

2015

Arbitrators And Arbitral Institutions: Legal Risks For Product Liability?

V. V. Veeder

Dickson Poon School of Law

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aubl>



Part of the [Common Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Veeder, V. V. "Arbitrators And Arbitral Institutions: Legal Risks For Product Liability?," American University Business Law Review, Vol. 5, No. 3 (2018) .

Available at: <http://digitalcommons.wcl.american.edu/aubl/vol5/iss3/7>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Business Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

ARBITRATORS AND ARBITRAL INSTITUTIONS: LEGAL RISKS FOR PRODUCT LIABILITY?

V.V.VEEDER*

Introduction	335
II. The Practical Problems	340
A. England and Wales.....	341
B. France.....	349
III. A Practical Solution	351
Conclusion.....	353

INTRODUCTION

Let us imagine a brown ginger beer bottle produced by a well-known global institution for your personal use. The bottle's label proudly proclaims that in addition to reaching regions of the world that other natural beverages cannot reach, its ginger beer is the best beverage that is better than any municipal water: not even "probably" so, like mere Danish beers, but indisputably so. This ginger beer is said to be more cost-effective, more efficient, and quicker at quenching your thirst than any other kind of beverage. The bottle's label contains no advisory, health information, or other warning whatsoever. So, this green, eco-friendly ginger beer is proclaimed as effectively "the only drink in town."

Now, let us also imagine that this global institution knows for certain that at least fifty percent of those of us who drink its ginger beer are likely to be greatly dissatisfied with this experience. In the ginger beer trade, the fifty percent of dissatisfied consumers are known as "losers" while the satisfied consumers are called "winners." Let us imagine further that those of us who would like to be winners find, once the bottle is opened, that our particular bottle contains not only a decomposed snail, which can make the

* Queen's Counsel, England and Wales, Arbitrator; Visiting Professor on Investor-State Arbitration, Dickson Poon School of Law, King's College, University of London.

drinking experience less than satisfactory, but worse, that the bottle contains no ginger beer at all. In the ginger beer trade, technically that is called “annulled ginger beer.”

There are two additional details. First, there is a legally binding contract between the institution and the imbibers. This case is not an elderly case from an old casebook on torts or delicts. It is not exactly clear what the contract’s applicable law might be or what court might have jurisdiction over any dispute between the imbibers and the institution. However, it is manifestly clear that the institution has assumed significant contractual obligations toward the imbibers of its ginger beer bottles. Furthermore, there may be certain non-contractual legal obligations on the institution as a promoter, manufacturer, and supplier of ginger beer, depending on the applicable law and the judicial forum. Second, the cost of a ginger beer bottle is not a modest five U.S. dollars or so. Taking into account all costs, the total can amount to millions, even tens of millions of U.S. dollars. However, that price will remain unfixed at the time a user purchases the bottle because it will usually be determined later by the institution itself. While this ginger beer bottle may be cost-effective, its price will not be cheap or fixed at the point of sale.

Now, on these facts, if we found the bottle empty or polluted, caused by the negligent act or omission of the institution, would we be surprised to learn that we had no legal claim against the institution? Would we also be surprised to learn that both the institution and its workers had legal immunity for any negligent act or omission on the ground of public policy? That, because ginger beer is so important to the national and global economy, ginger beer institutions and workers should not be held accountable because it might adversely affect their work? A lay person would likely be surprised because he or she would expect the contrary and so too would most regulators and legislatures. As a general principle, it is usually accepted that every institution should be legally accountable for its legal wrongs, including negligence, especially when the product sold is professionally produced, heavily promoted, and significantly expensive.¹ If we are not surprised, then we are almost certainly an arbitration user or an arbitration specialist because, traditionally, arbitration users have often been told that there was no possible legal claim against arbitrators and arbitral institutions apart from fraud, corruption, criminal activity and intentional wrongs. Other than these exceptions, there is no reported case in England of any arbitrator or arbitral institution being held liable to any

1. There is here no exact analogy with the famous case where there was a decomposed snail from Paisley in the ginger beer bottle. *See Donaghue v. Stevenson* [1932] AC 362 (holding Mrs Donaghue had no contract with the manufacturer or the tea-shop supplying the ginger beer.)

arbitration user in the long-recorded history of English arbitration. The same was also true in France, a country with a legal system and a judiciary that is even more favorable to arbitration than England. However, this is no longer the case.

First, regarding English law, the House of Lords decided two cases concerning “quasi-arbitrators” (but not arbitrators as such), *Sutcliffe v Thackrah* (1975) and *Arenson v Arenson* (1977) that the immunity for arbitrators traditionally assumed by commentators might be ill-founded at common law.² As a result of this new judicial approach, the position of arbitrators at English law became unclear; the Arbitration Act 1950 stated nothing about arbitral immunity. It was even more doubtful that arbitral institutions enjoyed any legal immunity at common law. In the first edition of Mustill & Boyd’s *Commercial Arbitration*, the authors analyzed the different directions that English law might take in the future.³ Their third possible direction concluded, “[a]rbitrators are not immune from suit. There is no reason of public policy to exempt them from liability.”⁴ They rejected that proposition on the grounds of the long tradition of arbitration in England, but also of public policy so as to avoid “the worst of all worlds.”⁵ There was, however, no comfort for arbitral institutions. Whereas an arbitrator might still claim a special status at common law, an arbitral institution’s relations with the parties was based on contract, not status, with no room for immunity influenced by public policy at common law.

Second, more recently in France in the *FFIRC* case (2010), the claimant recovered substantial damages in contract from an arbitral institution under French law.⁶ The institution was a specialist trade association that organized an arbitration service for its members under its own arbitration rules. There was a dispute between a French company and a Spanish company that was referred to the institution under the parties’ arbitration clause in their contracts. In due course, the sole arbitrator made an award in France ordering the Spanish company to pay substantial damages to the French company. That award was judicially challenged by the Spanish

2. See *Arenson v Arenson* [1977] AC 405; *Sutcliffe v Thackrah* [1974] AC 727.

3. See Sir Michael J. Mustill & Stewart C. Boyd, *COMMERCIAL ARBITRATION* (Butterworth, 1982).

4. See *id.*

5. 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).

6. See *Société Filature Française de Mohair v. Fédération Françaises des Industries Lainières et Cotonnières*, (1 ère Chambre 2010) JCP(G) No 51, 20 Dec 2010, ann. Ortscheidt, Dalloz 2011.3023, ann 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* 187–93 (2012).

company, resulting in a judgment of Cour d'appel de Paris that annulled the award for failure to respect the rights of the defense. The following is what had gone wrong: the sole arbitrator made his award without an oral hearing on the basis of documentary materials sent to him by the institution. However, under the arbitration rules, the institution was solely responsible for the onward transmission of all evidentiary materials to the sole arbitrator and the parties. One document that the institution received from the French company was duly forwarded to the sole arbitrator, but by innocent mistake, it was not sent by the institution to the Spanish company. Inevitably, of course, the sole arbitrator based his award against the Spanish company on the very document that the Spanish company did not receive, depriving it of any opportunity to comment in its defense to the French company's claim. Based on these circumstances, the Cour d'appel had no difficulty in annulling the award under French law on the ground of due process ("le principe de la contradiction"), leaving the French company with a worthless, albeit expensive, piece of paper – in other words, an annulled ginger beer bottle.

In olden times, the limitation period not having expired, the French company would simply have begun new arbitration proceedings and having won once, it could reasonably anticipate winning again before a new arbitration tribunal. But, these are more aggressive times in the Twenty-First Century. Instead, the French company sued the institution for damages before the Tribunal de Grande Instance of Nanterre. That court decided that the institution was contractually liable in damages to the French company for having failed in its legal responsibility to organize the arbitration in accordance with its arbitration rules. The court awarded the French company its legal costs incurred in the annulment proceeding (some 10,000 euros) and also part of its costs of the court proceedings (some 3,500 euros). However, the court rejected the claim for the face value of the annulled award on the ground of causation given that the French company could start a new arbitration against the Spanish company and recover the same substantial damages with no apparent time bar for such claim. The court also rejected the claim for moral damages, albeit finding that there was no immunity for the institution under French law.

Why is this case of any interest to us? It is a decision by a relatively minor court and the case is not even reported in the "Revue de l'arbitrage." While it has attracted a number of legal commentaries elsewhere, the only substantive article was written by Charles Price for a foreign audience.⁷ Mr. Price's article confirms that an arbitral institution can be liable in contract to its disappointed users for substantial damages under French law.

7. See Price, *supra* note 6; see also Y. Derains & L. Kiffer, *France, Int Handbook Comm. Arb.* 41, n. 147 (Kluwer; 2011).

Like any institution comprised of human beings, an arbitral institution can make a relatively small, innocent mistake with grave consequences for a disputing party resulting in a significant liability for the institution itself. If the applicable limitation period had time-barred the French company's renewed claim, it seems clear that the amount of the award could have been claimed as damages against the institution. The *FFIRC* dispute concerned a relatively small amount, producing a modest award with insignificant costs compared to a large international arbitration. What if such a dispute had concerned millions or billions of U.S. dollars?

The *FFIRC* case, to which we shall return later, also shows that attempts by an arbitral institution to protect itself in advance against liability are limited. In an earlier French case decided in 2009, *SNF S.A.S. v. International Chamber of Commerce (ICC)*,⁸ the court declared invalid under French law the "ICC's" contractual attempt to exclude liability for itself (and its arbitrators) under Article 34 of the 1998 ICC Rules.⁹ The ICC had optimistically (but mistakenly) intended that new provision to operate as an absolute immunity against all legal liability to users of ICC arbitration everywhere. In contrast to French law, English law sought to protect arbitral institutions with a limited form of statutory immunity under Section 74 of the English Arbitration Act 1996.¹⁰ Unfortunately, such statutory immunity is confined to the institution's appointment or nomination of arbitrators unless the institution's acts or omissions are shown to have been in bad faith. Moreover, this statutory immunity only applies if the seat of the arbitration is in England and Wales; how the immunity could apply to a suit against an arbitral institution outside England under an applicable law other than English law is far from clear. Today, given the increasingly aggressive tactics deployed by one-off users

8. *SNF v ICC*, JDI 2009.617, ann T. Clay; JIA 2009.579, ann. L. Kiffer.

9. International Chamber of Commerce Arbitration Rules art. 34 (1998) [hereinafter "1998 ICC Rules"] ("Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration."). Following the *SNF* case, this wording was changed in Article 40 of the 2012 ICC Rules, by adding at the end: "except to the extent such limitation of liability is prohibited by applicable law."

10. Arbitration Act 1996 § 74 (United Kingdom) [hereinafter "English Arbitration Act 1996"] ("(1) An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith. (2) An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator. (3) The above provisions apply to an employee or agent of an arbitral or other institution or person as they apply to the institution or person himself.").

of international arbitration with no interest in the arbitral system beyond winning (or not losing) their case, there is clearly a growing problem with regard to the potential legal liability of an arbitral institution for its product, namely impartial arbitrators deciding a dispute with a valid award.

There is also a growing problem for international arbitrators. Increasingly, arbitrators are the collateral victims of attacks by a party on the award and the arbitration itself. These collateral attacks often take the form of a challenge to the arbitrator's impartiality and independence. In some jurisdictions, a successful challenge against one of three arbitrators may invalidate an award, even for unanimous decisions. A pending challenge may influence the adverse party toward an otherwise unfavorable settlement. In other jurisdictions, a pending challenge may automatically stay the arbitration until it is resolved by a state court, preventing the tribunal from proceeding with a partial award on liability to a final award on quantum for an indefinite period of time.¹¹ Recently, state courts have called an unprecedented parade of international arbitrators to account, and required several arbitrators personally to give evidence on oath before a state court (usually at their own expense). These actions have taken place in London, Stockholm, and most recently in New York and France – hardly exotic venues hostile to international arbitration. In short, functional immunity is no longer working for arbitration.

II. THE PRACTICAL PROBLEMS

With this background, let us look more closely and advance a possible solution for the current practical problems facing arbitral institutions and arbitrators regarding potential legal liability to disappointed users. I can do so only in regard to English and French law because the subject is vast and varied. Over the years, well-known treatises and articles have been published including the work edited by Julian Lew in 1990, Susan Frank's comparative survey in 2000, and Martin Meissner's more recent study.¹² I shall also say nothing at all about the laws and practices of this jurisdiction. I understand too little about the USA's different arbitral traditions.

11. See, e.g., International Centre for Settlement of Investment Disputes Arbitration Rules (2003) [hereinafter "ICSID Arbitration Rules"]. A challenge, however unmeritorious, will also suspend ICSID arbitration under ICSID Arbitration Rule 9(10).

12. See Julian D. M. Lew, IMMUNITY OF ARBITRATORS (London Press Ltd, 1990), reviewed J. Paulsson (1991) 107 LQR 688; Susan Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1, 15 (2000); Martin Maisner, *Liability and Independence of the Arbitrator*, in CZECH (& CENTRAL EUROPEAN) YEARBOOK OF ARBITRATION – 2012: PARTY AUTONOMY VERSUS AUTONOMY OF ARBITRATORS 149 (2012); see also Alan Redfern, *The Immunity of Arbitrators*, in THE STATUS OF THE ARBITRATOR (ICC, 1995).

However, my common premise is simply stated at the outset: today, in the field of international arbitration everywhere, there are too many of us who are washing our hands like Pontius Pilate in the face of increasing legal risks to both arbitral institutions and arbitrators. As already described, England and France have taken two different paths, but regrettably, the result is materially the same. There is simply too much legal uncertainty and too much risk for individual arbitrators and arbitral institutions to bear alone. A great accident is bound to happen soon that may lead to the forced insolvency of an old arbitral institution or the involuntary bankruptcy of a much-respected arbitrator. In particular, (1) individual arbitrators are not corporations; (2) an arbitrator cannot easily limit his or her legal liability (like a law firm); (3) there is no legal cap on damages against an arbitrator or an arbitral institution (like shipowners, airlines, or the medical profession); and (4) arbitral institutions themselves, even large ones, are almost invariably non-profit organizations usually with little or no capital assets. On that future day of reckoning, we may knowingly nod to each other that we sadly saw it coming. We may also greatly regret that our laws, judges, and legal systems can be so treacherous to innocent victims unless we collectively do something. But, what can be done?

A. England and Wales

In English law, as with most common law systems, a professional person usually operates under an obligation to exercise a duty of care and skill: the breach of which may result in liability under both tort and contract law. A new bridge does not usually collapse without someone's negligent fault, probably by the engineer or the building contractor. If a new building suddenly falls down, the architect will invariably be blamed. No engineer, contractor, or architect will be entitled to immunity from suit. Therefore, expectations are high for professional products and services, particularly if that product or service is expensive. The professional person may have contractual limitations or exclusions on liability, but municipal laws and public policy will often regulate the scope of such contractual immunity. Other than death or personal injury, a professional person can usually contractually exclude a liability which he or she would otherwise attract in tort or contract to the customer, save where that person is guilty of deliberate wrongdoing (although the deliberate wrongdoing by an employee for whom the professional is vicariously liable can usually be contractually excluded).¹³ Under English law, there are statutory and regulatory restrictions on the legal effect of such contractual exclusions, notably under the Unfair Contract Terms Act 1977 and, regarding

13. CLERK & LINDSELL ON TORTS ¶¶ 10–17 (21st ed., Sweet & Maxwell, 2014).

consumers, the Unfair Terms in Consumer Contracts Regulations 1999 (enacting the EU Council Directive 93/13). At the present time, English courts have yet to decide on these restrictions regarding arbitrators and arbitral institution.

Until the decisions of the House of Lords, in the two English cases in 1974 and 1977 mentioned above, for at least 250 years it was firmly assumed that an English arbitrator could not be sued in English law for damages.¹⁴ There were many judicial obiter dicta to such effect in the law reports, but none of the reported cases actually concerned arbitrators (as distinct from quasi-arbitrators). Nonetheless, these dicta consistently suggested that English law was clear, beyond all doubt, as stated and re-stated in authoritative textbooks on arbitration.¹⁵ The first stone cast in this still pond was *Sutcliffe v Thackrah*.¹⁶ It concerned an architect who, acting as a certifier, allegedly issued negligent certificates for defective building work. The plaintiff-owner then paid the contractor, but he became insolvent and was unable to affect the necessary repairs. The trial judge found the architect liable for negligence and awarded damages for the cost of the repairs with no right to immunity from suit. The architect appealed. The House of Lords, dismissing the appeal, decided that a certifier was not a quasi-arbitrator and that there could be no analogy to the immunity of an arbitrator. This case was not a case about arbitral immunity, but there were important obiter dicta with four of the five judges expressing views that there was arbitral immunity under English law. Yet, the question had been raised.

The second case came before the House of Lords some two years later in *Aronson v Aronson*.¹⁷ It concerned an auditor valuing shares in a company between the plaintiff seller and a buyer, where the sale contract provided that the auditor's valuation would be final as regards the price to be paid to the seller. The seller alleged that the valuation made by the auditor had been negligently made and was too low. Following its earlier decision in *Sutcliffe v Thackrah*, the House of Lords decided that the auditor could be liable for negligence because he was not a quasi-arbitrator. Again, it was not a decision about arbitral immunity as such; and three of the five judges concurred in stating, obiter, that there was arbitral immunity because an arbitrator, like a judge, was not liable in negligence at common law. In this

14. See *supra* note 3.

15. Until Mustill & Boyd's first edition, see *supra* note 3, in 1991, the specialist works (including *Halsbury*, *Russell*, and *Hogg*), if they thought it necessary to address the matter at all, re-stated the same position: arbitrators could not be sued in damages (apart from fraud).

16. See *Sutcliffe v Thackrah* [1974] AC 727.

17. See *Aronson v Aronson* [1977] AC 405.

case, there were important dicta from two other judges who said there should be no arbitral immunity. Lord Kilbrandon and Lord Fraser, both Scottish law lords, suggested that an arbitrator was no different from a valuer and that, like a valuer, an arbitrator had no immunity from suit at common law. It may be significant that these were Scottish and not English judges; under Scots law, the legal principles underlying judicial immunity are different from English law, making them inapplicable to a private arbitrator.¹⁸

These important dicta from the two senior appellate judges caused considerable concern within the English arbitral community. The Institute of Arbitrators instructed Michael Mustill QC to advise its members whether English law still conferred any immunity for damages on an arbitrator alleged by one party to have been guilty of negligence. From anecdotal evidence, it is possible that these instructions were also provoked by legal proceedings brought against the Institute of Arbitrators for allegedly appointing a wholly incompetent arbitrator without taking reasonable care to ensure his competency, ending in catastrophic results for one party. That case is not publicly reported. It may have been settled before judgment, but it is clear that the issue at the time extended beyond arbitral immunity to the position of an arbitral institution or appointing authority in nominating or appointing an arbitrator. In 1977, in a long and scholarly opinion, Michael Mustill QC advised that a degree of risk now existed that arbitrators could be held liable in tort under English law.¹⁹ It is impossible to exaggerate the influence of Michael Mustill on the development of English arbitration over the last fifty years. He was always the House of Lords "Mark Two," even as Counsel at the English Bar, long before he began his distinguished judicial career. The result of his legal opinion, amongst others, was the first attempt by the London Court of International Arbitration (the "LCIA," then still part of the Institute of Arbitrators) to exclude liability for arbitrators and the LCIA as an arbitral institution in the LCIA's 1981 Rules.²⁰ Further, as explained below, Sections 29 & 78 of the later English Arbitration Act 1996 were enacted as

18. See generally Abimbola A. Olowofoyeku, *SUING JUDGES: A STUDY OF JUDICIAL IMMUNITY* (Clarendon Press, 1994).

19. This legal opinion is not published. Yet, over the years, it has entered the public domain.

20. See English Arbitration Act 1996 § 29 ("(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith. (2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself. (3) This section does not affect any liability incurred by an arbitrator by reason of his resigning. *But see id.* § 25 ("Section 25 addresses the position of an arbitrator who has resigned in regard to personal liability, fees and expenses, as to which the Court may (not must) grant him relief.").

mandatory provisions from which disputing parties cannot derogate in an English arbitration – that is an arbitration with an English seat.²¹

Statutory immunity for arbitrators was considered extensively by the Departmental Advisory Committee on the Law of Arbitration (“DAC”) which was responsible for the content of the English Arbitration Act 1996, first chaired by (as he had become) Lord Justice Mustill. The DAC’s published reports on this issue confirmed the doubts and concerns caused by the House of Lords’ decision in *Aronson v Aronson*. In the DAC 1996 Report,²² the DAC considered that at common law, there was “some arbitral immunity” because the reasons for such immunity were the same as those applying to judicial immunity under English law. The DAC added,

It is generally considered that an immunity is necessary to enable an impartial third party properly to perform an impartial decision-making function We feel strongly that unless a degree of immunity is afforded, the finality of the arbitral process could well be undermined. The prospect of a losing party attempting to re-arbitrate the issues on the basis that a competent arbitrator would have decided them in favour of their party is one that we would view with dismay.²³

That qualified phrase “some immunity” and the reasoning ostensibly limited to arbitral “decision-making” raised questions as to the full scope of such intended arbitral immunity. For example, was it intended by Parliament to exculpate an arbitrator who, by his own negligence or his own alleged negligence, failed to perform a sufficiently thorough conflict check prior to or after his appointment, as a result of which, he or she is successfully challenged by a party and the award set aside? That would not appear to form part of an arbitrator’s decision-making process regarding issues comprising the party’s dispute, particularly if he or she is not yet an arbitrator at the relevant time. This situation may suggest that an arbitrator’s liability may not be fully exculpated by this statutory immunity. Despite Michael Mustill’s valiant attempts over the years, as both a scholar and a judge, to maintain the arbitrator as having a distinct legal status under English law (such status more easily supporting a functional immunity at common law rather than a mere contractual relationship), the English courts have now recognized that even with an extra-contractual legal status, an arbitrator becomes a contractual party to a multilateral contract made with the disputing parties, and if relevant, also the arbitral institution. With such a contract for personal services, the arbitrator necessarily risks

21. See English Arbitration Act 1996 §§ 29, 78.

22. See Report, Departmental Advisory Committee on the Law of Arbitration, Report on Arbitration Bill 1996 (Feb. 1996) [hereinafter “DAC 1996 Report”].

23. See DAC 1996 Report, *supra* note 22, at ¶ 132; Sir Michael J. Mustill & Stewart C. Boyd, COMMERCIAL ARBITRATION: 2001 COMPANION VOLUME 417ff (Butterworth, 2001).

contractual liability, subject to considerations of public policy for arbitral decision-making.

Public policy at English common law, as the DAC had reported, was based on the assumption that English arbitrators were like English judges. However, that is manifestly not the case. First, international arbitrators are not English judges. No English judge makes a contract with litigants nor is an English judge paid by any litigant. There is no accurate analogy between a state judge with imperium and an international arbitrator with none. Moreover, England's senior judges enjoy absolute immunity under English law, but that is not so of junior judges. There is no obvious reason to equate English arbitrators, the majority of whom are not lawyers, with senior members of the English judiciary. Moreover, in other jurisdictions, we know that senior judges do not enjoy absolute immunity, such as Austria.

Most importantly, immunity under English law has significantly receded in other related areas. In *Rondel v. Worsley*, the House of Lords held that a trial lawyer enjoyed immunity from suit for negligence in the conduct of criminal proceedings.²⁴ However, in *Hall v Simons*, the House of Lords reversed itself, deciding that a trial lawyer enjoyed no immunity in both civil and criminal proceedings.²⁵ It is an important case on immunity by virtue of its new treatment of public policy considerations; the decision has been followed in New Zealand and, regarding civil proceedings, in Scotland.²⁶ Given that judges will decide upon immunities enjoyed by arbitrators and arbitral institutions, this decision provides no comfort in assuming that the traditional arguments for such immunity under public policy will prevail. Those arguments include, namely, that it allows disappointed parties indirectly to attack the final decision of a tribunal, that it bypasses the many procedural rules for impugning such a decision, and that the risk of personal liability unreasonably interferes with the independence and professionalism of the targeted defendant. All these arguments, as applied to trial lawyers, were examined anew by the House of Lords and firmly rejected. The result at common law is that arbitral immunity is more questionable than ever. There should be no reason to believe with any confidence that an arbitrator, still less an arbitral institution, enjoys any functional immunity at common law in England, in tort and, still less, in contract.

There is still the English Arbitration Act 1996 for arbitrations with an English seat, and as already indicated, Section 74 of that Act provides a

24. See *Rondel v. Worsley* [1967] 1 AC 191.

25. See *Hall v. Simons* [2002] 1 AC 615.

26. See *Chamberlain v. Lai* [2005] SC 19/2005 (NZ); *Wright v. Paton Farrell* [2006] 2006 SC 404 (Scotland).

limited immunity to arbitral institutions for wrongful failures in the appointment of arbitrators unless that wrong is shown to have been in bad faith. Does this suffice for the 21st Century? In its 1996 Report, the DAC provided two reasons for this statutory immunity.²⁷ The first, as with arbitral immunity, was the concern that the threat of litigation against the institution could be used to reopen matters finally decided by an award. The second was, in its words, of great importance:

Many organisations that provide arbitration services, including Trade Associations as well as bodies whose sole function is to provide arbitration services, do not in the nature of things have deep pockets. Indeed much of the work is done by volunteers simply in order to promote and help this form of dispute resolution. Such organisations could find it difficult, if not impossible, to finance the cost of defending legal proceedings or even the cost of insurance against such costs. In our view, the benefits which these organizations and indeed individuals have in arbitration generally, fully justified giving them a measure of protection so that their good work can continue.²⁸

As a matter of legal logic, this rationale should have justified a larger measure of statutory immunity for arbitral institutions. Work at the more interventionist institutions like the ICC covers the organization of an arbitration from beginning to end, far beyond the composition of the original tribunal. It may include the *prima facie* assessment of jurisdiction, the removal of an arbitrator, the grant of extensions of time for the award and intermediate procedural steps, the arrangement of advance payments by the parties on account of arbitration costs, the suspension of those payments in a deposit account, the determination of the final amount of arbitral fees and expenses, the scrutiny of the draft award, and the issuance of the award to the parties. This process certainly consists of far more than merely appointing ICC arbitrators. I have already described how the scope of Section 74 is also limited to an arbitration with an English seat. In short, the limited scope and application of Section 74 is no longer fit for purpose, if it ever was.²⁹

As for international conventions, the International Centre for Settlement of Investment Disputes (“ICSID”) Convention of 1965 was enacted into English law in 1966, whereby ICSID as an arbitral institution and ICSID

27. See DAC 1996 Report, *supra* note 22.

28. DAC 1996 Report, *supra* note 22, at ¶ 301; Report, Departmental Advisory Committee on the Law of Arbitration, Supplementary Report on English Arbitration Act 1996, at ¶ 38 (1997); see also Mustill & Boyd, *supra* note 23, at 444, 469.

29. In 1995, the DAC had been ready to consider recommending to the UK Government a broader form of statutory immunity, but the arbitral institutions did not consider it important – at that time.

arbitrators enjoy statutory immunity.³⁰ But, the ICSID Convention is a solitary exception amongst arbitral conventions. There is nothing about immunity in the 1958 New York Convention.³¹ There is also nothing in the 1985 United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on Arbitration.³² This omission was addressed by UNCITRAL’s former Secretary, Gerald Hermann, in his 1998 Freshfields Lecture.³³ There, he explained that, at UNCITRAL, the national delegations abstained from touching the issue of arbitral immunity, preferring “to let sleeping dogs lie” for the Model Law. The trouble with sleeping dogs is that they eventually wake up. Soon, as a tactical measure, arbitrators were threatened personally with challenges and claims against them. Accordingly, twenty–five years after the Model Law, UNCITRAL reconsidered arbitral immunity when drafting its new UNCITRAL Arbitration Rules 2010.³⁴ It was a long and troubled debate.

That debate started with the working paper prepared for the UNCITRAL Working Group on Arbitration.³⁵ This unofficial working paper recommended a provision, which by contract would form part of an arbitration agreement under the new UNCITRAL rules. It was to the effect that no arbitrator (including his or her employees or assistants), secretary, or expert to the Tribunal, “shall be liable to any party for any act or omission in connection with the performance of his or her tasks under these Rules except if that act or omission was manifestly in bad faith.” It was intended that “bad faith” would be included in this exception, as also a deliberate violation of the arbitration agreement and the UNCITRAL Rules. It was also suggested that UNCITRAL might consider extending this contractual immunity to persons or institutions performing the function of an appointing authority under the UNCITRAL Rules although the Permanent Court of Arbitration (“PCA”) itself, as an appointing authority under the UNCITRAL Rules, was legally immune from suit. During the elephantine gestation of the 2010 Rules, the new Article 16 eventually emerged: “[s]ave for intentional wrongdoing, the parties waive to the

30. See ICSID Convention, Art. 21 (Apr. 2006) [hereinafter “ICSID Convention”].

31. See generally New York 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (UNCITRAL).

32. See generally Model Law on International Commercial Arbitration, UNCITRAL (1985) [hereinafter “UNCITRAL Model Law”].

33. See Gerold Herrmann, *Does the World Need Additional Uniform Legislation on Arbitration?*, 15 ARB. INT’L 211 (1999). As a consequence, several Commonwealth jurisdictions enacting the UNCITRAL Model Law added their own statutory provision on arbitral immunity (for example, Bermuda).

34. See UNCITRAL Arbitration Rules, UNCITRAL (rev. 2010) [hereinafter “2010 UNCITRAL Arbitration Rules”].

35. See generally Working Paper, Suggested Changes to the ICSID Rules and Regulations (May 12, 2005) [hereinafter “Suggested Changes to ICSID Rules”].

fullest extent permitted under the applicable law any claim against the arbitrators, the appointing authority, and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.”³⁶ As the accompanying UNCITRAL commentary makes clear, the rationale for this contractual exclusion was, “to ensure that arbitrators were protected from the threat of potentially large claims by parties dissatisfied with an arbitral tribunal’s rulings or rewards who might claim that such rulings or rewards arose from the negligence or thought of an arbitrator.”³⁷ This immunity is intended to protect the arbitrator’s decision-making process in an UNCITRAL arbitration. However, the UNCITRAL Rules do nothing to protect an arbitral institution acting other than as an appointing authority under the UNCITRAL Rules.³⁸

From an English perspective, international conventions, model laws, and rules of arbitration provide little actual guidance. We are left only with the limited statutory provisions in the English Arbitration Act 1996 and multifarious, untested contractual exclusion clauses, such as Article 31 of the 1998 LCIA Rules (as since modified by Articles 31.1 and 31.2 of the 2014 LCIA Rules).³⁹ Regarding immunities in the LCIA Rules, as indicated, their history began with the 1981 LCIA Rules following Michael Mustill QC’s influential legal opinion in 1977. Article 14(1) of the 1981 LCIA Rules excluded liability for the LCIA Court and LCIA arbitrators for any act or omission in connection with the arbitration, but with regard to LCIA arbitrators (albeit not the LCIA Court), it excluded “the consequences of any conscious and deliberate wrongdoing” on the arbitrator’s own part from this immunity. Article 19.1 of the 1985 Rules repeated this provision. It was revised in Article 31 of the 1998 LCIA rules to allow also for the liability of the LCIA Court in the case of its own conscious and deliberate wrongdoing. Article 31 of the 1998 Rules also reversed the burden of proof requiring the claimant to prove wrongdoing by the LCIA Court or LCIA arbitrator, rather than impose a negative obligation on the LCIA Court or LCIA arbitrator to disprove such wrongdoing in order to qualify for contractual immunity. To my

36. See 2010 UNCITRAL Arbitration Rules, *supra* note 34 art. 16.

37. See Report, UNCITRAL Working Group II, (Arbitration and Conciliation) on the work of its fifty-second session ealand(A/CN.9/688) ¶ 46 (2010).

38. If the arbitral institution is the PCA, it will enjoy a broader immunity under its founding treaties. It is not clear whether such a broader immunity would benefit arbitrators appointed by the PCA under the UNCITRAL Rules, outside the Netherlands (where the PCA has its headquarters).

39. See LCIA Arbitration Rules § 31 (1998); now LCIA Arbitration Rules § 31.1 and 31.2 (2014). Apart from liability in tort or under the LCIA Rules, there is no reason why an arbitrator could not be liable in contract under English law. See M. Smith, *Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment*, 8 ARB INT 17 (1992).

knowledge, none of these provisions has yet been tested in litigation in England or abroad.

It is not surprising to see a provision for the immunity of the LCIA as an arbitral institution because, like the ICC, its functions extend far beyond the appointment of arbitrators and are not simply administrative under the LCIA Rules. Although, unlike the ICC, the LCIA does not actively control the conduct of the arbitration or vet draft awards (thereby taking responsibility for both), the LCIA decides challenges to arbitrators, provides written reasons to the parties for such challenges, acts as a deposit-holder for the parties, and fixes the final amount of arbitral fees and expenses under the LCIA Rules. None of these functions are unusual for many arbitral institutions around the world. Would its contractual exclusion work in practice if tested for LCIA arbitrators and the LCIA both in English and particularly in non-English litigation? For that analysis, we need to go back to France.

B. France

Under French law, as in English law, there is a bilateral legal agreement between the contracting parties to an arbitration clause. But, even before that agreement, there is a standing offer made by the arbitration institution recommending to the world, including these contracting parties, that the institution is ready, willing, and able to administer an arbitration resulting from the parties' arbitration agreement. Once the arbitration has commenced, under French law there is a multilateral legal relationship between the parties and the institution where the arbitrators become parties upon their respective appointments.⁴⁰ This means that, unlike a French judge, an arbitrator and an arbitral institution can be sued in contract at French law. Regarding arbitrators, this position was confirmed in the 2008 decision by the Cour d'appel de Paris in legal proceedings brought by a disappointed party against three arbitrators.⁴¹ The French courts have recognized that an arbitrator could be liable in contract under French law, holding that a French arbitrator is charged with a "mission" or task, which that arbitrator must complete in good conscience, independence, and impartiality. Although an arbitrator enjoys a functional legal immunity under French law, the French cases establish that immunity does not exclude liability for fraud, denial of justice, and gross negligence ("équivalente au dol, constitutive d'une fraude, d'une faute lourde ou d'un deni de justice"). Applied to an arbitral institution, the Paris Cour de Cassation confirmed in the 2001 *Cubic* case that an arbitral institution

40. See Philippe Fouchard, *Les institutions permanentes d'arbitrage devant le juge étatique (à propos d'une jurisprudence récente)*, REVUE DE L'ARBITRAGE 225 (1987).

41. *Charasse c/D* REVUE DE L'ARBITRAGE 376 (2009), ann. P. Leboulanger.

could be held liable in contract to a disputing party under French law.⁴²

An arbitral institution is not an arbitrator; therefore, it is not required to respect the rights of the defense or to provide its decisions in the form of an award subject to judicial review. However, as analyzed at length by Professor Philippe Fouchard in his 1987 article: “[t]he French cases established that an arbitral institution is contractually obliged to respect its own arbitration rules, and it may also be obliged to ensure a fair procedure for the arbitration” (“un procès équitable”).⁴³ In his article, Professor Fouchard concluded that it would be inconceivable that an arbitral institution, paid for its services, could benefit from any legal immunity under French law.⁴⁴

It was against this legal background that the ICC introduced Article 34 of its 1998 ICC Rules,⁴⁵ ostensibly granting an absolute immunity for ICC arbitrators, the ICC Court, and the ICC without any exception. The drafting of this new article provoked considerable controversy within the ICC. However, the ICC Council decided at its meeting in Shanghai in 1997 upon the absolute form of contractual immunity, which became part of the 1998 ICC Rules.⁴⁶ Many legal scholars predicted that this broad wording, without any exceptions for fraud, corruption, or deliberate wrongdoing, could never survive judicial scrutiny in a state court. These critics included, famously, Professor Pierre Lalive and the ICC National Committees from France, Italy, and the United Kingdom. They were soon proven right.

In the *SNF* case (2009), the French courts had to consider the validity of Article 34 of the 1998 ICC Rules in legal proceedings brought by a disappointed party against the ICC as an arbitral institution.⁴⁷ This litigation was part of a larger battle between two commercial parties arising from two ICC awards made in Brussels that raged in the French and Belgian courts (where the ICC was not a party). *SNF*'s claim against the

42. See *Société Cubic Defense Systems Inc v. Chambre de Commerce internationale*, Cour de cassation 1ère ch civ: 20 (Feb. 2001); see also T. Clay note in *Rev arb* 2001.511; P. Lalive, *Rev arb* 1999.103; P. Lalive, “Sur l’irresponsabilité arbitrale”, *Etudes de procédure et d’arbitrage en l’honneur de Jean-François Poudret* (1999); and Philippe Fouchard ET. AL, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 1153–1155 (Savage and Gaillard eds., 1999).

43. See Fouchard, *supra* note 40.

44. See Fouchard, *supra* note 40, at 225, 251.

45. See 1998 ICC Rules, *supra* note 9 art. 34.

46. See W. Laurence Craig ET. AL, ANNOTATED GUIDE TO THE 1998 ICC ARBITRATION RULES: WITH COMMENTARY 183–84 (1988).

47. See *SNF SAS v. Chambre de commerce internationale*, Cour d’appel de Paris (2009), ann C. Jarosson *Rev arb* 2010.314; see also *Rev arb* 2007.847 and R. Dupeyre, 32:2 ASA Bulletin 265.

ICC in France alleged that the ICC had effectively conspired with the arbitrators to evade illegally the European Union's mandatory competition rules contrary to French law and international public policy. During these proceedings, the Cour d'appel of Paris required the ICC to disclose its confidential papers relating to the work of the ICC Court in approving the two draft awards under the ICC rules. It further publicly criticized the ICC in its judgment for being reluctant to provide the essential papers to the Court. This criticism was without precedent in the ICC's long experience of as a litigant in France. It was a bad omen. Having examined the confidential papers, the court rejected any liability of the ICC. It then went out of its way to declare that Article 34 was invalid under French law, its absolute terms purporting to excuse the ICC wrongly for performing its essential contractual obligation as an arbitral institution towards the parties.

There were, of course, a number of "I told you so's." But, "I told you" is never a solution. The solution chosen by the ICC for its new 2012 ICC Rules is the limited language of the new exclusion in Article 40. Article 40 seeks to exclude liability for a large number of people, including ICC arbitrators, the ICC Court, and the ICC itself, "for any act or omission in connection with the arbitration except to the extent that such limitation of liability is prohibited by applicable law." Will this exclusion work any better than the old wording? Only time will tell. It will not be a benevolent arbitrator who will so decide, but a state court and not necessarily a court in France. In the meantime, little comfort is provided by the ICC Secretariat's Guide to ICC arbitration as recently published. The rationale provided there for this contractual immunity is based on the suggestion, "such bodies and individuals [were] exposed to liability"; "this could hinder their work making it difficult for them to provide the required level of service."⁴⁸ That simplistic rationale is not applied to other professions, such as engineers, architects, building contractors, trial lawyers, and even ginger beer manufacturers. It is not an argument that will carry the day in any state courts, nor indeed before any regulators.

III. A PRACTICAL SOLUTION

In a little box at the very end of the ICC Guide, "Note to Arbitrators and Experts – Liability Insurance," the following words appear: "[a]rbitrators and experts are advised to obtain insurance that adequately covers their work in arbitration matters so as to minimize the risk associated with any potential liability." Where contractual and statutory immunities are insufficient under English and French law, could such legal liability insurance be the Holy Grail as the only safe and certain solution for

48. See Jason Fry ET AL., *The Secretariat's Guide to ICC Arbitration*, ICC at 421ff (2012).

arbitrators and arbitral institutions? It seems to me that we are only left with professional indemnity insurance as the most effective practical solution to the potential liabilities of arbitrators and arbitral institutions.

For arbitrators who do not practice as arbitrators as a separate profession, there is usually adjectival cover for acting as an arbitrator that forms part of the professional liability insurance required by their regulator or professional body. For example, a practicing member of the English Bar has cover for arbitral liability as part of the professional liability cover required to practice as a barrister (as do *avocats* at the Paris Bar). However, many full-time arbitrators do not exercise a separate profession, particularly if they have retired from professional practice or from a judicial career or have chosen to pursue an academic career from the outset. Many of these arbitrators, including some of the best-known international arbitrators, may carry no professional indemnity insurance at all. Even for those arbitrators that have insurance, the geographical scope of the cover may be limited given the insurance market's traditional divisions between North American and non-North American risks. It is also difficult for an individual arbitrator personally to negotiate insurance cover: (1) the legal risks are too uncertain for underwriters; (2) they are complicated to explain satisfactorily; (3) insurers prefer high volumes and not singletons as insureds; and (3) as a result, even if cover is available, insurance premiums for individual cover can be very expensive.

If cover is to be obtained, it could be more easily done for a large group under a master policy that is agreed with one insurer, possibly even a captive operating with its own reinsurance programme. It could be done with little or no controversy, particularly because the ICC has set an important example that could be adopted and supported by other arbitral institutions, independently, or with a group cover collectively negotiated by IFCAI or ICCA. Today, the ICC carries professional indemnity cover, not only for itself and the ICC Court, but also for ICC arbitrators. This fact has only recently become publicly known, although the terms of such cover remain discretely veiled for good reason. It means that a small part of the administrative fees payable by the disputing parties to the ICC Court constitutes an insurance premium covering legal liability for both the ICC and ICC arbitrators. Is that not the basis for a practical solution to the problem?

Insurance cover, at least for arbitrators, does not need to be for a significant insured sum. An honest arbitrator is unlikely to be held liable in negligence for substantial damages measured in tens or hundreds of millions of dollars for making a wrong award as part of the decision-making process. Yet, an arbitrator is increasingly likely to be made a party to a legal proceeding brought in bad faith by a disappointed party as a collateral attack on an award. For example, this can be done not only by

challenging the arbitrator's impartiality or independence, but also by instituting disciplinary proceedings before his or her professional body, or by threatening other legal proceedings directly against him, whether for alleged contempt of court, alleged defamation, or alleged criminal conduct. What an arbitrator then needs is not so much an indemnity against legal liability for damages, but rather immediate defense cover from an insurer so as to defend against such malign proceedings. These defense costs for an individual arbitrator can be expensive and in some cases, have run into six figures (USD). It seems wrong for an individual, uninsured arbitrator to bear such costs and expenses alone, particularly when the proceedings against him or her fail or are abandoned, having exhausted their collateral purpose. It does not seem right, as we saw in the USA (regarding legal proceedings brought against three arbitrators acting in a Geneva arbitration), to rely on local arbitration specialists giving so generously of their time to defend the impugned arbitrators pro bono. The same arguments apply equally to big and small arbitral institutions. This relatively modest cover for defense costs, with a relatively small sum insured for any legal liability, ought to be possible to place in current market conditions if sufficient numbers of arbitrators and institutions were willing to subscribe to such group insurance. It is now needed, but will it be done?

CONCLUSION

Let me conclude with a story about Norwegian lemmings. As you may well know, a lemming is a small, furry, brown rodent living in large numbers in the arctic tundra. From the beginning of time, every four years the lemming population plummets to near-extinction. For reasons never fully understood and also much disputed by scientists, migrating lemmings commit mass suicide by jumping into the ocean and swimming collectively to their watery deaths. At school many years ago, I became a minor expert on Norwegian lemmings because a friend and I were applying for a travel scholarship to northern Norway to observe the lemming migration. However, our scholarly application, of which we were mistakenly proud, was summarily rejected by the scholarship committee because we had chosen the wrong year. It was an off-year of non-migration with no mass suicides by lemmings, and we were not allowed to resubmit a more timely application. Like Norwegian lemmings, we may continue our lives as arbitrators and arbitral institutions for the next several off-years. I may be wrong again about the exact time, but unless we do something soon, we can be morally certain that one day a calamity will befall the international arbitral community. We should at least attempt a solution soon. If we tried together (arbitral institutions, arbitrators, and arbitration users), we could certainly do better than lemmings.