reviewed except as provided in the statute." Under that view it would be possible to write into an arbitration clause a nonbinding provision, i.e., a trial on all the merits if parties do not like the arbitrator's decision. But see *Graham v. Scissor Tail*, 28 Cal. 3d 807, 824, 623 P.2d 165, 175, 171 Cal. Rptr. 604, 614 (1981), where the California Supreme Court, while expressly recognizing parties' right to provide "arbitral machinery of their own design and composition," denies them the right to provide for non-neutral arbitration. See *infra* note 153 and accompanying text. The issue does not seem to have been expressly decided.

44. *Player v. Brewster & Son*, 18 Cal. App. 3d 526, 534, 96 Cal. Rptr. 149, 154 (1971) ("One of the principal purposes which arbitration proceedings accomplish is to relieve that congestion and to obviate the delays of litigation.").

45. *Pacific Inv. Co. v. Townsend*, 58 Cal. App. 3d at 9, 129 Cal. Rptr. at 493, ("Courts should indulge every intentment to give effect to such proceedings.").

46. See CAL. CIV. PROC. CODE § 1286.2, *supra* note 43. *Canadian Indem. Co. v. Ohm*, 271 Cal. App. 2d 703, 707, 76 Cal. Rptr. 902, 904 (1969). ("The sole grounds for vacating an arbitration award are those set forth in Code of Civil Procedure."). An additional nonstatutory ground for vacating an award also exists in California: Impression of possible bias. This rule is based on a United States Supreme Court decision *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), in which the court held that an actual showing of fraud, misconduct or partiality was not necessary, but the failure to disclose the possibility of a partiality was in certain circumstances enough to vacate an award. This holding has been recognized in *Fifi v. New Hampshire Inc.*, 108 Cal. App. 3d 772, 166 Cal. Rptr. 773 (1980); *Tipton v. Systron*



is a strong presumption in favor of the award when a party attempts to have it vacated.<sup>47</sup>

In summary, arbitration has evolved into a favored method for resolution of conflicts especially when the parties require a swift and economical solution;<sup>48</sup> many of the legal niceties are bypassed because of this ultimate goal,<sup>49</sup> and by agreeing to arbitrate, the parties accept the accompanying limitations.<sup>50</sup>

## II. ARBITRAL IMMUNITY

There has been little, if any controversy concerning the concept of arbitral immunity until now. According to one author:

There is hardly any aspect of arbitration law and practice more settled . . . than the immunity of arbitrators from court actions for their activities in arriving at their award. This concept is originally based on the immunity of the judiciary in order to preserve the integrity and independence of its members and protecting them from harassment through court action to which they may otherwise be exposed by a dissatisfied party.<sup>51</sup>

### A. Judicial Immunity

Simply stated, judges are not held personally liable for acts, conduct and alleged mistakes for which a disgruntled plaintiff may try to sue them; "the judge is not liable in damages in an action by a litigant or private person."<sup>52</sup> The United States Supreme Court first recognized the principle of judicial immunity in *Bradley v. Fisher*.<sup>53</sup> The Court, subsequently emphatically underlined and approved the doctrine as recently as 1978 in *Stump v. Sparkman*,<sup>54</sup> when it held, citing *Bradley*, that judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."<sup>55</sup>

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Donner Corp. 99 Cal. App. 3d 501, 160 Cal. Rptr. 303 (1979); *Johnston v. Security Ins. Co.*, 6 Cal. App. 3d 839, 86 Cal. Rptr. 133 (1970).

47. *American & Nat'l League Baseball Clubs v. Major League Baseball Players*, 59 Cal. App. 3d 493, 498, 130 Cal. Rptr. 626, 628 (1976) ("Every intendment of validity must be given the award and doubt must be resolved in its favor.")

48. See *supra* note 44 and *infra* note 95.

49. See *supra* notes 41-44 and accompanying text.

50. DOMKE, COMMERCIAL ARBITRATION, *supra* note 12, §§ 1.01-1.02.

51. Domke, *Arbitrator's Immunity*, *supra* note 2, at 99.

52. *Wyatt v. Arnott*, 7 Cal. App. 221, 227, 94 P. 86, 89 (1907).

53. 80 U.S. (13 Wall.) 335 (1872).

54. 435 U.S. 349 (1978).

55. 435 U.S. at 356. The Court in *Bradley* made the immunity applicable when a judge acts in excess of jurisdiction, but not when he acts in absence of jurisdiction. This distinction had historical significance now largely obsolete. *Stump v. Sparkman*, repeated the distinction. For an especially enlightening historical analysis of judicial im-

The test, as emphasized in *Stump*, is whether the act or activity complained of, is a judicial act and, if so, is it in absence of the judge's jurisdiction or in excess of his jurisdiction.<sup>56</sup> Since the decision in *Stump* seemed particularly outrageous,<sup>57</sup> a substantial quantity of critical opinion followed, opposing the Court's holding that judges should be automatically protected for judicial acts regardless of possible misconduct.<sup>58</sup>

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munity see Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L. REV. 201 (1980) [hereinafter cited as Feinman, *Suing Judges*].

56. If a judge normally has the power to send someone to jail for an infraction and he makes a mistake or deliberately sends someone to prison for a nonexistent crime this would be construed as in excess of jurisdiction. Accordingly within the purview of the doctrine, if he has no jurisdiction to put a person in jail, he acts in absence of jurisdiction.

57. The judge ordered a 15-year-old semi-retarded girl to be sterilized because her mother requested it. He failed to appoint a guardian for the girl; she was not told of the procedure, and there was no opportunity to appeal. After she married she discovered her sterility. She then sued the judge for damages. The district court granted immunity; the court of appeals reversed, and finally, the Supreme Court reversed that decision and upheld the district court's decision of the grant of immunity.

58. Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237, 239 (1978) The next shift in the case law should be to qualify judicial immunity in civil rights cases. Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Immunity*, 64 VA. L. REV. 833, 858 (1978) The central policy of fostering a fearless and independent judiciary would have been far better served had the Court instead found him amenable to suit by holding correctability on appeal to be a crucial underpinning of absolute judicial immunity. Way, *A Call for Limits to Judicial Immunity, Must Judges Be King in Their Courts?* 64 JUDICATURE 390, 399 (1981):

But there is another and more important dimension to this problem. Given the absolute nature of the immunity, the doctrine immunizes torts which, if committed by a government executive, would be compensable. Thus, . . . tortious acts of a malicious or unreasonable nature were immunized. If the current doctrine were qualified by either a malice standard or a negligence standard, it seems likely that some of these cases would have gone to trial on the merits. . . .

There was a time when judges were kings in their courts. But monarchs in a democratic society are an anachronism, no matter how small their kingdom or how rarely their subjects suffer abuse.

See also Feinman, *Suing Judges*, *supra* note 55. Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549 (1978). Recommends cause of action against judges when the misconduct can be characterized as willful, reckless, malicious and corrupt.

The purpose of this Note is not to criticize judicial immunity; however, it is apparent that there is a great deal of scholarly dissatisfaction with the concept. The judiciary seems intent on protecting itself, but indeed has narrowed other immunity concepts. Particularly under attack is the increasingly irrelevant distinctions of "excessive jurisdiction" versus "in absence of jurisdiction." More rational and logical distinctions might be derived from type of misconduct: for example, negligence, unreasonableness, maliciousness or fraud. All such distinctions have their own drawbacks, however, See Feinman, *Suing Judges*, *supra* note 55, at 261-66. It seems reasonable to assume that if the concept of judicial immunity is softened as this author believes will happen arbitral immunity will almost certainly be reanalyzed. Conversely, if arbitral immunity as distinct from judicial immunity is narrowed, this may eventually lead to additional reevaluation of judicial immunity.

In a very recent development the Supreme Court held in *Pulliam v. Allen*, 104 S. Ct. 1970 (1984), that a judge may be held responsible for attorney fees when a claimant

Of some consequence is the fact that many of the traditional absolute immunities for various agencies, executive officers, and government officials have slowly been eroded and have been replaced by various good faith and reasonableness tests, thereby in effect giving qualified immunities.<sup>59</sup> Additional scrutiny of both judicial and arbitral immunity is both timely and inevitable.<sup>60</sup>

### B. *Judicial Immunity Applied to Arbitrators: State Case Law*

In the United States the concept of judicial or quasi-judicial immunity has also been extended to arbitrators. *Jones v. Brown*,<sup>61</sup> is generally credited for the first approval of the doctrine. The arbitrator in *Jones* sued for nonpayment of his fee and the defendants counterclaimed for damages, since the arbitrator had rendered the award without having any power to do so. The court, however, declined to find the arbitrator liable, and, citing *Bradley*<sup>62</sup> reasoned that: “[i]t does not seem to be seriously contended that arbitrators of matters of difference between parties do not act in judicial capacity. That they are in a certain sense a court, cannot be questioned.”<sup>63</sup> In *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*,<sup>64</sup> an arbitrator was sued for his alleged participation in a conspiracy with the attorney for opposing party. The *Hoosac* court also declined to find personal liability and in frequently cited language said: “An arbitrator is a quasi-judicial officer under our laws, exercising judicial functions. There is as much reason in his case for protecting

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under 42 U.S.C. §§ 1983, 1988 (1982) obtains injunctive relief. Though attorney’s fees are not technically damages, a small dent seems to have been made in finding judges responsible for misconduct even though the court had upheld judicial immunity under that statute in *Pierson v. Ray*, 387 U.S. 547 (1967). See Plotkin & Mazorol, *Judicial Malpractice*, 20 TRIAL 24 (1984).

59. *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison administrator entitled to qualified immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors entitled to immunity in their capacity as prosecutors); *Wood v. Strickland*, 420 U.S. 308 (1975) (school administrators entitled to qualified immunity); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state executive officials entitled to qualified immunity); *Butz v. Economou*, 438 U.S. 478 (1978) (federal executive officials entitled to qualified immunity). See also *Lynch, Butz v. Economou and Federal Executive Officials’ Immunity: Much Ado About Nothing?*, 59 U. DET. J. URB. L. 281 (1982) (for a critical view of executive immunity).

60. *Baar* is such an example. It is predictable that more cases will follow despite the line of cases which support immunity; eventually reevaluation takes place. See *supra* note 58 and *infra* note 148.

61. 54 Iowa 74, 6 N.W. 140 (1880). See generally Glick, *Bias, Fraud, Misconduct and Partiality of the Arbitrator*, 22 ARB. J. 161 (1967) [hereinafter cited as Glick, *Bias*].

62. 80 U.S. (13 Wall.) 335 (1871). See *supra* notes 55-58 and accompanying text.

63. 54 Iowa at 77, 6 N.W. at 142. The court relied for its reasoning on early cases applying absolute judicial immunity to judges.

64. 137 Mass. 424 (1884). The arbitrator was sued because of undue influence, i.e., alleged conspiracy between the attorney for plaintiff and the arbitrator in favor of the other party. The attorney was personally liable, but the arbitrator was not. It seems possible that a penal sanction could apply. See Glick, *Bias*, *supra* note 61, at 163. See also DOMKE, COMMERCIAL ARBITRATION, *supra* note 12, § 23.01.

and insuring his impartiality, independence and freedom from undue influence, as in the case of a judge or juror.”<sup>65</sup>

A few early courts followed *Hoosac* and *Jones*<sup>66</sup> and extended protective immunity to the arbitrator. They based their decision on the analogous concept of quasi-judicial function and on general public policy without employing an in-depth analysis of either the rationale or the circumstances of the particular case.<sup>67</sup>

Much later, a New York court<sup>68</sup> embraced the concept of arbitral immunity. It cited *Hoosac*,<sup>69</sup> and then expressed in its own words:

Considerations of public policy are the reasons for the rule and like other judicial officers, arbitrators must be free from fear of reprisals by an unsuccessful litigant. They must of necessity be uninfluenced by any fear of consequences for their acts. . . . I see no reason to distinguish between a judge and an arbitrator in deciding the issue herein. The analogy is clear, and considering the favor in which arbitration is held by the courts of this state, the same rule of immunity should apply to arbitrators as applies to the judiciary, inasmuch as the same reasons of public policy are applicable. If arbitrators are to be distinguished from jurists in this respect, a blow would be dealt to the cause of arbitration which is unwarranted.<sup>70</sup>

Another significant group of cases grant arbitral immunity to architects when they act in a quasi-judicial capacity as arbitrators between a contractor and an owner.<sup>71</sup> Architects often have several functions in construction projects. They are agents for the owner in a supervisory capacity, they prepare plans and specifications, and finally act as quasi-judicial officers in resolving disputes between the owner and the contractor.<sup>72</sup> The question in these cases is usually

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65. *Id.* at 426.

66. See *supra* notes 63-65 and accompanying text.

67. *Melady v. South St. Paul Live Stock Exch.*, 142 Minn. 194, 171 N.W. 806 (1919) (board of directors of a Live Stock Exchange organized and incorporated according to Minnesota Statute and accorded powers to adjudicate disputes were given immunity against civil suit). *Hutchins v. Merrill*, 109 Me. 313, 84 A. 412 (1912) (scaler of logs was given immunity in his decisionmaking capacity). Arguably, these might not be given *arbitral* immunity now; these cases seem more like an application of executive immunity.

68. *Babylon Milk & Cream Co. v. Horvitz*, 151 N.Y.S.2d 221 (Sup. Ct. 1956), *aff'd*, 4 A.D.2d 777, 165 N.Y.S.2d 717 (1957). In *Babylon*, an employer in a labor dispute tried to vacate an award on the basis of collusion and misconduct; unable to do so, plaintiff finally sued the arbitrator directly. The court declined to extend any alleged liability to the arbitrator.

69. 137 Mass. 424. See *supra* note 59 and accompanying text.

70. *Babylon*, 151 N.Y.S.2d at 224 (citing *Hoosac*, 137 Mass. at 426).

71. *E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas*, 551 F.2d 1026 (5th Cir. 1977), *reh'g denied in part*, 559 F.2d 268 (1977) *cert. denied*, 434 U.S. 1067 (1978). *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962).

72. *Huber, Hunt & Nichols, Inc. v. Moore*, 67 Cal. App. 3d 278, 299-300, 136 Cal. Rptr. 603, 616-17 (1977) (citing *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962)). An architect, in his arbitral capacity, is immune from personal liability absent fraud and

whether the architect was performing duties in his arbitration capacity. The immunity attaches strictly to his role as arbiter.<sup>73</sup> Otherwise, the reasoning is similar to cases dealing with immunity of other types of arbitrators.<sup>74</sup>

### C. Federal Case Law

The federal courts have also addressed the issue of arbitral immunity. In *Hill v. Aro Corp.*,<sup>75</sup> a 1967 labor arbitration case, the court acknowledged the few old cases<sup>76</sup> and one other labor arbitration case decided by a federal court.<sup>77</sup> As the court stated: "The history of litigation aimed at arbitrators is easily reviewed for there are few reported cases."<sup>78</sup>

In *Hill*, the plaintiff charged the arbitrator with fraud and collusion, but the court was not sympathetic to the plaintiff's theories: 1) that the arbitrator's actions were allegedly in excess of his jurisdiction; 2) that the plaintiff was a third party beneficiary to the arbitrator's implied contract with the Federal Mediation & Conciliation Service; 3) that neither Congress nor the Ohio Legislature had granted immunities, and finally; 4) that it was time for a change.<sup>79</sup> The court found that the strong public policy in favor of labor arbitration particularly ran counter to any argument an aggrieved plaintiff might have in these circumstances against "the all important labor arbitrator in the developing federal common law of labor relations."<sup>80</sup>

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collusion. *Accord* *Blecick v. School Dist. No. 18 of Cochise County*, 2 Ariz. App. 115, 406 P.2d 750 (1965); *Craviolini v. Scholer & Fuller Assoc. Architects*, 89 Ariz. 24, 357 P.2d 611 (1960) (architects granted immunity for arbitral functions); *Compare* *Wilder v. Crook*, 250 Ala. 424, 34 So. 2d 832 (1948) (an engineer accorded immunity for acts done in his judicial capacity).

73. *Huber*, 67 Cal. App. 3d at 300, 136 Cal. Rptr. at 616. (The court found that the architect was not acting in his arbitral capacity and, therefore, could be held liable. The court indicated that immunity might be available if the architect acted in arbitral capacity).

74. *Id.* "He is a quasi-judicial officer with certain immunity when he acts as arbiter in resolving disputes between the owner and the contractor."

75. 263 F. Supp. 324 (N.D. Ohio 1967).

76. *See supra* notes 61-68 and accompanying text. *Hill* cites the cases cited in this Note. *See also* *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962), which cites the Federal Arbitration Statute but also seems to use Oregon Law.

77. *Cahn v. International Ladies' Garment Union*, 203 F. Supp. 191 (E.D. Pa. 1962), *aff'd per curiam*, 311 F.2d 113 (3rd Cir. 1962) (Labor dispute where appellant manufacturer alleged fraud and collusion against arbitrator, and also that award was illegal. The arbitrator was granted immunity.).

78. *Hill*, 263 F. Supp. at 325.

79. *Id.* at 326.

80. *Id.* Labor arbitration is accorded special policy considerations. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) "Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here." *See supra* notes 16-17 and accompanying text.

Subsequent federal cases seem to affirm this position.<sup>81</sup> The only remedy for a dissatisfied plaintiff is vacatur of the award.<sup>82</sup> The courts tend to base their decisions on prior assumption about arbitral immunity rather than critical examination of underlying issues. They usually do not attempt an in depth analysis of the various functions and duties of an arbitrator to determine whether immunity is appropriate in the particular circumstances of any given case.<sup>83</sup>

An exception is *Corey v. New York Stock Exchange*,<sup>84</sup> in which the court went to some length to analyze arbitral immunity. The plaintiff in *Corey* sued the New York Stock Exchange for its role in an arbitration proceeding. The court reasoned that enough safeguards are built into the system; although curtailed in their legal remedies, disgruntled plaintiffs have several avenues by which to obtain redress.<sup>85</sup> First, since arbitration is an adversarial process, parties have a right to counsel, to at least limited discovery, and to present evidence and witnesses. Second, the arbitrator deliberates and issues a written opinion.<sup>86</sup> Third, there is an automatic right to judicial review if a party is dissatisfied with the decision. Finally, the court stated that the voluntariness of the arbitration is crucial

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81. *Tamari v. Conrad*, 552 F.2d 778 (7th Cir. 1977). The court gave immunity to an arbitrator in a challenge to the arbitrator's authority to solve a customer/brokerage house dispute. *Calzarano v. Liebowitz*, 550 F. Supp. 1389, 1391 (S.D.N.Y. 1982) (Labor arbitration: "[T]he principle . . . is the same as that giving rise to the doctrine of judicial immunity: the protection of the decisionmaking process from reprisals by dissatisfied litigants."). *Yates v. Yellow Freight System*, 501 F. Supp. 101, 105 (S.D. Ohio 1980) (Labor arbitration: "A validly appointed arbitrator is clothed with immunity analogous to judicial immunity against actions brought by either of the parties arising out of the performance of his duties."). *Raitport v. Provident Nat. Bank*, 451 F. Supp. 522 (E.D. Pa. 1978) (Judicial arbitration: Arbitrator immune because he was performing quasi-judicial duties.).

See also *Larry v. Penn Truck Aids, Inc.*, 94 F.R.D. 708 (E.D. Pa. 1982); *Rubinstein v. Otterbourg*, 78 Misc. 2d 376, 357 N.Y.S.2d 62 (N.Y. Civ. Ct. 1973).

82. 9 U.S.C. §§ 1-14 (1982).

83. See *supra* notes 63-65 and 81.

84. 691 F.2d 1205 (6th Cir. 1982).

85. *Id.* at 1209, 1210.

86. The court states that the arbitrator issues an opinion. However, the arbitrator does not have to give reasons for his opinion or award. Statutes do not usually call for that. For example, see CAL. CIV. PROC. CODE § 1283.4 (West 1982) which provides: "The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." Or see 9 U.S.C. § 9 (1982) (no mention of arbitrator finding facts and giving reasons for his award). *United Steelworkers v. Enterprise Wheeler Car Corp.*, 363 U.S. 593, 598 (1960) "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . . Arbitrators have no obligation to the court to give their reasons for an award." See also *Pacific Vegetable Oil Corp. v. C.S.T. Ltd.*, 29 Cal. 2d 228, 232, 174 P.2d 441, 444 (1946) ("There is no general rule that arbitrators must find facts or give reasons for their awards."); *Sapp v. Barenfeld*, 34 Cal. 2d 515, 522, 212 P.2d 233, 239 (1949) (citing *Pacific* with approval).

since individuals presumably will not choose arbitration over a remedy at law unless they strongly feel it to be to their advantage.<sup>87</sup>

The court in making its decision also used what it calls a "functional comparability test."<sup>88</sup> The arbitrator functions as a judge and, therefore, immunity attaches. "The immunity does not depend upon the source of the decisionmaking power but rather upon the nature of the power."<sup>89</sup> Further, the *Corey* court found the public policy arguments particularly compelling. Arbitrators need freedom to make independent judgments, and to be free from the threat of lawsuits; it is necessary to protect the decisionmaking process from reprisals of dissatisfied litigants. Federal policy favors arbitration, and a disgruntled plaintiff can appeal the award. An arbitrator has no interest in the outcome and, therefore, should not be part of such an action.<sup>90</sup>

### III. PUBLIC POLICY

Chief Justice Burger has stressed that the overburdened legal system needs relief. Americans increasingly turn to the courts for whatever conflicts and disputes that they have, even though it takes a long time to be heard or to have "your day in court."<sup>91</sup> In addition, litigants with greater frequency look for appellate relief if they lose on the first ground.<sup>92</sup>

Alternative methods of dispute resolution are becoming more and more necessary and desirable as the cost of litigation in energy, time and money, are increasing to record levels. "The traditional litigation process has become too cumbersome, too expensive and also

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87. 691 F.2d at 1210. This last argument, in particular, lacks power. Since litigants assume that the process will be reasonably impartial, they rely on such presumed reliability. The court seems to beg the issue; despite its analysis it fails to answer adequately the question with which this Note deals. What *should* the remedy be when an arbitrator does not behave reasonably?

88. *Id.* at 1209 (citing *Butz v. Economou*, 438 U.S. 478 (1978)) (qualified immunity given to executive officers). See *supra* note 59.

89. *Id.* at 1211.

90. *Id.* See also *International Union, United Auto. Workers of Am. v. Greyhound Lines*, 701 F.2d 1181 (6th Cir. 1983). The court granted arbitral immunity in a case under Employees' Retirement Income Security Act of 1974 (ERISA) despite labor department regulations that arbitrators in ERISA proceedings are fiduciaries. For a critique of this labor department policy see Dobranski, *The Arbitrator as a Fiduciary Under the Employee Retirement Income Security Act of 1974: A Misguided Approach*, 32 AM. U.L. REV. 65 (1982).

91. Burger, *Better Way*, *supra* note 10, at 275.

92. *Id.* From 1940 to 1981, annual Federal District Court civil case filings increased from about 35,000 to 180,000. From 1950 to 1981 annual court of appeals cases climbed from 2,800 to 26,000. Similar increases are found in state courts. Appellate filings increased eight times population growth and trial court filings increased double the rate of population growth.

burdened with many other disadvantages."<sup>93</sup> Furthermore, many disputes may not be worth extensive litigation efforts. Arbitration, as well as negotiation and mediation, may be adequate to deal with many such conflicts.<sup>94</sup>

The primary rationale for favoring and encouraging arbitration is to facilitate easier, faster, and less expensive conflict resolution.<sup>95</sup> Additionally, arbitration has subsidiary but important by-products; first, the decisionmakers have particular expertise in the subject matter of the dispute, and second, a forum is provided, which more easily permits solutions to be tailored to individual situations because it is unfettered by precedent and legal limitations.<sup>96</sup>

How then is this policy best implemented? The argument against anything less than absolute arbitral immunity in this context is that arbitrators may choose not to arbitrate if they can be held personally liable and that to encourage additional litigation is directly contrary to the stated goals.<sup>97</sup> From this perspective, vacatur of an award is a sufficient remedy.<sup>98</sup>

However, another viewpoint is possible. If the arbitrator and arbitration with its attendant procedures become insulated from all remedies other than the most limited,<sup>99</sup> parties may choose not to use arbitration. If absolute immunity is applied, regardless of circumstances, the process may fail to provide what is desired and necessary; namely a fair, impartial, quick and useful solution to conflict.<sup>100</sup> Not only is it necessary to have free and independent decisionmaking<sup>101</sup> it is also essential for arbitration to be fair or parties in conflict will not elect to use the process. It is at this juncture

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93. *Id.* at 277.

94. *Id.* See also, Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty First Century*, 76 F.R.D. 277 (1978) (recommendations by American Bar Association's task force regarding overcrowded courts and other judicial problems); Janofsky, *Reducing Court Costs and Delay*, 71 ILL. B.J. 94 (1982) (attack on delays in civil litigation with suggestions and examples of how to improve the system); Williams, *Court Delays and the High Cost of Civil Litigation: Causes, Alternatives, Solutions*, 71 ILL. B.J. 84 (1982) (a look at an alternative system in Detroit, Mich.).

95. *Lesser Towers, Inc. v. Roscoe-Ajax Const. Co.*, 271 Cal. App. 2d 675, 702, 77 Cal. Rptr. 100, 117 (1969). ("The very object of submitting matters to arbitration is to obviate or put an end to litigation.") See *supra* note 44. See also *supra* notes 91-94 and accompanying text. *Levy v. Superior Ct.*, 15 Cal. 2d 692, 704, 104 P.2d 770, 776 (1940) (In labor arbitration there exists another very important policy goal: labor peace.) See also *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982) ("Federal policy, as manifested in the Arbitration Act and case law, favors adjudication of differences by a means selected by the parties.").

96. DOMKE, COMMERCIAL ARBITRATION, *supra* note 12, § 2.01.

97. See *supra* notes 91-94 and accompanying text.

98. See *supra* notes 43-46 and accompanying text.

99. See *supra* notes 46-47 and accompanying text.

100. See *supra* notes 48-50 and accompanying text.

101. *Baar v. Tigerman*, 140 Cal. App. 3d 979, 982, 189 Cal. Rptr. 834, 836 (1983).



and in this context that *Baar v. Tigerman*<sup>102</sup> must be analyzed.

#### IV. THE CASE: *BAAR V. TIGERMAN*

##### A. *Facts and Holding*

In *Baar*, conflicting parties had contracted with the American Arbitration Association to conduct an arbitration pursuant to an arbitration clause in their disputed contract. When the arbitrator failed to render an award, the unhappy participants brought a civil suit against the arbitrator and the Association.<sup>103</sup>

Tigerman, the arbitrator, held approximately forty-three days of evidentiary hearings and ten days of closing arguments over a four year period. When he was not ready to make a decision thirty days after closing briefs were filed, he and the Association received a three month extension.<sup>104</sup> An award, however, was still not made. Finally, the parties pursuant to the governing statutes<sup>105</sup> noticed an objection to the arbitrator rendering any award; as a result, the arbitrator lost his authority to act.<sup>106</sup> Eventually, another arbitration took place and there was a settlement.<sup>107</sup> Subsequently, all parties to the dispute filed the instant suit based on the failure of the first

102. 140 Cal. App. 3d 979, 189 Cal. Rptr. 834 (1983).

103. 140 Cal. App. 3d at 982 n.5, 189 Cal. Rptr. at 836 n.5. Baar's complaint listed the following causes of action: 1) breach of contract; 2) negligence; 3) breach of implied covenant of good faith; 4) unjust enrichment; 5) detrimental reliance; 6) injurious falsehood; and 7) violations of constitutional rights. Edelman, another plaintiff, charged: 1) breach of contract; and 2) breach of implied covenant of good faith and fair dealing. Lustbader, a third plaintiff alleged: 1) breach of contract; and 2) negligence.

104. Appellant's Brief at 4, *Baar v. Tigerman*, 140 Cal. App. 3d 979, 189 Cal. Rptr. 834 (1983) [hereinafter cited as Appellant's Brief]. The case states that this extension was agreed upon by the parties. Appellant Baar's brief alleges that the extension was unilaterally granted by the Association. However, since in any event no award was ever made, this point was moot. See AAA, *Rules*, *supra* note 24, Nos. 39 and 41 which provide:

The award shall be made promptly by the Arbitrator and, unless otherwise agreed by the parties, or specified by law, no later than thirty days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the Arbitrator.

The parties may modify any period of time by mutual agreement. The AAA for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefor.

105. CAL. CIV. PROC. CODE § 1283.8 (West 1982) which provides:

The award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on petition of a party to the arbitration. The parties to the arbitration may extend the time either before or after the expiration thereof. A party to the arbitration waives the objection that an award was not made within the time required unless he gives the arbitrators written notice of his objection prior to the service of a signed copy of the award on him.

106. *Id.*

107. Appellant's Brief, *supra* note 104, at 6.

arbitrator to make a decision and the Association's failure to properly conduct the arbitration.<sup>108</sup> The plaintiffs alleged upwards to \$1,000,000 in attorneys' fees, costs and arbitration fees for the five years.<sup>109</sup>

The superior court judge sustained demurrers for both the arbitrator and the Arbitration Association on the basis of arbitral immunity. Although he gave some credence to plaintiff's claims and believed the alleged misconduct sufficiently outrageous for a remedy to be available, he nevertheless relied on the traditional doctrine of judicial immunity set forth by defendants and refused to grant a trial on the merits.<sup>110</sup> Hence, plaintiffs appealed, and the appellate court reversed.<sup>111</sup>

The appellate court, while it did not reject arbitral immunity altogether,<sup>112</sup> found that in the specific narrow circumstance of this case an arbitrator (and the sponsoring American Arbitration Association) should not automatically be permitted to invoke the doctrine of arbitral immunity to shield themselves from the alleged failure to give an award.<sup>113</sup>

The court emphasized that arbitrators have immunity in their judicial capacity,<sup>114</sup> and that this immunity "promotes fearless and independent decisionmaking."<sup>115</sup> However, the court also held that the failure to make an award is distinct from the decisionmaking process and involved no misconduct in arriving at a decision.<sup>116</sup>

While other courts which have grappled with the issue have usu-

108. 140 Cal. App. 3d at 981, 189 Cal. Rptr. at 836. Baar and Edelman were partners in the contract and in the arbitration. Appellant Lustbader was opposing party in the original action.

109. Silverii & McCollum, *Commercial Arbitration — Safeguards Needed*, 4 CAL. BUS. LAW REP. 129, 134 (1983) (Authors of this article are also the attorneys for plaintiff Baar).

110. Appellant's Brief, *supra* note 104, at 7.

111. Defendants relied on *Wyatt v. Arnott*, 7 Cal. App. 221, 94 P. 86 (1907). In *Wyatt* the judge failed to make a decision after hearing the case when pursuant to an election he moved to another county to be a judge. He was granted immunity. They also cited *Oppenheimer v. Ashburn*, 173 Cal. App. 2d 624, 343 P.2d 931 (1959) (judges are not subject to personal liability in allegedly refusing wrongfully to grant a writ of habeas corpus). Further, *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872) and *Stump v. Sparkman*, 435 U.S. 349 (1977) were cited to support the traditional doctrine of judicial immunity. The court did not cite a California case for or against arbitral immunity; this author's diligent search also proved futile.

112. *Baar*, 140 Cal. App. 3d at 982, 189 Cal. Rptr. at 836. The court stated: "Courts of this country have long recognized immunity to protect arbitrators from civil liability for actions taken in the arbitrator's quasi-judicial capacity."

113. This Note is not specifically geared to the possible liability of the Association in these circumstances; however, the court in *Baar* found that their immunity against suit is based on the immunity of the arbitrator and, therefore, also found the Association unprotected. 140 Cal. App. 3d at 986-87, 189 Cal. Rptr. at 839-40.

114. *Id.* at 982, 189 Cal. Rptr. at 836-37.

115. *Id.*

116. *Id.* at 983, 189 Cal. Rptr. at 837.

ally held that the arbitral and judicial functions are analogous,<sup>117</sup> the *Baar* court focused on the differences. It reasoned that the functions are significantly distinguishable and do not automatically warrant the same immunity. The court stated:

[T]he many and significant differences between judicial proceedings and arbitrations dictate a different result in this case. To begin with a judge receives power from the Constitution and the people and judicial action has far-reaching and precedent setting consequences. Indeed, our tripartite form of government has given the judiciary coequal responsibility for the maintenance of social, economic and governmental order in our society. An independent judiciary is essential to the preservation of a democracy and must be protected. Judicial action therefore demands that civil immunity be granted a judge in all aspects of decisionmaking.<sup>118</sup>

Besides the technical differences in the two procedures,<sup>119</sup> the court additionally noted that: 1) court proceedings are public in nature in contrast to nonpublic arbitration proceedings; 2) judges have to follow the law whereas arbitrators do not; 3) there is not precedent setting significance to an arbitrator's award while this is not true of a judge's decision; and 4) a judge has a duty to decide matters before him if they are within the court's jurisdiction whereas arbitrators can determine rights of parties, only if they by a contractual agreement submit issues to him. The contractual relationship between the parties to an arbitration is a key feature which differentiates the two proceedings.<sup>120</sup>

The court stressed that the failure to render an award all together concerned the contractual obligations of the arbitrator to the parties involved.<sup>121</sup> On the one hand, the court approved (in dictum) of judicial immunity as extended to arbitrators in a decisionmaking capacity, but nonetheless also stated: "Bearing in mind that an arbitrator is not a judge and that arbitration is not a judicial proceeding . . . our decision gives credence to the complaint stating a cause of action in breach of contract . . . ." <sup>122</sup>

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117. *Hoosac Tunnel Dock & Elevator Co., v. O'Brien*, 137 Mass. 424, 426 (1884). ("An arbitrator is a quasi-judicial officer . . . exercising judicial functions.") *Babylon Milk & Cream Co. v. Horvitz*, 151 N.Y.S.2d 221, 224 (1956), *aff'd*, 4 A.D.2d 77, 165 N.Y.S.2d 717 (1957). ("I see no reason to distinguish between a judge and an arbitrator in deciding the issue herein.") See also *Jones v. Brown*, 54 Iowa 74, 6 N.W. 140 (1880), *supra* notes 61-63 and accompanying text. DOMKE, *COMMERCIAL ARBITRATION*, *supra* note 12, § 23.01; Domke, *Arbitrator's Immunity*, *supra* note 2; Glick, *Bias*, *supra* note 61, at 161-62.

118. 140 Cal. App. 3d at 984, 189 Cal. Rptr. at 837 (footnote omitted).

119. See *supra* notes 38-46 and accompanying text.

120. 140 Cal. App. 2d at 984, 189 Cal. Rptr. at 838. Further, see *infra* notes 147-48 and accompanying text.

121. 140 Cal. App. 3d at 985, 189 Cal. Rptr. at 839.

122. *Id.*

Since the arbitrator in *Baar* did not make a decision at all, the parties were deprived of even the limited legal remedies for dissatisfaction with an award, if one had been rendered.<sup>123</sup> They could neither accept the award nor ask for relief.<sup>124</sup> Meanwhile, the arbitrator and the Association received their fees, and the parties incurred costs and attorney's fees. The court in *Baar* declined to extend arbitral immunity in this circumstance finding that the contractual agreement between the arbitrator, the Association and the parties had been breached.<sup>125</sup>

In reaching its decision, the *Baar* court relied, in part, on *Bever v. Brown*,<sup>126</sup> a follow-up case to *Jones v. Brown*.<sup>127</sup> In *Jones*, the judge had originally granted immunity to the arbitrator when he sued for his arbitration fee and the defendant counterclaimed for damages. In *Bever*, the same defendant instead of counterclaiming for damages, answered that the service he contracted for, i.e., the arbitration, was valueless to him and therefore, he should not have to pay the fee. To this the court agreed, reasoning that there was no immunity for the breach of contract.<sup>128</sup> In effect, the court in the two cases, granted immunity from damages, but at the same time refused to force a party to pay for services that were of nonexistent value. The court in *Bever* apparently recognized distinctions in the various duties of an arbitrator and also pinpointed aspects of the contractual relationship he had with the parties.<sup>129</sup>

The *Baar* court also relied on *E.C. Ernst Inc. v. Manhattan Construction Co. of Texas*,<sup>130</sup> which involved an architect who claimed

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123. CAL. CIV. PROC. CODE §§ 1285-1287.6 (West 1982). These sections of the statute provide for procedures of enforcement, vacatur (see § 1286.2, *supra* note 43), and correction if necessary. Correction is based on miscalculation of figures and the like.

124. See CAL. CIV. PROC. CODE § 1283.8 (West 1982) *supra* note 105, § 1286.2 *supra* note 43, § 1285 *infra* note 142.

125. *Baar*, 140 Cal. App. 3d at 985, 189 Cal. Rptr. at 839. In one case which the court used, *Boone v. Reynolds*, 1 Serg. & Rawle 231 (1814) one party did not have to pay the arbitrator, since he was late making the award. The relevant statute provided for this remedy.

126. 56 Iowa 565, 9 N.W. 911 (1881).

127. 54 Iowa 74, 6 N.W. 140 (1880). Curiously, *Jones v. Brown* is cited frequently in this context without any mention of the follow-up companion case, which did *not* extend the arbitrator's immunity to the breach of contract arising out of the contractual relationship between the parties.

128. 50 Iowa at 569, 9 N.W. at 913. ("We think that the rule of judicial immunity goes far enough when it protects the arbitrators from an action for damages, without allowing them compensation for an act rendered useless by their wilful misconduct.")

129. *Id.* at 569-70, 9 N.W. at 913 (Even though parties do not contract for perfect judgment, they do not contract for fraudulent practices which render an award useless. The arbitrator delegated his authority to arbitrate to someone else; this was not within the purview of decisionmaking.)

130. 551 F.2d 1026 (5th Cir. 1977), *reh'g. denied in part*, 559 F.2d 268, *cert. denied*, 434 U.S. 1067 (1978). The *Baar* court did not find *Ernst* completely persuasive. The holding was favorable to plaintiffs but the court felt that the *Ernst* court failed to distin-

arbitral immunity for actions he took, while solving disputes between an owner and a contractor.<sup>131</sup> In *Ernst*, the architect was held liable for not making decisions quickly enough in his dealings with the parties. The *Ernst* court found that since he was not acting as an arbitrator, the arbitral immunity should not be granted. The architect could be held liable.<sup>132</sup>

### B. Hypothetical Case

*Baar* represents only one factual circumstance to which the court's reasoning is applicable. *Baar* arose out of a violation of AAA Rules which provide that an award be made within thirty days of closing briefs.<sup>133</sup> The Rules also impose other obligations.<sup>134</sup> Consider the following hypothetical situation. Two opposing parties have a controversy which requires a solution. They make a decision to arbitrate and they wish to use the American Arbitration Association to facilitate the proceeding. An arbitrator is selected by AAA procedure, which requires that the arbitrator disclose all apparent conflicts of interest and permits a disqualification based on this friction.<sup>135</sup> The arbitrator is told of the nature of the dispute, he proceeds to hear the case and duly renders an award.<sup>136</sup>

Subsequently, the party against whom the award is made discovers that the arbitrator had an obvious conflict of interest. If the party had been apprised of this conflict, he would have objected to

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guish adequately the architect's functions, making the analogy unreliable. *See also, supra* note 72 and accompanying text.

131. *See supra* notes 72-73.

132. *Ernst*, 551 F.2d at 1033 ("Where his action, or inaction, can fairly be characterized as delay or failure to decide rather than timely decisionmaking (good or bad), he loses his claim to immunity because he loses his resemblance to a judge. He has simply defaulted on a contractual duty to both parties."). *See supra* notes 72-73 and accompanying text.

133. AAA, *Rules, supra* notes 24 and 104, No. 41.

134. *See generally* AAA, *Rules, supra* note 24.

135. AAA, *Rules, supra* note 24, Nos. 13, 14 and 19. Rules 13 and 14 list procedures required for appointment. Rule 19 provides:

A person appointed as neutral Arbitrator shall disclose to the AAA any circumstances likely to effect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such Arbitrator or other source, the AAA shall communicate such information to the parties, and, if it deems it appropriate to do so, to the Arbitrator and others. Thereafter, the AAA shall determine whether the Arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

136. *See* AAA, *Code of Ethics, supra* note 28, Canon II, which provides: "An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality." An arbitrator has a duty to disclose to the association any possible conflicts.

this particular arbitrator. The discovered conflict increased the likelihood that the decision rendered would be adverse to that party. Meanwhile, the arbitrator claims his fee. The adversely affected party moves to vacate the award, his choice of grounds very limited and the presumption in favor of such an award heavily against him.<sup>137</sup>

It is scant consolation for the aggrieved party that an award has been made. Even if he gets the award vacated, he still has to pay the arbitrator, he has suffered time delays, and he has incurred additional costs for litigation which could have been avoided had the arbitrator disclosed his conflict as he had an obligation to do.<sup>138</sup>

### B. Analysis

In *Baar* the arbitrator supervised the arbitration proceeding; he conducted hearings, heard testimony and evidence, yet he failed to render a decision. Applying the test of *Stump v. Sparkman*,<sup>139</sup> the arbitrator's activities were, arguably, within the ambit of the decisionmaking process and would, therefore, be protected by the doctrine of immunity. It seems self-evident that by hearing the case he is participating in a judicial act.<sup>140</sup> However, the parties are before the arbitrator because of their private contract. His jurisdiction over them and his power to hear and decide the controversy is derived from the agreement,<sup>141</sup> not from the traditional judicial system. But most importantly, the parties did not receive the benefit for which they bargained,<sup>142</sup> i.e., an award and a solution to their conflict. They have even been deprived of the remaining legal rem-

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137. See *supra* note 43.

138. See AAA, *Rules, supra* note 24, No. 51, see *supra* note 25 for the text of Rule No. 51. The parties may agree to pay the arbitrator a fee which is arranged by the Association.

139. 435 U.S. 349 (1978).

140. See *supra* notes 55-56 and accompanying text. There is an argument that since the arbitrator did *not* act, i.e., did not make an award he did not actually participate in a judicial act and, therefore, the immunity should not apply. Appellant's Brief, *supra* note 104, at 28-30.

141. *Baar*, 140 Cal. App. 3d at 985, 189 Cal. Rptr. at 838. The court in *Baar* stated: "While 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." An arbitrator, for example, does not have power to decide any matter that is not presented to him and he has no power over anyone that does not voluntarily submit to his authority. See *Freeman v. State Farm Mut. Auto. Ins. Co.*, 14 Cal. 3d 473, 535 P.2d 341, 121 Cal. Rptr. 477 (1975).

142. The litigants bargained for impartial, knowledgeable and fast decisionmaking. See *supra* note 44. Further, the litigants bargained for a decision that could either be vacated or enforced. *Baar*, 140 Cal. App. 3d 979, 189 Cal. Rptr. 834. See *supra* note 43. See CAL. CIV. PROC. CODE § 1285 (West 1982) which provides: "Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award."

edy, either a vacatur or an enforcement of the decision.<sup>143</sup> Thus, the contract which is the source of the arbitrator's power has been breached.

In the event no timely award is made, the California arbitration statute provides that the parties do not have to abide by a late decision,<sup>144</sup> but they have still spent time and expended funds in an unsuccessful effort to find a solution to their conflict. The parties will not have to participate in additional hearings in order to settle their differences, while the arbitrator and the Association have already received fees for services, which were of very little value to the parties and even injured them.<sup>145</sup>

In the hypothetical case in which the arbitrator failed to disclose possible conflicts of interest, there is no act of judicial nature in his failure to disclose; however, the lack of disclosure is a breach of the arbitrator's contract with the Association and thereby with the parties.<sup>146</sup> This is a prearbitration matter, and it is not a judicial act and has nothing to do with the arbitrator's jurisdiction over the parties; except that he indeed was granted the power—the jurisdiction—over the litigants only because he did not make the proper disclosures.

Though an award has been made, and the arbitrator has acted within his judicial capacity in making it, his breach of the AAA Rules has little to do with the arbitration itself; rather it relates to the arbitration selection process mandated by the rules and the contractual agreement of the parties. A dissatisfied and harmed plain-

143. See *supra* notes 43 and 46 and accompanying text.

144. CAL. CIV. PROC. CODE § 1283.8 (West 1982), see *supra* note 105 for the text of § 1283.8.

145. It would seem that if an arbitrator performed his services adequately he would have no trouble enforcing such an agreement. The parties, however, have to enforce their side of the contract by using a third party beneficiary theory, since the agreement is made through the Association in this case. See *contra* Hill v. Aro Corp., 263 F. Supp. 324, 326 (N.D. Ohio 1967). See *supra* notes 78-80 and accompanying text. See also Bever v. Brown, 56 Iowa 565, 569, 9 N.W. 911, 913 (1881), *supra* notes 126-27 and accompanying text. In *Bever* the court held that the arbitrator did not deserve his fee since his service had no value. As a matter of practical significance, arbitrators are often paid in advance. In *Baar*, the arbitrator after hearing the case, prior to making the decision, asked for and received \$7,500 for future time to be spent. Appellant's Brief, *supra* note 104, at 4.

146. See AAA, *Rules*, *supra* note 24, No. 19 and AAA, *Code of Ethics*, *supra* note 28, Canon II; *supra* note 136, See *supra* note 145. A very recent case raised similar issues on appeal. Aggrieved plaintiffs, parties to an arbitration, refused to pay an arbitrator the remainder of his fee. The arbitrator had not disclosed facts which the plaintiffs felt would have precluded his choice as arbitrator. A majority of the fourth district court of appeal found that the arbitrator had no duty to disclose the particular conflict alleged and the court did not reach issue of immunity. A rather vigorous dissent argues that whether the relationship requires the requisite disclosure is factual and should be heard by a trier of fact and further would not give immunity for any breach of duty. Rich v. Western Land & Dev. Co., 4 Civ. No. 28625 (July 2, 1984) (Wiener, J., dissenting) [copy on file in the offices of California Western Law Review].

tiff should not have to pay the arbitrator's fee in such a situation. The *Baar* court likely would agree, since it determined that the narrow circumstance of failure to make an award is outside the decisionmaking process; there is no reason to protect the arbitrator.

#### D. Public Policy Revisited

The *Baar* court explored underlying issues and problems in arbitration and arbitral immunity not usually addressed. It specifically stressed the differences rather than the similarities between the conventional judicial process and arbitration.<sup>147</sup> The absence of safeguards also is significant: 1) there is usually no public record of proceedings as there is in court; 2) errors are not subject to correctability on appeal to the extent they are in the judicial process; 3) there are no recorded rules of precedent; 4) the judge is far more insulated from improper influences than is an arbitrator; and 5) an arbitrator does not need to state reasons for his conclusions as does a judge.<sup>148</sup>

A system of dispute resolution with inadequate safeguards ultimately may not be preferable to civil litigation.<sup>149</sup> If a system is devised that results in burdens to litigants, which they do not expect and for which they have no remedy, the advantages of using the alternative proceedings may no longer outweigh the disadvantages. Chief Justice Burger particularly stressed voluntary and binding arbitration as a viable alternative and a valuable addition to conventional judicial litigation.<sup>150</sup> However, such a system must be responsive to the persons who choose to use it.

The arbitrator must understand the seriousness and magnitude of his duties and responsibilities. He must recognize that his decision will have great impact on parties who submit a controversy to him.<sup>151</sup> An arbitrator who is protected not only for his decision-making, but also for any and all acts and conduct that arise out of

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147. See *supra* notes 119-21 and accompanying text.

148. See also, Becker, *The Liability of Arbitrators: The United States*, 8 INT. BUS. LAW. 341, 343 (1980) [hereinafter cited as Becker, *Liability of Arbitrators*]. (The safeguards that apply to judges: adversary process, recorded rules of precedent, errors correctable on appeal are not applicable to arbitrators; therefore, the author believes that arbitral immunity should be reexamined—and altered.) For a critical view of arbitration which the author believes has at times been used as social control (labor arbitration, antitrust cases) without any of the constitutional safeguards see Kronstein, *Arbitration is Power*, 38 N.Y.U. L. REV. 661 (1963). Although not primarily concerned with arbitral immunity, the author criticizes the unbridled power inherent in decision-makers who have few limitations on their activities.

149. It is possible to imagine a whole system of dispute resolution where the parties pay for services, never have a chance to see a court and have very little, if any, awareness of any of their legal rights.

150. Burger, *Better Way*, *supra* note 10, at 277.

151. *Baar*, 140 Cal. App. 3d 979, 189 Cal. Rptr. 834 (1983).



an arbitration, including his own misconduct, is more likely to be careless or negligent. He is less likely to disclose relevant conflicts as in the hypothetical case, or he may easily fail to make a timely award as in *Baar*. Even though there are important policy goals to the contrary,

The question must be asked whether the law should expose this arbitrator to the risk of liability of malicious tort in the belief that the risk will of itself inhibit this misconduct. It is no answer that arbitration is consensual; the parties have not agreed to be abused. I suggest that the time may not be distant when courts in the United States will ask this question seriously and that some will answer it affirmatively.<sup>152</sup>

The *Baar* court responded affirmatively. Moreover, in *Graham v. Scissor Tail*,<sup>153</sup> the Supreme Court of California vacated an award because one of the arbitrators was not neutral. Despite the voluntary agreement to the contrary, the court held that the inclusion of a non-neutral arbitrator was an outrage to public policy. A court of this disposition is more likely to agree that effective deterrence of arbitral misconduct may in certain circumstances call for the piercing of traditional arbitral immunity. As the Supreme Court of the United States in *Commonwealth Coatings Corp. v. Continental Casualty Co.*<sup>154</sup> recognized, even the appearance of partiality can jeopardize the fairness of the procedure.<sup>155</sup>

### CONCLUSION

This Note has considered the important societal goals sought to be accomplished by arbitration and has endeavored to discuss whether these are necessarily relevant today and whether they are best served by continued application of absolute arbitral immunity in all matters connected with the arbitration process.<sup>156</sup>

A California case,<sup>157</sup> which distinguishes an arbitrator's failure to

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152. Becker, *Liability of Arbitrators*, *supra* note 148, at 343.

153. *Graham v. Scissor Tail*, 28 Cal. 3d 807, 825, 623 P.2d 165, 176, 171 Cal. Rptr. 604, 615 (1981). Although the court found an adhesion contract present, the holding goes beyond that. The court recognizes the statutory right of the parties to structure their own dispute resolution machinery, but also insists citing *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), that certain minimum levels of integrity need to be present in order to pass judicial muster. The court called the arrangement for a partial arbitrator illusory and contrary to public policy. The court vacated the award. It was not a case of personal liability of an arbitrator.

154. 393 U.S. 145 (1968).

155. *Id.* The Supreme Court recognized that appearance of prejudice was not desirable. The AAA, *Code of Ethics*, *supra* note 28, cites *Commonwealth* for this proposition and Canon II appears to be written in response to the holding. See also *supra* note 136 and accompanying text.

156. See *supra* notes 91-101 and accompanying text.

157. *Baar v. Tigerman*, 140 Cal. App. 3d 979, 189 Cal. Rptr. 834 (1983).

render an award from his duties in his decisionmaking capacity,<sup>158</sup> and which also differentiates the conventional judicial setting from the arbitration procedure, serves to point out the problems inherent in the blind utilization of the immunity doctrine.<sup>159</sup>

The public policy consideration of encouraging litigants to avail themselves of arbitration is not pertinent to the conventional judicial setting.<sup>160</sup> To implement this goal, it is incumbent upon its proponents to provide a system that is as impartial and fair, as it is quick and economical.<sup>161</sup>

Clearly, a factual circumstance like the one in *Baar v. Tigerman*,<sup>162</sup> and similar to the one of the hypothetical arbitrator with the conflict of interest, falls short of this goal. A mere vacatur of the award<sup>163</sup> is an insufficient and inadequate remedy. There is little, if any, deterrent effect upon an arbitrator if an award is vacated. However, a cause of action for personal liability, when there is no adequate explanation for an arbitrator's alleged misconduct will serve both as deterrence to the arbitrator and as compensation to injured parties.<sup>164</sup>

Further, it is proper that an arbitrator should not get compensation for his services when he fails to disclose obvious conflicts of interests or fails to make an award. It will not undermine his ability to make a decision, but will only serve to make him aware of his responsibilities.

California, once again, is in the forefront with this inroad into arbitral immunity. This Note has demonstrated that the benefits of absolute immunity do not always outweigh the disadvantages. Since implementing fair, impartial and efficient procedures in the alternative conflict resolution setting is a primary goal,<sup>165</sup> it is appropriate that an arbitrator is held accountable when he fails to heed his responsibilities. *Baar* illustrates that absolute arbitral immunity should not be the standard in all cases. It is time for further

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158. See *supra* notes 121-22 and accompanying text.

159. See *supra* notes 104-09, 135-46 and accompanying text.

160. See *supra* notes 91-101 and accompanying text.

161. See *supra* notes 44, 95 and accompanying text.

162. See *supra* note 46. See generally Feinman, *Suing Judges*, *supra* note 55. The policy arguments relevant to judicial immunity are applicable here. However, as the *Baar* court pointed out, there are significant differences that alter the basic relationship between the parties and an arbitrator.

163. See *supra* note 151 and accompanying text.

164. *Baar v. Tigerman*, 140 Cal. App. 3d 979, 189 Cal. Rptr. 834 (1983). See *supra* notes 103 and 151 and accompanying text.

165. See *supra* notes 44, 48, 91-95 and accompanying text.

examination. Hopefully, *Baar* is just the beginning of such reevaluation.

*Elvi J. Olesen*